

STATEMENT OF CASE
WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53

THE WILTSHIRE COUNCIL (PARISH OF DONHEAD ST ANDREW) PATH NO.27
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2016

STATEMENT OF GROUNDS BY JANICE GREEN ON BEHALF OF WILTSHIRE
COUNCIL

Introduction

1. Wiltshire Council intends to rely upon this Statement of Grounds; the Southern Area Planning Committee report, with Appendices, dated 2nd February 2017 and Appendices **DSTA 1 – DSTA 25**, as its Statement of Case and does not, at this time, intend to submit a further statement of case. Should additional evidence come to the Council's attention that may be relied upon, this will be presented as a Supplementary Statement of Case within the appropriate time frame, however it is considered unlikely that this will be necessary. The Southern Area Planning Committee Report dated 2nd February 2017, with Appendices A – E, contains a full investigation and comment on the application and the supporting and opposing evidence available to the Council.
2. An application was made to Wiltshire Council on 15th May 2015 (**DSTA 1**), 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 Donhead St Andrew, based on user evidence, the application form being accompanied by 33 completed witness evidence forms (**DSTA 15**). Following an investigation of the available evidence, the Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map and Statement Modification Order 2016 (**DSTA 5**), was made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981, where it can be reasonably alleged that a right of way for the public on foot, subsists and the objector has offered no incontrovertible evidence to refute this reasonable allegation, (please see objections at **DSTA**

6, the Order Making Authority's comments on the objections at **DSTA 7** and landowner evidence at **DSTA 19**).

3. The land over which the claimed route passes is known as the Mansfield and its ownership is divided between two landowners: Mr and Mrs Shepherd who own the southern section of the field and Wardour Ltd, C/O Mr and Mrs Shaw, who own the central and northern sections of the field and the neighbouring property Beauchamp House. The whole of the larger field was previously owned by Mrs Francis Pitman; Mr David Pitman and Mr Gerald Pitman, purchased by them between 1982 and 1984. The land was transferred to Mrs Margaret Pitman for a short period in June 2011, before the southern section of the land, (south of the present fence line), was sold to Mr and Mrs Shepherd in July 2011. The central and northern sections of the land were purchased by Wardour Ltd on 22nd May 2012. Mr and Mrs Shaw have also owned the property to the west of the Mansfield, Beauchamp House, since January 1993. Mr and Mrs Shepherd also own the south-west corner of the field, (purchased in 2002), and the south-east corner of the field is owned by Dr and Mrs Barkham, however the southern extremity of the field is not affected by the footpath claim, please see land ownership plan at **DSTA 2**.
4. The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, (please see definitive map and statement of public rights of way at **DSTA 9** and working copy of definitive map and statement at **DSTA 10**), but this is without prejudice to the possible existence of other rights. Wiltshire Council is the Surveying Authority for the County of Wiltshire (excluding the Borough of Swindon), responsible for the preparation and continuous review of the definitive map and statement of public rights of way. In this case, Section 53(2)(b) of the Wildlife and Countryside Act 1981 applies:

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

- (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."

5. 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."*

Documentary Evidence Summary

6. Section 32 of the Highways Act 1980 states:

"32. Evidence of dedication of way as highway

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

7. As part of Wiltshire Council's investigations, Officers have examined documentary evidence, including the provenance and purpose of the documents to draw conclusions regarding the existence of public rights over the claimed route. Please see documentary evidence summary at Appendix 2 of

8. A route corresponding with the location of the northern section of the order route is recorded on three maps examined by the Surveying Authority: 1) Ordnance Survey (OS) map dated 1890 and drawn at a scale of 6 inches to 1 mile, 2) 1901 OS map drawn at a scale of 25 inches to 1 mile and 3) 1910 Finance Act Map which uses the 1901 OS 25 inch map as its base. OS maps are topographical in nature, i.e. they record only what was visible on the ground to the surveyor at the time of survey, (please see **DSTA 12**).
9. These maps record a route leading between Rickets Mill to the north and Kelloways Mill to the south, directly linking the two mills, between Footpath no.5 and the former route of Footpath no.4 Donhead St Andrew, (Footpath no.4 was diverted south of its original line in 1996/97). The route on these maps is recorded by double broken lines which suggests that the path was open to the field on both sides. The 1901 map shows the route braced as part of the field and labelled "F.P", although the map carries the following disclaimer: *"The representation on this map of a Road, Track or Footpath, is no evidence of the existence of a right of way."* These maps do not record the claimed route leading south of Kelloways Mill to its modern day connection with Footpath no.4, (i.e. the diverted route of Footpath no.4).
10. The route described above is not recorded on the 1925 OS 25 inch map, which suggests that at some point between the 1901 and 1925, the route was no longer visible on the ground, perhaps being out of repair / use. The 1901 and 1925 maps are based on the survey of 1884-85, the 1925 map being revised in 1924. In evidence the landowner Mrs Shaw states that *"Mention is made in some Witness Statements to the OS Map of 1901...which shows a track between Rickett's Mill and Kelloways Mill. The two Mills were in common ownership at that time and the track was not shown on the OS maps after 1901 (on the 1925 OS Map Kelloway's Mill is shown as disused) suggesting that there was no evidence of any footpath after the mill was closed..."* Having considered the documentary evidence available, Officers would agree that this

is an entirely plausible explanation for the omission of the claimed route on OS maps after 1901. It is also possible that the route is not recorded on the OS map after 1901 as a result of World War I, where rights of way may have been ploughed out and lost to maximise land for crop production. Following an instruction to surveyors in February 1883, footpaths on large scale maps were annotated "FP", as explained by Dr R Oliver in "Ordnance Survey Maps – a concise guide for historians" "*the object of...F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic*".

In 1893 it was specified that 'all footpaths over which there is a well known and undisputed public right of way' were to be shown and also 'private footpaths through fields (but not in gardens)...if they are of a permanent character. This will generally be indicated by their being made or gravelled or provided with stiles and footgates...Mere convenience footpaths, for the use of a household, cottage or farm, or for the temporary use of workmen, should not be shown, but paths leading to any well-defined object of use or interest, as to a public well, should be shown...Private paths in woods... [and] temporary cart tracks should not be shown.'"

11. Whilst OS maps can provide useful supporting evidence of public rights of way, they cannot be relied upon alone to indicate the public status of a route shown. The Planning Inspectorate publication "Wildlife and Countryside Act 1981 Definitive Map Orders: Consistency Guidelines", when considering the evidential weight of OS mapping, quotes Cooke J in *Norfolk County Council v Mason* [2004], who observed that: "*Throughout its long history the OS has had a reputation of accuracy and excellence...It has one major, self imposed, limitation; it portrays physical features, but it expresses no opinion on public or private rights...*" OS mapping evidence should therefore be carefully considered alongside other documentary evidence. In this case, Officers have viewed no other documentary evidence which would support the existence of the claimed route as a public right of way. The Finance Act map (**DSTA 12**), shows a route as per the 1901 OS 25 inch base map, however, there is no additional evidence within the Finance Act documents to support public rights over this route, i.e. the route is not excluded from the shading of plot no.24; it is braced as part of the field and there are no deductions for rights of way recorded over plot no.24.

12. On the balance of probabilities, Officers conclude that the documentary evidence, as a whole, does not alone support the existence of a public right of way and the available user evidence in this case, should now be considered.

Witness Evidence Summary

13. The application to add a footpath in the parish of Donhead St Andrew was accompanied by 33 completed evidence forms with maps attached (**DSTA 15**). Landowner evidence was also provided by Mr and Mrs Shaw of Wardour Ltd, (**DSTA 6** and **DSTA 19**) and others presented evidence in representations and objections made at both the initial consultation stage, (**DSTA 3**), and within the formal objection period, (**DSTA 6**). Additional evidence was submitted following a consultation carried out by Officers amongst witnesses who claimed to have used the path in question before 1996/97, (i.e. before the diversion of Footpath no.4 Donhead St Andrew), (**DSTA 21**) and further evidence was also presented to the Southern Area Planning Committee meeting, dated 2nd February 2017, (**DSTA 18**).

14. Section 31 (1) of the Highways Act 1980, states that:

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

15. Therefore, where a way over the land has been enjoyed by to public, as of right and without interruption for a full period of 20 years, it is deemed to have been dedicated, unless there is sufficient evidence that there was no intention, by the landowner, during that period to dedicate it.

Bringing Into Question

16. In order to demonstrate a 20 year period, there must be a date upon which the use of the path by the public was brought into question. In the Donhead St Andrew case there are several events which may bring the public's right to use the way into question:
- 1) March 2012 - Fence with stile and dog latch installed by Mr and Mrs Shepherd across the path at the northern boundary of their land.
 - 2) 8th August 2012 - Mrs Anne Shaw on behalf of Wardour Ltd deposits with Wiltshire Council a statement and map under Section 31(6) of the Highways Act 1980, followed by a subsequent statutory declaration on 14th August 2012, (DSTA 24).
 - 3) Autumn 2012 and January 2013 – Permissive Footpath signs and waymarkers displayed on the Wardour Ltd land, (the central and northern sections of the route).
 - 4) Late 2014 - Temporary closure notices erected on the claimed route, when a large sinkhole appeared close to the path. There is no evidence to suggest that these notices were erected upon that part of the route over land in the ownership of Mr and Mrs Shepherd.
 - 5) 22nd July 2015 - Mrs Shaw on behalf of Wardour Ltd submits Form CA16 for deposits under Section 31(6) of the Highways Act 1980 and Section 15A of the Commons Act 2006, (DSTA 24).
17. The majority of users ceased their use of the claimed route in 2014, once temporary closure notices were erected on site and it is likely that this event has triggered the footpath claim in this case. However, there are events taking place over the land previous to this date which may or may not have brought the public user of the path into question at an earlier date.

18. The erection of the fence over the path in March 2012, (at the boundary of the land owned by Mr and Mrs Shepherd), included a stile with a dog latch and evidence suggests that at this time, the path was moved 3-4ft closer to the river. However, the slight variation in the route as a result of the fencing, is considered to be de-minimus for the purposes of recording a route on the definitive map. Additionally, the action of including a stile would not bring home to the public that their right to use the path was being brought into question, particularly where provision is made for users with dogs. Mr John Graham confirms that after the stile was erected, the number of path users increased and Mr and Mrs Collyer confirm that the stile was incorporated into the fence *"...allowing us to continue to use the path between DSTA4 and DSTA5..."* This is supported by Mrs K Saunders who states in evidence that *"When the fence was put in (approx 2013) from west to east, a stile was put in the fence to allow walkers to continue walking the path..."* Witnesses were not prevented from using the path and the evidence supports continued use of the order route after 2012, (please see witness evidence user period chart at **DSTA 17**).
19. Mrs Anne Shaw provides evidence that in Autumn 2012 – January 2013, notices stating the following were erected over the land owned by Wardour Ltd, close to the stile erected by Mr and Mrs Shepherd and at the northern boundary of the claimed route where it begins to follow the field boundary leading south at the edge of the woodland:
- "The footpath shown in blue on the plan below is a permissive footpath only. Please note that this path may be closed on some days. It is not intended that this path should be dedicated as a public right of way. Please keep to the route shown on the plan".*
20. Permissive path waymarkers were also placed on the stile on Footpath no.5 where it exits the Mansfield at the north-east corner of the field and on the stile erected by Mr Shepherd.
21. The notice showing the claimed route in blue is included within the landowner evidence at **DSTA 6** and **DSTA 19**. The plan included the whole of the claimed

route and these notices were erected only upon the land in the ownership of Wardour Ltd and not on the southern section of the order route, over land owned by Mr and Mrs Shepherd. Mrs Shaw claims in evidence, (DSTA 6), that the permissive path signs were erected with the express permission of Mr Shepherd:

"When villagers pressed Marcus Shepherd to install the stile in March 2012, Mr Shepherd spoke to Kevin Prince of Carter Jonas, who had advised Wardour Limited (Wardour) on the purchase of its land. Mr Shepherd agreed that Carter Jonas should prepare a "Permissive Path" sign which would include the route of the path on the Shepherds' land. Accordingly Mr Shepherd installed his stile on the understanding that it was only a permissive path.

Sometime after the "Permissive Path" signs had been erected, Mr Shepherd commented to me that he was glad that they had been put up. The "Permissive Path" signs, prepared with the Shepherds' express consent and agreement, were prepared by Carter Jonas and differ from the plan attached to the Statutory Declaration I made on behalf of Wardour in August 2012, which showed only the permissive path on Wardour's land and not on the Shepherd's land."

22. Mr Shepherd states that "...we met with Kevin Prince, the Shaw's land agent and agreed that a stile should be erected and that a notice was displayed stating that the footpath was a permissive one. Our permission was given for "the map attached to the notices" to display the whole route as a permissive path."
23. Additionally, Mrs Shaw on behalf of Wardour Ltd, has deposited with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, dated 8th August 2012, followed by a subsequent statutory declaration on 14th August 2012 (DSTA 24). This has the effect of, from that date, negating the landowners intention to dedicate additional highways over the land and with the permissive path signs erected in 2012, serves to bring public user of the claimed route into question in 2012.

24. These actions by Wardour Ltd, as landowners, serve to bring use of the whole route into question, i.e. the southern section of the route would become a cul-de-sac footpath at the fence, as user leading northwards from that point is not qualifying user, after 2012, where the owner of that part of the Mansfield, (Wardour Ltd), has indicated their non-intention to dedicate additional public rights of way, (although it is noted that Mr and Mrs Shepherd have not lodged with Wiltshire Council a statement and map, with subsequent statutory declarations under Section 31(6) of the Highways Act 1980 and/or Section 15A of the Commons Act 2006, nor is there evidence that they have erected permissive / prohibitory notices over land in their ownership, at any time). The relevant period of user for the whole of the claimed route should therefore be calculated from 1992 - 2012.

Twenty Year User

25. For the user period in question, i.e. 1992 – 2012, all of the witnesses who have completed user evidence forms, claim some use during this period and 19 witnesses have used the claimed route for the full 20 year period, (please see user evidence chart at **DSTA 17**). Most witnesses refer to seeing other path users on the route, (walking), during their user period and Mr Tom Kilner; Dr and Mrs Barkham and Mr Wareham refer to their use of the path with family members. Given the population of Donhead St Andrew of 430 in 2001 and 413 in 2011, (Wiltshire Community History, Wiltshire Council), and the context of a rural route outside the main village settlement, there is a sufficiency of user for the period 1992 – 2012.
26. 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.
27. Mrs Shaw confirms that she and her husband have owned Beauchamp House adjacent to the Mansfield since 1993. The field and the claimed footpath can be seen from Beauchamp House and Mrs Shaw confirms in her landowner evidence form, (**DATA 19**), that she was aware of use by the public, adding that

from 1993 - 2003, use of the path was virtually non-existent, rising to occasional use in 2003 and increasing to several times per day by 2015, (the relevant user period in this case being 1992 - 2012).

28. Mr David Pitman and his family owned the land from approximately 1982 - 84 onwards, until Mr and Mrs Shepherd and Wardour Ltd took ownership of the land in 2011 and 2012 respectively. In his statutory declaration Mr David Pitman, (**DSTA 19**), confirms that in the first 20 years or so of their ownership of the field, there was hardly any public use, however, in about 2003 public use generally began to increase noticeably. Therefore, he claims that if the public had really been using the field other than the public footpaths, it would only have been in the last 12 years or so that they have done so.
29. In their statutory declarations, (**DSTA 19**), Mr Hugh Graham; Mr John Graham; Mrs Claire MacDonald; Mrs Margaret Pitman; Mr Christopher Long and Mrs Janet Long, agree that public use of the claimed route began between 2002 and 2005, therefore public user of 20 years cannot be shown.
30. Mrs Margaret Pitman also confirms that during her husband's ownership of the land she did not see others using the claimed route and she herself did not use the route. When she owned the land for a short period in 2011-12, she only ever saw the odd dog walker. In conversation with Mrs Margaret Pitman, she confirms that she may not have seen users during her family's or her own period of ownership, as they may have used the path at different times to her own use of the land, perhaps early in the morning.
31. Objectors do not add further evidence regarding a significant event which took place in around 2002-2005 which would lead to increased public user of the claimed route after that date.
32. Officers agree that there is a concentration of user around the early 2000's until 2014, however, there is also a significant amount of user provided by witnesses to suggest long and historic user prior to that date, the earliest recorded use being from 1953 (Mr Roy Powell); 1970 (Mr and Mrs Lisle) and 1970's onwards

(M Wareham), (please see user evidence chart at **DSTA 17**). In further evidence Mr Tom Kilner confirms that he was born in the village in 1981 and lived there until 2000 and now frequently visits. During those 34 years he has frequently walked the path along with many other dog walkers and ramblers. Mr and Mrs C Kilner confirm that they have used the path fairly frequently since they moved to Pigtrough Lane in 1977, at which time the path was well known and well used. They are supporting the claim based on the historical mapping evidence and their own experience of using the path for more than 35 years. Mr Roy Powell confirms that he used the claimed path as early as 1953 as a child to walk to school from Pigtrough Lane every day and on Sundays to go to church. Mr Richard Lee who has lived in the parish for over 31 years and knows the village and the surrounding area well, submits that it is very probable that this route has been used by the public for over 100 years, given the 1900 OS mapping. Mr and Mrs C Eves have used the claimed route as a footpath for over 26 years. Mr Wareham confirms that as a child living in the area they would often walk from the church along the path to visit friends at Thorn House. His mother is now 70 and attended school and the church, as did her brother and sisters and recalls using the path many times.

33. A number of users continued to use the route after 2012, (please see user evidence chart at **DSTA 17**), but the evidence suggests that use after that date was not qualifying user "as of right", where the new landowners, Mr and Mrs Shaw on behalf of Wardour Ltd, had lodged with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, indicating the landowners non-intention to dedicate the route as a public highway, (8th August 2012), (with subsequent statutory declaration), followed by the erection of "permissive path" notices and waymarkers later that year.
34. The frequency of user suggests a well used route, i.e. between 4-5 times per year and daily, 5 users claiming daily use.
35. 26 of the 33 witnesses are residents of Donhead St Andrew, however use wholly or largely by local people may be sufficient to show use by the public. The Planning Inspectorate Consistency Guidelines make reference to R v

Southampton (Inhabitants) 1887, in which Coleridge L J stated that: *"user by the public must not be taken in its widest sense...for it is common knowledge that in many cases only local residents ever use a particular road or bridge."*

36. In conclusion, whilst the landowner has provided evidence, including statutory declarations, to the effect that the public have only used the route since the early 2000's and Officers would agree that there is a concentration of use from the early 2000's onwards, there is also a significant amount evidence of use at the start of the user period in question, i.e. from 1992 and before that date. On balance, Officers consider that it is more likely than not that the public have been using the route for a full period of 20 years, with user as of right ending in 2012.

As of Right

37. In order to establish a public right of way, public use must be "as of right", i.e. without force, without secrecy and without permission.

Without force

38. In the Planning Inspectorate publication "Definitive Map Orders Consistency Guidelines", it is stated that *"Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate."*
39. In the Donhead St Andrew case, there is no evidence before the Surveying Authority to suggest that public use of the claimed route, was by force. Officers consider that it was not necessary for the public to use force to enter the land, where there was free access to the claimed route from the existing public highways, Footpath no.4 and Footpath no.5 Donhead St Andrew. Additionally, there is no evidence of obstructions to the claimed route and when a fence was erected over the line of the path in March 2012, a stile with dog gate was included in the fence, allowing access to continue.

40. Use by force does not include only physical force, but may also apply where use is deemed contentious, for example by erecting prohibitory signs or notices in relation to the use in question. In the Donhead St Andrew case, there is no evidence that prohibitory notices were erected on site prior to those erected in 2014, closing the footpath over the land in the ownership of Wardour Ltd, following the appearance of a sink hole on the land close to the path, however, this was outside the relevant user period of 1992 – 2012. Public use does not appear to have been contentious and therefore use is not by force, (the permissive path notices erected in 2012 allowed the public to continue using the route, but on the understanding that access to the path may be withdrawn at any time, at the discretion of the landowner).

Without secrecy

41. It would appear that witnesses used the route in an open manner, without secrecy and in a manner in which a person rightfully entitled to do so would do and considered that the landowners were aware of public use of the path. The witnesses claim that there is a well worn path and that the route can be seen from the landowners, (Mr and Mrs Shaw's), residence, Beauchamp House. Mrs Shaw in her evidence appears to have been aware of public use in the relevant user period 1992 – 2012, albeit virtually non-existent until 2003. Some witnesses claim that the provision of a stile in the new fencing erected in 2012 and/or maintenance of the stiles, suggests that the landowners were aware of use. Mr Michael York confirms that as a Parish Councillor he was involved in meetings dated 10th December 2014 with the landowners' Solicitor and 31st January 2015 with the Landowner, the Chair of the Parish Council and the Clerk, to facilitate the opening of the now closed permissive path. At these meetings they were told that the owner was aware of the use and that walkers were not keeping exactly to the prescribed path, (however this is outside the relevant user period of 1992 – 2012).
42. The objectors claim that there is no evidence of public use of the path on the ground. Mrs Shaw suggests that if a path had been apparent on the ground, one would expect it to remain on OS maps after 1901 and to be claimed under

the 1949 National Parks and Access to the Countryside Act 1949 and included within the definitive map and statement of public rights of way. The original definitive map process in Wiltshire was not exhaustive and Parish Council's often omitted paths or made errors in status. This was reflected in the legislation at the time, (i.e. the need for quinquennial reviews), and remains so today. Reliance may be placed upon what the definitive map records, but not on what it does not show. It is noted that there are 1500 known anomalies in the status and recording of rights in way in Wiltshire, in addition to more than 180 applications for definitive map modification orders.

43. Mrs Shaw viewed aerial photographs of the area from the 1990's, in March 2012, upon purchasing the land, which did not show any evidence of a trodden path along the eastern edge of the field at that time. Mr David Pitman; Mr John Barton; Mr Hugh Graham; Mr John Graham; Mrs Claire MacDonald; Mrs Margaret Pitman; Mr Christopher Long and Mrs Janet Long, in evidence, (please see statutory declarations at **DSTA 19**), acknowledge the existence of Footpath no's 4 and 5 Donhead St Andrew, as recorded on the definitive map of public rights of way, but claim that there was no other obvious or trodden footpath at the eastern edge of the land when they first knew the land.
44. Aerial photographs examined by Officers, dated 1982; 1991; 2001; 2005/06 and 2014, (two of them within the relevant user period), do not appear to record a well worn footpath route at the eastern edge of the Mansfield, (**DSTA 14**). These photographs cannot be relied upon to support the existence or non-existence of a public right of way and the Planning Inspectorate publication "Definitive Map Orders: Consistency Guidelines", state, *"The time of day a photograph was taken can be significant, as shadows can hide or distort the line of a narrow path. An oblique photograph may also hide a number of features which exist on the map."* They are inconclusive where they are subject to a number of variables including ground conditions; season and time of day the photograph was taken.
45. None of the users claim to have been challenged whilst using the path until recently. Mr and Mrs Collyer state with reference to the diversion of Footpath

no.4 in 1996/97: "...At no point, either before or after the changes that occurred to path DSTA4 in 1996/97, were we challenged with regard to our use of this path..." Dr and Mrs Barkham were approached in autumn 2014 by a man claiming to be the brother of the owner of the field, who told them that the footpath was closed due to a sinkhole; Mr Barton was recently told by Mrs Shaw that the way was not public, (evidence form dated 2015); Miss Maxwell-Arnot advises that only after the permissive path was introduced did she hear of people being stopped when they closed the path due to subsidence and Miss Whymark was never told it was not public until recently when the present owner told the Parish Council that it was not public, (evidence form dated 2015). Additionally, one of the witnesses makes reference to the permissive path signs being a challenge to their use and 3 witnesses refer to the path closure signs forming a challenge to their use.

46. In the statutory declaration provided by Mr David Pitman, he states that *"We told people who asked where the public footpaths were..."*, however, there is no further evidence that the Pitman's challenged users and no specific incidents of challenge are referred to, i.e. times and dates; how individuals were using the land at the time of challenge and the individuals involved.
47. Dr Simon Barkham, in his presentation to the Southern Area Planning Committee, dated 2nd February 2017 (**DSTA 18**) states that, *"Together with my wife, a teacher and three sons we bought Donhead Farm in 2003. Donhead Farm has a paddock which was an integral part of the Mansfield, the field through which Path 27 runs. Gerald Pitman farmed Mansfield; we agreed with Gerald that he continue to use our paddock as part of Mansfield for grazing and silage...on arrival in the village we asked Gerald Pitman about footpaths through the field, in particular regarding Path 27 as we could see people walking it on a regular basis. Gerald said that this was a public footpath and had been used for as long as he could remember. Thereafter we frequently walked this footpath, often encountering Gerald and others working on the land who hailed us in a friendly manner and chatted with us, never once suggesting that we shouldn't be there."*

48. As a landowner of part of the Mansfield, Dr Barkham appears to be aware of use of the order route in 2003. Use in an open manner would allow the landowner the opportunity to challenge the use, should they wish to do so. The witness evidence suggests that on the balance of probabilities, the past and present landowners were aware of use of the route by the public. Mr and Mrs Shaw, (Wardour Ltd), have challenged public user immediately upon taking ownership of the land in 2012, by erecting permissive path signs; granting permission to certain individuals and, it is claimed, to other individuals on behalf of the village and by depositing with Wiltshire Council a statement and plan, followed by a statutory declaration, under Section 31(6) of the Highways Act 1980. However, it would appear that the previous landowners and the present owners of the land over which the southern section of the route passes, have not undertaken any actions to challenge public user. On the evidence before the Council it would appear that any challenge to public use of the path has been recent in date and outside the relevant user period of 1992 – 2012.

Without permission

49. None of the witnesses were employees or tenants of the landowner at the time of their use, nor were they related to the owners or occupiers of the land, therefore they cannot be said to be using the land by licence or with implied permission. The majority of users claim to be using the order route without permission.
50. The users and the landowner make reference to permissive path signs being erected on site in 2012. This action by the landowner brings to an end the period of user "as of right" and demonstrates to all users of the path that their use is at the discretion of the landowner and with permission which may be withdrawn at any time. Additionally, the action of depositing a plan and statement under Section 31(6) of the Highways Act 1980, with Wiltshire Council on 8th August 2012, (and subsequent statutory declaration), further demonstrates the landowner's non-intention to dedicate the path as a public right of way.

51. Whilst the permissive path notices served to bring home to all path users that their use was no longer "as of right", in 2012, there is evidence that individuals also approached Mrs Shaw in 2012, to request permission to continue using the route. In Mr Barton's statutory declaration he states that he and his family were granted permission to use the route in a letter from Mrs Shaw dated 17th July 2012, a copy of which has been supplied by Mrs Shaw in evidence (DSTA 19). It is also claimed that at the same time Mr and Mrs Lee sought permission from Mrs Shaw to use the claimed route on behalf of the village and statements supporting these permissions being granted to both parties are given by Mrs Shaw; Mr Hugh Graham; Mr John Graham; Mrs Judy MacMillan and Mr Paul Farrant. Additionally, Mrs Shaw recalls that Mrs Barkham thanked her whilst attending a gardening opening on 21st June 2014, for allowing her and her husband to walk the path and asked if her husband could inspect the sinkhole which had opened up adjacent to the claimed route. Mrs Barkham does not refer to this permission in her witness evidence form, but in 2014 the path was already signed as permissive and it falls outside the relevant user period.
52. It is noted that Mr and Mrs Lee do not refer to the permission which it is claimed they sought on behalf of the village, in their user evidence forms and no further evidence of Mr and Mrs Shaw granting this permission on behalf of Wardour Ltd, is submitted by the landowners, e.g. correspondence relating to this matter. The Parish Council minutes dated 2012, (DSTA 23), make no reference to a request for permission being put forward on behalf of the village, or permission being granted for villagers to use the path. If this permission was granted, there is no evidence of how it was conveyed to the public, or the date on which such permission was granted.
53. The land was previously owned by the Pitman family. In his statutory declaration, (DSTA 19), Mr David Pitman confirms that *"When we purchased the Land one or two people asked us for permission to walk other than on the public footpaths (Mrs. Belinda Blanshard was one such person) and we granted that permission."* Mrs Shaw, the present landowner also confirms that Mrs Belinda Blanshard requested permission to walk the field other than the public

footpaths, in the early 1980's from Mr David Pitman, however this permission is not referred to in Mrs Blanshards user evidence form.

54. Mr Pitman continues, *"I know my brother, Gerald Pitman who died in 2009, also gave permission to some villagers to walk other than on the public footpaths"*. Mrs Margaret Pitman supports this in her statutory declaration, in which she states *"I understand that from time to time Gerald gave some villagers permission to walk on the land other than on the public footpaths."* However, no further details of these instances are given, for example did this permission refer to the claimed route or just the land in general and to whom was this permission given. Mr David Pitman also states that *"...we always led everybody to believe that it was at our discretion if they walked anywhere else on the field other than the footpaths."*, but there is no further evidence given of how this permission was conveyed to members of the public at large and there is no evidence of notices being erected on site to make this clear to the public during the Pitman family's ownership of the land. Neither did they place on deposit with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, with subsequent statutory declarations, to negate their intention to dedicate additional rights of way over their land.
55. Dr and Mrs Barkham claim that on purchasing their house and the adjoining paddock in 2003, they approached Mr Gerald Pitman regarding walking through the field on what was a well used path, (the claimed route). Mr Pitman advised them that it was ok to do so, as it was a public footpath and they were free to walk it.
56. In his statutory declaration, Mr Barton confirms that when he moved to Kelloways Mill in 1987, he was aware of the existence of Footpath 4 and 5, but did not recall a trodden path at the eastern edge of the field. At that time he requested permission from Mr Pitman to walk the claimed route and they agreed that it was not a public right of way. Mr Barton again sought permission from the new landowner Mrs Shaw to use the route in 2012. There is a conflict in the evidence regarding the Pitman family's view on whether or not the order route was a public right of way.

57. In this case, Mr John Barton and possibly Mrs Belinda Blanshard's witness evidence, cannot be considered as use "as of right" where they sought and were granted permission to use the claimed route during the relevant user period in question. However, even when this evidence is removed, there is still a substantial amount of evidence that the public used the route without permission, on the balance of probabilities, during the relevant user period.

The Claimed Route

58. Users claim that the route in question has historically formed a vital public highway link, within the village and even to neighbouring parishes. A north – south link in the rights of way network, (please see further rights of way network at **DSTA 10**).
59. The claimed route links the two recorded Footpaths, 4 and 5 Donhead St Andrew, however it is noted that the application plan does not record Footpath no.5 in its correct position, (**DSTA 1**). It is shown at the northern field edge, in fact the definitive line of the path goes further south into the field, (please see **DSTA 9** and **DSTA 10**). The claimed route is shown meeting with Footpath no.5 at the field edge path, however this junction would be further south in the field and there is no reason for path users to walk to the field edge where there is no connection with another public highway.
60. 18 of the witnesses have used a different route to the claimed route, at the northern end, i.e. instead of continuing in a northerly direction to meet Footpath no.5 within the field, they have turned in a north-easterly direction to continue to the edge of the field, to junction with footpath no.5 at the field edge, near Ricketts Mill. This is supported by OS mapping dated 1890, (6 inch map) and 1901 (25 inch map), which record a route leading to the north-east corner of the field, (please see **DSTA 12**). "The Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map and Statement Modification Order 2016", therefore records the route at point C, as used by the public, (please see order plan at **DSTA 5**).

61. It should also be noted that the line of Footpath no.4 Donhead St Andrew, was diverted in 1996 by Salisbury District Council, (confirmation of order 14th November 1996, the diversion route to be made available 21 days after confirmation. A subsequent definitive map modification order was made to amend the definitive map and statement of public rights of way accordingly, in 1997), (please see diversion order and definitive map modification order at **DSTA 20**). The claimed route leads between Footpath no.5 and the present route of Footpath no.4 Donhead St Andrew, forming a link between these two routes.
62. It could be argued that prior to 1996, the public would have walked only to the connection with the existing public highway, Footpath no.4. There would be no reason to continue southwards to the present route of Footpath no.4 as the footpath did not exist on this line and there was no other connection with another public highway at this point. This is supported by the historic OS maps dated 1890 and 1901, which record a route only between the two mills, (please see **DSTA 12**). It could be argued that where the extension of the claimed route southwards has only been used by the public since the diversion in 1996/97, 20 year public user cannot be established over this part of the route.
63. It is possible that whilst the diversion of Footpath no.4 was formally recorded on the definitive map in 1997, the public may have already been walking the proposed diversion route for a number of years prior to 1996/97, thereby demonstrating 20 year user of the southern section of the claimed route. Officers therefore carried out a consultation amongst 19 witnesses who claimed to have used the path prior to 1996 and the Parish Council, (please see consultation and replies at **DSTA 21**).
64. 10 of these witnesses, (Mr and Mrs Collyer; Mr and Mrs Eves; Mr and Mrs Kilner and Mr and Mrs York have sent joint responses and are counted as one and Mrs Hinchley's evidence is included where she has used only the former route of Footpath no.4 and does not indicate on this plan that she used the order route leading north or south of Kelloways Mill), refer to use of the former route of Footpath no.4 before 1996/97 and 12 witnesses refer to turning north in

the Mansfield to use the northern part of the order route prior to 1996/97, whilst 4 users claim to have used the southern section of the order route prior to 1996/97, (the evidence suggests that they then continued east through the paddock of Kelloways Mill, (not a public right of way), to junction with the existing Footpath no.3, leading south). Mr T Kilner used such a route and provides detailed evidence on this point, (**DSTA 21**). He recalls a stile or hurdle into the Kelloways Mill field, (at point A on the order map, **DSTA 5**), as follows:

"...over the stile (or it may have been an old hurdle in those days) in to Kelloways Mill field and then turned right on to footpath 3.

It certainly joined footpath 3 (which has also changed course I believe after all the new houses were built on what used to be the pig farm, as I used to walk along it to youth club in the late 1980's and that was held at the Henrietta Barnett field centre by the church, whilst I lived around the corner from the East entrance to footpath 5)." Mr Kilner's user period spans from 1981 to the present day, (witness evidence form completed March 2015). He would have been around 15 years old when Footpath no.4 was diverted in 1996/97 and cannot recall any change to his route around this time.

65. Mr B Sullivan also provides further evidence to support this, (**DSTA 21**), *"If we had walked down Barker's Hill then walked along footpath 3 past the church and then at the end of it turn left along footpath 4 [Officer's consider this to be a reference to the diverted route of Footpath no.4 as shown on the consultation plans included at **DSTA 21**] after climbing over the stile [this stile is believed to be that also referred to by Mr T Kilner at point A on the order plan, **DSTA 5**] we then followed a well trodden and clearly defined route north until we picked up footpath 5 which we then followed past our secondary parcel of land (which I have highlighted in yellow) until we came out on the route adjacent to our house. The advantage of doing this was to avoid the admittedly not very heavy vehicular traffic along New Road."* Mr Sullivan has lived at Thorn House, since July 1992. Mr Kilner and Mr Sullivan's evidence suggests that they were using part of the diversion route of Footpath no.4, leading east of point A, (please see order plan at **DSTA 5**), through Kelloways Mill field, prior to the official diversion of the footpath in 1996/97, to junction with Footpath no.3 leading south and

accessing other parts of the village, from their respective residences at the north of the order route, avoiding vehicular routes.

66. Additionally, Mrs Munro indicates on her plan, (DSTA 21), that she used the former route of Footpath no.4 at Mill Lane, past Kelloways Mill and into the Mansfield, where she either turned immediately left and into Kelloways Mill field, leading south to the present route line of Footpath no.4, or turning left in the Mansfield and following the order route to its junction with the present line of Footpath no.4, although she does put a question mark against the original route on this map and states in her response that *"It is a long time ago."* Mrs J Brown indicates that she used the former route of Footpath no.4 past Kelloways Mill and into the Mansfield, whereupon she turned north to follow the order route, or south following the order route to its present junction with Footpath no.4 and leading west to junction with Barkers Hill, beside Beauchamp House, (DSTA 21). She clearly states that she turned left upon entering the field, *"Prior to 1997 (a date of redirected footpath) I walked the old footpath which went up the drive of Kelloway's Mill – in front of the house – keeping left of river to a bridge and gate. Then I either turned right along the bottom of the field (now the footpath in dispute) or left and then up the hill to Barkers Hill (leaving footpath just beside Beauchamp House)."*

67. Although more witnesses do not claim use of the southern section of the route prior to 1996/97, 4 users have done so, Mr Kilner and Mr Sullivan providing particularly detailed evidence of a route which they have used prior to 1996/97, crossing into Kelloways Mill field, at point A as shown on the order map, (DSTA 5) and joining Footpath no.3 leading south to the church and Bartholomew's Street. This is likely to be sufficient evidence to claim this part of the route under statute.

68. In objection, (DSTA 6), Mrs Shaw states that throughout this application and on the plan attached to the Order itself, the position of the new fence line is incorrectly shown: *"WC has assumed that that the northern boundary of the land purchased by the Shepherds is approximately the same position as Footpath 4 prior to its diversion in 1997 (old FP4). This is incorrect. The*

boundary is further south as shown by the blue line on the Plan. This location of the fence has always been shown on all plans produced by Wardour.

Accordingly there is a significant part of the claimed route on Wardour's land which has not been walked for the statutory period of 20 years." Plotting the new fence line correctly against the former route of Footpath no.4, Mrs Shaw estimates this gap to be 20 metres at least and the full length of path over Wardour Ltd and Mr and Mrs Shepherds' land, which has not been used for a full period of 20 years, to be 120 metres in total.

69. Officers agree that the fence line recorded on the order map, (DSTA 5), does not accurately reflect the position of the fence on the ground and this line should be located further south. At the time of preparation of the order map this fence line was not recorded on the Ordnance Survey (OS) base map available and was inserted incorrectly by Officers. This line does now appear on the OS base map and Officers would concur with objectors on this point. However, it is not considered that this inaccuracy materially affects the evidence or the Wiltshire Council decision on the application. When witnesses were completing the evidence forms, no fence line was recorded on the map provided to witnesses and many of the witnesses have annotated the map to include the fence where they believe it to be located. It is also noted that the map provided to witnesses who used the route prior to the diversion of Footpath No.4 Donhead St Andrew in 1996/97, did not include the fence line and this map was not annotated in any way by Officers, allowing witnesses to record the route/s they had used. Officers also consider it likely that when witnesses have made reference to the location of the fence, they would have taken reference from the fence in its true location on the ground. It is in fact only the order map which records the fence line incorrectly.

70. Whilst researching the claim, Officers undertook a consultation amongst users who had used the route prior to 1996/1997, i.e. prior to the diversion of Footpath No.4 Donhead St Andrew, (please see consultation and relies at **DSTA 21**). Witnesses were able to mark on a map the route/s they had used prior to this date and from this evidence it can be seen that 4 users claim to have used the southern section of the order route before 1996/97, including the

gap between the former route of Footpath no.4 and the present fence line, as identified by the objectors, and that part of the order route over land in the ownership of Mr and Mrs Shepherd, which is likely to be sufficient user under statute, (please see consultation plans with former route of Footpath no.4 and present fence line added at **DSTA 25**).

71. Mrs Shaw in objection states that: *"Christopher Kilner in his letters of 30th April 2016 and 7th May 2016, with attached maps, suggests that the new stile is sited almost exactly on the historic mapped route of old FP 4. The Plan (which is an extract from a much more recent map than the copy of the 1901 OS Map Mr Kilner relies on) confirms that this is plainly not the case. Moreover, Mr Kilner's maps do not show the new fence in its correct position and do not accord with the map prepared by the 1996/7 members of the Parish Council dated 10th May 2016."* Mr and Mrs C Kilner and Mr and Mrs York make the following comments regarding the line of the former route of Footpath no.4 Donhead St Andrew, suggesting that they used a route for the footpath further south in the field, closer to the present fence line, (it should also be noted that at the start of the relevant user period in 1992, the Mansfield was a single open field, (please see 1991 aerial photograph at **DSTA 14**), and there is no evidence of the field being fenced again until 2012).

72. The 1901 Ordnance Survey Map is referred to by Mr and Mrs C Kilner, which with the OS map of 1925, appears to show the route of Footpath No.4, south of its former line, to the north of a former fence line which existed in 1901, giving less distance between Footpath No.4 and the 2012 fence and stile. Mr and Mrs Kilner state that before the diversion of Footpath No.4, they followed a very similar route to the 1901 OS map and they claim that reference to this historic map shows that the stile is sited almost exactly on the historic mapped route of Footpath No.4.

73. Mr and Mrs York also appear to record on their map, (of use prior to 1997), the route of Footpath No.4 further south in the field. They describe their pre-1997 route entering the Mansfield *"...near where the present stile is for the new*

fence. ..." and "We think the old footpath 4 roughly followed the line of the new fence. Again we think to its southern side."

74. When considering the claimed route in general, all witnesses have used the path through the field on more or less the same route, although there are some variations, i.e. some being closer to the field boundary and some being more central within the field, allowing for the inevitable inconsistencies in the drawing of the route by different individuals. Mrs Shaw refers to an inconsistency of the lines drawn on the map in objection, however as Mrs Elizabeth Collyer states in evidence presented to the Southern Area Planning Committee (**DSTA 18**), *"I am one of the 30 plus who completed the User Evidence Form and would like you to know that neither was I coerced nor did I coerce others into completing it."*

Villagers completed these forms freely and without collusion so it is not surprising that they are not identical." The witness evidence as a whole suggests an identifiable and consistent route at the eastern field boundary.

75. At the southern end of the order route, the majority of users have junctioned with Footpath no.4 at point A, (please see order plan at **DSTA 5**), however, one of the users Miss Maxwell-Arnot records Footpath no.4 Donhead St Andrew further north on her plan and then suggests that she continues south of the junction with Footpath no.4, however the termination point of the path shown on her plan, coincides with point A on the order plan, (**DSTA 5**) and she may then continue east on the continuation of Footpath no.4 which links with Footpath no.3, leading south, and Mill Lane). Additionally, two of the users, (Miss Ronan and Mr Winslet), terminate their route north of the fence line and do not enter the southern field. Their route terminates to the north-west of Kelloways Mill where the former route of Footpath no.4 would have junctioned with the claimed route and it is not clear where they were going after this as there are no longer any linking public highways at their termination point following the diversion of Footpath no. 4 Donhead St Andrew in 1996/97. Miss Ronan used the claimed route until 2014 and Mr Winslet used the route until 2015, so their use continued following the diversion of Footpath no.4.

76. In her evidence Mrs Shaw states that until the 1980's the land now owned by the Wardour Ltd was divided into several fields, as shown on the 1901 OS 25" map (**DSTA 12**). Drainage was poor and the eastern edge of the field was waterlogged throughout the autumn and winter. This is supported by Mrs Margaret Pitman in her statutory declaration (**DSTA 19**), who states that when they bought the land *"It was then divided into several fields and was poorly drained."* The 1982 aerial photograph, (included at **DSTA 14**), shows that in 1982 the field was divided by hedges and certainly the 1925 OS 25 inch map records the field divisions, (please see **DSTA 12**). Although witnesses claim use dating back to 1970, the majority of witnesses do not mention previous field boundaries and how these were negotiated. Mr Tom Kilner advises that there used to be a metal fence a long time ago, with a gate as he recalls and when the newer wooden fence was put in, a stile was placed where the path crossed it. From examining the historic OS mapping, (please see **DSTA 12**), it would appear that there was previously a fence to the southern section of the field, on the approximate line of the present fence and Officers believe this to be the former fence which Mr Kilner refers to, with gate, (Mr Kilner's use spans 34 years). In his presentation to the Southern Area Planning Committee dated 2nd February 2017, (**DSTA 18**), Mr Christopher Kilner states that, *"When we came to Donhead in 1977, the whole of Mansfield was owned by the Coward family and was farmed as organic grazing land. As far as I can remember it was divided as shown on the 1901 map, although the hedges had gaps and were incomplete. Where the path crossed the hedgeline there was a wide gap, which was probably a gateway in the past."* It is not clear when these boundaries were removed and although they appear on the 1982 aerial photograph, they have been removed by 1991, (as can be seen from the 1991 aerial photograph, see **DSTA 14**), at the start of the relevant user period. They do not appear to be present on the 2001 and 2005/06 aerial photographs, within the relevant user period, (**DSTA 14**). It is likely that during the user period in question 1992-2012, the field boundaries had been removed and Mr and Mrs Shepherd sought to re-establish the field boundary to the north of their land, in 2012.

Common Law Dedication

77. Section 5 of the Planning Inspectorate Definitive Map Orders: Consistency Guidelines, suggest that even where a claim meets the legal tests under Section 31(1) of the Highways Act 1980 for dedication under statute, there should be consideration of the matter at common law.
78. Dedication at common law does not rely upon a 20 year public user period and there is no defined minimum period of contentious user. Where the origin of a highway is not known, its status at common law depends upon the inference that the way was in fact dedicated at some time in the past.
79. A highway can be created at common law by a landowner dedicating the land to the public for use as a highway, either expressly or in the absence of evidence of actual express dedication by landowners, through implied dedication. Dedication at common law may be inferred from the fact that the owner has done exactly what one would expect from any landowner who intended to dedicate a right of way or from use and enjoyment by the public as of right, known to the owner and acquiesced in by them.
80. Common law dedication also relies upon the public showing their acceptance of the route by using the way. Whilst the principles of dedication and acceptance remain the same in both statute and 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 in practice evidence of such dedication is difficult to obtain and it is then appropriate to apply Section 31 of the Highways Act 1980.
81. Relatively few highways can be shown to have been expressly dedicated and in the Donhead St Andrew case there is no evidence before the Surveying Authority that Wardour Ltd, or the Pitman family before them, have carried out any express act of dedication over the northern section of the claimed route.

However, there is evidence that the previous landowners acquiesced in use of the claimed route by the public, before 2012, and evidence of the public acceptance of this route through user. Therefore if the claim under statute were to fail, it is possible to apply the principles of common law on the northern part of the order route.

82. On the southern section of the route, Mr and Mrs Shepherd installed a fence on the northern boundary of their land in March 2012, including a stile in the fence to allow public access with a dog gate. Whilst this action was de-minimus as an interruption for the purposes of Section 31 of the Highways Act 1980, (i.e. where the route was moved 3-4ft eastwards by the installation of the stile), this act by the landowner could be taken as an act of implied dedication at common law, (in the absence of any express dedication at common law). Although Wardour Ltd lodged with Wiltshire Council a plan and statement under Section 31(6) of the Highways Act 1980 to negative their intention to dedicate land in their ownership as a public highway, on 8th August 2012, followed by the subsequent statutory declaration, and the erection of permissive path notices on Wardour Ltd's land, which brought into question the public right to use the whole of the claimed route, these actions came 5 – 6 months after the erection of the stile. The user evidence chart at **DSTA 17**, shows that 32 witnesses continued to use the claimed route after the erection of the fence and stile, throughout and after 2012, which is considered sufficient to show acceptance by the public over the southern section of the route on Mr and Mrs Shepherds land, during that 5-6 month period. Additionally, Mr John Graham confirms that the number of users increased following the erection of the stile and Mr and Mrs Collyer and Mrs K Saunders state that the stile was incorporated in the fence allowing them to continue to use the path. All that is required for common law dedication is an act of dedication by the landowner and acceptance by the public.

83. There is evidence that the adjoining landowner, Mr David Pitman, advised against the installation of a stile as evidenced by Mr David Pitman; Mrs Shaw; Mr Hugh Graham and Mr Paul Farrant. Mr Farrant states that a stile was incorporated at the eastern edge of the fence to accommodate the walkers,

although David Pitman, a previous owner of the land who was involved in constructing the fence, made it clear that the walkers had no right to walk that route. Mrs Shaw requested that the stile be removed in an e-mail to Mr Shepherd dated 15th October 2014, to which she received no reply. She later claims in evidence that Mr Shepherd did not receive this e-mail, (DSTA 6): *"Mr Shepherd has confirmed that, due to a problem with his offices e-mail server at that time, he never received my E-mail dated 15th October 2014. ...In my E-mail of 15th October 2014, I requested Mr Shepherd to remove the stile from the fence."*

84. Mr and Mrs Shepherd, (DSTA 6), in objection state that *"...we met with Kevin Prince, the Shaw's land agent and agreed that a stile should be erected and that a notice was displayed stating that the footpath was a permissive one. Our permission was given for "the map attached to the notices" to display the whole route as a permissive path."* However, there is no further evidence that "permissive path" notices were erected on Mr and Mrs Shepherd land when the stile was erected or at any time after that. In evidence Mr Colin Eves indicates that permissive path notices were erected at points B and C, i.e. upon land owned by Wardour Ltd, (please see plan included with witness evidence form 12 at DSTA 15). He makes no reference to permissive path notices at point A, i.e. on land owned by Mr and Mrs Shepherd. This is supported by Mr and York in evidence forms 32 and 33 at DSTA 15). Where these notices were erected only upon the land in the ownership of Wardour Ltd and then some 5-6 months after the erection of the stile, at the time the stile was installed there would have been no indication that public use of the path was being brought into question, in fact the provision of a stile with dog gate would appear as quite the opposite to the members of the public using the way, as evidenced by Mr and Mrs Collyer and Mrs K Saunders. If the landowner had not intended the route to be public, there is no evidence that they took the further action required to disabuse the public of their belief that the way was public, i.e. through the erection of permissive path notices, or the deposition of a map and statement, with subsequent statutory declarations, under Section 31(6) of the Highways Act 1980, particularly where they claim that they had only erected the stile after experiencing pressure from villagers; against the advice of the previous

landowner and where there was no obligation placed upon them to provide a dog gate.

85. Therefore if the claim under statute were to fail, it is possible to apply the principles of common law on the southern section of the route where Mr and Mrs Shepherd, as the landowners, installed a stile on the route over land in their ownership in 2012 and there is evidence of acceptance of the route by the public in the period of time before the route as a whole was brought into question by the actions of the adjoining landowner, Wardour Ltd, in lodging with Wiltshire Council a plan and statement, (with subsequent statutory declaration), under Section 31(6) of the Highways Act 1980 and erecting permissive path notices on their land.

Width

86. In making an order to add a footpath to the definitive map and statement of public rights of way, a width must be recorded within the definitive statement, based on evidence. The 1901 OS map (25 inches to 1 mile), records only part of the claimed route (i.e. within plot no.105), by double broken lines, standard OS symbols to record a route with no physical boundaries. The route is also braced as part of the field, therefore no conclusions regarding the width of the path can be drawn from the OS mapping, (please see **DSTA 12**). It is important therefore to consider the witness evidence submitted regarding the actual used width of the path. Witnesses give varying path widths and Officers have therefore used an average from those users who have provided width figures, (based on the maximum extent given), which gives an average width of 1.8 metres, recorded as the definitive path width within the order (**DSTA 5**).

Landowner's Intention

87. Under Section 31 of the Highways Act 1980, there is a presumption of dedication following public use of a route for a period of 20 years or more "as of right", unless during that period, there was in fact no intention on the landowners part to dedicate the land as a highway.

88. The land was previously owned by Mr David Pitman; Mr Gerald Pitman and Mrs Francis Pitman from 1982/84, being transferred to Mrs Margaret Pitman in June 2011. From the evidence available to the Council, it would appear that the Pitman family, took little action to deter the public from using the route. The witnesses suggest the Pitman's were aware of the path and no witnesses report being challenged during the Pitman's period of ownership suggesting that they acquiesced in its use. Mrs Hinchley reports standing in her paddock with Mr Gerald Pitman, watching people using the path and two witnesses, Mr and Mrs Barkham, report that Mr Pitman told them that the route was a public footpath which they were free to walk when they came to the village in 2004, thereby acknowledging the existence of a path. There is a conflict in this evidence where Mr John Barton claims that Mr Pitman told him that the route was not public.
89. In his statutory declaration Mr David Pitman states that they always led everyone to believe that it was at the landowners' discretion if they walked anywhere else on the field other than on the public footpaths and they told people who asked where the public footpaths were. They did grant permission to one or two people who asked permission to walk elsewhere on the land, other than on the public footpaths, (including Mrs Belinda Blanshard). Upon purchasing the land Mr John Barton requested permission from Mr Pitman to walk the claimed route. However, whilst two individuals appear to have requested and been granted permission to use the way, (it is claimed that Mr and Mrs Lee claimed permission to use the route on behalf of the village in 2012, however there is no documentary evidence to support this claim, e.g. written permission of the landowners or reference to this permission within the Parish Council minutes 2012, **DSTA 23**), this does not convey the landowners intentions to the wider public and there is no evidence that the landowners non-intention to dedicate the route, was communicated to the public at large, e.g. through the erection of permissive path signs or prohibitory notices. Mr David Pitman also states that *"We told people who asked where the public footpaths were..."* however, there is no further evidence that the Pitman family challenged path users and no specific incidents of challenge are referred to.

90. Mr and Mrs Shepherd who own the land over which the southern section of the order route passes, appear to have taken no action to communicate to the public that it was not their intention to dedicate the land as a public highway and in fact included a stile with dog latch in the boundary fence erected in 2012. Mr Shepherd states that they received pressure from local path users to install a stile in the fence in order to avoid the fence being broken to gain access and livestock escaping, (DSTA 6) *"...the circumstances for the installation of the stile to the southern boundary were as follows:*

The stile was erected in response to pressure from the villagers. We were required by the former owner of the land, Margaret Pitman, to erect a fence between our field and the Shaw's land. Whilst the fence was being erected a contingent of villagers gathered and demanded a stile or threatened to cut a hole in the fence...we stock the field with sheep and need it to be stockproof so concluded our only course of action was to erect a stile."

91. There is evidence that this was against the advice of Mr David Pitman, a former owner of the land, who states *"I confirm that I was employed to work by Garrett & Fletcher, on the installation of a fence for Mr Shepherd as the new boundary fence to his property in March 2012. A former part owner (in Pitman and Sons with my brother Gerald) my interest in the land had been transferred to Margaret Pitman and she sold a portion to the Shepherds. Members of the village objected so aggressively to the installation of the new fence, that Mr Shepherd had no option but to install a stile with dog latch. I did not regard that the villagers were entitled to demand the installation of the stile as there was no footpath. So far as I am aware Mr Shepherd agreed to the inclusion of a stile on the basis that the path is a permissive path."*

92. However, there is no evidence that Mr Shepherd took action to convey to members of the public at the time the fence was erected, that the path was permissive only. The landowner erected the stile against the advice of the former landowner and if the landowners did not agree to public access, there was no requirement for them to install a dog gate. They did not take any further action to convey to members of the public using the way that it was not their intention to dedicate the route as a public right of way, i.e. they have at no time

deposited with Wiltshire Council a map and statement, with subsequent statutory declarations, under Section 31(6) of the Highways Act 1980 and S.15A of the Commons Act 2006 and there is no evidence that they have erected permissive path notices or prohibitory notices where the route passes over their land, at any time during their ownership.

93. On the northern section of the route, since Mr and Mrs Shaw's ownership of the land in May 2012, they have clearly communicated to the public their non-intention to dedicate this land as a public highway. It would appear that they were aware of the public use of the route upon purchasing the land and lodged with Wiltshire Council a map and statement, under Section 31(6) of the Highways Act 1980, covering the area of land in question, on 8th August 2012, (with subsequent statutory declaration), thereby negating the landowner's intention to dedicate further public rights of way over the land. This intention was further communicated to the public at large by the erection of permissive path signage on the claimed route in Autumn 2012 and January 2013, making it clear to members of the public that use of the path was at the discretion of the landowners and could be withdrawn at any time. In 2014 temporary path closure notices were erected on site by Mr and Mrs Shaw, amid safety fears following the appearance of a sink hole on the land, close to the claimed footpath.
94. Whilst these do qualify as actions to negate a landowner's intention to dedicate the land as a public highway and Officers accept that Mr and Mrs Shaw, on behalf of Wardour Ltd, have done all that is required to negative their intention to dedicate public rights of way upon taking ownership of the central and northern part of the Mansfield in 2012, it would appear that on the balance, a 20 year public user period, as of right and without interruption, had already been established prior to Wardour Ltd's ownership of the land.

Conclusion

95. "The Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map and Statement Modification Order 2016" has been made on the grounds

that there is sufficient evidence for it to be reasonably alleged that a right of way for the public on foot, subsists, where no incontrovertible evidence to refute this allegation has been received.

96. Following the making and advertising of the order, no further evidence has been submitted which would lead Officers to change this view and for this reason Wiltshire Council continues to support the making of the order, (please see Southern Area Planning Committee minutes – 2nd February 2017, (attached at **DSTA 8**).
97. Officers consider that there is sufficient evidence of public user of both the northern section of the route over land in the ownership of Wardour Ltd and the southern section of the route over land in the ownership of Mr and Mrs Shepherd, for it to be reasonably alleged that a right of way for the public on foot, subsists. Wiltshire Council has concluded that the date of bringing into question is the date of Wardour Ltd, lodging with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, on 8th August 2012, (with subsequent statutory declaration), which negates the landowners intention to dedicate further rights of way over the land, followed by the erection of permissive path notices later that year. These actions carried out by the landowners Wardour Ltd, have the effect of bringing into question the whole of the order route, (even upon the land owned by Mr and Mrs Shepherd who did not take any such action upon their land, whereby use continuing north on that part of the route over land in the ownership of Wardour Ltd, would not qualify as user "as of right").
98. Officers consider that there is a sufficiency of user for the whole of the relevant user period over the northern section of the route, (removing the evidence of Mr Barton, who requested permission to use the path from both the previous and present landowners, and Mrs Blanshard, who it is claimed requested permission to use the way from the previous landowners, the Pitman family). There is less evidence of user for the southern section of the route over land in the ownership of Mr and Mrs Shepherd, and the gap between the former route of Footpath no.4 and the present fence line, as identified by Mr and Mrs Shaw,

however, in consultations regarding the route used by members of the public prior to 1996/97 when Footpath no.4 Donhead St Andrew was diverted, (19 witnesses claimed to have used the path prior to 1996/97), 4 witnesses claim to have used the order route in its entirety, including the gap and the route over land now in the ownership of Mr and Mrs Shepherd, which is considered sufficient to claim this part of the route under statute.

99. However, Officers have also considered the implications of dedication at common law, which does not require a 20 year user period, (it can be a much shorter period), where the landowner in March 2012 installed a fence with stile and dog gate and there is evidence that public use of the route continued and even increased after that date. Even where the date of bringing into question is 2012, all that is required for common law dedication is an act of dedication by the landowner, (i.e. the installation of the stile in March 2012) and acceptance by the public, (i.e. evidence use continuing/increasing after the installation of the stile). Mr and Mrs Shepherd as the landowners have argued that they felt pressure to install a stile in the new fence, however even if that were the case, they did not need to install a dog gate and they carried out no action to convey to the public that it was not their intention to dedicate the way, i.e. the erection of permissive path notices or lodging with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980.
100. Wiltshire Council therefore submits "The Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map and Statement Modification Order 2016" to the Secretary of State for determination, with a recommendation from Wiltshire Council that the order be confirmed without modification.

Janice Green

Rights of Way Officer – Definitive Map

24th November 2017