



Application for a definitive map and statement modification order to add a footpath from Higher Holt Farm to Fuzzy Grounds, Melbury Osmond

Report to the Executive Director of Place

Portfolio Holder: Cllr D Walsh, Planning

Local Councillor(s): Cllr Mary Penfold – Member for Yetminster

Executive Director: J Sellgren, Executive Director of Place

Report Author: Paul Hopkins
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Report Status: Public

Recommendation:

That:

- (a) The Order be submitted to the Secretary of State for determination; and
- (b) The Council takes a neutral stance in the proceedings.

Reasons for Recommendation:

- (a) As there have been objections to the Order Dorset Council cannot confirm it itself but must submit it to the Secretary of State for an Inspector to be appointed to consider whether it should be confirmed.

(b) The Council has been directed to make the Modification Order by the Secretary of State. On 31st July 2019 the Council resolved not to make a modification order on the grounds that there is insufficient evidence to suggest that public rights subsist or can be reasonably alleged to subsist along the claimed route. In view of this decision a neutral stance is appropriate.

1. Executive Summary

This report considers representations received to the Dorset Council County of Dorset Definitive Map and Statement of Rights of Way Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to Bridleway 15 at Fuzzy Grounds, Melbury Osmond) Definitive Map and Statement Modification Order 2020 and the stance that the Council should take when the order is submitted to the Secretary of State for determination. A copy of the Order is at **Appendix 1**.

2. Financial Implications

Any financial implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

3. Well-being and Health Implications

Any well-being and health implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

4. Climate implications

Any climate implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

5. Other Implications

None

6. Risk Assessment

Having considered the risks associated with this decision, the level of risk has been identified as:

Current Risk: LOW

Residual Risk LOW

7. Equalities Impact Assessment

An Equalities Impact Assessment is not a material consideration in considering this application.

8. Appendices

1. Dorset Council

County of Dorset Definitive Map and Statement of Rights of Way Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to Bridleway 15 at Fuzzy Grounds, Melbury Osmond) Definitive Map and Statement Modification Order 2020

2. Report of Corporate Director for Economic Growth and Infrastructure, 31 July 2019
3. Appeal against Refusal to make a modification order, 27 August 2019.
4. Appeal Decision, 14 February 2020
5. Objection to Modification Order, 27 October 2020

9. Background Papers

The file of the Executive Director, Place (ref. RW/T513).

1. **Background**

Applicant

- 1.1 An application to add a footpath as shown between points A, B, C, D and E on Drawing 14/30/31 was made by Mr R Caesley on 11 July 2011.

Description of the route

- 1.2 The route subject to the modification order starts at point A on the Order Plan, Drawing 14/30/1, and follows a track to point E. The track has a surface of crushed stone and grass, and its width is approximately 2 metres. There are field gates at points A, C, X, Y, D and E. There are notices which say '*Ilchester Estate Private Land No Access Please Only Use Marked Public Rights of Way*' in place at points A, D and E.

Background to the Application for the Modification Order

- 1.3 The application for the modification order was considered by the Corporate Director for Economic Growth and Infrastructure on 31 July 2019. **(Appendix 2)**. The report considered documentary and user evidence relating to the claimed footpath. It was decided that the application be refused on the grounds that there is insufficient evidence to suggest that public rights subsist or can be reasonably alleged to subsist along the claimed route.
- 1.4 On 22 August 2019 the applicant for the modification order, Mr. Caesley, submitted an appeal to the Secretary of State for the Environment, Food and Rural Affairs under section 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 on the grounds that the path should be added to the definitive map and statement for the area. **(Appendix 3)**
- 1.5 On 14 February 2020 an Inspector appointed by the Secretary of State allowed the appeal and in accordance with paragraph 4(2) of Schedule 14 of the 1981 Act directed Dorset Council to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the route as proposed in the application dated 11 July 2011. **(Appendix 4)**
- 1.6 The Modification Order was made by Dorset Council on 7 August 2020 and advertised on 24 September 2020. **(Appendix 1)**
- 1.7 One objection has been received and is attached as **Appendix 5**.

2. **Law**

- 2.1 Paragraph 7 (i) of Schedule 15, Wildlife and Countryside Act 1981, provides that if any representation or objection duly made to the order is not withdrawn the Council shall submit the Order to the Secretary of State for confirmation.

3. **Issue to be decided**

- 3.1 As there have been objections to the Order, the Council is unable to confirm it itself; instead it must be sent to the Secretary of State for confirmation. In these circumstances the Secretary of State, through the Planning Inspectorate, may hold a local Public Inquiry at which issues can be explored fully before an Inspector decides whether the Order should be confirmed. Alternatively, at the discretion of the Inspector, the matter may be considered by way of a hearing or written representations.

- 3.2 The options now available to the Council are:

- To oppose the Order (maintaining the position of the Council to date);
- To support the Order (in view of the findings of the Secretary of State); or
- To take a neutral stance.

- 3.3 Opposing or supporting the Order would entail the preparation of an extensive and detailed Statement of Case to be submitted to the Secretary of State for consideration. There would also be preparation for and active participation in any subsequent Public Inquiry which may be held.

- 3.4 If the Council takes a neutral stance in the matter, copies of all correspondence relating to the case are submitted for consideration and there is reduced participation in any subsequent Public Inquiry which may be held.

4. **Discussion.**

- 4.1 In deciding which stance to take, it is necessary to consider, alongside the Council's decision on 31 July 2019 to decline to make a modification order, the grounds on which the appeal was made by the applicant, the grounds on which the Inspector based his decision to direct the Council to make a modification order and the objection to the order.

Appeal against the Council's Refusal to make a modification order.

- 4.2 The Grounds on which Mr. Caesley based his appeal against the Council's refusal to make a modification order are summarised below. **(Appendix 3)**
- 4.3 Mr. Caesley refers to the report of 31 July 2019, and notes that there is no reference to the 1995 deposit being activated by a statutory declaration. Mr. Caesley points out that it is clear from the legislation that it is the declaration and not the deposit which constitutes evidence of no intention to dedicate. Mr. Caesley adds that the appendix to the report contains a copy of a deposit and the map accompanying it, but no copy of any statutory declaration. Subsequent to its decision on 31 July 2019 the Council confirmed to Mr. Caesley that they can find no record of a statutory declaration to accompany the 1995 deposit. As a result, the Council has stated that it appears that the 1995 deposit is invalid. The Council also confirmed that the 2007 deposit does have an accompanying statutory declaration and is thus valid. **(Appendix 3)**
- 4.4 As a consequence of the absence of a statutory declaration accompanying the 1995 deposit, in making the appeal Mr. Caesley maintained that the 20 year period for the consideration of user evidence for the purposes of Section 31 of the Highways Act 1980 should terminate on 20 July 2007; that is, the period should run from 20 July 1987. In the appeal Mr. Caesley pointed out that there is evidence from five of the witness statements that the path was in use prior to 1987.
- 4.5 Mr. Caesley notes that for the landowner to provide sufficient evidence that there is no intention to dedicate as path as a public right of way there must be some overt act by the landowner to show to the public at large that he has no intention to dedicate it. Mr. Caesley acknowledges that such evidence was provided by the signs that were erected in 2009, and points out that until the signs were erected no evidence existed that the public was warned that they were trespassing whilst using the path. Mr. Caesley suggests that *'There is, therefore, a case that the 20 years required by Section 31 of the Highways Act 1980 should start from a date in 1989.'*
- 4.6 Mr. Caesley points out that a landowner's capacity to dedicate a public right of way is not an issue to be considered in the context of section 31(1) of the Highways Act 1980; it is the use which establishes the right. Mr. Caesley notes that Section 31(1) requires that the use of the way must be "as of right", and that 'what must be satisfied is the tripartite test which makes up 'as of right' i.e. the use must be without force, without secrecy and without permission.' Mr. Caesley challenges

the statement in the report of 31 July 2019 that such use must be sufficient to have come to the attention of the landowner.

Appeal Decision

4.7 In his decision letter of 14 February 2020 the Inspector, Mr. Mark Yates, summarised the main issues to be considered thus: **(Appendix 4.)**

4.8 *‘Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that “a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...”’.*

In considering this issue there are two tests to be applied:

- *Test A: Does a right of way subsist on the balance of probabilities?*
- *Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.*

I conclude that ‘For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.’

The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 (“the 1980 Act”). This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

Alternatively, an implication of dedication may be shown at common law if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.’

4.9 In making a decision the Inspector has considered the issue of the relevance of a statutory dedication and when the use of the claimed route was brought into question, public use of the claimed route, and whether the landowner demonstrated a lack of intention to dedicate a footpath.

- 4.10 In considering when the use of claimed route was brought into question, Mr. Yates concludes that

*'It is clear that for a landowner to make use of the Section 31(6) provision in order to demonstrate a lack of intention to dedicate additional ways over their land they need to deposit a map and statement and within the required period lodge a statutory declaration. It is not enough to make only an initial deposit. In light of Godmanchester, it is unlikely that a deposit by itself will be sufficient to bring the status of the route into question. For the purpose of reaching a view at the Schedule 14 stage, I agree with the conclusions of the second Inspector*1 on this matter. This means that the deposit alone would not have brought the status of the route into question.'*

- 4.11 *A statutory declaration was lodged in connection with a Section 31(6) deposit made in 2007. It follows from the above that this would constitute an event that brought the status of the claimed route into question. This means that the relevant period for the purpose of statutory dedication ("the relevant period") should be taken to be 1987-2007. It is therefore not necessary to consider the later action taken to challenge use of the claimed route.'*

*1 In addition to case law, Mr. Yates refers to the conflicting decisions of two Inspectors in drawing his conclusion.

- 4.12 In considering public use of the claimed route, Mr Yates notes that

'ten user evidence forms ("UEFs") have been submitted in support of use of the claimed route. It is apparent that one of these users had permission to use the route. The landowner asserts that certain users were aware that the way was not public, use was less frequent than specified in the UEFs and some people did not actually use the route. Reference is also made to additional people having permission to use the route. In support, statements have been submitted by six people with knowledge of the estate.'

- 4.13 *'Although the evidence reveals that the current track was constructed in around 1984, this does not necessarily mean that people were unable to previously use the claimed route. There is some evidence that is supportive of use prior to the construction of the track. It should also be borne in mind that this event pre-dates the onset of the relevant period and the provision of a track may have served to encourage or facilitate public use. Furthermore, a lack of observed use does not mean that the claimed use did not occur.'*

- 4.14 *'The UEFs provide evidence of use throughout the relevant period. There is evidence of use by between five and nine of the users during each year of this period. I note that the specified use is generally stated to have occurred on a regular basis. There is a clear conflict between the written submissions of the parties. Nonetheless, the user*

evidence is sufficient to reasonably allege that there was use during the relevant period to raise a presumption of the dedication of a footpath.'

- 4.15 In considering whether the landowner demonstrated a lack of intention to dedicate a footpath, Mr. Yates concludes that

'I have addressed the issue of statutory deposits above. In the absence of a statutory declaration, a deposit would not constitute a lack of intention to dedicate any additional public rights of way over the land in question. A tenancy agreement would also not be a sufficiently overt act to demonstrate a lack of intention to dedicate.'

- 4.16 *'Reference is made to the erection of a locked gate to deter horse riders. However, there is no evidence to show that pedestrians were prevented from using the route by way of any structure. I note that the users refer to a gate or gates that were open or not locked.'*

- 4.17 *'There is evidence contained in the statements supplied by the landowner of challenges being issued to people seen on the claimed route. This evidence directly conflicts with the UEFs where none of the users' state that they were challenged. In terms of people being aware of challenges issued to other people, it cannot be determined when any such challenges occurred. Any event that occurred after 2007 would not be relevant in this case.'*

- 4.18 The Inspector's conclusion is:

'Having regard to the above, I find there to be a conflict of credible evidence and that an order should be made on the ground that a right of way can be reasonably alleged to subsist. I reach this conclusion on the basis of statutory dedication. This means there is no need for me to consider the user evidence in the context of common law dedication. However, the Wild judgment may mean that any reliance on common law dedication would not succeed.'

- 4.19 *'Having regard to these and all other relevant matters raised in the written representations I conclude that the appeal should be allowed'.*

- 4.20 The Inspector's decision is:

'In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act the Dorset Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the route as proposed in the application dated 11 July 2011. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 to the 1981 Act.'

The objection to the Modification order

4.21 The objection is made by Mr. J. Cheal, of Mogers Drewitt, Solicitors, on behalf of Ilchester Estate, the owners of the land over which the footpath subject to the modification order runs. Mr. Cheal objects to the order on the following grounds: **(Appendix 5)**

4.22 *'This is a case based entirely on alleged public use evidence.'*

Comments of Dorset Council. The evidence of use of the way will be considered by an Inspector. In investigating the application for the modification order Dorset Council has also inspected documentary evidence, and concluded that the available documentary evidence is insufficient to show that the claimed footpath carries public rights.

4.23 *'The amount of alleged evidence is insubstantial.'*

Comments of Dorset Council: The Council considers that the evidence is not sufficient to show the existence of public rights over the path.

4.24 *'The maximum number of application witnesses is ten, though one of them is discounted because of permission and employment.'*

Comments of Dorset Council: In assessing the evidence of use of the path the Council discounted that use by the witness who was given permission to use the path.

4.25 *'The Dorset County Council Committee recommendation in July 2019, and their decision, was to refuse the application on the basis that there was insufficient evidence to suggest that public rights subsist or can be reasonably alleged to subsist along the claimed route.'*

Comments of Dorset Council: The Council was subsequently directed to make a modification order. As has been noted above, in making a decision as to whether such a direction should be issued the Inspector considered that an order should be made on the ground that a right of way can be reasonably alleged to subsist.

4.26 *'The Inspector on appeal felt that the evidence should be tested at Inquiry on the ground that a right of way could be reasonably alleged to subsist, that the County should be directed to make an Order, and that the claim period was to be 1987 to 2007.'*

Comments of Dorset Council: The Council supports the notion that the evidence should be tested at inquiry.

- 4.27 *'The period dates back twenty years from when a 2007 Deposit (Statement and Declaration) was lodged. The Estate had done a previous Statement in 1995 but unwittingly omitted the Declaration.'*

Comments of Dorset Council: The Inspector's view on the absence of a declaration is noted above.

- 4.28 *'We say that the 1995 Deposit brought into question the alleged public right; it made it plain that the Estate had no intention to dedicate and was on the DCC system at Dorset History Centre. Thus the period should be 1975 – 1995.'*

Comments of Dorset Council: As noted, the Inspector disagrees with this assertion.

- 4.29 *'The amount of alleged public use during that earlier period is negligible.'*

Comments of Dorset Council: This is acknowledged, but the Inspector's decision on the appeal extends the period of use to be considered to 2007.

- 4.30 *'The amount of alleged public use in the 1987 – 2007 period is itself negligible. Only four of the witnesses claim intermittently to have been using the route in the early part of the relevant period. Even taking the Applicant's case at its highest, the alleged use is insufficient to support a successful claim.'*

Comments of Dorset Council: The Council agrees with this assertion. An Inspector will consider the extent of the user evidence, and decide whether the modification order should be confirmed.

- 4.31 *'Despite signage being erected in 2009, it was not until 2011 that an application for a public way was made.'*

Comments of Dorset Council: This is noted, but does not affect the issue of whether or not the modification order should be confirmed.

- 4.32 *'The Estate has long had a policy of managing public access so as to prevent untoward rights arising. Estate staff are well aware of the need to confront trespassers and have done so when any trespass is observed. The Estate have six witnesses who all deny the alleged public use as of right of the Order Route.'*

Comments of Dorset Council: The Inspector has acknowledged that there is a clear conflict between the written submissions of the parties. The statements of witnesses will be considered by an Inspector in deciding whether to confirm the Modification Order.

- 4.33 *'The Parish Council (of which the Applicant is a long standing member) is well aware that that is the Estate's policy.'*

Comments of Dorset Council: This does not affect the issue of whether or not the modification order should be confirmed.

- 4.34 *'It was well known locally that in 1978 there was a Public Inquiry, held in the Melbury Osmond Parish Hall, at which the Agent for the Estate spoke in denial of a public footpath on this route.'*

Comments of Dorset Council: The Inspector has considered the relevance of the decision at the 1978 Inquiry, as noted above.

- 4.35 *Overall, the Applicant's evidence is insufficient to establish a public right of way on the balance of probabilities and, as such, the Order should not be confirmed.*

Comments of Dorset Council: As noted the Council considers the evidence to be insufficient, and welcomes the determination of this matter by an Inspector.

5. **Conclusion.**

- 5.1 The objection remains outstanding. The Council is therefore unable to confirm the order itself and must submit the order to the Secretary of State for determination.

- 5.2 The question of whether the evidence of use of the path subject to the modification order, together with other available evidence, is sufficient to show the existence of public rights in the absence of a statutory declaration accompanying the 1995 deposit, should be made by an Inspector. The Council considers the evidence to be insufficient and was directed to make the Order. Accordingly, it is recommended that the Council takes a neutral stance in the proceedings.

6. **Recommendation:**

(a) The Order be submitted to the Secretary of State for determination;
and

(b) The Council takes a neutral stance in the proceedings.

Footnote:

Issues relating to financial, legal, environmental, economic and equalities implications have been considered and any information relevant to the decision is included within the report.

APPENDICES

1. Dorset Council
County of Dorset Definitive Map and Statement of Rights of Way
Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to
Bridleway 15 at Fuzzy Grounds, Melbury Osmond) Definitive Map and
Statement Modification Order 2020
2. Report of Corporate Director for Economic Growth and Infrastructure,
31 July 2019
3. Appeal against Refusal to make a modification order, 27 August 2019.
4. Appeal Decision, 14 February 2020
5. Objection to Modification Order, 27 October 2020



**Dorset
Council**

APPENDIX 1

Wildlife and Countryside Act 1981

**Dorset Council
County of Dorset Definitive Map and Statement of Rights of Way**

**Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to Bridleway 15 at
Fuzzy Grounds, Melbury Osmond)
Definitive Map and Statement Modification Order 2020**

This Order is made by Dorset Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the County of Dorset Definitive Map and Statement require modification in consequence of the occurrence of an event specified in section 53(3)(c)(i) namely, 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 and section 53(3)(c)(iii) namely, that any other particulars contained in the map and statement require modification.

The authority has consulted with every local authority whose area includes the land to which the Order relates. Dorset Council hereby order that:

1. For the purposes of this Order the relevant date is 23 April 2020.
2. The County of Dorset Definitive Map and Statement shall be modified as described in Part I and Part II of the Schedule and shown on the map attached to the Order.
3. This order shall take effect on the date it is confirmed and may be cited as the "Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to Bridleway 15 at Fuzzy Grounds, Melbury Osmond) Definitive Map and Statement Modification Order 2020".

Dated this 07 day of AUGUST 2020

366/20

THE COMMON SEAL OF
DORSET COUNCIL
was fixed in the presence of:-



Authorised Signatory

SCHEDULE

(The points specified relate to the map attached to the Order and their positions are identified by national grid references)

Part I

Description of path to be added

A Footpath, Melbury Osmond

To be numbered Footpath 19, Melbury Osmond

- A – B – C From its junction with Footpath 17, south west of Higher Holt Farm, at point A
– C1 – D (ST 56370878), south along a gravel/stone surfaced track, hedged on the
– E eastern side, to point B (ST 56330858). Continue west to point C (ST
56250857) and then southwards along the track, hedged on the eastern side,
to point C1 (ST 56230805) at the north western corner of Dole Copse.
Continue south south west along the track, hedged on the western side to its
junction with Footpath 16 at point D (ST 56160786). Continue south along
the track, hedged on the western side and fenced on the eastern side, to the
north east corner of Fuzzy Grounds and its junction with Bridleway 15 at point
E (ST 56200751).
The width is 2.5 metres.

Part II

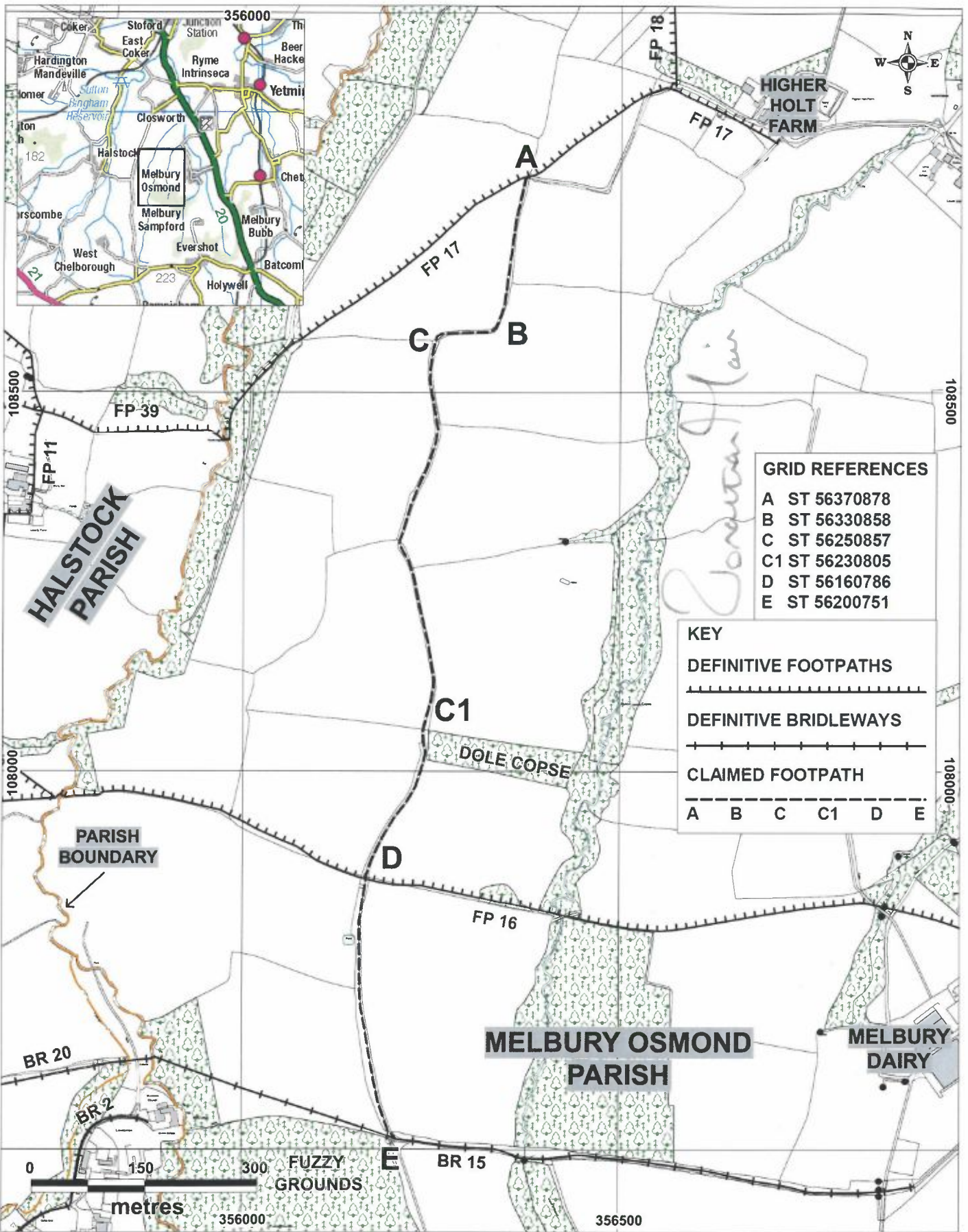
Modification of definitive statement Variation of particulars of path

Footpath 19, Melbury Osmond:

Add:

From: ST 56370878 To: ST 56200751

From its junction with Footpath 17, south west of Higher Holt Farm, at ST 56370878, south along a gravel/stone surfaced track, hedged on the eastern side, to ST 56330858. Continue west to ST 56250857 and then southwards along the track, hedged on the eastern side, to ST 56230805 at the north western corner of Dole Copse. Continue south south west along the track, hedged on the western side to its junction with Footpath 16 at ST 56160786. Continue south along the track, hedged on the western side and fenced on the eastern side, to the north east corner of Fuzzy Grounds and its junction with Bridleway 15 at ST 56200751.
The width is 2.5 metres.



DORSET COUNCIL (FOOTPATH FROM FOOTPATH 17 AT HIGHER HOLT FARM TO BRIDLEWAY 15 AT FUZZY GROUNDS, MELBURY OSMOND) DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2020

Ref: 14/30/1
 Date: 18/03/2020
 Scale 1:6500
 Drawn By: AH
 Cent X: 356317
 Cent Y: 108199

Dorset Council

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Report to the Executive Director for Place

Application for a definitive map and statement modification order to add a footpath from Higher Holt Farm to Fuzzy Grounds,

Melbury Osmond

Lead Member: Cllr Mary Penfold – Member for Yetminster

Lead Officer: Matthew Piles, Corporate Director for Economic Growth and Infrastructure

Executive Summary:

This report considers an application for a definitive map and statement modification order to add a footpath from Higher Holt Farm to Fuzzy Grounds, Melbury Osmond as shown on Drawing 14/30 (see Appendix 1)

Equalities Impact Assessment:

An Equalities Impact Assessment is not a material consideration in considering this application.

Budget:

Any financial implications arising from this application are not material considerations and should not be taken into account in determining the matter.

Risk Assessment:

As the subject matter of this report is the determination of a definitive map and statement modification order application the Council's approved Risk Assessment Methodology has not been applied.

Other Implications: None.

Recommendation:

That the application be refused.

Reason for Recommendation:

There is insufficient evidence to suggest that public rights subsist or can be reasonably alleged to subsist along the claimed route.

Appendices:

1 - Drawing 14/30 showing path subject to the application for a modification order. 2

- Law

3 - Documentary evidence

- Section 31 (6) Deposit • 1978 Inquiry Inspector's decision
- Tithe Map of 1835-50
- One Inch Ordnance Survey Map of 1811

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- Greenwood's map of 1826
- Parish Survey Map of 1950's
- 1886 Ordnance Survey Map • 1903 Ordnance Survey Map
- 1958 Ordnance Survey Map

4 - User evidence

Charts to show periods and level of use

Background Papers:

The case file of the Corporate Director for Economic Growth and Infrastructure (ref. RW/T513)

Officer Contact:

Name: Vanessa Penny, Definitive Map Team Manager

Tel: 01305 224719

Email: Vanessa.Penny@dorsetcouncil.gov.uk

1 **Background**

1.1 Applicant

An application to add a footpath as shown between points A, B, C, D and E on Drawing 14/30 (Appendix 1) was made by Mr R Caesley on 11 July 2011.

1.2 Description of the route

The route claimed starts at point A on Drawing 14/30, and follows a track to point E. The track has a surface of crushed stone and grass, and its width is approximately 2 metres. There are field gates at points A, C, X, Y, D and E. There are notices which say '*Ilchester Estate Private Land No Access Please Only Use Marked Public Rights of Way*' in place at points A, D and E.

2 **Law**

2.1 A summary of the law is contained in Appendix 2.

3 **Issue to be decided**

3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on the route claimed and if so, at what status the route should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.

3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.

3.3 Historical documentary evidence and user evidence has been examined to see whether depictions of the route point to it having acquired public rights as a result of deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist even if they are no longer used or needed. It is unlikely that a single map or document will provide sufficient evidence to justify a change to the Definitive Map, and the evidence must be assessed holistically. The Council has a duty to record any rights that are found to exist even if they are not those that have been claimed by the applicant.

4 **Documentary evidence (Appendix 3)** (copies available in the case file RW/T513)

4.1 A table of all the documentary evidence considered during this investigation is contained in the case file. All documents considered to be of relevance are discussed below.

4.2 **The Definitive Map**

The National Parks and Access to the Countryside Act 1949 charged the County Council, in its capacity of "Surveying Authority", with a duty to compile a record of the public rights of way network. As part of this process District and Parish Councils carried out surveys and provided the County Council with information for the purposes of recording the existence of public rights of way.

There were various maps produced by the County Council leading up to the current definitive map, which was sealed in 1989. These were the draft map of 1959, provisional map of 1964, first definitive map of 1967 and the revised draft map of 1974.

4.2.1 **Parish Survey**

The parish survey map, produced by Melbury Osmond Parish Council in the early 1950s, does not show the claimed footpath. The inference to be drawn from this is that the Parish Council did not consider the path to be a public path at that time.

4.2.2 No subsequent rights of way maps produced by the Council up to and including the current Definitive Map sealed in 1989 showed the claimed route.

4.2.3 **Definitive Map Review 1973/1978**

There is no record of the claimed route being raised as part of the definitive map review process that took place in 1973. However, on 22 November 1978 a public inquiry was held in Melbury Osmond Parish Hall at which a number of claimed paths were considered as part of the Special Review process. One of these paths, 'Case 3', ran between footpaths 16 and 17 on a line that coincides with part of the claimed footpath. The path under consideration was claimed as a footpath by a Mr Croker, who objected to the omission of the route on the Revised Draft Map on the grounds that it appeared on the First Edition Ordnance Survey map and the tithe map. The report on the case states that the path was not claimed by the Parish Council in 1952, and that it was not on the definitive map. The report notes that 'no evidence of public use has been produced', and that it was 'Difficult to ascertain claimed path's route from footpath 16 owing to this path being overgrown in places and the presence of newly erected wire fencing.'

4.2.4 The Agent of the Estate, Mr Green, submitted a statement to the Inquiry, which stated that 'The owners deny that there has been a footpath along

the route claimed.' Mr Green asserted that the existence of a track on the tithe map and first edition Ordnance Survey map was not evidence of the existence of a public right of way, and referred to 'the impossibility of the use of the route even as a footpath for the first 200 yards north of footpath 16'. The claim did not succeed and was dismissed by the Secretary of State.

4.2.5 Officer Comments: This Inquiry and Inspector's decision has relevance in considering whether use of the way has established a right of way for the public and is considered further elsewhere in this report. The tithe map and Ordnance Survey maps are discussed below.

4.2.6 In summary, there is no evidence in correspondence associated with the process of the drawing up and review of the definitive map to show that the claimed footpath carries public rights.

4.3 **Highways Records**

No part of the claimed footpath is shown in Dorset County Council current records as a highway maintainable at public expense. The records of preceding highway authorities are not available, and may have been destroyed.

4.4 **Ordnance Survey Maps**

4.4.1 One inch Ordnance Survey 1st Series map of 1811

Shows a lane or road running south-westwards and southwards from Higher Holt, which turns eastwards to join Holt Lane at Pimperne. The line of this way does not appear to coincide precisely with that of the claimed footpath, but the 1811 map shows there was a route on or close to part of it at that time. We do not know from this map who used the way, nor whether it was used by the public, but it was clearly of sufficient substance on the ground to be shown.

4.4.2 25 inch Ordnance Survey map of 1887

Does not show the claimed footpath. A path or track is shown running south-westwards from point A, which terminates in the vicinity of point C, but this does path not appear to continue beyond this point. It may be that this way had continued southwards from its point of termination on the map and ran on the line which is shown on the tithe map of 1835/1850 (see paragraph 4.4.6 below) and, possibly, on the 1811 OS map, but by 1886 it was insufficiently used to appear to an extent that was apparent on the ground. The boundaries on the western side of the route shown on the tithe map and 1811 Ordnance Survey map appear to have been removed by 1886, and what may have been a former lane has been incorporated into the fields by then. It is not known, however, that this was certainly the case, nor whether the path shown on the 1886 map continued southwards from its point of termination at, or near to, point C.

4.4.3 1903 25 inch Ordnance Survey map

Shows the same detail in relation to the path as the 1887 map, and no conclusions can be drawn from this.

4.4.4 1958 two and a half inch OS map

Shows the path terminating at the same point as that shown on the 1887 and 1903 maps.

4.4.5 It is important to acknowledge that Ordnance Survey maps do not provide any indication of the status of a route, but they are of use in that they confirm the physical existence of what was on the ground at the time of the survey.

4.5 **Tithe Apportionment Map of 1835-1850**

The tithe apportionment map of 1835-50 shows a way, in the form of a lane, running south-westwards from Holt Mill and southwards to Dole Copse, where it turns to the east and north-east and continues to join Holt Lane at Pimperne. The way appears as land that was excluded from tithe. This suggests that the land occupied by the lane may have been considered to have been 'public' land, and highways were often excluded from tithe in this way. Part of the route shown on the tithe map, between a point to the south of A and Dole Copse, corresponds with that of the claimed footpath. The tithe apportionment for the enclosures through which the remaining length of the claimed footpath runs do not make reference to a public way of any kind.

4.5.1 The purpose of tithe maps was to record land for the purpose of tithe payments, and the showing of highways and ways carrying public rights was not a necessary part of their compilation. Nonetheless, this record is useful in indicating that part of the way in question may have been exempt from tithe because of its use as a public way of some kind.

4.6 **Greenwood's map of 1826.**

Greenwood's map of 1826 shows a lane or road running south-westwards and southwards from Higher Holt, which turns eastwards to join Holt Lane at Pimperne. The line of this way may coincide partly with that of the claimed footpath, and it is similar to that which is shown on the 1811 map and on the tithe map. Greenwood's map does not tell us whether use of the way shown was by the public or for private purposes, but it shows that a route was in existence on the ground in the vicinity of the claimed footpath. Greenwood's map is of a small scale, and caution should be exercised in drawing conclusions from it.

4.7 **Section 31 (6) Deposits**

On 18 April 1995 Melbury Estates deposited a plan and statement showing the footpaths and bridleways that the Estate accepted to have been

dedicated as highways, using provisions contained in section 31 (6) of the Highways Act 1980. The claimed footpath is not included as one of these paths. Further statements and plans were submitted on 6 April 1998 and 20 July 2007, which was followed by the submission of further plans on 30 July 2008. This has implications with regard to the establishment of public rights over the claimed footpath following the date of the section 31 (6) deposit, and is further considered elsewhere in this report in assessing the user evidence that has been submitted in support of the application.

4.8 **Rights of Way Act 1932.**

A letter dated 12 February 1932 from the clerk of Dorset County Council to the Clerk of Dorchester Rural District Council makes reference to the Agent of Lord Ilchester having deposited with the County Council a map and statement 'showing the ways on the Strangeways Estate which they admit to be public.' The claimed footpath is not one of the admitted paths. The Rights of Way Act 1932 introduced the rule that 20 years user could lead to a presumption of dedication and made provision for a landowner to deposit a map and statement to prevent the dedication of any additional rights of way. This provision is now contained in section 31 of the Highways Act, as noted above.

4.9 **Early Maps**

A number of early published maps have been examined, including Saxton's map of 1575, Kip's map of 1607, Bill's map of 1626, Blau's map of 1645 and Seale's map of 1732, Archer's map of 1842, Osbourne's map of 1824 and Wallis's map of 1811. None of these shows the claimed footpath, but the maps are of a small scale and generally only show settlements and significant topographical features

4.10 **Finance Act 1910 Valuation Map and Field Book**

The Finance Act Valuation Map and Field Book is not available for the land crossed by the claimed footpath.

4.11 **Summary of documentary evidence**

The available documentary evidence shows that there was a way of some kind on, or close to, part of the claimed footpath at the time of the 1811 Ordnance Survey map, and a similar route appears on Greenwood's map of 1826 and on the tithe map of 1835-50. We do not know from these records what the status of this way was, but it was clearly of sufficient substance to be shown on these maps in the form of a lane or road, and of such a nature that the land the way occupied was excluded from tithe, which suggests a highway. There is nothing in the background to the drawing up of the definitive map to show that the path's omission from the definitive map is in error. Other records that have been examined do not assist in determining whether the path carried public rights, and it is considered that the available documentary evidence is insufficient to raise a reasonable allegation that the claimed footpath subsists. Of principal significance are the section 31 (6) deposits made by Ilchester Estate, and

the records relating to the 1978 public Inquiry into the status of the path, which have relevance in considering the user evidence submitted in support of the application, and which is discussed below.

5 User evidence (Appendix 4)(copies available in the case file RW/T513)

5.1 Analysis of User evidence

A total of ten users have completed user evidence forms, which have been submitted in support of the application. Six of these forms were sent to the Council along with the application form for the modification order which was received on 14 July 2011, and a seventh form was received by the Council on 13 February 2012. A further three forms were received in March 2019.

5.2 A summary of the forms of evidence is set out below, but reference should be made to the actual forms contained within the case file Ref.T513 for all the information. The graphs at Appendix 4 summarise the key information contained in these forms.

5.3 Not all witnesses have been personally interviewed. The information has been taken from the forms of evidence which have been signed by each witness stating: "I hereby certify that to the best of my knowledge and belief the facts that I have stated are true".

5.4 Seven of the user evidence forms are accompanied by maps on which the person completing the form has indicated the line of footpath they refer to. They all show the same route as the claimed path. Each of the ten forms contains a description of the route referred to on the form.

5.5 Section 31 of the Highways Act 1980 provides that where a way has been enjoyed by the public as of right and 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. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question. Although Section 31 of the Highways Act 1980 does not specify the minimum number of users required to raise a presumption of dedication, it does require that their use must have been for a minimum period of 20 years from the date the right to use the route was brought into question. Dedication of a way may also be inferred at common law, where it can be demonstrated that at some time in the past the landowner dedicated the way to the public, either expressly, the evidence of the dedication having been lost, or impliedly, by making no objection to the use of the way by the public. In order to challenge the establishment of a public right of way, an objector must show that the owner of the land had no intention of dedicating public rights over the path and had taken steps to prevent the accrual of public rights. There are various means of achieving this, including submitting a declaration to the Council under s31(6) of the Highways Act, informing users that the route is not public

(verbally or by using signs), physically blocking the route (for example, by a locked gate or fence), or actively granting permission to use the route.

- 5.6 The date of the application for the modification order is 11 July 2011. There are references in several of the user evidence forms to the witnesses' use of the path being brought into question by a notice that appeared on the path in 2009, which contained the words: 'Ilchester Estates Private Land No Access Please only use marked public rights of way'. In assessing the extent to which use of the path by the public might have established a public footpath statements testifying to use of the path may therefore refer to use of it up to the date of the display of that notice in 2009 in order to meet the requirements of section 31 unless it can be shown that use of the way by the public was brought into question prior to that date. The issue of the bringing into question the use of the way by the public is considered further below.
- 5.7 The statements contained in the user evidence forms indicate that the use referred to by nine of the witnesses was on foot. One witness, had used the way on foot, cycle and with a car. The period of use recorded in the forms was between 1956 and 2012; this amounts to 56 years up to 2012, or 53 years up to 2009.
- 5.8 Of the ten witnesses who have used the route, one had used the route for 53 years up to 2009), two for 25 years, one for 20 years, one for 15 years, one for 13 years, and two for 11 years. One witness states that she used the path 'from 1967 until the time footpath (was) closed', and one records the year '1983' on the form, without giving further details of the years during which she had used it.
- 5.9 The frequency of use of the path varied from 150 times a year to 1-2 times a year.
- 5.10 One of the witnesses had asked for, and been granted, permission to use the path (User J). None of the remaining people make a statement to the effect that they were granted permission to use the claimed footpath. However, User J has noted that she had enquired whether it was acceptable to use the path and had been told that 'it was a public path/bridlepath anyway'. She does not say who told her this.
- 5.11 Witnesses refer to signs or notices on the claimed path that were intended to prevent their use of it. The information given in the user evidence forms indicates that this notice appeared during the summer of 2009.
- 5.12 None of the witnesses mention their use of the path being in the exercise of a private right of access.
- 5.13 One witness has stated that they were an employee of the owner of the land (User J). The information given suggests that the employee referred to was her husband rather than the witness herself.

- 5.14 None of the witnesses recall there being any gates along the route that were locked, nor refers to any other obstructions that would have prevented their use of the way.
- 5.15 Eight of the witnesses mention meeting or seeing other users of the path and the information given suggests that this use was primarily on foot or horseback. Two refer to use by people on bicycles and two make reference to seeing motor vehicles on the path. Several give their opinion that the landowner(s) would have been aware of their use of the way.
- 5.16 In assessing the evidence contained in these user evidence forms, it is necessary to discount the use of the path by one witness (User J), who had obtained permission to use the path, which indicates that she was not using it as a member of the public. One witness, states that her use was in '1983' and does not give any other information on their period of use. It is presumed that this indicates use from that date until the user evidence form was completed in 2011. Another witness states that she used the path from '1967 until the time footpath closed', and she has confirmed in a telephone conversation that this was in 2009. If the use of the path by User J is discounted, it can be seen that the path was walked by nine members of the public between 1967 and 2009, a total period of 42 years.

5.17 **Landowner comments on user evidence**

Alongside the information contained in the user evidence forms the statements of other witnesses must be considered. Six further witness statements have been submitted to the Council, and these are contained within the submission of 14 November 2011 from Mr J Cheal on behalf of Ilchester Estate, and with a letter from Mr Cheal of 26 April 2019. Mr Cheal has also commented on the information contained in the user evidence forms submitted in support of the application. Mr Cheal's submission and letter is discussed in further detail section 6 below, but the following must be taken into account in assessing whether use of the path has given rise to a right of way for the public.

- 5.17.1 Mr Cheal has made comments on the evidence of the six user evidence forms submitted in 2011, as follows:
- 5.17.2 User A: Mr Cheal states that User A is aware that the path 'is not a public right of way and that the Estate has no intention of dedicating it as such'. Mr Cheal refers to the statements of the Estate's witnesses, which he maintains suggests that User A's use of the path is less frequent than stated in his evidence form.
- 5.17.3 User E: Mr Cheal notes that this user refers to 'being aware that other people have been challenged whilst using the route'.
- 5.17.4 User B: Mr Cheal maintains that this user's use of the path may be less frequent than stated on the user evidence form. Mr Cheal also notes User B's statement says he has walked the path 'socially

with the previous agent', and to the user's acknowledgement that he is aware of two other people having been challenged'.

- 5.17.5 User D: Mr Cheal questions whether this user has used the route since 1967, as stated on the form, 'since the track was not made until 1984'. Mr Cheal points out that 'all of our witnesses are consistent in saying they have never seen this user walking the route.'
- 5.17.6 User F: Mr Cheal refers to the year 1983 being recorded on the form as the period during which this user had used the path, and also says that 'all our witnesses say they have never seen her on the route.'
- 5.17.7 User J: Mr Cheal refers to this user's acknowledgement that she was using the path with the permission of the Estate, and that this permissive use of the path must be discounted in determining whether rights for the public have been established.
- 5.17.8 Officer Comments: As noted above, the evidence of User J should not be considered in determining the existence of public rights.
- 5.17.9 The statements of users regarding their frequency of use must be considered alongside the statements of the six witnesses who have provided statements on behalf of the Estate. These statements are summarized below.
- 5.17.10 Mr B. D. Jones: Mr Jones is the Agent for the Melbury Estate and has been since 2004. Mr Jones lives at Higher Holt Farm and has a close working knowledge of the claimed footpath. Mr Jones explains that it is the Estate's policy to challenge anyone walking a path which is not a public right of way, and to request that they return to the nearest public path. This was the Estate's policy prior to Mr Jones taking up his post in 2004. Mr Jones adds that 'we have occasionally seen people short-cutting between points. (D and E on Plan 14/30)'; that is, the southern end of the claimed footpath between Bridleway 15 and footpath 16. Mr Jones refers to the policy of the family who own the estate of 'giving specific permission to people they know and who they are happy to invite to enjoy the Estate', and how 'this policy of the family starkly contrasts with their policy of rigorous prevention of new public rights of way arising...' Permission for use of the route is given in writing to those to whom it is granted. Mr Jones notes that User J is one of those who has enjoyed permissive access. Mr Jones has never seen any of those who have completed user evidence forms using the route and is of the view that 'it is most unlikely that the public can be said to have used the route sufficiently to give rise to this claim'. Mr Jones explains that when he became Agent in 2004 he inherited a policy of submitting deposits under section 31 (6) of the Highways Act 1980, one of which was deposited in 1995 and

another in 1998. Mr Jones refers to correspondence with Dorset County Council about plans for deposits, and that a new deposit was made on 20 July 2008. Mr Jones believes that there has been a 'valid deposit in place for all or much of the time from 1995 until now.' (that is, until 2011).

5.17.11 Officer Comments: Deposits under section 31 (6), in the absence of a contrary intention, provide sufficient evidence to negative the intention of the landowner to dedicate any additional public rights of way over the land shown on the deposited plan. This is further considered below.

5.17.12 On 26 April 2019 Mr Cheal sent several notes and correspondence contained in Mr Jones' files, the contents of which are as follows:

(i) Letter from Mr Jones to a walker, dated 7 June 2013. This letter refers to the walker having been seen using the claimed footpath on 6 June 2013 and contains a request from Mr Jones that he desist from using the path.

(ii). A file note of 6 July 2012. This note refers to Mr Jones encountering two residents of Melbury Osmond using the claimed footpath and asking them not to do so. This file note is accompanied by an e mail from Mr Jones to Dorset County Council, also dated 6 July 2011, informing the Council of the incident and request.

(iii). A file note of 15 October 2012 which refers to Mr Jones stopping User D whilst using the path and requesting that she should not use it.

5.17.13 Officer Comments: These encounters and incidents post-date the application for the modification order. The first walker is not one of those giving evidence of their use of the path in support of the claim. User D has completed a user evidence form.

5.17.14 Mr A. Dallas: Mr Dallas is the Farm Manager at the Melbury Estate (Ilchester Estates) and has been employed by the Estate for nine years. In the course of his work Mr Dallas is in the vicinity of the claimed footpath 'at least once a week and often more.' Mr Dallas has only ever seen one person using the route, and that is a local person who has permission from the Estate to do so. Mr Dallas has never seen any of those who have completed user evidence forms using the path. Mr Dallas has explained that a locked gate was installed some years ago at the northern end of the route to prevent horseriders from using the path without permission. Mr Dallas has noted that it is the Estate's policy to ask its staff to 'challenge anybody who we see trespassing on the estate or in any way walking where they are not entitled to.' Mr Dallas also adds that 'there has never been a complaint about the blockage of this route.' Yet there are closed gates on the route and no stiles

and it is feasible that from time to time we might have had a live electric fence or tape across the route.'

5.17.15 An updated statement from Mr Dallas dated 25 April 2019 has been submitted to the Council by Mr Cheal. In this update Mr Dallas states that he confirms that since 2011 he has not 'seen anybody walking along the Higher Holt Track.' Mr Dallas adds 'I go along this track...two times a week at various times of day and I have seen nobody other than Estate staff.'

5.17.16 Officer Comments: This is noted, but none of the witnesses who have completed user evidence forms has referred to the way being obstructed, or to their use of the path being discouraged by Estate employees.

Mr

5.17.17 S. Mintern: Mr Mintern began working on the Estate in 1969 and became Farm Manager, a post he left in 2005. Mr Mintern has explained that the hard track on which the claimed footpath runs today was not put in until about 1984; prior to that 'it was just fields'. The track was put in by the Estate so that it could be used by tractors and other vehicles.' Mr Mintern has 'very infrequently' seen people using the claimed footpath, a number he believes is 'no more than four in total.' Each of these has been challenged, and, with one exception, the person has 'gone back to the public right of way.' Mr Mintern has stressed that 'the policy of the Estate was always to challenge people if they were where they shouldn't be.' Mr Mintern has never seen any of the people who have completed user evidence forms on the path, apart from Mrs Smith who had permission to use it.

5.17.18 Officer Comments: None of the witnesses who have completed user evidence forms refers to being challenged whilst using the path.

5.17.19 Mr R. Squires: Mr Squires has been employed as Deer Keeper at the Melbury Estate since 1982, and also worked on the Estate for a couple of years in the mid 1970's. Mr Squires has said that ever since he first started working for the Estate he has been told to look out for anyone who was not on a public footpath or elsewhere where they had no right to be, and to ask them to return to the footpath. In doing so, Mr Squires has never come across anyone who has 'tried to assert that it was a public right of way.' Mr Squires has explained that signs were put up in 2009 because it was discovered that 'people had been short-cutting between the footpath and bridleway at the southern end of the route'. (Between D and E on Plan 14/30). Mr Squires adds that anyone using the claimed path is most likely to be on this part of it. Mr Squires refers to a number of people who have been given permission to use the path, one of whom is Mrs Smith. In Mr Squires' view it is unlikely that anyone would have used the path without being seen and challenged by himself or other members of staff. Mr Squires has never seen any of the people who have completed user evidence forms on the claimed footpath.

5.17.20 An updated statement from Mr Squires dated 25 April 2019 has been submitted to the Council by Mr Cheal. In this update Mr Squires states that he confirms that since 2011 he has 'only seen two walkers along the...track and they stated they were lost and I directed them back to the nearest public right of way.' Mr Squires adds 'I go along this track...between five and ten times a week at various times of day and I have seen no other users.'

Mr

- 5.17.21 Officer Comments: None of the witnesses who have completed use evidence forms refers to being challenged whilst using the path.
- 5.17.22 E.W. S. Green: Mr Green was Agent at the Melbury Estate from 1977 until 2004. Mr Green explains that the track from Big Wood to Higher Holt only came into existence, in sections, during that period, prior to which 'there was no continuous access except by a succession of field gates'. Mr Green says that the track was occasionally used by walkers, who were sent back to the existing public paths or 'were allowed to continue on the understanding that they had left the public path and were on private property.' Mr Green does not 'recall seeing any of the witnesses who have put in statements in support of the claim except for User B who I am sure was aware of the status of the track.' Mr Green adds that the Estate's policy on public access was clear and 'all staff were aware that the public should be kept on the public paths.' Mr Green notes that User D would have been aware of the Estate's policy on public access. Mr Green also points out that User J's husband had permissive access to carry out a study over many years on nesting birds.
- 5.17.23 Mr A. R. M. Bryer: Mr Bryer has lived at Princes Place, next to Higher Holt Farm, for 35 years (prior to 2011). Mr Bryer has permission from the Estate to walk and ride on the path in question, and has never known it to be a public footpath. Mr Bryer has seen very few people using the claimed footpath during the time he has known it, most of whom were tenants of the Estate or had permission to use it. Mr Bryer has not seen User J or User D on the claimed path.
- 5.17.24 Mr Cheal has provided a copy of an e mail sent by Mr Bryer on 25 March 2019 to the Ilchester Estate. In this email Mr Bryer adds that, since 2011, he has seen no walkers on the route since the time of his 2011 statement, 'despite regularly using it myself.'
- 5.17.25 It is necessary to consider, in the light of the statements from the six witnesses on behalf of Ilchester Estate, the Section 31 (6) deposits, and those occurrences which have been described by Mr Cheal, whether the public's use of the claimed footpath was brought into question prior to the display of the notice which those completing user evidence forms indicate was in 2009.
- 5.17.26 Section 31 (6) of the Highways Act 1980 enables a landowner to deposit with the highway authority a map and statement showing the ways that he admits are highways. Subject to the submission within ten years of a statutory declaration to the effect that no additional ways have been dedicated since the original deposit (since 2013, the required time period has been 20 years), this is

Mr

sufficient evidence that no additional ways have been dedicated, unless there is proof to the contrary. In 1995 a deposit was made by the landowners in accordance with section 31(6). It can be concluded from this that any evidence of use of the claimed footpath between 1995 and 2005 cannot be taken into account in determining whether public rights have been established.

5.17.27 Cheal is of the view that the Public Inquiry which took place in 1978, (see 4.2.3 above), and the objection by the owner of the land to the addition of the path considered by the Inquiry, would have brought into question the public's use of the footpath, and between the date of that Inquiry, and the first section 31 (6) deposit in 1995, actions taken by the Estate's staff to prevent use of the path would also have brought into question its use. Mr Cheal thus states that "the right of the public to use this route has been subjected to a series of bringing-into-question events over the last 33 years."

5.17.28 Officer Comments: None of the witnesses who have completed user evidence forms refers to having been approached by the Estate's staff and being asked not to use the route, and, although it was the Estate's policy, and practice, to take action to discourage use of the path by the public, it appears that these witnesses were not made aware of that position until 2009, when the notice first appeared. It is acknowledged that the 1978 inquiry would have brought into question the public status, or otherwise, of the path, although it must be noted that only part of the claimed footpath (between point C and Dole Copse) coincides with the path that was the subject of the 1978 Inquiry.

5.18 In drawing conclusions from user evidence, it is necessary to consider whether the owners of the land had capacity to dedicate the way as a public path. It needs to be determined whether the existence of any tenancies affecting the land crossed by the footpath have meant that the owner of the land at the time of these arrangements had capacity to dedicate any public rights over the path in question. A tenant or leaseholder does not have the legal capacity to dedicate public rights over a way, and dedication can only be granted by the landowner. Mr Cheal explains that an Agricultural Holdings Act tenancy has been in place over the land crossed by the whole length of the claimed footpath since 25 March 1968. Mr Cheal points out that Clause 33 of that Agreement obliges the tenant 'to prevent any new footpaths...from being acquired over any part of the holding.' Mr Cheal maintains that this is 'an important further indicator of the Estate's intention to prevent further footpaths arising', and that it 'demonstrates the consistency of the Estate's policy, especially under the common law, where the claimant has to prove lack of intention to dedicate on the part of the Estate.'

Mr

5.18.1 Officer Comments: The existence of the tenancy is noted, and it emphasises the Estate's policy with regard to the establishment of additional public rights of way, but the tenancy agreement does not in itself prevent the establishment of such rights. The *Godmanchester* case established that the landowner must communicate to the public that he has no intention to dedicate the way and that private documents such as tenancy agreements would not bring a lack of intention to dedicate to the attention of the public. In the absence of firm evidence to suggest otherwise, it is submitted that the owners of the land had capacity to dedicate the way in question as a public footpath.

5.20 **Summary of User Evidence**

In summary, one witness testifies to having walked the path prior to the public Inquiry that took place in 1978; that is, since 1967, and, in total, six witnesses give evidence of use of the path by the public between 1978 and 1995, when the first section 31 (6) deposit was made. The evidence of one witness has not been taken into account because her use of the path was with the permission of the landowners. The evidence of three users testifies to their use of the path after 1995, and this evidence cannot be taken into account in considering whether the requirements of section 31 of the Highways Act 1980 have been met. Conclusions on evidence of use of the path are drawn in sections 8 and 9 of this report.

6. **Additional Landowner correspondence** (copies available in the case file RW/T513)

6.1 On 14 November 2011, Mr Cheal, acting for the owners of the land, the Ilchester Estate, sent to the Council a detailed submission containing witness statements, comments on the user evidence submitted with the application, other information and documents which lead Mr Cheal to conclude that 'this case is demonstrably insufficient to satisfy the evidential tests, whether statutory or common law.'

6.1.1 Mr Cheal has summarised as follows the reasons for concluding there is insufficient evidence to show that the Council should make a modification order:

(a) 'The alleged users constitute much too small a group, and over too short a period, to qualify.'

Officer Comments: This is considered in analysing the user evidence in section 5 and in drawing conclusions in sections 8 and 9 below. Mr Cheal is maintaining that the evidence of use is insufficient for the purposes of section 31 of the Highways Act 1980 or to show dedication of public rights at common law.

(b) 'The Estate's witnesses will say how infrequently any of the claimant's witnesses have been seen on the Estate as a whole, let alone on this route.'

Officer Comments: The witness statements provided by Mr Cheal must be considered alongside the information contained in the user evidence forms. Whilst the Estate's witnesses may not have seen any of these users on the claimed footpath, this is not to say that it was not used by those people.

(c) 'Whatever use they have had of the route cannot be said to have been as of right, given the amount of challenges, and the Estate's access policy generally.'

Officer Comments: Whilst the Estate's policy is made clear by its witnesses, none of those who have completed user evidence forms

refers to any attempt taken to prevent their use of the path. Other users may have been asked not to use the path, but not those whose use of the path has been submitted to the Council and is being considered in determining whether a modification order should be made.

- (d) The steps the Estate has taken, by way of permissions, challenges, opposing the 1978 Inquiry successfully, and a succession of section 31 (6) deposits, shows that the owners have done enough to demonstrate a lack of intention to dedicate and that, on the balance of probabilities, this is not a case in which an order should be made.'

Officer Comments: This is considered in detail in other paragraphs

- 6.2 On 26 April 2019 Mr Cheal wrote with comments on the three user evidence forms that were submitted in 2019. Accompanying Mr Cheal's letter was a bundle of letters, handwritten notes and emails from the Estate's files and two updated statements from witnesses.

Officer Comments: This information has been considered where appropriate in this report.

- 6.2.1 In his letter of 26 April 2019 Mr Cheal has summarised the Estate's position as follows:

- (a) 'We stand by the contents of our Submission dated 14 November 2011 and all its appendices.'

- (b) 'It is important to keep in mind that at the 1978 Inquiry no public right of way was found on the map evidence and no evidence of public use had been produced, and that the route had not been claimed on the Parish Survey.'

Officer Comments: The 1978 Inquiry has been considered in this report in drawing conclusions from the user evidence submitted in support of the application for the modification order. One witness testifies to having used the path prior to 1978; that is, from 1967.

- (c) 'The route was not formed until 1984. At the same time ditches were put in beside the route. Before then it was not a route at all and there was no apparent reason for anyone to walk along that line as opposed to anywhere else. It was just a grass field. Thus it is not possible for anybody to have claimed that the route itself had been in use in 1978 since it was not formed until 1984.'

Officer Comments: Whilst the path runs on a track that was installed on the ground in 1984, the statements of witnesses indicate that they had used the path prior to that date. In considering the user evidence it is necessary to establish whether users have used a specific line of the claimed footpath. Whilst there may have been no physical indication of a path, or any physical feature that might have directed users of the

path on a particular line prior to 1984, there is equally nothing to suggest that they had not used the line of path that has been claimed.

- (d) 'The land has been the subject of Deposits since 1995, each of which has formed a bringing-into-question date. The 1995 deposit itself will have brought into question the public right to use the route, which will have made a claim period of 1975 to 1995. In view of the fact that the route did not exist as a route until 1984, it means that there are only 11 years at most of that period of possible use.'

Officer Comments: The effect of the 1995 Deposit is considered below in drawing conclusions from the user evidence submitted in support of the application. The implications of the installation of the track on which the claimed path runs are noted above. The evidence of three users (Users B, C and H) testifies to their use of the path after 1995, and this evidence cannot be taken into account in considering whether the requirements of section 31 of the Highways act 1980 have been met. There is evidence that one person used the route from 1967 until the time of the 1995 deposit, and in total the evidence of six people indicates that the path was used by the public between 1967 and 1995.

7. **Consultation responses and other correspondence** (copies available in the case file RW/T513)

7.1 The applicant

Mr Caesley, the applicant for the modification order, sent, on 12 March 2019, a letter explaining that, prior to the submission of the application for a modification order, the claimed footpath had been the subject of a 'protracted negotiation' between Melbury Osmond Parish Council and Ilchester Estate. Accompanying the letter is a briefing containing background information, correspondence between Melbury Osmond Parish Council and Ilchester Estate, and notes of meetings that have taken place between various interested parties, including Melbury Osmond Parish Council, Ilchester Estate, Officers of Dorset County Council and a representative of the Ramblers Association.

- 7.1.1 Correspondence and meetings between Melbury Osmond Parish Council and Ilchester Estate took place following the placement of the notices to prevent access to the path in 2009. As a result of these meetings a proposal was put forward that the Estate would dedicate the claimed footpath as a public footpath as part of a package of changes which included the extinguishment and diversion of a number of other paths. It was proposed that these changes would be the subject of applications made to Dorset County Council for public path extinguishment and diversion orders under the Highways Act 1980. However, whilst the package of changes appears to have been supported by the Estate and Melbury Osmond Parish Council, these proposals were not pursued due to disagreement about the contributions towards funding the applications to

Dorset County Council for public path orders that would be made by the Estate and the Parish Council.

7.1.2 Officer Comments: This information is of interest, but does not assist in assessing whether the claimed footpath carries public rights.

7.2 Melbury Osmond Parish Council

The Parish Council explained in a letter dated 13 March 2019 that at its meeting on 11 March 2019 the Parish Council reviewed the briefing pack submitted by the applicant and did not wish to add or delete anything from it. The briefing pack contains a draft of a letter from the Parish Council to Ilchester Estate, which refers to the Parish Council's meeting on 28 January 2011. There was 'unanimous agreement that the Council's preferred option is for the Ilchester Estate to allow the Holt Farm Track to be designated as a permissive path...'. The letter goes on to explain that the Parish Council would not raise any objections to the creation of the path as part of a package of changes which included the diversion and extinguishment of a number of other paths, so long as the cost of making such an application was met by the Estate.

7.2.1 Officer Comments: This is noted but is of no assistance in determining whether the claimed footpath carries public rights. The view of the Parish Council indicates their desirability for the availability of the path for use by the public, but the information provided does not give any indication as to the extent to which it had been used by the public.

7.3 Ramblers

Mrs Wardell, on behalf of Dorset Ramblers Association, has walked the path, in July 2010, when she was approached as Group Footpath Secretary, for her views on the feasibility of a path 'reorganisation proposal in the parish of Melbury Osmond', but has not walked it before, or since. Mrs Wardell has no evidence to offer as a user of the path but notes that the Ramblers would welcome the addition of a path to the network.

7.4 Local Residents

In an e mail of 23 April 2019, stated as follows:
'I am the owner of Fuzzy Grounds and have lived at Lewcombe Manor since 1992. We have used the track between Higher Holt and Fuzzy Grounds with the permission of the landowner and are aware that it is not a public right of way. We have never seen anyone else on the track other than those with the same permission or who work for the landowner. There have always been notices advising that the track is private and not a public right of way at both ends and at points where it is crossed by existing footpaths.'

8 **Analysis of the evidence**

8.1 There is evidence of public use of the claimed route since 1967. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

8.2 Analysis of the evidence under Section 31, Highways Act 1980 For Section 31 of the Highways Act 1980 to give rise to a presumption of dedication, the following criteria must be satisfied:

- The physical nature of the path must be such as is capable of being a right of way at common law
- The use must be brought into question i.e. disputed or challenged in some way
- Use must have taken place without interruption for a period of 20 years immediately prior to the date the right was brought into question
- Use must be 'as of right' i.e. without force, without secrecy and without permission
- Use must be by the public at large
- There must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

8.3 Physical nature of the route

The route that has been claimed is capable of being a public right of way at common law, given that it follows a well-defined, linear route. The Estate has explained that the track on which the path presently runs was not installed until 1984. There does not, however, appear to be any indication in the statements of witnesses in the user evidence forms, and in the documentary evidence that has been considered, to suggest that the path was not available for use on the ground during the years they testify to having used it.

8.4 Bringing into question the right of the public to use the path

The earliest date in which the public right to use the path was brought into question was in 1978 when the public inquiry was held. In which case the 20 year period under consideration would be between 1958 and 1978. The evidence submitted shows that the earliest use without permission was in 1967 therefore use is not for the required full 20 year period.

8.4.1 The right of the public was also brought into question in 2009 by the erection of notices. Therefore, the period from 1989 to 2009 needs to be considered. The 1995 deposit made under section 31(6) of the Highways Act is within this period and demonstrates a lack of intention by the landowner to dedicate the route as such, use after 1995 cannot be taken into account when considering the accrual of public rights.

8.5 Twenty years use without interruption

Based on the documentary and user evidence, it would appear that there has been no substantive physical interruption to public use of the path until the notices were first displayed in 2009. The statements of the Estate's witnesses refer to members of the public being requested not to use the

path, but those completing user evidence forms do not refer to any attempt to prevent them from using the path prior to 2009.

8.6 Without force, secrecy or permission

There is no evidence to suggest that the route has ever been used by force. Use of the route has been open. The information contained in nine of the user evidence forms indicates that the people completing the forms were not using the path with the permission of the landowner. It is noted, however, that other people had been granted permission to use the path.

8.7 Use by the public

Use must be of a volume that is capable of coming to the attention of the landowner, and should be public and not, for example, solely by the tenants or employees of a particular landowner or business. As noted, the evidence of one witness has not been taken into account because she was granted permission to use the path. Nine of those people who have completed user evidence forms appear to have been using the path as members of the public. The erection of notices in 2009 suggests the landowner was aware of people using the route at that time.

8.8 Conclusions under Section 31, Highways Act 1980

In the 20 year period prior to the public inquiry into the status of part of the claimed footpath in 1978 there is evidence of only 11 years use. There is evidence of 20 years continuous use prior to the erection of notices in 2009. However, the section 31(6) deposit made in 1995 is a clear demonstration that there was no intention by the landowner to dedicate public rights along the route during that period. It is therefore considered that the requirements of Section 31 of the Highways Act 1980 have not been satisfied in this case. The level and period of use of the path by the public is insufficient for the accrual of public rights.

8.9 Analysis of the evidence under common law

This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under

common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.

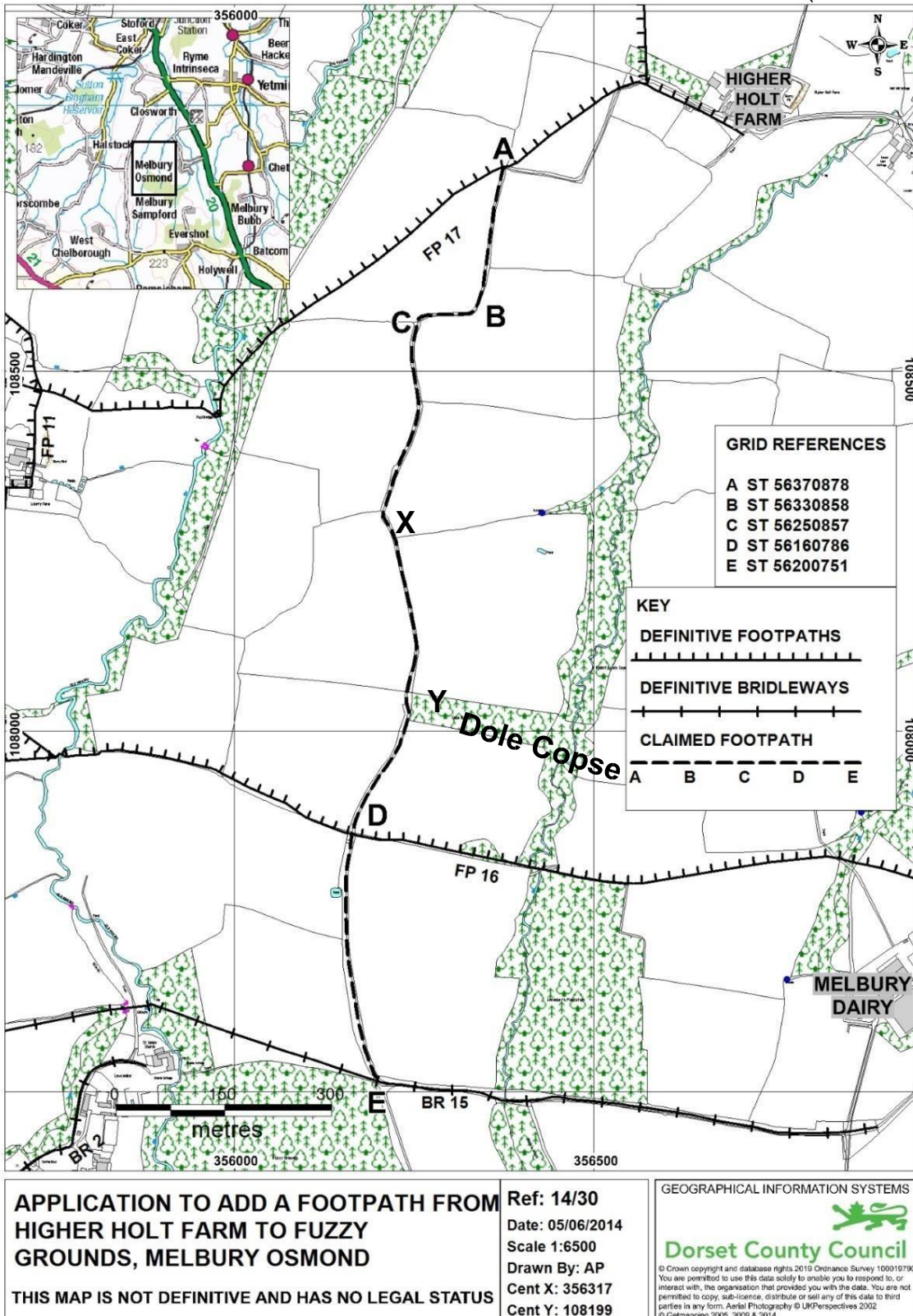
8.10 Conclusions under common law

It is considered that the level of use of the path by the public is insufficient to show that a deemed dedication at common law can be inferred. It is noted that there is evidence in the statements of witnesses on behalf of the landowners that the owners of the land took measures to prevent members of the public from using the path. There is no evidence that it was widely communicated to the public that the path was not available for public use, and none of those who have completed user evidence form refers to any attempt to discourage or prevent their use of the path.

9 **Conclusions**

- 9.1 In deciding whether or not it is appropriate to make an order, it is necessary to consider whether public rights subsist or are reasonably alleged to subsist on this route and/or the balance of evidence shows that the route ought to be recorded with a different status. On balance it is considered that there is insufficient evidence for the “reasonably alleged” test to be met.
- 9.2 There is insufficient documentary evidence to show that the claimed footpath carries public rights.
- 9.3 The user evidence is insufficient for the purposes of section 31 of the Highways Act 1980.
- 9.4 The available evidence is also insufficient for a common law presumption to be inferred.
- 9.5 Therefore, the recommendation is that the Council Refuses the application as there is insufficient evidence to demonstrate that the claimed public rights exist.

APPENDIX 1
(to 2019 report)



APPLICATION TO ADD A FOOTPATH FROM HIGHER HOLT FARM TO FUZZY GROUNDS, MELBURY OSMOND

THIS MAP IS NOT DEFINITIVE AND HAS NO LEGAL STATUS

Ref: 14/30
 Date: 05/06/2014
 Scale 1:6500
 Drawn By: AP
 Cent X: 356317
 Cent Y: 108199

GEOGRAPHICAL INFORMATION SYSTEMS

Dorset County Council

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Plan of the path subject to the application for the modification order

LAW

APPENDIX 2

(to 2019 report)

General

- 1 Wildlife and Countryside Act 1981
- 1.1 Section 53 of the Wildlife and Countryside Act 1981 requires that the County Council keep the definitive map and statement under continuous review and in certain circumstances to modify them. These circumstances include the discovery of evidence which shows that a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
- 1.2 Section 53 of the Act also allows any person to apply to the Council for an order to modify the definitive map and statement of public rights of way in consequence of the occurrence of certain events. One such event would be the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way not shown on the definitive map and statement subsists.
- 1.3 The Committee must take into account all relevant evidence. They cannot take into account any irrelevant considerations such as desirability, suitability and safety.
- 1.4 The Council must make a modification order to add a right of way to the definitive map and statement if the balance of evidence shows either:
 - (a) that a right of way subsists or
 - (b) that it is reasonably alleged to subsist.

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).
- 1.5 An order to add a route can be confirmed only if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 For an application to change the status of an existing right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows that it ought to be recorded with that different status.
- 1.7 The confirmation test for an order to change the status of an existing right of way is the same as the test to make that order.
- 1.8 An order to add a right of way and to change the status of an existing right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.
- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.

2 Highways Act 1980

- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought into question.
- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
 - (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
 - (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.
- 2.3 Section 31(3) of the Highways Act 1980 says that where a landowner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.
- 2.4 Section 31(6) of the Highways Act 1980 permits landowners to deposit with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.
- 2.5 Section 32 of the Highways Act 1980 says that the Committee must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

3 Human Rights Act 1998

- 3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.
- 3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

Case specific law

4 Inclosure Consolidation Act 1801

- 4.1 Section 8 of the Inclosure Consolidation Act required Commissioners to set out and appoint the public carriage roads and highways and to divert, turn or stop up any roads or tracks upon or over the lands to be allotted prior to the land being enclosed.
- 4.2 Section 9 of the Act required carriage roads to be well and sufficiently fenced on both sides and made it unlawful for any gate to be erected across them.
- 4.3 Section 10 of the Act, amongst other things, empowered commissioners to appoint private roads, bridleways and footpaths in, over, upon and through the allotments to be made.
- 4.4 Section 11 of the Act determined that after the public and private roads and ways had been made and set out any remaining roads, paths and ways over, through and upon such lands and grounds, which had not been set out as required, would be extinguished and deemed to be taken as part of the lands and grounds to be enclosed.
- 4.5 The Inclosure Consolidation Act 1801 could be accepted in whole or excluded in whole or part by local acts relevant to the area to be enclosed.

5 Finance Act 1910

- 5.1 The Finance Act 1910 required the Commissioners of Inland Revenue to cause a valuation of "all land in the United Kingdom" and plans were prepared identifying the different areas of valuation. In arriving at these valuations

certain deductions were allowed, including deductions for the existence of public rights of way.

- 5.2 Public 'fenced' roads were generally excluded from the valuation. Where public rights passed through, for example a large field and were unfenced, they would be included in the valuation and a deduction would be made in respect of the public right of way.

6 National Parks and Access to the Countryside Act 1949


- 6.1 The National Parks and Access to the Countryside Act 1949 required the County Council as "Surveying Authority" to compile the record of the public rights of way network and the District and Parish Councils were consulted to provide the County Council with information for the purposes of the survey.

7 Natural Environment and Rural Communities Act 2006

- 7.1 Section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) extinguishes (subject to certain exceptions) unrecorded rights of way for mechanically propelled vehicles. DEFRA guidance states that where it is found that a route was historically a public vehicular route before NERC, that route should be recorded as a restricted byway rather than a byway open to all traffic.

Section 31 (6) Deposit of 1995

APPENDIX 3
(to 2019 report)



ILCHESTER ESTATES

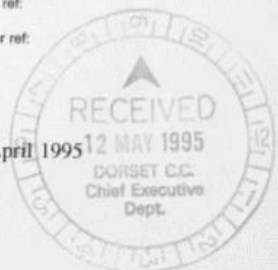
Registered Office:
The Estate Office
Evershot
Dorchester
Dorset DT2 0JY
Tel: Evershot (01935) 83222
Fax: Evershot (01935) 83029

Resident Agent: E.W.S. Green, A.R.I.C.S.

The Chief Executive's Department,
Dorset County Council,
County Hall,
Colliton Park,
Dorchester,
Dorset.
DT1 1XJ

our ref: MAQS/ET
your ref:

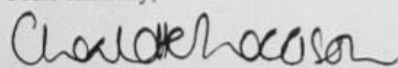
18th April 1995



Dear Sir,

**DEPOSIT OF PLAN AND STATEMENT
SECTION 31(6) OF THE HIGHWAYS ACT 1980**

1. I am and have been since 11th November 1990 the owner within the meaning of the above section of the land known as the Melbury Estate more particularly delineated on the plan accompanying this statement and thereon edged red.
2. The aforementioned land lies in the Parishes of Evershot, Melbury Sampford, Melbury Osmond and Melbury Bubb.
3. The ways coloured blue on the plan have been dedicated as highways with vehicular status.
4. The ways coloured green on the said plan have been dedicated as bridleways.
5. The ways coloured yellow on the said plan have been dedicated as footpaths.
6. The deposit shall comprise this statement and accompanying plan.

Yours faithfully,


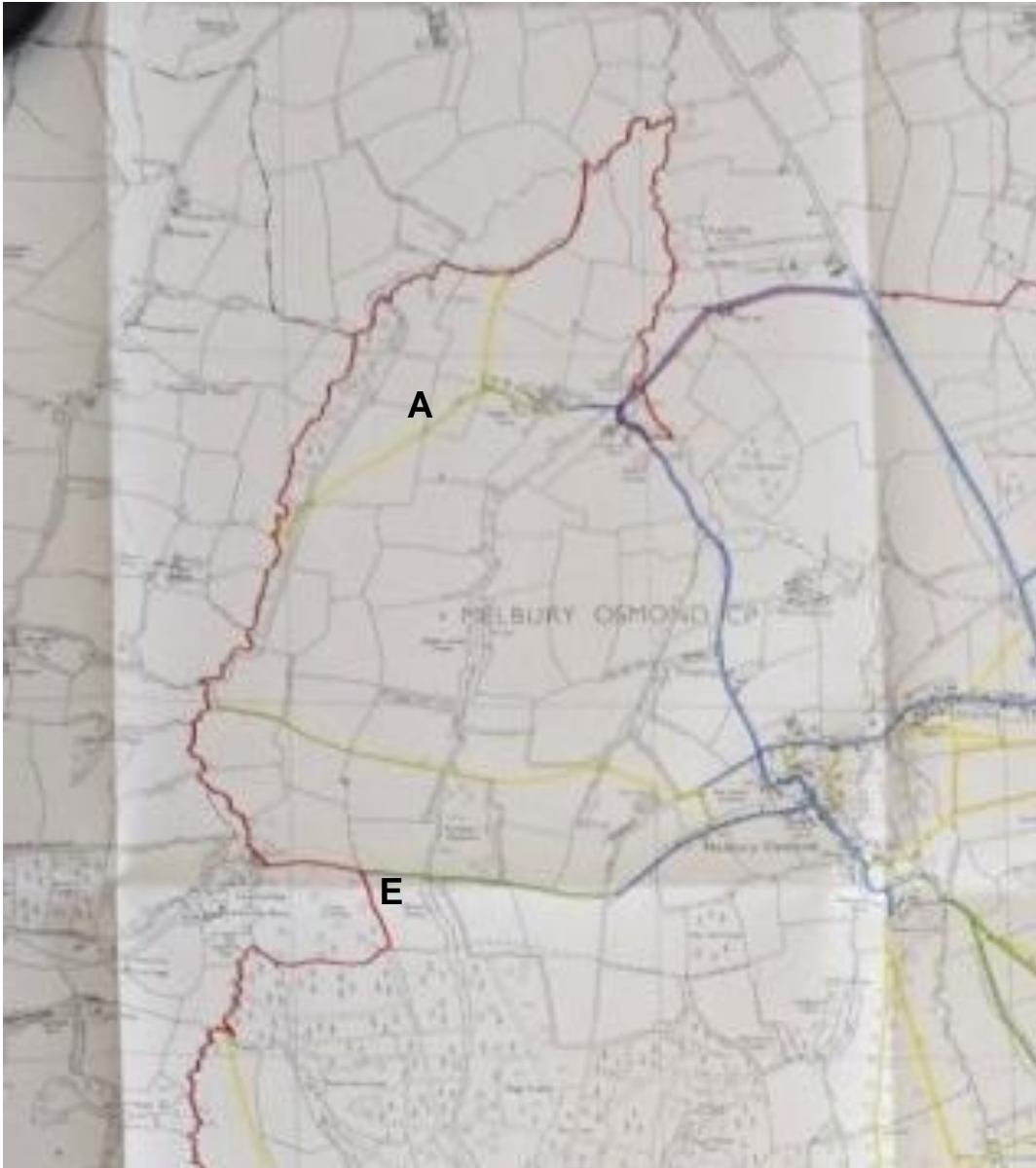
The Hon. Mrs. Morrison
Address: The Estate Office, Evershot, Dorchester, Dorset. DT2 0JY

Signed (Witness)
E.W.S. Green
Address: The Estate Office, Evershot, Dorchester, Dorset. DT2 0JY

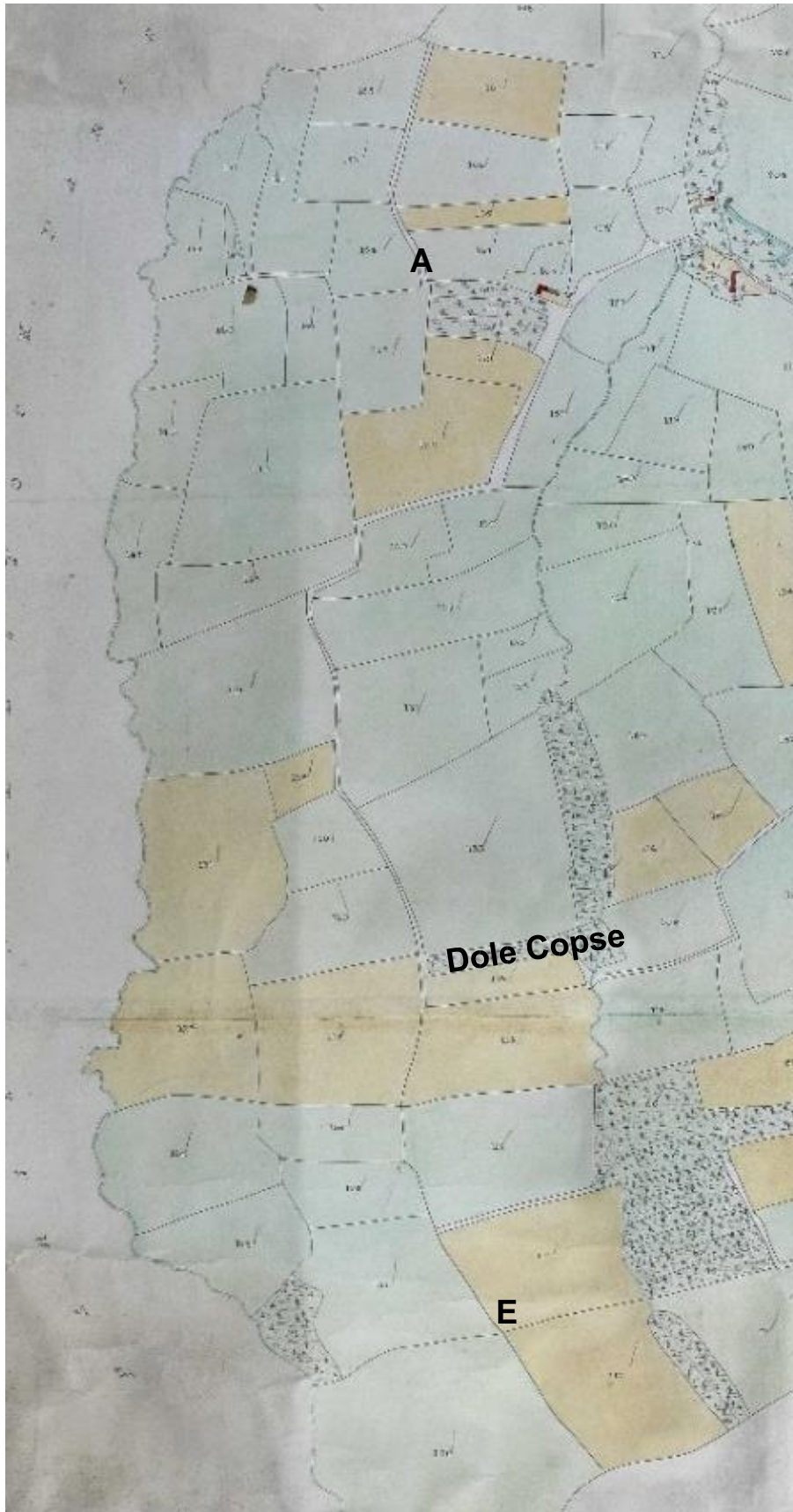
Occupation : Agent

Directors: The Hon. Mrs. Morrison H. M. Henderson J. A. C. Drake R. M. W. Agnew
Registered in England No. 1006592

Section 31 (6) Map accompanying Deposit of 1995

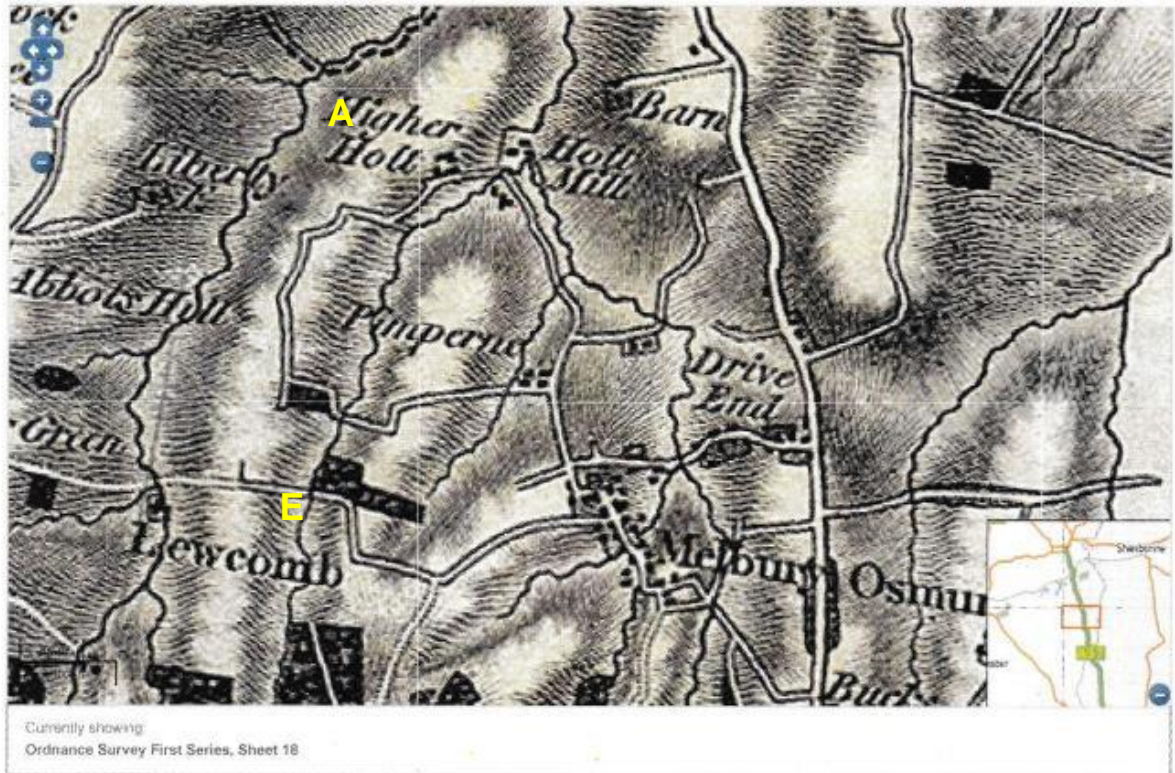


Tithe Map of 1835-50



One Inch Ordnance Survey Map of 1811

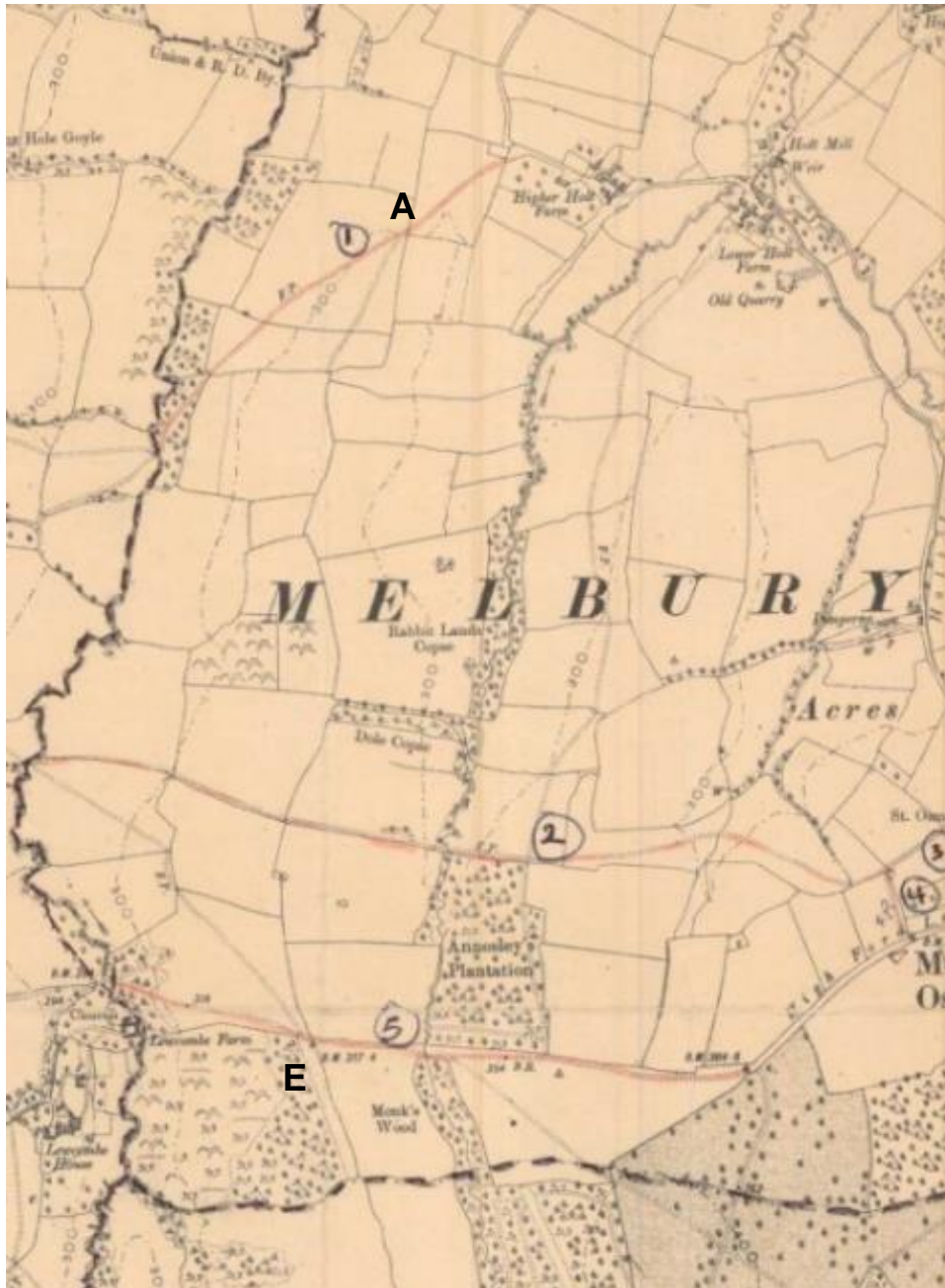
Ordnance Survey and Ordnance Survey of Scotland First Series



Greenwood's Map, 1826



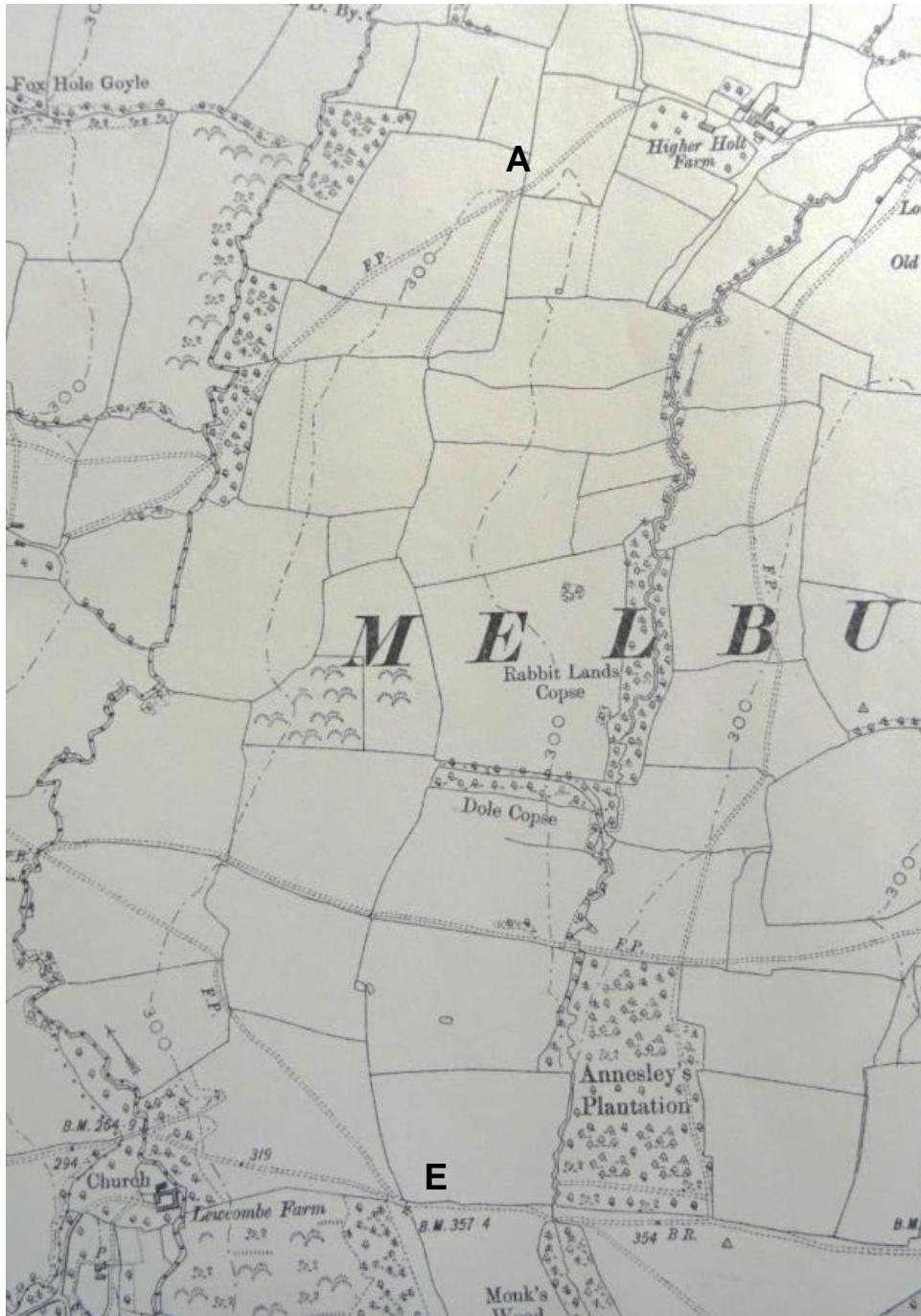
Parish Survey Map, 1950's



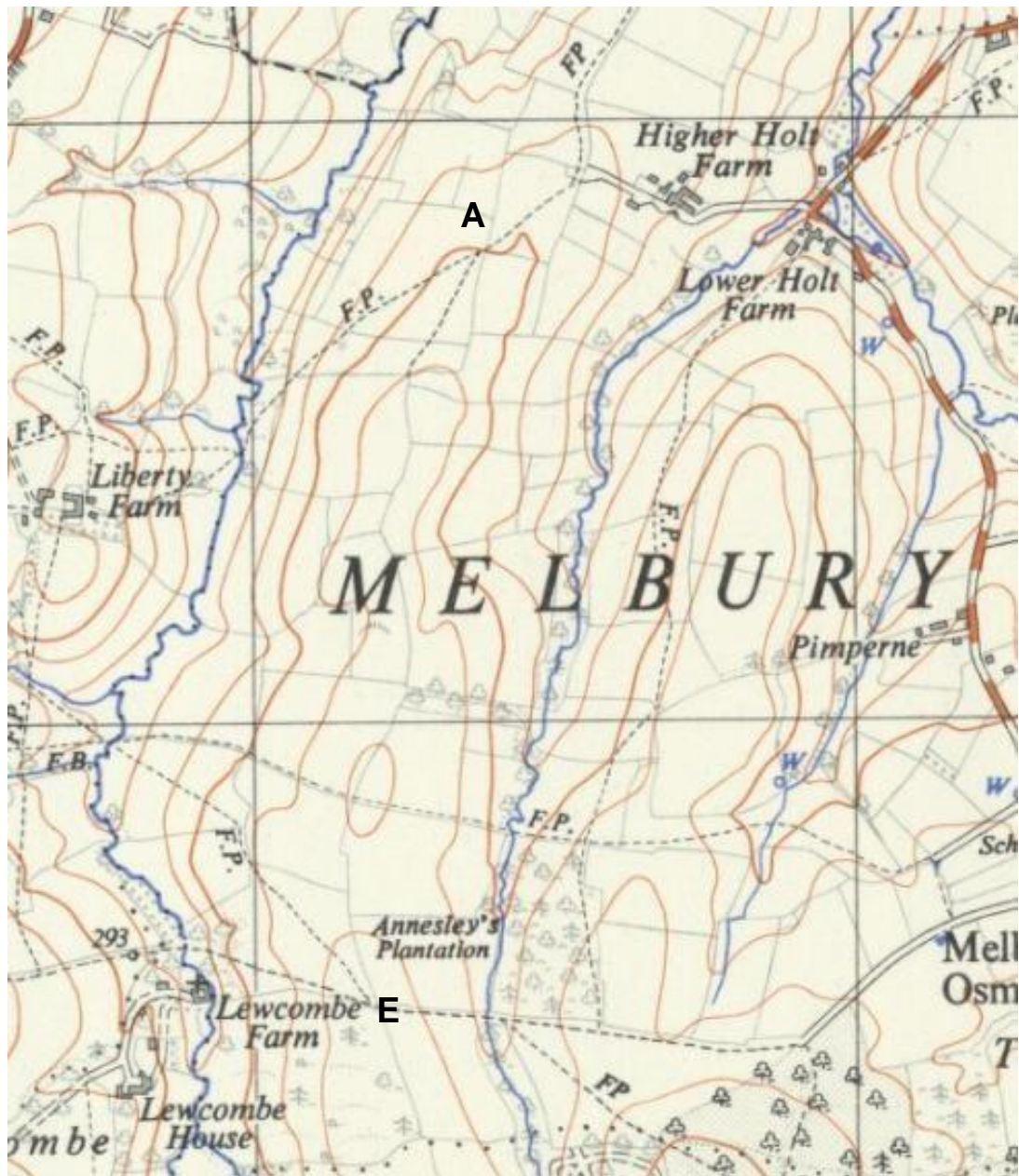
1887 Ordnance Survey Map



1903 Ordnance Survey Map



Ordnance Survey Publication Date: 1958



Page

Graph of the user evidence
Chart to show level of use

APPENDIX 4

(to 2019 report)

Recommendations accepted:

Signed:

...*Signature redacted*.....

Date:.....31 July 2019.....

Mike Garrity

Head of Planning

APPEAL FORM



Rights of Way Section
The Planning Inspectorate
3A Eagle
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

WILDLIFE AND COUNTRYSIDE ACT 1981, SECTION 53 AND SCHEDULE 14
Appeal to the Secretary of State Secretary of State for Environment, Food and Rural Affairs
under paragraph 4 (1)

For official use:

1.	Name: Roger Caesley
2.	Address: 2, Riverside Cottage, Melbury Osmond, Dorchester, Dorset Postcode: DT2 0LS Daytime telephone: 01935 83659 Email: roger.caesley@epsilonoptics.com
3.	Name of surveying authority: Dorset Council
4.	Title of definitive map: The Definitive Map and Statement for Dorset
5.	Description of the way: Higher Holt Farm to Fuzzy Ground (Melbury Osmond)
6.	Date and reference of application to surveying
7.	Date of service of notice of

Grounds of appeal: *please note that your appeal cannot be considered if you have not submitted grounds of appeal :*

- The officer's report is unclear on the matter of the section 31(6) procedure. It explains that where a statutory deposit is made under section 31(6), then a subsequent statutory declaration renders it evidence of no intention to dedicate (paragraphs 5.5, 5.17.26 and Appendix 2 para 2.4). But in the course of the report, they refer not to a statutory declaration but merely to the deposits or statutory deposits (paragraphs 4.7, 4.11, 5.17.10, 5.17.25). At no point do they say that the 1995 deposit was activated by a statutory declaration, even though it is clear from the legislation that it is the declaration and not the deposit which constitutes evidence of no intention to dedicate. Moreover, the Appendix to the report contains a copy of a deposit and the map accompanying it, but no copy of any statutory declaration.

However, subsequent to the issue of the Dorset Council (DC) decision, they confirmed that they can find no record of a statutory declaration to accompany the 1995 deposit. As a result, DC has stated that it appears that the 1995 deposit is invalid. They did confirm that the 2007 deposit does have an accompanying statutory declaration and is thus valid (see copy of DC e-mail sent 08 August 2019, which is attached).

Case law indicates that that if a landowner wants to rely on documentary evidence which would not normally come to the attention of users of the way, it must be compliant with the statutory provisions, therefore deposits on their own cannot count.

Therefore, the 20 year period that should be taken for consideration regarding the application of Section 31 of the Highways Act 1980 should only be to terminate on 20 July 2007 i.e. should run from 20 July 1987. There is clear evidence from five of the witness statements that the path was in use prior to 1987. The erroneous presumption of the existence of a valid Section 31 (6) deposit from 1995 unfairly influenced DC Planning and Community Services against the application.

Also, the case of the Withyham Decision of 03 February 2010 Para 15 of the Inspectors report is relevant in that it makes the point that for the landowner to provide sufficient evidence that there is no intention to dedicate there must be some overt acts by the landowner to show to the public at large that he has no intention to dedicate. This evidence was only provided by the signs that were erected in 2009. Up until the signs were erected no evidence exists that the public was warned that they were trespassing (paragraphs 5.17.16: 5.17.18 and 5.17.21 of the report). There is, therefore, a case that the 20 years required by Section 31 of the Highways Act 1980 should start from a date in 1989.

- The view expressed in paragraphs 5.18 and 5.19 about "capacity to dedicate" is questionable. Section 31 does not require there to be a person in possession of the land with capacity to dedicate. Its predecessor section 1(1) of the Rights of Way Act 1932 contained two provisos: 20 years' use (as of right, etc) led to deemed dedication, except where there was sufficient evidence of no intention to dedicate, and unless during the period "there was not at any time any person in possession of [the] land capable of dedicating such way". And section 1(2) provided that 40 years' use (as of right, etc) led to deemed dedication, but there was no proviso about the land having to

be in the possession of a person with capacity to dedicate. Then the National Parks and Access to the Countryside Act 1949 repealed section 1(2) and struck out of section 1(1) the words “unless ... there was not at any time any person in possession of land capable of dedicating such way”. So now, 20 years’ use (as of right, etc) impels the deeming of the way to have been dedicated as a highway — that is, treated as if it had been dedicated — whether there is a person in possession of it with capacity to dedicate, or not. So capacity is not an issue with section 31(1); it is the use which establishes the right.

- In paragraph 8.7 the report states that “Use must be of a volume that is capable of coming to the attention of the landowner ...”. That is not a requirement of section 31 of the Highways Act. Section 31(1) requires that the use must be “as of right” so that what must be satisfied is the tripartite test which makes up ‘as of right’ i.e. the use must be without force, without secrecy and without permission.

(please continue on separate sheet(s) if necessary)

I enclose 2 separate copies of:

- the application made to the surveying authority ✓
- the notices associated with the application ✓
- a map showing the alleged right(s) of way ✓
- the authority's decision letter ✓
- other relevant supporting documentation: e-mail dated 08 August 2019 from Dorset Council,

I understand that a copy of this appeal and supporting papers may be made available for public inspection.

Signed .  Date ..22 August 2019.....

Certification

I served notice of this appeal on the surveying authority on: [date]

Signed .  Date ..22 August 2019.....

Note: Your appeal will be invalid if you fail to correctly serve notice of your appeal on the surveying authority within the 28 day deadline.

Please follow link to Privacy Statement <https://www.gov.uk/privacy-statement>.

Please provide an index of the documents submitted with this form and ensure your documents are clearly labeled.

This form should now be returned to the address shown at the top of this form.



Appeal Decision

by Mark Yates BA(Hons) MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 14 February 2020

Appeal Ref: FPS/C1245/14A/12

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of the Dorset Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 11 July 2011 was refused by the Council on 31 July 2019.
- The appellant claims that a footpath between Higher Holt Farm and Fuzzy Grounds, in the parish of Melbury Osmond ("the claimed route"), should be added to the definitive map and statement for the area.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

Main Issues

3. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *"a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist..."*.
4. In considering this issue there are two tests to be applied:
 - Test A: Does a right of way subsist on the balance of probabilities?
 - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

5. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as
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of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

6. Alternatively, an implication of dedication may be shown at common law if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.

Reasons

Statutory dedication

When the status of the claimed route was brought into question

7. A public inquiry was held in 1978 to consider a number of alleged rights of way as part of a special review. One of the alleged ways coincided with a section of the claimed route. It is apparent that some documentary evidence was considered and the agent for the landowner provided a statement to the inquiry outlining that the owner denied this way was a footpath. The Inspector's decision was to turn down the relevant route on the basis of the evidence available at that time.
8. The statement made on behalf of the landowner constituted a declaration of there being no acknowledged public rights over a proportion of the claimed route and could bring into question the status of the route. Further, there is no evidence of any substance to support an earlier dedication of a footpath over the claimed route. This matter is relevant to the determination of whether there was a subsequent twenty-year period available for the purpose of statutory dedication. Reference has been to the *Wild*¹ case in respect of this matter.
9. It is apparent from reading the *Wild* judgment that the way in question had also been considered at a public inquiry in 1978 and found to not be a right of way. A subsequent decision that was challenged had considered a twenty-year period for the purpose of statutory dedication prior to 1978. Whilst the evidence was not considered sufficient to satisfy the statutory test, the Inspector concluded that a footpath had been dedicated under common law for a period that post-dated 1978.
10. The *Wild* judgment may mean that a case reliant on common law dedication would fail in relation to the claimed route. However, the same cannot necessarily be said to apply in terms of statutory dedication, which was not a matter before the Court of Appeal. Statutory dedication requires a period of user of at least twenty years dating back from when use of the route was challenged. It does not matter if action was taken to challenge public use at some point in time earlier or later than the relevant period. I find support for this view in paragraph 21 of the *Paterson*² case.
11. I now turn to the other events that could have subsequently brought the status of the claimed route into question. The parties have made submissions regarding various documents tendered by the landowner under Section 31(6) of the 1980 Act. Section 31(6) states that:

¹ James Wild v Secretary of State for Environment, Food and Rural Affairs and another [2009] EWCA Civ 1406

² Brian Paterson v Secretary of State for Environment, Food and Rural Affairs and others [2010] EWHC 394 (Admin)

“An owner of land may at any time deposit with the appropriate council—

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

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

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

(i) within [the relevant number of] years from the date of the deposit, or

(ii) within [the relevant number of] 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 lodging 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.”

12. A deposit was made by the landowner under Section 31(6) in 1995. At that time, the period for the lodging of a statutory declaration following a deposit was 6 years. However, no statutory declaration was submitted in connection with the 1995 deposit. This also applies to a deposit made in 1998. The landowner nonetheless views the 1995 deposit as being sufficient to bring the status of the claimed route into question. In support, reliance is placed on the Schedule 15 Decision of an Inspector³. The contrary view of the appellant relies on the recent Schedule 14 Decision of another Inspector⁴.
13. I am not in a position to know the extent of the submissions made in the respective cases. In reaching my view, I have had regard to the submissions made to me on this matter. Of particular relevance is the judgment involving the appeal to the House of Lords in the *Godmanchester*⁵ case.
14. Lord Hoffman states in paragraph 37 of the *Godmanchester* judgment that *“I do not say that all acts which count as negating an intention to dedicate would also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31 (5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we do not need to decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts”*.
15. The obiter dictum⁶ comments of Lord Hoffman are supportive of there being symmetry between acts that are sufficient to bring the status of the way into question and those that demonstrate a lack of intention to dedicate a way.

³ Planning Inspectorate Ref: ROW/3191249

⁴ Planning Inspectorate Ref: FPS/Y3940/14A/13

⁵ *Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28

⁶ An opinion given in the judgment that is not essential to the decision and therefore not legally binding as a precedent.

They are supportive of declarations made under Section 31(6) constituting such an act. Lord Hope of Craighead outlines at paragraph 53 of *Godmanchester* that a Section 31(6) deposit will demonstrate a lack of intention to dedicate if it is backed up by a statutory declaration.

16. It is clear that for a landowner to make use of the Section 31(6) provision in order to demonstrate a lack of intention to dedicate additional ways over their land they need to deposit a map and statement and within the required period lodge a statutory declaration. It is not enough to make only an initial deposit. In light of *Godmanchester*, it is unlikely that a deposit by itself will be sufficient to bring the status of the route into question. For the purpose of reaching a view at the Schedule 14 stage, I agree with the conclusions of the second Inspector on this matter. This means that the deposit alone would not have brought the status of the route into question.
17. A statutory declaration was lodged in connection with a Section 31(6) deposit made in 2007. It follows from the above that this would constitute an event that brought the status of the claimed route into question. This means that the relevant period for the purpose of statutory dedication ("the relevant period") should be taken to be 1987-2007. It is therefore not necessary to consider the later action taken to challenge use of the claimed route.

Public use of the claimed route

18. Ten user evidence forms ("UEFs") have been submitted in support of use of the claimed route. It is apparent that one of these users had permission to use the route. The landowner asserts that certain users were aware that the way was not public, use was less frequent than specified in the UEFs and some people did not actually use the route. Reference is also made to additional people having permission to use the route. In support, statements have been submitted by six people with knowledge of the estate.
19. Although the evidence reveals that the current track was constructed in around 1984, this does not necessarily mean that people were unable to previously use the claimed route. There is some evidence that is supportive of use prior to the construction of the track. It should also be borne in mind that this event pre-dates the onset of the relevant period and the provision of a track may have served to encourage or facilitate public use. Furthermore, a lack of observed use does not mean that the claimed use did not occur.
20. The UEFs provide evidence of use throughout the relevant period. There is evidence of use by between five and nine of the users during each year of this period. I note that the specified use is generally stated to have occurred on a regular basis. There is a clear conflict between the written submissions of the parties. Nonetheless, the user evidence is sufficient to reasonably allege that there was use during the relevant period to raise a presumption of the dedication of a footpath.

Whether the landowner demonstrated a lack of intention to dedicate a footpath

21. I have addressed the issue of statutory deposits above. In the absence of a statutory declaration, a deposit would not constitute a lack of intention to dedicate any additional public rights of way over the land in question. A tenancy agreement would also not be a sufficiently overt act to demonstrate a lack of intention to dedicate.

22. Reference is made to the erection of a locked gate to deter horse riders. However, there is no evidence to show that pedestrians were prevented from using the route by way of any structure. I note that the users refer to a gate or gates that were open or not locked.
23. There is evidence contained in the statements supplied by the landowner of challenges being issued to people seen on the claimed route. This evidence directly conflicts with the UEFs where none of the users' state that they were challenged. In terms of people being aware of challenges issued to other people, it cannot be determined when any such challenges occurred. Any event that occurred after 2007 would not be relevant in this case.

Conclusion

24. Having regard to the above, I find there to be a conflict of credible evidence and that an order should be made on the ground that a right of way can be reasonably alleged to subsist. I reach this conclusion on the basis of statutory dedication. This means there is no need for me to consider the user evidence in the context of common law dedication. However, the *Wild* judgment may mean that any reliance on common law dedication would not succeed.

Overall Conclusion

25. Having regard to these and all other relevant matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

26. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act the Dorset Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the route as proposed in the application dated 11 July 2011. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 to the 1981 Act.

Mark Yates

Inspector



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Miss Vanessa Penny
Definitive Map Team Manager
Economic Growth and Infrastructure
Dorset Council

Date: 27th October 2020
Your Ref: T513
Our Ref: MJCC/SAD/I1205.001
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By email only

Dear Vanessa

**T513 Higher Holt – FP Order
LETTER OF OBJECTION**

Thank you for your letter of 22nd September and the Order.

I write (on behalf of the Owners of the Estate, Ilchester Estates Ltd) to **OBJECT** to the Order, on the following grounds.

1. This is a case based entirely on alleged public use evidence.
2. The amount of alleged evidence is insubstantial.
3. The maximum number of application witnesses is ten, though one of them is discounted because of permission and employment.
4. The Dorset County Council Committee recommendation in July 2019, and their decision, was to refuse the application on the basis that there was insufficient evidence to suggest that public rights subsist or can be reasonably alleged to subsist along the claimed route.
5. The Inspector on appeal felt that the evidence should be tested at Inquiry on the ground that a right of way could be reasonably alleged to subsist, that the County should be directed to make an Order, and that the claim period was to be 1987 to 2007.
6. The period dates back twenty years from when a 2007 Deposit (Statement and Declaration) was lodged. The Estate had done a previous Statement in 1995 but unwittingly omitted the Declaration.

7. We say that the 1995 Deposit brought into question the alleged public right; it made it plain that the Estate had no intention to dedicate and was on the DCC system at Dorset History Centre. Thus the period should be 1975 – 1995.

8. The amount of alleged public use during that earlier period is negligible.

9. The amount of alleged public use in the 1987 – 2007 period is itself negligible. Only four of the witnesses claim intermittently to have been using the route in the early part of the relevant period. Even taking the Applicant's case at its highest, the alleged use is insufficient to support a successful claim.

10. Despite signage being erected in 2009, it was not until 2011 that an application for a public way was made.

11. The Estate has long had a policy of managing public access so as to prevent untoward rights arising. Estate staff are well aware of the need to confront trespassers and have done so when any trespass is observed. The Estate have six witnesses who all deny the alleged public use as of right of the Order Route.

12. The Parish Council (of which the Applicant is a long standing member) is well aware that that is the Estate's policy.

13. It was well known locally that in 1978 there was a Public Inquiry, held in the Melbury Osmond Parish Hall, at which the Agent for the Estate spoke in denial of a public footpath on this route.

14. Overall, the Applicant's evidence is insufficient to establish a public right of way on the balance of probabilities and, as such, the Order should not be confirmed.

Yours sincerely,

A large black rectangular redaction box covering the signature of Jonathan Cheal.

Jonathan Cheal
Solicitor
On behalf of Mogers Drewett LLP
Wells Office

Signed:

...**REDACTED**.....

Date:.....4 May 2021.....

Vanessa Penny

Definitive Map Team Manager

Spatial Planning