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## Order Decision

Inquiry opened on 21 August 2018

Site visit made on 11 October 2018

**by Martin Elliott BSc FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 18 January 2019**

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### Order Ref: ROW/3191396

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map and Statement Modification Order 2016.
- The Order is dated 18 August 2016 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were nine objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed.**

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### Preliminary Matters

1. I opened a public local inquiry on 21 August 2018. The inquiry sat for three days and was adjourned until 10 October 2018 and sat for a further three days until 12 October. I carried out an unaccompanied site inspection of the Order route and the surrounding area on the afternoon of 20 August 2018. I carried out a further accompanied site inspection on 11 October.
2. Although there were nine objections to the Order these objectors were represented by Ms Crail at the inquiry. For convenience I shall refer to these nine individuals collectively as the objector.
3. At the commencement of the inquiry the Council submitted a map showing the correct alignment of the boundary between land owned by Wardour Ltd and Mr and Mrs Shepard. The Council sought, in the event of confirmation, a modification to the Order map to show the correct alignment of this boundary. The Council also submitted a statutory declaration of a Mr T Kilner who was unable to attend the inquiry. Donhead St Andrew Parish Council (the Parish Council) also submitted a number of statements from witnesses they intended to call. Whilst the documents from the Council and the Parish Council should have been submitted in accordance with the timescales set out in the Notice of Order there is nothing to indicate that anyone has been prejudiced.
4. As noted above the Council asked that, should the Order be confirmed, the Order map be modified so as to show the correct alignment of the boundary as identified above (inquiry document 1). It is not disputed that the boundary is shown incorrectly on the Order map and even though the boundary is shown incorrectly the variation is not significant. I do not consider anyone will have been misled or prejudiced by the error. If the Order is confirmed I will modify the map accordingly.

5. The Order arises from an application, under section 53(5) and Schedule 14 to the 1981 Act, by the Parish Council to add a public footpath to the definitive map and statement for the area.

### **The Main Issues**

6. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i) namely whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over the land in the area to which the map relates. The test to be applied to the evidence is on the balance of probabilities.
7. The Council has made the Order on the basis that a right of way is reasonably alleged to subsist. However, for me to confirm the Order it will be necessary to show that a right of way subsists.
8. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
9. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.
10. The Council has considered a number of Ordnance Survey maps but does not rely on these in support of confirmation of the Order; other historical documents have been considered but do not support the existence of the claimed route. However, the Parish Council contend that the Order route is an historic link in the public right of way network, is shown on maps from 1886 to 1910 and has a long history of use.
11. The main issue in this case is whether the Order route has been used by the public, as of right and without interruption, for a full twenty year period such as to raise a presumption that the way has been dedicated as a public footpath. If such a presumption has arisen it will then be necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way. Should the test for statutory dedication fail then it will be necessary to consider dedication at common law. I will also need to consider any documentary evidence and whether this shows the existence of public rights.

## Reasons

### **Background information**

12. The Order route crosses land known as Mansfield. The land was acquired by the Pitman partnership in around 1983. When the partnership dissolved the land was transferred to Mrs M Pitman. In 2011 Mrs Pitman sold the southern part of Mansfield to Mr and Mrs Shepard (the area of Mansfield to the south of the fence line passing through point B<sup>1</sup>). The fence was erected towards the end of March 2012. The northern part of Mansfield was purchased by Wardour Limited in May 2012.
13. Mansfield is crossed by two public footpaths. Public footpath 5 to the north leading from point C to Pigtrough Lane. Public footpath 4 passes over the southern area of Mansfield owned by Mr and Mrs Shepard and continues to St Bartholomew's Street (Barker's Hill). Footpath 4 was diverted to its current alignment in 1996. The route previously ran through Kelloway's Mill into Mansfield and continued to St Bartholomew's Street.

### **Documentary evidence**

14. The 1890 Ordnance Survey map shows a route marked by a double pecked line between points B and C. The 1901 Ordnance Survey map also shows a double pecked line between points B and C which is annotated 'f.p.'. The base map for the 1910 Finance Act records, which will be an edition of the Ordnance Survey mapping, shows a route in a similar way to the 1901 map. The route is not shown on the 1925 Ordnance Survey map.
15. Ordnance Survey maps were produced to record topographical features and were not intended to record public rights. As such the maps do not provide evidence of public rights and in any event the route marked on the maps does not include the entire length of the Order route. The symbol 'f.p.' was used so as to identify that the route is not traversable by horses or wheeled traffic and again does not provide evidence of public rights. It is apparent that by 1925 there was no longer a route visible on the ground which surveyors were required to show.
16. I note the contention that the Order route is an historic link but for me to reach a conclusion that the way was public I would need evidence of public rights. The Ordnance Survey mapping is insufficient to demonstrate public rights and there is no other documentary evidence which suggests the existence of such rights. I will have regard to the evidence of use in the context of a statutory dedication or dedication at common law.
17. The point is made by the objector that the route was not claimed in the parish survey under the National Parks and Access to the Countryside Act 1949 whereas other footpaths in the same field were. The Parish Council suggest that there was no need to claim the route because the path was always open. However, the purpose of the survey under the 1949 Act was to record all public footpaths. The fact that the route was not claimed is highly suggestive of the fact that, at that time, the way was not regarded as a public footpath. However, that does not preclude public rights from being shown to exist at a later date.

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<sup>1</sup> Letters A, B and C used in this decision relate to points shown on the Order map.

18. In conclusion whilst part of the Order route is shown on the Ordnance Survey mapping this is insufficient to show that public rights subsist.

**Statutory Dedication – Section 31 Highways Act 1980**

**When the right to use the way was brought into question**

19. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. I was referred to the cases of *Fairey v Southampton County Council 1956* and *R (Godmanchester Town Council) v Secretary of State for Environment, food and Rural Affairs [2008] 1AC 221* (Godmanchester) which are relevant.
20. It is not disputed that the right to use the way was brought into question in August 2012 when Wardour Limited made a deposit and statutory declaration under section 31(6) of the Highways Act 1980. Such an event would clearly bring the right to use the way into question and would set a relevant twenty year period from August 1992 to August 2012.
21. It was also suggested by the objector that the right to use the way could have been brought into question in March 2012 with the erection of the fence by the Shepherds. However, although, on the evidence before me, the fence obstructed the route walked, there is nothing to indicate that those who used the route understood at that time that the right to use the route was being brought into question. A stile with a dog gate was provided, albeit on a slightly different alignment, and use was not prevented.

**Evidence of use 1992 to 2012**

22. The Council has submitted 33 evidence of use forms which show use of a route between point A and C. However, there is a degree of variation as to the route used with some taking an alignment close to the eastern boundary of Mansfield, others walking further west in the field. Some show the route walked at the northern end as linking directly with footpath 5 with others taking a north easterly direction to point C. The maps show the route continuing to the current route of footpath 4.
23. There is nothing to indicate that use was interrupted or that use was in secret or with force. However, the form of Mr J Barton indicates that he was given permission to use the route by Mrs Shaw. The UEFs refer to seeing the landowner and that he was aware of the use of the route. They also refer to a well-worn track, frequent use by others and that it was common knowledge that the route was a public footpath.

*Route alignment*

24. It is argued by the objectors that the fluctuations in the route used are such that none of the routes identified would be sufficiently used by the public to qualify under section 31 of the Highways Act 1980.
25. Section 31(1) talks of a way over any land and in *Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425* Lord Oliver of Aylmerton said that 'a public right on land depends upon proof of public user

over an exactly demonstrated course'. In *Kotegaonkar v Secretary of State for Environment Food and Rural Affairs* [2012] EWHC 1976 (Admin) (*Kotegaonkar*) Hickinbottom J, in setting out the characteristics of a highway, said that 'the right must be over a defined route: the common law did not recognise a right to stray or wander over land'.

26. I was referred to the case of *Fernlee Estates Limited v City & County of Swansea and The National Assembly for Wales* [2011] EWHC Admin 360 (*Fernlee*) by the Council who pointed out that in that case the deviation was 20 metres and that the deviations in respect of the Order route fell within the scenario set out in *Fernlee*.
27. As accepted by the Council and the objector it is not clear from the *Fernlee* judgement, without the Inspectors decision and Order map, what the exact circumstances were. From my reading of the case there were two issues in respect of alignment the first being whether the Order route was the route used at the commencement of the twenty year period and secondly whether building works constituted an interruption to the use of the way. However, as pointed out by the Council the judgment deals with a deviation during the twenty year period; this arose from dumped building materials and trench digging. It was held that the obstructions did not amount to an interruption. As such the judgment deals with lateral movement during the relevant twenty year period and suggests, as submitted by the Council, that some deviation is acceptable.
28. *Fernlee* by reference to *Wimbledon and Putney Commons Conservators v Dixon* [1875] 1Ch362, 368<sup>2</sup> indicates that where a route from one point to another goes across open land the route need not follow a precise path.
29. Having regard to the various authorities, for a dedication to arise the route used should follow a reasonably defined route however, where the route crosses open land the route need not follow a precise alignment. Nevertheless straying or wandering over land will not give rise to the dedication of a public footpath.
30. I note the analysis of the variations in the routes used as set out in the objector's statement of case. These do show a variation in the route used. However, the accuracy of any drawn line over what is essentially open land will vary depending on the skills of the person drawing the line. As pointed out by the Council it would raise suspicions if all users had produced identical plans.
31. From all the evidence before me a route is described as running adjacent to paddock of Kelloway's Mill heading towards point B (I consider the use of this section during the relevant period at paragraphs 59 to 65 below). It is acknowledged that the current position of the stile is not on the route walked for the majority of the twenty year period. The evidence to the inquiry is that the route prior to the stile was between '4ft' (1.2 m) and as much as 3 to 4 metres from the current location of the stile. Mrs Eves described the land in the vicinity of the stile as being muddy whereas the walked path was never too wet. From my observations on site it is clear that the land in the vicinity of the stile is likely to be muddy at times. If the walked route at this location was never too wet I consider that the route walked is likely to be more than 1.2 m from the stile and I am inclined to accept the evidence of Mrs Eves that the

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<sup>2</sup> It is agreed between the Council and the objectors that this is a private easement case

walked route was around 3 to 4 metres from the current location of the stile. From that point the route is described as following the River Nadder but again the evidence is that the land adjacent to the river was boggy and not used. Mr Barton described the diversion around the boggy section as '*as wide as this room*' referring to the width of the downstairs inquiry venue at Shaftesbury Town Hall. Additionally Miss Maxwell Arnot said that the route was not directly adjacent to the river; she did not consider that the Order map showed the alignment of the route used. The route is then described as following the wood although Mrs Hinchley said that when the silage had been cut she would walk further into the field. From the corner of the wood the route took a diagonal line to join footpath 5 although it is clear that from the corner of the wood some continued directly northwards to footpath 5 at point C. It is of note that this latter route formed part of the original application to the Council and is the route identified on some of the maps accompanying the UEFs.

32. A number of those giving evidence to the inquiry in support of the Order referred to a discernible route on the ground although Mr York said that the path was not well worn. Mrs Hinchley said there was a visible track depending on the time of year and Miss Maxwell-Arnot said that whilst she had lived in the village there had been a track. Some UEF's also refer to a well-worn path. In opposition Mr Farrant sometimes saw trodden grass and Mr Shepard was aware of a worn path but this would have been after 2002 after the purchase of land from the Pitmans. Mr J Graham said there was no visible path along the claimed route until after 2009 when there was never a single path but Mr R Graham said there was no visible track.
33. Aerial photographs from 1982 to 2014 do not show any worn track which corresponds with the Order route. However, the absence of any discernible route does not mean that the route was not used or that there was no discernible track. The aerial photographs show that at the time photographs were taken no feature on the ground corresponding with the Order route was visible. Consequently the aerial photographs do not assist in determining the route used.
34. Having regard to the evidence as a whole, whilst Mr Graham alludes to there being more than one track the evidence points to the use of a route which, on balance, corresponds with the route shown on the Order plan. The evidence does not point to people wandering over the land such that use could not give rise to a presumption of dedication.

#### *Use as of right*

35. Use as of right is use without force, without secrecy and without permission<sup>3</sup>. I agree with the objector by reference to *Sunningwell* and *Barkas*<sup>4</sup> that whether use is as of right is to be judged on how the matter would have appeared to the landowner. *Sunningwell* indicates that the belief of the user is not determinative as to whether use was as of right but it does not follow that the belief is evidentially irrelevant.
36. As noted previously there is no evidence that use was with force or in secret.
37. The Council acknowledge that Mr J Barton and possibly Mrs B Blanshard had permission to use the Order route. Mr J Barton was given permission by Mrs

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<sup>3</sup> *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*)

<sup>4</sup> *R(Barkas) v North Yorkshire County Council* [2015] AC 195



- Shaw on 17 July 2012 to walk the perimeter of Mansfield which would include part of the Order route. Mr Barton also said that he had been given permission by Mr G Pitman shortly after he moved to the village in 1986 although this is not mentioned in his UEF. In cross examination he said that he had not mentioned the permission from Mr Pitman as he was thinking of the relevance in respect of Mr and Mrs Shaw and did not realise the significance of not mentioning the permission given by Mr Pitman. A Statutory Declaration made in 2015 by Mr Barton refers to asking Mr G Pitman for permission to walk the edge of the land. Although there appears to be a conflict in the evidence as to whether Mr Pitman gave permission to Mr Barton some weight should be given to a signed Statutory Declaration and his evidence to the inquiry.
38. As regards Mrs Blanshard her UEF does not state that use was with permission. However, Mrs Shaw was told in 2007 by Mrs Blanshard that she always asked a landowners consent before walking on their land. The Statutory Declaration of Mr D Pitman of July 2015 indicates Mrs Blanshard and one other asked permission to walk elsewhere other than the public footpaths. Mr D Pitman's proof of evidence indicates that 'we' gave Mrs Blanshard and a Jane Hopkins consent to walk the eastern edge of Mansfield. In cross-examination Mr D Pitman said that it was Mr G Pitman who would have given the permission and that he had been told that by Mr G Pitman. The UEF of Mrs J Hopkins does not state that use was with permission although acknowledges that permissive path signs were put on the stile; this would have been in 2012.
39. Whilst the UEFs of Mrs Blanchard and Mrs Hopkins do not indicate that they had permission to use the Order route it has not been possible to test this evidence. The evidence conflicts with the evidence of Mr D Pitman who, whilst accepting that he was not party to the conversation was clear that Mr G Pitman had advised him that permission had been granted to these individuals. Given that it has not been possible to examine further whether Mrs Blanchard and Mrs Hopkins had permission to use the route I am inclined to accept the evidence of Mr D Pitman. His evidence is consistent with that of Mrs M Pitman whose statement indicates that Mr G Pitman gave some villagers permission. I acknowledge that this evidence has not been tested and it is not possible to establish who the villagers were who were given permission. The evidence of Mr D Pitman also accords with that of Mrs Shaw who was told by Mrs Blanshard that *'she always asked a landowner's consent before walking on his land'*.
40. In respect of other permissions being granted, the evidence of the objector is that there was a meeting at Beauchamp House on 12 July 2012 (when Mr Barton received permission from Mrs Shaw) when permission was given to Mr and Mrs Lee, on behalf of the villagers, to walk the Order route. Mrs Shaw was clear that Mr and Mrs Lee were asking for permission on behalf of the villagers. There was no indication that permission was being sought on behalf of the Parish Council. The Statutory Declaration of Mrs MacMillan, who was a house guest at the time of the meeting, indicates that Mr and Mrs Lee had called at the house to ask for permission for the village to walk the route at the eastern edge of Mansfield. Mrs Shaw stated that Mrs MacMillan was present when the Lees made their request and permission granted.
41. The evidence of Mr Lee is that he had a social meeting with Mr and Mrs Shaw on the evening of 12 July 2012; this conflicts with the evidence of the objector which suggests that the meeting was in the morning. On leaving Beauchamp House he and his wife realised that Mr and Mrs Shaw would not object to them

- walking the eastern side of Mansfield. He said that he did not have a mandate on behalf of villagers to seek permission.
42. It does not appear to be disputed that Mr and Mrs Lee sought permission to use the route over Mansfield. The issue is whether such permission was sought on behalf of the village. Apart from Mrs Shaw none of the other witnesses for the objector were present when Mr and Mrs Lee sought permission. Although Mrs Shaw said that Mrs Macmillan was present her Statutory Declaration only indicates that she was a house guest at the time and that Mr and Mrs Lee had called at the house to ask permission for the village. It is recognised that Mr Lee's recollections of the meeting in respect of timing clearly conflicts with the evidence of the objectors witnesses and this suggests that Mr Lee's recollections of events were not clear. Nevertheless he was clear that he had no mandate to seek permission on behalf of the village. The only direct evidence to the inquiry is that of Mrs Shaw. In the absence of other evidence I find it difficult to conclude that Mr Lee was seeking permission on behalf of the village.
  43. Following the meeting at Beauchamp House in July 2012 Mr Graham and Mr Farrant erected permissive footpath signs at the stile erected in March 2012. The evidence as to exactly when these appeared is not entirely clear but on balance it is likely that the signs were erected in August at the same time as a deposit and declaration was made by Wardour Limited under section 31(6) of the 1980 Act.
  44. On 21 June 2014, at an open garden event, Mrs Shaw said that Mrs Barkham thanked her for allowing her and Dr Barkham to walk the 'permissive path'. Mrs Shaw suggested that this indicated that Mrs Barkham regarded it necessary to have consent to use the route.
  45. Mrs Barkham did not give oral evidence to the inquiry but Dr Barkham was clear that he had not been given permission to use the way. He said that his wife had sought permission to look for archaeological artefacts although he was not at the meeting when the permission was granted. Neither the UEF of Mrs nor Dr Barkham indicate that permission was granted to use the Order route. Some issue was taken by the objector in respect of the answer to question 12 of Dr Barkham's UEF which is virtually identical to the response given by Mrs Barkham. In response to the question as to whether permission had ever been granted the response is '*Not by the present owner but the previous farmer G Pitman told us it was a footpath*'. I do not see any significance in the use of the term '*footpath*' in the UEF. The form specifically refers to the term at question 4 and, given the purpose of the form, I would take the term to refer to a public footpath. Whilst it was put to Dr Barkham that the conversation he had with Mr G Pitman was a neighbourly conversation granting permission Dr Barkham was clear that Mr G Pitman had not granted permission and that he had referred to the route as a public footpath.
  46. Looking at the evidence relating to Mrs Barkham, and given that she sought permission after the erection of the permissive notices, I do not consider that the comments suggest that Mrs Barkham understood it to be necessary to have consent to use the route. By the time Mrs Barkham sought permission it is clear that the route was regarded as permissive.
  47. I note the various extracts of The Donhead Digest from 2017 and 2018 which variously refer to the Order route as being '*in recent years a permissive*



*footpath*' and *'former permissive path'*. However, bearing in mind the dates of the documents, I do not consider that these show that use prior to 2012 was with permission. It was in 2012 that permissive notices were erected on the route.

48. The objector contends that local people acquiesced in the designation of the route as a permissive path. However, whilst there is more recent acknowledgement of the 'permissive status' that is not borne out in the UEFs and the evidence to the inquiry. Other than Mr Barton, Mrs Blanshard and Mrs Hopkins none of those used the route on the understanding that use was with permission of the Pitmans. It was not until the land was acquired by Wardour Limited that Mr and Mrs Lee, and later Mrs Barkham, sought permission to use the way. Additionally, as pointed out by the Council, the Parish Council submitted an application to add the route to the definitive map and statement. That does not suggest to me that the public have acquiesced in the permissive status of the route.
49. The objector submitted, by reference to *R(Beresford) v Sunderland City Council [2004] 1 AC 889 (Beresford)* that permission may be inferred from the relevant circumstances. It is recognised that Mr G Pitman was well known by the many of the inhabitants of Donhead St Andrew and it is also apparent that many of those using the way saw Mr G Pitman when using the Order route. However, other than those who were specifically given permission there is nothing to indicate that any nods or waves were understood to be the granting of any permission. It is noted that Mrs Hinchley was a friend of Mr G Pitman and she recalls that whilst he was frustrated that dogs were not always under control there was no indication to her that he regarded the route as permissive or that there was a requirement to seek permission. In *Beresford* the point is made at paragraph 5 that conduct of the landowner, in the absence of any express statement, may be pursuant to granting permission. However the conduct envisaged is exclusion from the land when the landowner wished to use the land for his own purposes or by excluding inhabitants. There is nothing from the evidence which suggests such conduct by Mr G Pitman.
50. Having regard to the evidence before me I consider that it is, on balance, insufficient to demonstrate that permission may be inferred by the actions of Mr G Pitman. It is noted that some users felt it necessary to seek permission from Wardour Limited however, this was after the fence and stile were erected and the change of ownership. I do not consider that this demonstrates that Mr G Pitman's attitude and conduct was understood. The evidence points to use without permission.
51. Taking all factors into consideration, whilst some individuals had permission to use the Order route the granting of permission to some does not prevent use by others from being without permission. The evidence indicates use by the public without permission and as noted previously there is no evidence to the effect that use was with force or in secrecy. As such I conclude that there was use by the public as of right.

### *Sufficiency*

52. As asserted by the objector by reference to *R(Lewis) v Redcar and Cleveland Borough Council [2020] 2 AC 70* for the public to acquire a right by prescription, they must by their conduct bring home to the landowner that a

right is being asserted. Lord Walker endorses the view taken in *Hollins v Verney (1884) 13 QBD 304*.

53. The objector accepts that user by the public may be satisfied by user by local residents (*R v Southampton (Inhabitants) (1887) QBD 590 (Southampton)*) and I agree that this does not abrogate the requirement for there to be sufficient user. It is noted that in *Southampton* use was considerable and extensive. However, the case related to a bridge on the edge of a large conurbation where it might be expected that use was considerable and extensive. In this case Donhead St Andrew is a relatively small rural community (the population figures indicate a population of the low 400s) and whilst I note that the number of users is relatively small compared to the population the issue is one of sufficiency and not whether use is considerable or extensive. The test is as set out at paragraph 52. I am aware that a number of witnesses come from a small number of families but in this case use is not confined to a single family and their friends.
54. Some 19 individuals completing UEFs claim use of the way for the full twenty year period and it is apparent that there is an increase in the use of the way over time. Use varied from daily to a few times a year. A number of those completing UEFs refer to seeing Mr G Pitman when he was working in the field and to seeing others. There is a general view that the way was regarded as a public footpath and that the landowner must have been aware of the use.
55. Of those who gave evidence to the inquiry in support of the Order Mrs Hinchley frequently met others and observed use when she was accompanied by Mr G Pitman. Dr Barkham, who said he frequently used the path, saw people walking the route on a regular basis and often encountered Mr Pitman. Mr B Sullivan and Mrs A Eves frequently saw others using the route.
56. In contrast Mr D Pitman said that there was no evidence prior to 2002 of regular use without consent. However, he acknowledged that it was Mr G Pitman who was predominantly in Mansfield looking after the stock. Mr Farrant saw use from time to time and noted an increase from 2013. His knowledge of the land was from 2007 although he did visit the village before that year. Mrs Macdonald did not recall any evidence of a path until around 2002/03. Mr Shaw, living in Beauchamp House for a few weeks a year since 1993 did not recall anyone using the east side of Mansfield until recent years. Mr Shepard was not aware of use of the route between 2002 and 2011 other than by the Barkhams and the Redmans. Mrs Shepard was also aware of the use of the claimed route by Mr Redman. Mr Barton rarely saw use of the claimed route prior to the diversion of footpath 4. Mr J Graham did not see use between 1993 and 2002/03 but after that time he noticed occasional use by a small number of people. He did not visit the area before 1993. In cross examination he acknowledged that after 2002/03 Mr G Pitman would have been aware of the use. Mrs Shaw said that in 1993 there was no evidence of a walked path but that use increased from occasional use to several times a day in 2015. She spent much of the term time at Beauchamp House and was clear that she would have seen use during those times if it had taken place. Mr R Graham also said that from 1993 for the next 10 years there was no obvious footpath; He moved to Chestnut Cottage and worked at Beauchamp house from 1993. From 2002/03 the route was used occasionally with use increasing. He accepted that the way may have been walked prior to 2002.

57. The statement of Mrs M Pitman outlines that Pitman & Sons purchased Mansfield in 1982 and never witnessed walkers on the route even though she spent time with her husband, Mr G Pitman, in Mansfield. She was sure that her late husband would not have encouraged walkers and was sure he would not have told Dr Barkham that the route was public. The point is made that it was unlikely that the path existed until improvements to the land were carried out. Mr D Pitman said that the improvements were carried out in the early years of ownership. These improvements would have taken place prior to the twenty year period.
58. Whilst the objectors did not see evidence, or use, of a path prior to 2002 this contrasts with the evidence of those who used the route and saw others including Mr G Pitman. The earliest use is identified as being from 1970. It is nevertheless acknowledged, as demonstrated by the UEFs, that use increased over time possibly arising from the diversion of footpath 4, development in the village, the removal of stock from Mansfield and the dissolution of the Pitman Partnership. By 2002/03 use was acknowledged by Mr D Pitman and others albeit that such use was considered to be limited. In my view the evidence demonstrates use by the public and whilst in the early part of the twenty year period the use was not substantial it would have been sufficient for the landowner to have been aware that the route was being used.
59. Notwithstanding the above a further issue which needs to be considered is the use of the Order route between the former alignment of footpath 4 and the new alignment of footpath 4. Footpath 4 was diverted in December 1996 and therefore during the twenty year period.
60. The Council identify five individuals who have used the Order route prior to the diversion of footpath 4; the Council had carried out further consultation to examine use of the route prior to the diversion.
61. Mrs Brown, using the route on a weekly basis in summer, did not use the Order route between points A and B prior to 1996 but used a route in the paddock immediately adjacent to Kelloway's Mill. Mrs Munro describes a route through Kelloway's Mill over a stile into the garden and then down the drive to the lane. However, the map accompanying her consultation response shows a route through Kelloway's Mill, one through the paddock adjacent to the property and one corresponding with the Order route. She used the route about 6 times a year. Mr Sullivan said in cross examination that he did not use a route south of the former route of footpath 4 until the diversion. Until that time he used the route marked on the Ordnance Survey map; this route ended at Kelloway's Mill. Mrs Stoker visited her parents who moved into Donhead St Andrew in 1996, the diversion of footpath 4 occurring as her parents moved to the village. She recalled walking through Kelloway's Mill but found that to be embarrassing. Mr T Kilner used footpath 27 from footpath 5 and then over a stile (or hurdle) into Kelloway's Mill field joining footpath 3 to get to the youth club; this was on a monthly basis. The route marked on his consultation plan corresponds with the Order route. His Statutory Declaration indicates that he used the Order route although did not recall the diversion of footpath 4 accepting that at the time he was 15 years of age and that at such time such things were not of note.
62. The Parish Council also responded to the consultation from the Council asking for information on public use of the route prior to 1996/97. The response from

- the Parish Council includes a map. This shows a route through Kelloway's Mill along the former route of footpath 4 and one northwards along a route which would appear to reflect the route claimed. There is no indication of a route being used to the south of the former route of footpath 4. It is noted that the response identifies the routes remembered by parish councillors although the question related to public use. In any event there is nothing to indicate a route to the south of footpath 4.
63. In respect of the objectors Mr Barton did not recall use of the small field, through which footpath 4 now runs, before the diversion. At point A the boundary into the field was secure and it would have been a struggle. It was not until the diversion of the footpath that stiles were erected. He did not remember Mr T Kilner walking through the paddock adjacent to Kelloway's Mill. Although Mr Barton completed a UEF he said that prior to the diversion he accessed the claimed route from his garden at Kelloway's Mill.
64. Having regard to the above, the only persons potentially using the Order route prior to the diversion of footpath 4 were Mrs Munro and Mr T Kilner. Mrs Munro's use is limited to a few times a year and she also used other routes. The routes shown on her map conflict, to some extent, with her written evidence which states that the original route used was through Kelloway's Mill. This suggests that it is more likely that Mrs Munro did not continue southwards from the original route of footpath 4 until it was diverted. Although Mr Kilner claims to have used the Order route the evidence from Mr Barton is that prior to the diversion it would not be possible to enter the field adjacent to Kelloway's Mill. The response from the Parish Council is that prior to 1996/97 there was no use of a route to the south of the original route of footpath 4.
65. The evidence of use of the Order route south of the former route of footpath 4 prior to its diversion is, at best, extremely limited and is lacking in credibility. The evidence is insufficient to show use by the public such as to raise any presumption of dedication.
66. In view of the above, whilst there is evidence of use of the northern part of the Order route to the former route of footpath 4 there is insufficient evidence to show use of the whole of the Order route. For the statutory dedication to be made out there must be sufficient use of the whole route throughout the relevant period. As such the test for a statutory dedication fails. I have therefore not considered further whether any landowner demonstrated a lack of intention to dedicate during the relevant twenty year period.
67. It was put to me by the Council that I may wish to modify the Order so as to confirm the Order in respect of a route between point C and the former route of footpath 4. Such a modification would result in a cul-de-sac. Whilst there is nothing to preclude the dedication of a cul-de-sac, there is no evidence before me to indicate that the termination point provides a place of popular resort or place of interest that the public may wish to visit such that special circumstances exist. The point of termination would be isolated at the edge of a field. I note the point that Mrs Shaw described the route as being pretty and that even as a cul-de-sac the path would offer something to the public. Again there is no evidence before me to indicate that the route was used so as to enjoy features adjacent to the route such that special circumstances exist. Consequently I do not consider it appropriate to modify the Order as suggested.

### **Dedication at Common Law**

68. In view of my findings in respect of a statutory dedication it is necessary to consider the dedication of the Order route at common law. There is no evidence before me of any express dedication. The objector referred to a number of authorities<sup>5</sup> which are relevant to the consideration of dedication at common law. I was also referred to *Norfolk County Council v Mason [2004] EWHC B1 Ch* by the Council. This does set out some established principles of common law but also addresses issues relating to section 31 of the 1980 Act which are not applicable to dedication at common law. The long established principles of dedication at common law are set out in *Mann v Brodie* as confirmed in *Godmanchester and Folkestone Corpn. v Brockman*.
69. *Jones v Bates*, which provides a clear description of dedication at common law, makes it clear that even a formidable body of evidence may not be sufficient to demonstrate a dedication at common law.
70. I have already considered the evidence of use in respect of a statutory dedication and have concluded that, in respect of the section of Order route between the former route of footpath 4 and the current route, there is insufficient evidence to raise a presumption of dedication. For this reason I consider that there is insufficient evidence of use of the whole route to raise an inference of dedication prior to the diversion of footpath 4. I revert to my previous comments in respect of any modification to include the Order route from point C to the former route of footpath 4. However, as suggested by the Council, it is open to me to consider a period of 15 years between 1997 and 2012 or any lesser period. It was at the end of 1996 that footpath 4 was diverted.
71. Mansfield was in the Pitman partnership from when the land was purchased in 1983. The partnership comprised Messrs G and D Pitman and their mother and father. When the partnership was dissolved the land was transferred to Mrs M Pitman. From the evidence before me Mrs M Pitman owned the land in 2011/2012. In 2011 the land to the south of the fence was purchased by Mr and Mrs Shepard and in 2012 the land to the north was purchased by Wardour Limited.
72. Noting my conclusions in respect of use of the southern section of the Order route prior to 1996 the UEFs show that from that time there was an increase in use of the Order route with a further increase in use after around 2002/03. Use was varied between daily use and a few times a year. As noted above those using the way saw others including Mr G Pitman. Evidence given to the inquiry from users of the Order route also indicates use by those individuals and others and that Mr G Pitman was aware of use. There is nothing to indicate that use was interrupted or prevented.
73. I have already considered the issue of permission (paragraphs 35 to 51 above) and have concluded that some individuals were given permission by Mr G Pitman. I do note that Mr D Pitman referred to giving consent to owners of properties built on the former pig farm and other houses adjacent to Mansfield. However, other than those individuals identified above I have not been provided with details of others who were given permission. That some

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<sup>5</sup> *Jones v Bates [1938] 2 All ER 237 (Jones v Bates)*, *Farquhar v Newbury RDC [1909] 1 Ch 12*, *Folkestone Corporation v Brockman [1914] AC 338 (Folkestone Corpn. v Brockman)* and *Godmanchester*



individuals have been given permission to use the route must be put in the balance in considering whether dedication at common law can be inferred. The granting of permission does not support an intention to dedicate.

74. The evidence from the objector is that it was not until 2002/03 that more frequent use of the Order route was observed. Mr D Pitman was clear that as a partner in the Pitman partnership he would not have consented to the creation of a public footpath. Mrs Pitman's evidence is that Mr G Pitman had never referred to the route as being a public footpath (although this contrasts with the evidence of Dr Barkham) and would never encourage walkers. She did not recall ever seeing walkers on the Order route.
75. I note the suggestion that Mr G Pitman's social relationships with friends and neighbours is an important part of the context as to whether he intended to dedicate a public right of way. I accept that Mr G Pitman was well known in the village however, the evidence is that he must have been aware of the use and there is nothing to indicate that he challenged use. The fact that the way was used by friends and neighbours does not mean that use was not as of right. Nevertheless the use must be seen in the context of the evidence that some villagers were given permission to use the route.
76. In 2011 Mr and Mrs Shepard purchased an additional 4 acres of Mansfield from Margaret Pitman. As part of the condition of sale there was a requirement to fence the new boundary with the remainder of Mansfield. In March 2012 the erection of the fence commenced. Although the exact circumstances of the incident are unclear it is not disputed that a request was made for the erection of a stile in the fence. A stile with a dog gate was subsequently erected as Mr and Mrs Shepard wanted to keep stock in the field and were concerned that any fence might be cut. Mr Shepard subsequently spoke to Mr Shaw to inform him of his intentions to erect a stile; Mr Shaw did not own the land to the north of the boundary fence but Wardour Limited were in the process of completing the purchase from Mrs M Pitman. Permissive path notices were, following the discussions with Mr Prince the Agent for Wardour Limited, subsequently posted on the stile in the autumn of 2012; this was after Wardour Limited made a deposit and Statutory Declaration under section 31(6) of the Highways Act 1980.
77. Whilst a stile was erected in the fence I do not consider, in the circumstances that the dedication of a public footpath can be inferred. Nevertheless the reaction of some would suggest that the way was used and that there was some concern over continued access. It has to be accepted that there was a significant delay in the erection of the permissive path notices when it would have been possible to produce such a notice in a short time. However, given that the task was given to the Agent for Wardour Limited, who purchased the land in May 2012, it is not surprising that the matter was delayed. It is also noted that in March 2012 Mr Shepard informed Mr Redman of his intentions to erect a fence and that consequently there would be no access over the newly acquired land other than along footpath 4. That does not support a view that Mr and Mrs Shepard considered the route to be a public right of way.
78. I note the observation that Mrs M Pitman who, at the time of the erection of the stile owned the land to the north of the fence, did not make any response to the erection of the stile. However, although she was unable to give evidence to the inquiry, her statement says that during her brief period of ownership she

had no intention to dedicate a public footpath. This is consistent with the requirement, when she sold the land to the Shepards, for them, as purchasers, to erect a fence separating the land from the land to the north. The requirement to erect a fence is acknowledged by Mr and Mrs Shepard but there is nothing to indicate that a stile should have been provided. It is recognised that even with the erection of a stile the requirement to erect a fence would be satisfied. Notwithstanding the above, Mrs Pitman sold the land shortly after the erection of the fence. As suggested by Mr Shepard it may have been the case that Mrs Pitman no longer had any interest in the land and wished to see it sold. I do not consider that it can be inferred from her actions that she intended to dedicate a public footpath.

79. The objector makes the point that in erecting a stile the Shepherds would have been dedicating a cul de sac; I was referred to *Attorney General v Antrobus [1905] Ch D 188*, *Kotegaonkar and R(The Ramblers Association) v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin)*. I would agree that, in the absence of a suitable terminus as described in the authorities, the erection of a stile could not amount to a dedication of a public footpath. I have already considered the circumstances in respect of Mrs Pitman. In respect of Wardour Limited, within a short period of purchasing the land they made a deposit and Statutory Declaration under section 31(6) of the Highways Act 1980. That does not suggest to me any acquiescence in any public footpath continuing northwards of the fence line.
80. Having regard to all of the above, whilst there is evidence of use of the way, when considering all the evidence before me I do not consider it sufficient to raise an inference of dedication. I also do not consider that the actions of the landowners were sufficient to infer any dedication at common law.

### **Other Matters**

81. The Parish Council makes the point that the Order route is needed to ensure an integrated footpath network. Concerns are also raised in respect of road safety. Whilst I note these issues my decision must be based on the evidence before me measured against the relevant criteria set out above at paragraphs 6 to 9.

### **Conclusions**

82. Having regard to these and all other matters raised at the public inquiry I conclude that the Order should not be confirmed.

### **Formal Decision**

83. I do not confirm the Order.

*Martin Elliott*

Inspector

APPEARANCES

**For Wiltshire Council**

Mr T Ward

Of Counsel, instructed by Head of Legal services,  
Wiltshire Council

who called  
Miss J Green

**Also in support of the Order:**

Miss P Maxwell-Arnot

Donhead St Andrew Parish Council

who also called  
Mr R Powell  
Mr M York  
Mrs H Hinchley  
Mrs E Collyer  
Mr B Sullivan  
Mrs J Stoker  
Mr R Lee  
Mrs A Eves  
Dr S Barkham  
Mr C Kilner

**In opposition to the Order:**

Ms R Crail

Of Counsel, on behalf of the objectors

who called  
Mr K Prince  
Mr D Pitman  
Mr P Farrant  
Mrs C Macdonald  
Mr C Shaw  
Mr M Shepard  
Mrs J Shepard  
Mr J Barton  
Mr J Graham  
Mrs A Shaw  
Mr R Graham

## **Documents handed in at the Inquiry**

- 1 Copy of Order map with correct boundary
- 2 Statutory Declaration Mr T Kilner
- 3 Bundle of Authorities and legal submissions on behalf of the objectors
- 4 10 No. Statements submitted by Donhead St Andrew Parish Council
- 5 Map of existing footpaths accessing the central Wardour Estate from Donhead St Andrew
- 6 Extracts from Donhead Digest
- 7 Correspondence and map from Mr R Powell
- 8 Extracts from Donhead Digest
- 9 Statement of Mr R Lee
- 10 Statement of Elizabeth Collyer to Donhead St Andrew Parish Council
- 11 Correspondence from Mrs J Brown 22 August 2018
- 12 2 No. satellite images (2004)
- 13 Extract of Ordnance Survey map marked up with existing public footpaths and route to be designated (application plan)
- 14 Map from Mr Kilner showing routes around Kelloway's Mill
- 15 Memorandum of Sale (land at Mansfield)
- 16 Application for diversion of footpath 3 and 4 Donhead St Andrew
- 17 Closing submissions on behalf of the objectors
- 18 Closing submissions on behalf of the Parish Council
- 19 Outline closing submissions on behalf of the Council

The Wiltshire Council (Parish of Donhead St Andrew)  
Path no.27 Definitive Map and Statement Modification Order 2016

Date: 16/08/2016

The Wiltshire Council (Parish of Donhead St Andrew) Path no.27 Definitive Map  
and Statement Modification Order 2016

Key

- Length of Footpath to be added: A — B — C
- Connecting Footpaths: ○○○○○○○○○○○○○

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Tracy Carter - Associate Director Waste and Environment

Prepared by JEG Date: 16<sup>th</sup> August 2016 Scale: 1:5,000 Grid Ref: ST 915-252

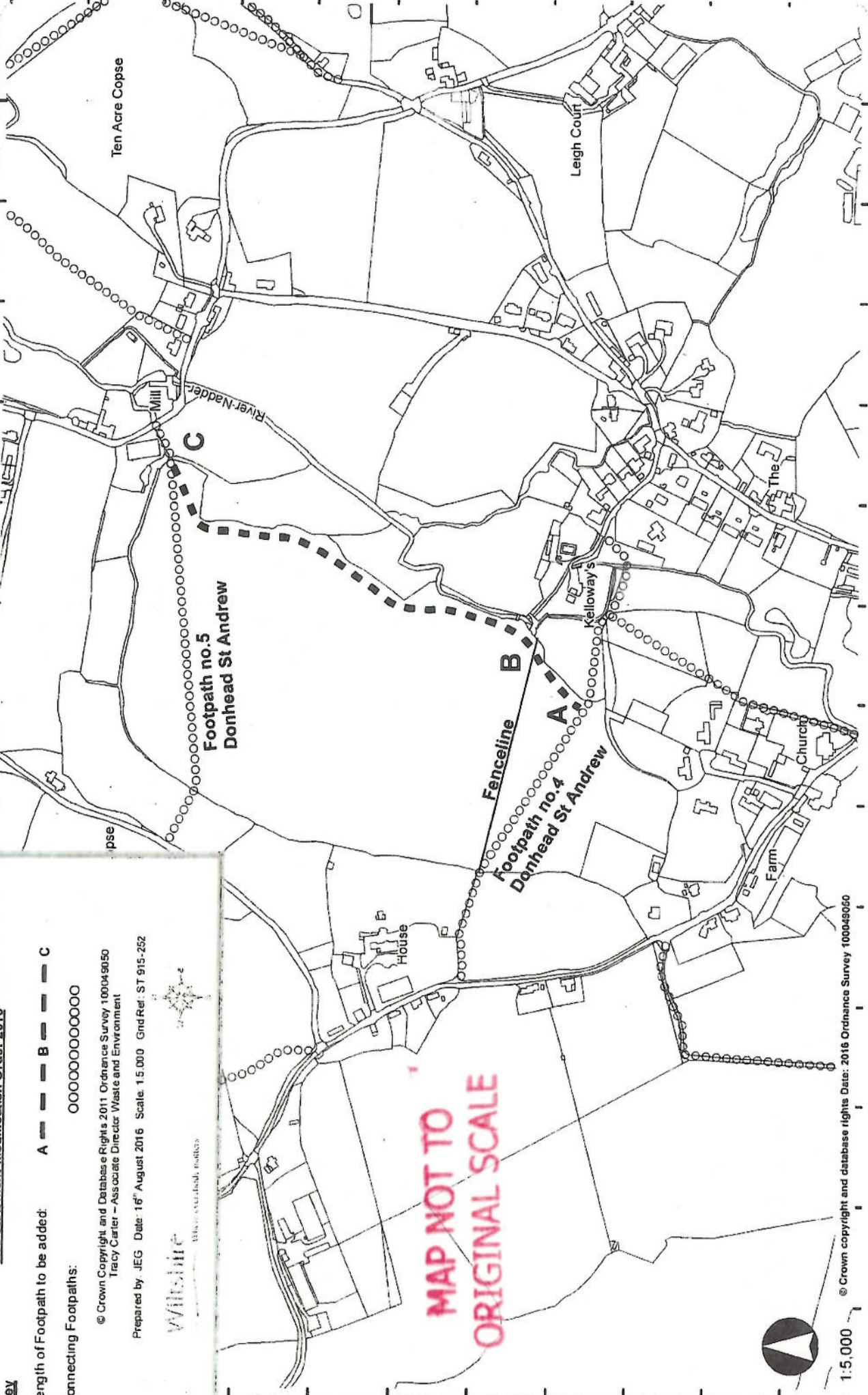


Wiltshire

THE WILTSHIRE COUNCIL

125440 125360 125280 125200 125120 125040 124960 124880

391400 391500 391600 391700 391800 391900 392000 392100



MAP NOT TO ORIGINAL SCALE



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