



**WILDLIFE AND COUNTRYSIDE ACT 1981
SWINDON BOROUGH COUNCIL
HIGHWORTH RURAL DISTRICT DEFINITIVE MAP AND STATEMENT
THE SWINDON BOROUGH COUNCIL
FOOTPATH 44 WANBOROUGH MODIFICATION ORDER 2017**

STATEMENT OF GROUNDS

14 AUGUST 2018

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1.0 INTRODUCTION

- 1.1 This Statement of Grounds is in respect of Swindon Borough Council's ("the Council") stance to support The Swindon Borough Council Footpath 44 Wanborough Modification Order 2017 ("the Order") and the Council's comments on the objections received to the Order.

2.0 THE APPLICATION

- 2.1 On 21 June 2017 John and Ginny Warr ("the applicant") made an application under section 53 Wildlife and Countryside Act 1981 for a path to be added to the definitive map and statement. The route of the path, subject of the application, is shown on the plan attached as **Appendix 1**.
- 2.2 The application was made following the closure of the path by the landowners in the first half of 2017. The closure happened as a result of the land between Points A-B (**Appendix 1**) being developed for housing, and, separately a stile between Points B-Y being removed.
- 2.3 The complete application is attached at **Appendix 2**. In addition to the relevant forms the application was accompanied by:
- 2.3.1 19 user evidence forms.
 - 2.3.2 An undated letter and attachments from Chris Hinton.
 - 2.3.3 A document from C Inskip dated 20 June 2017.
- 2.4 The 19 user evidence forms were signed by 23 individuals. Those individuals cite use of the path on foot over a 60 year period from 1957 to 2017, the time of the closure. The frequency of use of the path by those individuals ranged from daily to weekly to monthly to occasionally. A summary of that evidence is attached as **Appendix 3** along with a list of those individuals' names and addresses.

- 2.5 Within the 60 year period of use, 13 individuals have stated that they used the path from 1997 to 2017. A further 6 individuals stated that they used the path during that 20 year period for at least 13 years. All of the user evidence suggests that the public have used the path as of right and without any interruption until the path was closed.
- 2.6 Prior to the receipt of the application (**Appendix 2**) the Council received a letter and plan from Robert Fisher, dated 12 May 2017, attached as **Appendix 4**. That letter states that his stepfather Gerald Anthony Sadler owned the land crossed by the path between Points A-B, on the plan attached as **Appendix 1**, from the 1970s. The land was then sold in two separate transactions in 2008 and 2014. Mr Fisher states that during his ownership of the land Mr Sadler encouraged use of the route between Points A-B which was always kept available.
- 2.7 The letter and attachments from Chris Hinton (2.3.2 above) includes an extract from an Ordnance Survey plan stated to date from 1960 that shows the line of a path between Points A-B-Y (**Appendix 1**) but on a slightly different alignment.
- 2.8 The document from C Inskip dated 20 June 2017 (2.3.3 above) is mainly concerned with vehicular traffic using The Marsh / Burycroft road and describes the path as a permissive footpath. The document states that the permissive footpath has been regularly used by residents for well over 20 years and provides safe passage around a blind double bend.

3.0 INFORMAL CONSULTATION

- 3.1 After assessing the evidence sent to the Council, Officers considered that the path had existed and been enjoyed by the public for many years. In addition the evidence shows that a path is reasonably alleged to subsist. Therefore an informal consultation was undertaken in preparation for making a legal order.

- 3.2 The informal consultation was undertaken between 7 July and 4 August 2017 and the plan used for that exercise is attached as **Appendix 5**.
- 3.3 Details of the proposal were sent to the local elected member, Wanborough Parish Council, the affected landowners, statutory undertakers and interested organisations including The Ramblers, British Horse Society, Byways and Bridleways Trust, Cyclists Touring Club, Open Spaces Society and the Trail Riders Fellowship.
- 3.4 The landowners affected by this proposal, at the time of the informal consultation, were Bower Mapson Homes Ltd who owned between Points A-B on the informal consultation plan (**Appendix 5**) and Mr and Mrs Stalker who owned between Points B-Y and B-X on the same plan.
- 3.5 The only response to the informal consultation was an objection from Mr and Mrs Stalker, undated but received by the Council on 4 August 2017, which is attached as **Appendix 6**.
- 3.6 The objection from Mr and Mrs Stalker contains a number of points:
- 3.6.1 After buying the land, the permissive route between Points B-Y (**Appendix 5**) was agreed with the then Rights of Way Officer, Mrs Annie Ellis, in 2008 when the route was fenced in.
- 3.6.2 Pedestrian access from The Marsh via Point X has never been allowed and prevented when observed.
- 3.6.3 The temporary closure of the nearby Public Footpath WA25 via a temporary traffic regulation order which was effective from 22 February 2017 (**Appendix 7**) for six months.
- 3.6.4 The density of public footpaths on their land and the effect on their alpaca business.

3.6.5 The effect of the recent development of the land crossed by the section of route between Points A-B (**Appendix 5**).

3.7 The response to the informal consultation was considered alongwith the evidence enclosed with the original application and the letter from Robert Fisher (**Appendix 4**). Officers maintained the opinion that the path had existed and been enjoyed by the public for many years and that a path is reasonably alleged to subsist.

4.0 THE ORDER

4.1 On 22 November 2017 the Council made a Definitive Map Modification Order, **Appendix 8**. The Order was publicised in accordance with the statutory requirements; a public notice was published in the Swindon Advertiser on Friday 24 November 2017 (**Appendix 9**), notices were maintained on site and served on all of the prescribed persons and bodies. In addition a copy of the Order and notice were available for inspection at the Civic Offices and on the Council's website. The period for the receipt of representations about or objections to the Order was longer than the statutory minimum as it included the Christmas and New Year holidays.

4.2 The published Order, if confirmed, would modify the Highworth Rural District Definitive Map and Statement, relevant date 1 September 1958. An extract from the Map covering the area of the published Order is attached as **Appendix 10**. The Map was compiled following a survey undertaken by the Parish Council under section 28 National Parks and Access to the Countryside Act 1949. An extract from the plan that accompanied that survey is attached as **Appendix 11**. A review of the Highworth Rural District Definitive Map was proposed in 1966 when it was intended to add two public footpaths numbered 45 and 46 in Wanborough. That review was never completed, but those routes are shown in pink on the attached extract from the Definitive Map. Those two routes have also appeared in error on subsequent working copies of the Definitive Map but were adopted as public

highways by Wiltshire County Council, the then highway authority, when Warneage Green was adopted as public highway. Those two routes have been removed from the revised working copy of the Definitive Map produced in July 2017.

- 4.3 A section of the route shown on the application plan (**Appendix 1**) between Points A and B is not included on the Order plan, attached as **Appendix 12**, as that length of path became a public footpath when the Swindon Borough Council Footpath WA25 Order 2017 was confirmed on 15 November 2017. That Order came into force on 3 January 2018 and a copy of the confirmation order notice and plan are attached as **Appendix 13**. An earlier proposal, shown on **Appendix 14**, attracted objections from Wanborough Parish Council, Neil Stalker and the Ramblers and was therefore abandoned.
- 4.4 The published Order received three objections from Wanborough Parish Council, Neil Stalker and Derek Williams. The initial letter from Wanborough Parish Council is dated 2 January 2018, with further correspondence dated 8 January 2018 and 24 April 2018. The three letters are attached as **Appendices 15, 16 and 17**. The objection letter from Neil Stalker is dated 11 January 2018 and is attached as **Appendix 18**. The objection letter from Derek Williams is dated 11 January 2018 and is attached as **Appendix 19**.
- 4.5 An email from Catherine Inskip was also received during the period for the receipt of representations about the Order. That email is in support of the Order and is attached as **Appendix 20**.
- 4.6 A list of the names and address of the authors of the objections and representation is attached as **Appendix 21**.

5.0 DETAILS OF OBJECTION AND CORRESPONDENCE FROM WANBOROUGH PARISH COUNCIL

5.1 In their letter of 2 January 2018 (**Appendix 15**) the Parish Council stated their objection to the Definitive Map being modified by the addition of the path between Points E-F and G-D as shown on the Order plan attached as **Appendix 12**. The reasons for this objection are that the fencing enclosing the route between Points E-F was only constructed in 2009 and there is no need to have two footpaths within a short distance of each other. With regard to the path between Points G-D, it is only because the developer has realigned the permissive path is it necessary to have this additional length of path.

5.2 In their letter of 8 January 2018 (**Appendix 16**) the Parish Council proposed modifications to the Order which would enable them to withdraw their objection. The modification would remove the sections of path between Points C-D-E-F and D-G, as shown on **Appendix 12**, and create a new section of path from Point C to The Marsh immediately adjacent to the boundary fence of one of the new houses.

5.3 With their letter of 24 April (**Appendix 17**) the Parish Council submitted evidence in relation to the Order comprising a variety of photographs, witness statements, historic maps and other correspondence.

5.3.1 The 11 aerial photographs are dated between 1999 and 2014 with most showing no clear evidence of a path across Honeyfield Farm (Points F-E **Appendix 12**) with some later photographs showing a fenced path and a stile. The extract from Google Streetview, dated 2010, is purported to show a locked gate across the path at Point C. The Parish Council suggest that the path in the Order has not existed for 20 years.

5.3.2 Two letters, or witness statements, from long standing residents of the village and a Wanborough allotment holder from Covingham who have used

the paths in the parish for many years confirm that there has never been a clear path between Points E-F (**Appendix 12**).

5.3.3 Eight maps, one dated 1878 but many undated, show a network of paths in the area of the Order the majority of which are already recorded on the Definitive Map. The section of path between Points A-C (**Appendix 12**) appears on a recent map and the Parish Council supports the addition of this path to the Definitive Map.

5.3.4 Within the letter, the Parish Council also mentions communication with previous Rights of Way Officers regarding paths across Honeyfield Farm and the permissive path, and its closure, across the area recently developed.

5.4 In conclusion the Parish Council state that the path between Points E-F (**Appendix 12**) has not been used for 20 years and object to that part of the Order but do not object to the path between Points A-B-C.

6.0 DETAILS OF OBJECTION FROM NEIL STALKER

6.1 In his letter with 13 attachments, (**Appendix 18**) Neil Stalker provided a timeline of events that have occurred since July 2008 when he bought Honeyfield Farm. Those events include clearing overgrowth, fencing paddocks and a race, creating a permissive footpath as the definitive route of Public Footpath 25 was obstructed on Honeyfield Farm and the adjacent property, when that definitive route was made available, and, when the permissive footpath was closed for moving livestock and the installation of a sewer.

6.2 The letter then proceeds to detail the grounds of Mr Stalker's objection which is summarised below.

6.2.1 In 2008 there were no routes identified on the ground due to overgrowth. Path users could not distinguish between the definitive route of Public Footpath 25 or the Order route.

6.2.2 The addition of a further public footpath very close to Public Footpath 25 will make the land ineffective for agriculture and have a negative impact on the business.

6.2.3 A number of properties are accessed via the track over which the section of path between Points D-G (**Appendix 12**) runs by virtue of existing property rights. Any evidence of use of this section of path from people accessing those properties should be discounted.

6.2.4 Prior to 2008 the land was used for horse livery and any evidence of use of the path from anyone accessing the land in connection with that business should be discounted.

6.2.5 Some historic statements regarding previous use of the path by some individuals should be discounted due to their previous interest in the land.

6.3 Mr Stalker then comments on a number of inconsistencies within the evidence.

6.3.1 The route map that accompanied the application (**Appendix 1**) does not show or relate to Public Footpath 25 and was created and distributed unofficially.

6.3.2 In 2008 the path was impassable due to overgrowth. The path was closed for four months when a sewer was installed. Since 2011 the path has been closed annually and grazed at other times. Due to the type of fencing used walkers would have had to lift dogs over the fence to use the path.

6.3.4 Signs have been prominently displayed since 2009 stating “caution, horses may bite” and “dogs to be kept on leads”. A 16 consecutive day period of closed circuit television recording from 2015 of the path shows no walkers using the path but a horse grazing the path.

6.4 Mr Stalker further states that the majority of the user evidence statements are of poor quality and contain inaccuracies. In addition, information made available online was incorrect and misinformation has been provided at public meetings.

6.5 In conclusion Mr Stalker wrote that the premise and accuracy of the application is questionable and the merit of the supporting evidence in the user evidence statements is at best untenable.

7.0 DETAILS OF OBJECTION FROM DEREK WILLIAMS

7.1 The objection letter from Mr Williams (**Appendix 19**) state that he only objects to the proposed footpath where it crosses the land owned by Mr and Mrs Stalker, between Points F-E-D-G on **Appendix 12**.

7.2 Mr Williams states that the map used as part of the user evidence statements does not include the definitive route of Public Footpath 25 and that the path walked by the claimants was Public Footpath 25.

7.3 Mr Williams then lists 8 pieces of evidence that supports his objection to the Order.

7.3.1 Aerial photographs from Google taken between 2002 and 2007 that do not show a path across Mr and Mrs Stalker’s land. The same photographs show fields and wire fencing which dispute permitted use of the land and the path.

7.3.2 Emails, in 2008, from Mrs A Ellis and Mr Enright, both previous Rights of Way Officers from Swindon Borough Council, regarding the temporary permissive use of the livestock race by the public whilst other footpaths were unavailable.

7.3.3 Photographic and written evidence from the council that clearly shows the disruption to the path whilst a mains sewer was laid between December 2010 and March 2011.

7.3.4 Closed circuit television footage for 15 consecutive days that shows a horse grazing the race.

7.3.5 The width of the livestock race was only ever 2.3 metres and not 3 metres and it was removed in February 2017 when access to the path was blocked.

7.3.6 A map attached to a letter, dated 11 June 2010, from Mrs A Ellis, Swindon Borough Council, to Mr Stalker shows Public Footpaths 23 and 25 but doesn't make any reference to any other paths across the land owned by Mr and Mrs Stalker.

7.3.7 The livestock race was constructed to enable Mr and Mrs Stalker to move their livestock around the farm safely and securely and there was never any intention for this route to become a public footpath. The stile was installed at the request of Mrs A Ellis of Swindon Borough Council whilst other footpaths were closed.

7.3.8 Mr and Mrs Stalker have verbally challenged trespassers on their land which can be corroborated by the clerk to Wanborough Parish Council and digital information. This evidence shows that there is an escalating campaign of harassment and abuse against Mr and Mrs Stalker.

7.4 Mr Williams then comments on the user evidence forms, which had previously been supplied in a redacted form to Mrs Stalker, and states that the evidence of unimpeded public use is insufficient to indicate presumed dedication as a public right of way.

7.4.1 PDF 114, from David Birley. Mr Birley could not have used the route between Points B-Y for 30 years on the plan attached to the application, **Appendix 1**, as the aerial photographs show that it has not existed for 30 years. The user relates to a sign and stile at Point A which was the end of Public Footpath 25. No signed map attached to form.

7.4.2 PDF 130, from A Bell. This evidence clearly relates to Public Footpath 25 and the recent housing development. No signed map attached to form.

7.4.3 PDF 717, from Ivor and Margaret Coles. Unsigned map attached to form but use clearly relates to between Points A-B (**Appendix 1**) and not across Mr and Mrs Stalker's land.

7.4.4 PDF 729, from John Boston. No map attached to form and no indication where Mr Boston walked.

7.4.5 PDF 025, from John Errington. No signed map attached to form, do not know the routes walked and could have been using Public Footpath 25. The aerial photographs dispute Mr Errington's evidence.

7.4.6 PDF 042, from Linda Cripps. No signed map attached to form, no evidence to show route used and could have been using Public Footpath 25

7.4.7 PDF 213, from Margaret Errington. No signed map attached to form. Section between Points B-Y (**Appendix 1**) hasn't existed for 59 years and wasn't accessible at other times. Mrs Errington could be referring to Public Footpath 25.

7.4.8 PDF 327 from Graham Finch and Susan Bruce. No signed map or reference to any map. Not clear which route is being referred to and could have been Public Footpath 25.

7.4.9 PDF 502, from Dave Griffiths-Gay. No signed map or reference to any map and Mr Griffiths-Gay could have been using Public Footpath 25 but reference to stile and horses grazing livestock race.

7.4.10 PDF 619, from Malcolm Hinton. Unsigned map attached to form with reference to cutting off corner but frequency and period of use would indicate use of Public Footpath 25.

7.4.11 PDF 912, from Catherine Inskip. Unsigned map attached to form but confusion over route used. Comments about developers and question over length of use of path

7.4.12 PDF 037, from Robert Inskip. Unsigned map attached to form but Mr Inskip has been using Public Footpath 25 with a question over length of use of path.

7.4.13 PDF 157, from Michael Pethick. No map attached to form and no clear evidence of route walked but likely to be Public Footpath 25.

7.4.14 PDF 240, from John Warr. No map attached to form and path use not regular, long term or as of right.

7.4.15 PDF 118, from Peter Waldron. No signed map attached to form and no reference to any points on map; usage indicates use of Public Footpath 25.

7.4.16 PDF 947, from John Sutton. No signed map attached to form and usage indicates use of Public Footpath 25.

7.4.17 PDF 749, from John Shirreff. No signed map attached to form and no reference to any points on map; usage indicates use of Public Footpath 25.

7.4.18 PDF 637, from Steve Savage. No signed map attached to form. Mr Savage has been using Public Footpath 25 and not path during ownership of Mr and Mrs Stalker.

7.4.19 PDF 356, from Stephen and Caroline Read. No signed map attached to form and no reference to points on any map; usage indicates use of Public Footpath 25.

7.5 Mr Williams concludes his letter with further considerations about the order making process and other communications.

8.0 COMMENTS ON REPRESENTATION

8.1 The representation from Catherine Inskip (**Appendix 20**) is in support of the Order. Mrs Inskip confirms her, and others, use of the signposted path over at least 20 years.

9.0 COUNCIL'S COMMENTS ON OBJECTIONS

9.1 Objections were received to the published Order from Wanborough Parish Council (**Appendices 15, 16 and 17**), Neil Stalker (**Appendix 18**) and Derek Williams (**Appendix 19**).

9.2 The objection from Wanborough Parish Council is summarised in Section 5 above.

9.3 Wanborough Parish Council are only objecting (**Appendix 15**) to two sections of the path becoming a public footpath; the sections between Points E-F and G-D (**Appendix 12**). Therefore it can be assumed that they consider the path between Points A-B-C-D-E is a public footpath.

- 9.4 In their reasons for the objection the Parish Council suggest that the path between Points E-F cannot be a public footpath as it hasn't been fenced for 20 years. Many, if not the majority, of public footpaths are unfenced and usually any requirement for fencing would be for land management and not highway purposes. Similarly the proximity of another public right of way or highway is not grounds for the unrecording of any further public routes.
- 9.5 The issue of the proposed numbering of the Order route raised by the Parish Council is covered in Paragraph 4.2 above.
- 9.6 The appendices attached to the Parish Council's letter dated 2 January 2018 (**Appendix 15**) provide useful evidence in support of the Order. Appendix 4, enlarged as Appendix 5, is an extract from the then working copy of the Definitive Map produced on an Ordnance Survey base map at a 1:10,000 scale. Those maps show the route between Points A-C (**Appendix 12**) but due to the scale of the mapping it is not possible to exactly reflect the Order route. Appendix 6 contains an email from Annie Ellis dated 6 August 2013 with an attached plan. Although the email and plan incorrectly refer to Public Footpath 25 as Public Footpath 23 the plan shows the Order route and the email states, in two paragraphs, that the Order route has been in use for over 20 years.
- 9.7 The letter from the Parish Council dated 8 January 2018 (**Appendix 16**) suggests modifications to the Order. It was explained to the clerk and other representatives from the Parish Council during a meeting with Martin Fry, Swindon Borough Council Rights of Way and Highway Information Manager, on 30 January 2018 that the order making authority has no power to modify a Definitive Map Modification Order; any such modifications can only be undertaken by the Secretary of State. Further a Definitive Map Modification Order is made on the discovery of evidence rather than the desirability or suitability of the route. Again Appendix 1 attached to the letter of 8 January 2018, produced in 2011, shows the Order route.

- 9.8 The 12 photographs attached to the Parish Council letter dated 24 April 2018 (**Appendix 17**) are of a mixture of qualities; some are duplicated whilst others are blurred because they have been enlarged beyond their normal resolution. Those aerial photographs that are not blurred show a field boundary to the west of the Order route and some also show another boundary to the east of the Order route. Those photographs do not show any evidence of Public Footpath 25 so it cannot be assumed that the Order route was not in use if there is no clear indication of other existing public footpaths. The Google photograph of a field gate at Point C (**Appendix 12**) does not show any fencing either side of the gate and none of the user evidence records a locked gate at this location and one records a gap. Overall it is impossible to establish from these photographs whether the Order route was unavailable to users; all of them show at least one fence line adjacent to the Order route between Points E-F.
- 9.9 The letter from the Parish Council dated 2 January 2018 states that "...the fenced footpath was constructed in 2009. ...". The letter from the Parish Council dated 24 April states in point 11 regarding a 2010 Google map "... showing a single fence across the field. ...". These points are contradictory and must cast doubt on the validity of the remainder of the photographic evidence.
- 9.10 The three witness statements attached to the Parish Council letter of 24 April 2018 (**Appendix 17**) do not generally relate to any accurate maps and so the routes described could be the Order route or other routes. May Archer writes about walking a footpath to Foxbridge to visit her grandparents but no public footpath leads to Foxbridge. David Fenn writes about walking up the track towards Foxbridge Farm which supports the evidence for the Order route between Points D-G (**Appendix 12**). He also adds that the Order route between Points A-B-C-D-G was first used in the 1950s when traffic increased and the road became dangerous to walk on. Mr Hughes states that he has walked across Honeyfield Farm for at least 30 years, and according to Neil Stalker in his letter of 11 January 2018 (**Appendix 18**) Public Footpath 25

was only made available to walkers in February 2017, therefore Mr Hughes must have been following the available route, the Order route. The maps included with these statements do not add any evidence to either case and one map relates to Marsh Farm and not the land crossed by the Order route.

- 9.11 The eight historic maps attached to the Parish Council letter of 24 April 2018 (**Appendix 17**) are of mixed use. The Parish Council states that the map attached as Appendix 3a to their letter shows "... an ancient footpath or byway from Upper Wanborough To Foxbridge Farm ..." which they have indicated with a red line. Today, nearly half of that route is public road, approximately a quarter is a public bridleway and approximately another quarter has no recorded public highway rights. However that route follows the drive to Honeyfield Farm and provides historical evidence for the route between Points D-G (**Appendix 12**). The maps attached to the Parish Council letter as Appendices 3b to 3g inclusive record features that were visible to surveyors when the maps were produced but do not indicate the status of any routes shown. Similarly the most recent map attached as Appendix 3h indicates that the Order route between Points A-B-C-D-G has existed for a period of time.
- 9.12 Contrary to the Parish Council's conclusion in their letter of 24 April 2018 (**Appendix 17**), the information contained within that letter and the attachments support the published Order; the aerial photographs show a defined route across Honeyfield Farm, the witness statements add further evidence to the existence of the Order route, and the Parish Council interpretation of an old map show public highway rights along the drive to Honeyfield Farm.
- 9.13 The objection from Neil Stalker (**Appendix 18**) is summarised in Section 6 above.
- 9.14 Mr Stalker suggests that use of the Order route would not have been possible in July 2008 and included a photograph of annual vegetation as Fig 7 with his

objection. It is suggested that the photograph was taken from the Order route near Point F (**Appendix 12**) and does not show the Order route. Irrespective of where the photograph was taken, annual vegetation growth is a regular problem on the public rights of way network and although it may inconvenience users it doesn't usually deter use of a path.

- 9.15 The application (**Appendix 2**) for the Order included an extract from an Ordnance Survey map stated in the attached letter from Chris Hinton to date from 1960. That plan clearly shows a double dashed line, labelled with F.P. along a similar route to the Order route. The Ordnance Survey 1941 Revision of the same map, which was surveyed in 1883 and revised in 1941, shows the same double dashed line and labelling as the map supplied by Chris Hinton. An extract from the Ordnance Survey 1941 Revision is attached as **Appendix 22**. Therefore a footpath route existed across the land that now forms part of Honeyfield Farm; it may have been overgrown when Mr Stalker bought the property but the Ordnance Survey maps show it existed from at least 1941.
- 9.16 The location of the closest other public right of way or the density of the path network are not factors that can be taken into account when a definitive map modification order is determined.
- 9.17 Although some of the individuals who have completed user evidence forms live in those properties stated by Mr Stalker as having existing access rights there is still considerable evidence from individuals living elsewhere of their long use of the Order route. The existing access rights would only affect the section of path between Points D-G (**Appendix 12**), the route described by Wanborough Parish Council as an historic highway, Paragraph 9.10 above.
- 9.18 Mr Stalker then comments on other aspects of the process. The map that accompanied the application (**Appendix 1**) was produced by the applicant and clearly shows the route of the claimed path. The closures of the Order route necessary for the installation of the sewer and for moving livestock were for land management purposes and not to interrupt the public use of the Order

route. The signs displayed since 2009 by Mr Stalker and the temporary diversion put in place by Mr Stalker during the sewer works all show his acceptance of the public use of the Order route.

- 9.19 Contrary to Mr Stalker's conclusion, the information contained within his objection letter (**Appendix 18**) and especially the appendices provide further evidence of his knowledge and acceptance of the public using the Order route. The signs and temporary diversion provided by Mr Stalker, illustrated in his Fig 3, and the emails from Annie Ellis, in his Fig 9, where it is stated a previous landowner unofficially diverted Public Footpath 25 over 20 years ago, both show the landowners acceptance of the public using the Order route.
- 9.20 The objection from Derek Williams (**Appendix 19**) is summarised in Section 7 above.
- 9.21 Mr Williams is only objecting (**Appendix 19**) to the section of the path on land owned by Mr and Mrs Stalker becoming a public footpath; the sections between Points F-E-D and G-D (**Appendix 12**). Therefore it can be assumed that he considers the path between Points A-B-C-D is a public footpath.
- 9.22 Mr Williams states that he has evidence in the form of photographs and emails that support his opposition to the published Order. As that evidence was not included with his objection it is difficult to comment on the validity or otherwise of that evidence. However most of the documents have been submitted by the other objectors and have already been considered in the relevant paragraphs above.
- 9.23 Contrary to the view expressed by Mr Williams there are no statutory requirements for a plan, signed or otherwise, to be attached to a user evidence form. The 19 user evidence forms, signed by 23 individuals, submitted with the application for this path, clearly show that the Order route has been used for at least 60 years. In addition the extract of the Ordnance

Survey map dated 1960 contained within the application for this path shows a path on an almost identical alignment to the Order route between Points A-B-C-D-E-F (**Appendix 12**).

- 9.24 Comments relating to the planning history and subsequent development of the land crossed by the Order route between Points A-B-C (**Appendix 1**) are not matters that can be taken into account when the published Order is determined.
- 9.25 The objections received to the published Order from Wanborough Parish Council (**Appendices 15, 16 and 17**) and Derek Williams (**Appendix 19**) state that they are not objecting to the Order route between Points A-B-C (**Appendix 12**). The objection from Neil Stalker (**Appendix 18**) only contains information regarding the routes between Points C-D-E-F and D-G. The landowner of the route between Points A-B-C, Bower Mapson Homes Ltd, did not object to the published Order. The evidence from the 23 individuals who provided evidence and the letter from Robert Fisher (**Appendix 4**) clearly show that this section of the Order route has been used as a public path for over 20 years. The Ordnance Survey map dated 1960 contained within the application for this path (**Appendix 2**) and the Ordnance Survey 1941 Revision (**Appendix 22**) both show a path has physically existed in this location for many years

10.0 PERMISSIVE PATHS

- 10.1 The Order route has frequently been referred to as a permissive path. A permissive path is a path which the landowner permits the public to use with no intention of it becoming a public right of way. Unofficial diversions of public rights of way made by landowners can be regarded as permissive paths but those paths can become public rights of way.
- 10.2 Landowners can prevent a permissive path from becoming a public path in a number of ways.

10.2.1 The path can be subject to a permissive path agreement or licence between the landowner and highway authority which can state the conditions under which the public can use the path.

10.2.2 There are procedures in section 31(6) Highways Act 1980 whereby a landowner can deposit a map and statement with the appropriate council to show that there is or has been no intention on the part of the landowner to dedicate any additional public rights of way over a piece of land.

10.2.3 Notices can be erected and maintained to inform the public that they have no right to use the path.

10.2.4 The path can be closed on an annual basis to interrupt the public use of the path by installing a barrier or locking a gate. However this action has been considered on several occasions by the courts who have concluded that this action does not always constitute an interruption but is dependent on the circumstances.

10.3 With regard to the Order route neither of the affected landowners has entered into a permissive path agreement or deposited a map and statement under section 31(6) Highways Act 1980 with the Borough Council.

10.4 Mr Stalker in his objection (**Appendix 18**) has included a photograph at Fig 3 which shows notices stating “caution horses may bite” and “dogs to be kept on a lead”. He states that these were displayed prominently from 2009 to February 2017. The photograph also shows a notice stating “path temporarily closed, follow diversion”. All of these notices provided information for the public who have used the Order route. No one has provided any evidence that any notices have been displayed on the Order route stating it is either a permissive path or that the use of the path is at the landowners discretion or that the public has no right to use it.

10.5 Although the Order route has frequently been described as a permissive path no evidence has been provided by any supporter or objector that shows the use was by permission and not as of right. The landowners for the Order route between Points E-F (**Appendix 12**) provided a stile at Point E to help walkers use the route, displayed notices at Point E to inform walkers of their horses' eating habits, and provided diversion routes when their works were obstructing the Order route.

11.0 HOW THE PUBLISHED ORDER MEETS THE RELEVANT CRITERIA

11.1 The application for this path (**Appendix 2**) was a claim of deemed dedication under section 31 Highways Act 1980. It was based on over 20 years evidence of the use of the route by the general public. The relevant subsections of section 31 are:

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right 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.

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

(3) Where the owner of the land over which any such way as aforesaid passes

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

*(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,
the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

- 11.2 The key text to consider in the above sub sections are “actually enjoyed by the public”, “as of right”, “without interruption”, “for a full period of 20 years”, “no intention during that period to dedicate it”, “the way is brought into question”, and, “a notice inconsistent with the dedication of the way as a highway”.
- 11.3 The application (**Appendix 2**) contained 19 user evidence forms signed by 23 individuals, 12 of those individuals gave the same 6 addresses and all are located within the same two postcode areas. However the Definitive Map Orders: Consistency Guidelines published by The Planning Inspectorate quotes from *R v Southampton (Inhabitants) 1887* where Coleridge LJ said that “*user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.*” Therefore the user evidence forms show that the Order route has been enjoyed by the public.
- 11.4 The common law definition of “as of right” is that the use of a path has to be without force, secrecy or permission (‘*nec vi, nec clam, nec precario*’). None of the evidence on the user evidence forms or provided by the objectors mentions anyone requiring the use of force, by for example breaking a lock or cutting barbed wire, to enable the Order route to be used. The owners of the land crossed by the Order route were aware that the public were using the route; Mr and Mrs Stalker provided a stile at Point E (**Appendix 12**) and displayed information notices for walkers and it is alleged that the previous owner of the whole Order route, Gerald Sadler, encouraged use of the route (**Appendix 4**). Although the objectors refer to the Order route as a permissive route, which has been considered fully in Section 10 above, the users of the Order route were not given permission to use the route and did not know they

were using the route with permission. The Order route was used without force, secrecy or permission.

- 11.5 Mr Stalker in his objection (**Appendix 18**) states that the Order route between Points F-E (**Appendix 12**) has been routinely closed for works and animal movements to take place. Those closures were put in place for animal husbandry or land management reasons and not to interrupt the public use of the Order route. Mr Stalker has confirmed that he provided an alternative route for walkers whenever possible, as shown in **Appendix 18**, Fig 3.
- 11.6 The Planning Inspectorate in their Rights of Way Advice Note 15, issued primarily to deal with temporary closures of paths during periods of foot and mouth disease, state at paragraph 8:
- “Over a period of 20 years or more there may well be periods when, for a variety of reasons, a way has not been used. In cases where a landowner’s ability to dedicate has not been removed it would be reasonable for an Inspector to take the view that, in a period of 20 years or more, periods of non-use of a way may occur.”*
- 11.7 Mr and Mrs Stalker have owned Honeyfield Farm when the Order route between Points E-F (**Appendix 12**) has been closed for a length of time but they have provided an alternative route. The public who have provided evidence of use of the Order route have not mentioned any interruptions to their use of the path, possibly because alternative routes have been provided by the landowner.
- 11.8 The user evidence forms submitted as part of the application (**Appendix 2**) show that the Order route has been used by the public since 1957. The user evidence forms signed by 13 individuals state that they used the Order route for a 20 year period between 1997 and 2017; 11 individuals used the Order route prior to that 20 year period and a further 6 individuals have used the Order route during that 20 year period for at least 13 years. The witness

statements provided by the Wanborough Parish Council attached to their letter of 24 April 2018 (**Appendix 17**) provide further evidence of the long use of the Order route. All of the user evidence provided by the applicant and the Parish Council show the Order route has been used for a full period of 20 years.

11.9 None of the owners of the land crossed by the Order route have taken any actions to prevent the dedication of the Order route as a public footpath either before or during the relevant 20 year period.

11.10 The use of the Order route was brought into question in the first half of 2017. In early 2017 Swindon Borough Council supplied Mr Stalker with two pedestrian gates to install on Public Footpath 25. Once those gates had been installed the stile at Point E (**Appendix 12**) was removed. At a similar time a previous gap in the fencing at Point C was closed. The Order route was then obstructed by fencing at Points C and E.

11.11 Alternatively it could be argued that the installation of the sewer was the action that brought the use of the path into question which according to Mr Stalker's objection letter (**Appendix 18**) occurred between 1 December 2010 and 1 March 2011. However the Definitive Map Orders: Consistency Guidelines published by The Planning Inspectorate quotes from Dyson J's interpretation of Denning LJ's judgement in *Fairey v Southampton County Council 1956* in *R v SSETR ex parte Dorset County Council 1999*:

“Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway.”

Whilst the sewer was installed the landowner did not challenge the public using the Order route but condoned the use by providing a temporary alternative route.

11.12 No evidence has been provided that anyone has displayed a notice which was inconsistent with the dedication of the Order route as a public highway. The only notices displayed on the Order route support the dedication of the route as a public highway.

11.13 The evidence provided to the Council by the applicant and the objectors to the published Order show that the public have enjoyed the Order route as of right and without any interruption for more than 20 years until that right was brought into question in early 2017. At no time during that 20 year period were any notices displayed on the Order route inconsistent with the status of the route as a public footpath and no action was taken to prevent the route being dedicated as public footpath.

12.0 DEDICATION AT COMMON LAW

12.1 Although the Council considers it has clearly demonstrated above how the legislative tests have been met to enable the Order to be confirmed it is also necessary to consider the dedication of the route at common law.

12.2 At common law there has never been a fixed minimum period of use of a route to establish dedication. If a clear intention to dedicate can be shown a short period of time has been held to be sufficient; a path through a newly created park became a highway after only four years of use.

12.3 There is an important difference in the burden of proof between a claim under section 31 Highways Act 1980 and a dedication at common law. The Definitive Map Orders: Consistency Guidelines published by The Planning Inspectorate quotes from Denning LJ in *Fairey v Southampton County Council* 1956:

“...reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right ... the legal burden is on the landowner to refute it.”

- 12.4 During their ownership of the Order route between Points E-F (**Appendix 12**) Mr and Mrs Stalker have accepted and allowed the public to use the route. They have also encouraged the public to use the route by the construction of a stile at Point E, displaying information notices for the public with regard to horses and dogs, and, provided temporary alternative routes when their land management activities affected the Order route.
- 12.5 None of the landowners affected by the proposal to record an additional public footpath on the Definitive Map between Points A-B-C-D-E-F and D-G (**Appendix 12**) have provided any evidence that the Order route could not have been dedicated.

13.0 SUMMARY

- 13.1 In response to receiving an application to modify the Definitive Map and Statement by recording a footpath, supported by user evidence and other documents, the Borough Council undertook a consultation exercise, which received an objection from one of the affected landowners. The evidence in the Council's possession suggests that the footpath is reasonably alleged to exist.
- 13.2 The resulting legal order attracted three objections, from the local parish council, one of the affected landowners and another individual, and one representation.
- 13.3 The Council considers that the evidence included in the initial application and objections to the legal order prove that the path has been enjoyed by the public as of right without interruption for more than 20 years until 2017 during which time there was no evidence of any intention not to dedicate it.

14.0 CONCLUSION

- 14.1 In view of the reasons set out, the Council respectfully requests that the Secretary of State confirms the Order to add the path to the Definitive Map and Statement.

LIST OF APPENDICES

- 1 Plan attached to application for path to be added to Definitive Map and Statement
- 2 Application for path to be added to Definitive Map and Statement
- 3 Summary of user evidence including names and addresses of users
- 4 Letter from Robert Fisher dated 12 May 2017
- 5 Informal consultation plan
- 6 Objection letter from Mr and Mrs Stalker received 4 August 2017
- 7 Temporary closure notice for Public Footpath 25 Wanborough
- 8 Definitive Map Modification Order made 22 November 2017
- 9 Newspaper and site notices for Definitive Map Modification Order
- 10 Extract from Highworth Rural District Definitive Map, relevant date 1 September 1958
- 11 Extract from Wanborough Parish Survey plan
- 12 Plan from Definitive Map Modification Order made 22 November 2017
- 13 Swindon Borough Council Footpath WA25 Order 2017 confirmation notice and plan
- 14 Original diversion proposal for Public Footpath WA25
- 15 Objection letter from Wanborough Parish Council dated 2 January 2018
- 16 Objection letter from Wanborough Parish Council dated 8 January 2018
- 17 Objection letter from Wanborough Parish Council dated 24 April 2018
- 18 Objection letter from Neil Stalker dated 11 January 2018
- 19 Objection letter from Derek Williams dated 11 January 2018
- 20 Representation from Catherine Inskip dated 9 January 2018
- 21 Names and addresses of authors of objections and representations
- 22 Extract from Ordnance Survey map 1941 Revision