

Agenda item:

# Regulatory Committee

6

## Dorset County Council



Date of Meeting	30 July 2015
Officer	Director for Environment and the Economy
Subject of Report	<b>Application for a definitive map and statement modification order to add a footpath from Mill Lane to New Close, Bourton</b>
Executive Summary	In response to an application to add a footpath to the definitive map and statement this report considers the evidence relating to the status of the route.
Impact Assessment:	Equalities Impact Assessment: An Equalities Impact Assessment is not a material consideration in considering this application.
	Use of Evidence:  The applicant submitted documentary evidence in support of their application.  Documentary evidence has also been researched from sources such as the Dorset History Centre, and the National Archives.  A full consultation exercise was carried out in July 2014, which involved landowners, user groups, local councils, those affected and anyone who had already contacted Dorset County Council regarding this application. In addition notices explaining the application were erected on site.  Twelve user evidence forms from users of the claimed route were submitted during the investigation. Any relevant evidence provided has been discussed in this report.

	<p><b>Budget:</b></p> <p>Any financial implications arising from this application are not material considerations and should not be taken into account in determining the matter.</p> <p><b>Risk Assessment:</b></p> <p>As the subject matter of this report is the determination of a definitive map modification order application the County Council's approved Risk Assessment Methodology has not been applied.</p> <p><b>Other Implications:</b></p> <p>None</p>
<p><b>Recommendation</b></p>	<p>That the application be refused.</p>
<p><b>Reason for Recommendation</b></p>	<p>The available evidence shows, on balance, that the claimed right of way does not subsist nor can be reasonably alleged to subsist.</p> <p>Decisions on applications for definitive map modification orders ensure that changes to the network of public rights of way comply with the legal requirements and achieves the corporate plan objectives of:</p> <p><b>Enabling Economic Growth</b></p> <ul style="list-style-type: none"> <li>• Work in partnership to ensure the good management of our natural and historic environment</li> <li>• Work with partners and communities to maintain cycle paths, rights of way and disabled access</li> <li>• Encourage tourism to our unique county</li> <li>• Support community transport schemes</li> <li>• Ensure good management of our environmental and historic assets and heritage</li> </ul> <p><b>Promoting Health, Wellbeing and Safeguarding</b></p> <ul style="list-style-type: none"> <li>• Actively promote physical activity and sport</li> <li>• Develop and maintain safe, convenient, efficient and attractive transport and green infrastructure that is conducive to cycling and walking</li> <li>• Improve the provision of, and access to, green, open spaces close to where people live</li> </ul>
<p><b>Appendices</b></p>	<ol style="list-style-type: none"> <li>1 - Drawing 14/20/1</li> <li>2 - Law</li> <li>3 - Documentary evidence <ul style="list-style-type: none"> <li>• Table of documentary evidence</li> <li>• Extracts from key documents</li> </ul> </li> </ol>

	<ul style="list-style-type: none"><li>▪ 1975 Ordnance Survey 1:2500 (Dorset)</li></ul> <p>4 - User evidence</p> <ul style="list-style-type: none"><li>• Table of user evidence</li><li>• Charts to show periods and level of use</li></ul>
Background Papers	<p>The file of the Director for Environment and the Economy (ref. RW/T489).</p> <p>Most of the original historic maps referred to are in the custody of the Dorset History Centre, except for the Finance Act maps, which are at the National Archives, Kew.</p> <p>Copies (or photographs) of the documentary evidence can be found on the case file RW/T489, which will be available to view at County Hall during office hours.</p>
Report Originator and Contact	<p>Name: Phil Hobson Rights of Way Officer</p> <p>Tel: (01305) 221562 Email: p.c.hobson@dorsetcc.gov.uk</p>

## 1 Background

- 1.1 An application to add a footpath as shown between points A – B – B1 – C – D on Drawing 14/20/1 (Appendix 1) was made by Bourton Parish Council on 18 April 2009.
- 1.2 The route claimed commences from its junction with Mill Lane, Bourton, shown as point A, leading through a gap in a stock fence, approximately 1.5 metres wide, before continuing south east then south west along a well-defined path approximately 75 centimetres wide through a small area of scrub and grassland towards point B.
- 1.3 At point B there is a gap in a post and wire fence approximately 3 metres wide. From B the route continues south east along a tarmac pathway approximately 2 metres wide before entering into a residential parking area at point B1 and then continuing south east to point C.
- 1.4 At point C the route turns south south west, following the access road to the parking area, this being approximately 3.2 metres wide and the surface consisting of tarmac, before reaching its termination point at point D, its junction with New Close, Bourton.
- 1.5 The land situated between points A and B is owned and registered to Mr J L Freeman. The land between points B and D is unregistered but was owned by Williams Brothers (Shaftesbury) Limited, subsequently dissolved, before then passing to the Crown.
- 1.6 On 18 March 2008 the Treasury Solicitor, as nominee for the Crown (in whom the property and rights of the Company vested when the Company was dissolved), disclaimed the Crown's title in the property. The effect of this disclaimer was that the freehold interest was extinguished and the land escheats to the Crown (the property reverts to the Crown). It is then open for the Crown Estate to deal with the property.
- 1.7 The applicant also notified all the residents of New Close, Bourton as to the submission of the application.

## 2 Law

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

## 3 Documentary evidence (Appendix 3) (copies available in the case file RW/T489)

- 3.1 A table of all the documentary evidence considered during this investigation is contained within Appendix 3. Extracts from the key documents are also attached.

## 4 User evidence (Appendix 4) (copies available in the case file RW/T489)

- 4.1 A table of user evidence summarised from witness evidence forms together with charts showing their periods and level of use form Appendix 4. An analysis of the user evidence is contained at paragraph 9 of this report.

5 **Additional evidence in support of the application** (copies available in the case file RW/T489)

5.1 No additional evidence has been submitted in support of this application.

6 **Evidence opposing the application** (copies available in the case file RW/T489)

6.1 Three submissions were received following the application and 13 following the consultation, in opposition to the application.

Name	Comments
Mr J Freeman	22 April 2009 - Owner of land between points A and B, objects to proposal.
Turner & Co Solicitors	23 June 2009 - Confirms Mr Freeman's objection, noting that Mr Freeman has owned the land since 1991 and that there had been several occurrences of trespass on the land when the fences had been cut and removed.
Mr J Freeman	30 September 2009 - Encloses copy of letter sent to applicant rebutting the claim.
Mr J Freeman	4 August 2014 - Confirms ownership of land (A – B), states that “there has never been a footpath on this site”. He created a gap in the hedge on Mill Lane and fitted a gate. “The gate was quickly stolen” and was replaced with fencing, that has been cut on several occasions.
Mr J Freeman	18 August 2014 - Provides further information that when the gate was stolen he also erected a notice “making it clear that this was private land”.
Turner & Co Solicitors	18 August 2014 - On behalf of Mr Freeman provides land registry title and plan of ownership (for A – B) and confirms their client's objection to proposal.
K Mole	20 September 2014 - She worked for Mr and Mrs Freeman 1993 – 2000. Her duties included helping move sheep into the paddock on Mill Lane. She printed and laminated ‘private property’ signs and erected them on the fence at Mill Lane in response to the cutting of the fences. During this time there was “never any evidence of a footpath through this area”.
Mr R Edmunds	30 September 2014 - He worked for Mr Freeman. His duties included the fencing and re-fencing of the land in Mill Lane. Concurs with details and events described in Mr Freeman's letter of 18 August 2014.
Mrs J Lock	29 September 2014 - States that she was born in Bourton in 1976. From the age of 8 she helped with the sheep, including moving them to and from different locations, including the land at Mill Lane. She states that “there was never a footpath going through this paddock” but was aware that the fences had been cut through.
A Smith	3 October 2014 – He carried out “re-fencing of the land to replace area where it had been maliciously cut down” on several occasions in 2003 and 2004/5. He says “The area was pretty impassable” and “there was never a footpath”.

Name	Comments
Mr R Bond	26 October 2014 - Mr Bond states that he has lived in the area for most of his life and knows the area well. He has "never been aware of any footpath" across the land but can confirm that he repaired vandalised fences in 1999 and 2002.
Mr J Freeman	30 October 2014 - Confirms date of purchase of land was 1991 and reiterates comments made in previous correspondence, enclosing an extract from an Ordnance Survey map of 1935 that does not identify a path across the land.
Mr A Traves	14 November 2014 – Made a planning application on Mr and Mrs Freeman’s behalf in 2002. “At no point was there any mention or evidence of a footpath and, in the reasons for refusal, there is also no mention of it”. The land was fenced “immediately on acquisition” and used to keep some of their sheep.
K Mole	17 November 2014 – States that she “started working at Bourton Mill in 1993 and.....this land was fully fenced and enclosed suitable to contain livestock”.
Mr R Edmunds	29 November 2014 - States that he lived at Penselwood from 1984 to 1999. Used Mill Lane often and land was fenced in the early 1990s long before he started working for Freeman Foods in 1995.

**7 Other submissions received** (copies available in the case file RW/T489)

7.1 A further five submissions related to the application were also received

Name	Comments
Burges Salmon (Crown Estate)	20 October 2014 - Explains the Crown’s position in relation to the land.
Mrs Peers	By telephone - Information about the fences which she believes may have been removed by users of the route in or around 1998.
C Shoopman (British Horse Society)	No evidence for or against the claim.
C Plnder (Senior Archaeologist)	No recorded archaeological finds or features.
Southern Gas Networks	No apparatus in the area.

**8 Analysis of documentary evidence**

**Inclosure Award**

8.1 Although the area was subject to an early enclosure (18<sup>th</sup> Century) no surviving records have yet been discovered.

### **Tithe Apportionment & Plan**

8.2 At the time of the **1841 Tithe Apportionment**, Bourton was a hamlet within the parish of Gillingham. The accompanying plan clearly depicts Mill Lane. The area of the claim is within an apportionment numbered 1813 and is described as being a meadow. There is no visible evidence or any other suggestion of the existence of a path or way across the site.

- This evidence provides no support to the application.

### **Finance Act 1910**

8.3 The claimed route would have passed through Hereditament 64. However, no route is shown on the Finance Act plan and no deductions were granted in respect of rights of way for Hereditament 64.

8.4 It should be borne in mind that there were no penalties for not acknowledging the existence of a public right of way. Conversely, a landowner deliberately attempting to reduce their potential tax liability by falsely claiming that a right of way existed over their land faced severe penalties.

- Therefore, as this evidence provides nothing in support of or against the application it is considered as being neutral in this instance.

### **Ordnance Survey maps**

8.5 The **Ordnance Survey drawings**, which were made in preparation for the publication of the First Edition of the 1 inch:1 mile scale map, are drawn at a scale of 2 inches:1 mile and therefore generally contain more detail than the later 1 inch:1 mile scale maps. The drawing that includes the area of Bourton parish was completed in **1808/09**. The claimed route is not shown.

8.6 A number of other **Ordnance Survey Maps** have been examined at a variety of scales and covering the period **1811 to 1993**. Although the later of these extracts (1993) shows the development of New Close, none of the maps depict the claimed route.

- Ordnance Survey Maps provide evidence as to the physical characteristics on the ground at the date of the map. However, in this instance they provide no support to the claim.

### **Parish Survey and County Council rights of way maps and records**

8.7 The **Bourton Parish Survey** of rights of way was completed in 1959 and does not include the claimed route.

8.8 The **1959 draft map** for the Bourton area, **1964 provisional map**, **1967 first definitive map** and the **current definitive map** (sealed **1989**) do not record the claimed route. The claimed route has not been the subject of any claim since.

- This evidence suggests that the route does not appear to have been the subject of any formal investigation as to whether it may hold public rights since the implementation of the **National Parks and Access to the Countryside Act 1949**.

### Planning Application 1974

- 8.9 On 14 November 1974, under the Town and Country Planning Act 1971, North Dorset District Council approved the details of reserved matters in respect of an application for the development of New Close, Bourton. The document reveals that one of the conditions of approval was that ***“the area of recreation space indicated on the plan shall be laid out to the full satisfaction of the Local Planning Authority before any of the dwellings are occupied”***.
- 8.10 The accompanying plan reveals that the land over which that part of the claimed route as shown from A to B runs was annotated as an Open Play Area and presumably was the area subject to the condition detailed in paragraph 8.9 above.

### Planning Application Appeal 1990

- 8.11 On 5 December 1990 an Inspector appointed by the Secretary of State determined an appeal made by **Williams Bros (Shaftesbury)** against the refusal by **North Dorset District Council** of an application for the construction of a house and garage at Mill Lane, Bourton.
- 8.12 At paragraph 6 of his decision letter the Inspector notes that he understood ***“when permission was given for the development of Mill Close, a condition was imposed requiring that the site, the subject of this appeal, be laid out and landscaped and so maintained as a recreation and amenity space. It appears that the requirements of this condition were never fulfilled, presumably because the developer considered the condition to be a sop to the then current planning desiderata”***.
- 8.13 In dismissing the appeal, at paragraph 9 of his decision letter the Inspector concludes that the development ***“would have an adverse effect on the character of the area as it exists and this adverse effect would be an even greater contrast from the character of the area that would exist if the condition imposed by the planning permission granted in 1976 had been implemented”***.
- The evidence provided by these planning documents demonstrates that the area containing the claimed route was originally designated as an area of recreational space. Therefore, as this evidence provides nothing in support of or against the application it is considered as being neutral in this instance.

### Aerial Photographs

- 8.14 Aerial photographs dating from **1947, 1972, 1997, 2005 and 2009** have been examined. The photographs from 1947 and 1972 show the area as it was prior to the development of the New Close estate, namely a pasture field. Due to their rather poor quality the photographs from 1997 lose detail at high magnifications. On those from 2005 and 2009 the section from B to D is visible but that from A to B is covered by trees.
- It is considered that the aerial photographs provide no assistance in determining whether that part of the route as shown from point A to B existed or whether this land was fenced.



### Register of Title

- 8.15 A recent land registry search revealed that the land as shown between points A to B was conveyed to the present owner, **Mr J Freeman**, from **Williams Brothers (Shaftesbury) Limited** on 17 September 1991. The remainder of the claimed route as shown between point B and D was unregistered.
- 8.16 A letter provided by the **Bourton Parish Council** from the **Treasury Solicitor's Office** and dated 23 March 2009 refers to the unregistered land (B to D), explaining that on the dissolution of **Williams Brothers (Shaftesbury) Limited** on 27 January 1998, the assets of the company were vested to the Treasury Solicitor. The Treasury Solicitor subsequently disclaimed the Crown's title (if any) in the property, the effect of which was to extinguish the freehold interest, the land then reverting to the **Crown Estate**.
- This evidence demonstrates that five of the user witnesses, Mrs Love, Mr Watts, Mr Martin, Miss Martin and Mrs Hounsell each own or have the right to use a garage in the garage block and therefore enjoy private rights over that part of the route from B1 to D. Consequently their evidence of use of this part of the route cannot be taken into consideration in determining the application.
  - It should be noted that any person owning or renting a garage on this site enjoys a private right over the land from B1 to D.

### Analysis of user evidence supporting the application

- 9.1 A total of 13 forms of user evidence were submitted by 12 witnesses (one individual completed two forms). Several witnesses were contacted by telephone to clarify some of the details they provided, in particular to the date the fences may have been first erected.
- 9.2 All of the witnesses claim to have used the whole of the route A to D as shown on Drawing 14/20/1 (Appendix 1).
- 9.3 All of the users state that their use of the route was for pleasure and that they were never challenged. The majority of use was on foot although two witnesses state that they used the route on foot and with a bicycle and three witnesses reported seeing others use it with bicycles. Of the 12 user witnesses, seven stated that there were no stiles, gates, notices or other obstructions. However, five witnesses, whilst stating there were no stiles, gates or notices, do state that a fence had been erected but was subsequently removed by users of the route. The majority of witnesses believe that the land is 'open space', belonging to or owned by the residents of New Close. One witness believes that the land is owned by Mr Freeman.
- 9.4 The earliest date of use on foot is 1979 and the last date of use is 2009, encompassing a period of 30 years in total. The frequency of use varies from daily to once a month. Four witnesses claim to have used the route on a daily basis.

## 10 Analysis of evidence in support of the application

- 10.1 **Bourton Parish Council** (the applicant) provided a number of documents in support of the claim, several of which have been summarised above in paragraphs 8.9 to 8.13. In addition they provided a covering letter (received in April 2009) clarifying some of the points raised. They refer to the 'land' as being that land between New Close and Mill Lane. They note the following:
- (a) The footpath runs across land forming part of the New Close development, which was subject to planning conditions.
    - This is summarised in paragraphs 8.9, 8.12 and 8.13 above.
  - (b) There is an outstanding planning application, Ref 2/2009/0165. The applicant's agent has signed a certificate to say that the applicant owns the land. The application has been refused.
    - The application was made on 2 February 2009 and was refused. An appeal against this decision was heard and dismissed on 15 March 2009.
  - (c) The Parish Council believes that the ownership of the land is not clear. The land is currently unregistered and after the development company went bankrupt the land then passed to the Crown and the Parish Council have declared an interest on behalf of the residents of New Close.
    - Land Registry documents reveal that between points A and B the land is owned by Mr J Freeman (conveyed on 17 September 1991). Between points B and D it is currently unregistered but vested with the Crown Estate (18 March 2009).
  - (d) The Parish Council believes that the fence referred to by a number of the witnesses was not erected by the landowner (the Crown) and therefore should not be viewed as an interruption to access to the footpath.
    - The fences erected at points A and B were erected by or on behalf of the landowner Mr J Freeman. Mr Freeman believes that these fences were erected shortly after the purchase of the property in 1991.
  - (e) The path has been in use since the development was built in the 1970s and remains in daily use.
    - The witnesses claim to have used the route, some on a daily basis, the earliest date of use being 1979. However, there is evidence that the landowner (between points A and B) took steps to exclude members of the public from his property by erecting fences. These, as some of the witnesses acknowledge, were subsequently removed by the users of the route. Nevertheless, they may be considered as a challenge to the use of the route by the public.
  - (f) As the ownership of the land is in doubt the Parish Council has notified all the residents of New Close, the planning applicant's Agent and the Crown Estate, regarding the application for a footpath.

- As noted in paragraph 10.1(c) above there does not appear to be any doubt as to the ownership of the affected land.

## 11 Analysis of evidence opposing the application

- 11.1 On 23 June 2009 in a letter submitted by **Alan Turner & Co (Solicitors)** on behalf of the landowner it was stated that **Mr Freeman** had owned the property since 1991, the land being used for the keeping of stock and being fenced since that time. They further state that on several occasions local residents have trespassed on the land and cut and removed the fencing surrounding the site. Mr Freeman has never consented to the use of the land by the public and objects to the application. On 18 August 2014 they provided a copy of Mr Freeman's Land Registry title and confirmed his objection to the claim.
- 11.2 **Mr Freeman** (landowner A to B) has made several submissions in response to both the application and the consultation. The first of these was made on 30 September 2009 the last on August 18 2014. The information he has provided and the issues he has raised are as follows.
- (a) Mr Freeman submitted a letter attaching a copy of a letter sent on his behalf by his Solicitor to the Bourton Parish Council. The letter to the Parish Council reiterates the points made in paragraph 11.1 above. Mr Freeman notes that there is an existing tarmac path continuing north west from point B that would, with the provision of a gateway, exit onto Mill Lane. He believes that it was intended by the developer of the estate that this would provide access to Mill Lane for local residents.
- (b) On 4 August 2014 Mr Freeman submitted a letter in which he stated that there had never been a footpath on the site (A – B) and that he created an opening in the hedge and fitted a gate (at point A) to enable the movement of sheep across the road. This gate was 'stolen' and he subsequently erected at least three wire fences, all of which were cut down.
- (c) On 18 August 2014 Mr Freeman submitted a further letter with additional details. He first fenced the land in 1991 and initially used the field as a ram paddock, installing a gate at point A. This gate was stolen and the sheep escaped into Mill Lane. He erected a notice stating that the land was private and replaced the gate with a wooden pallet. The pallet was subsequently removed by somebody and the fence at the top (at point B) pushed down. Repairs to the fence were made by Mr T Sutton and Mr R Edmunds and three years later the Parish Council requested that he consider giving the land to the Parish. Mr Freeman declined the invitation. Mr Freeman states that the fence has been repaired or replaced on four occasions, being originally built by himself and Mr Sutton, repaired by Mr Edmunds and in 2002 the fence replaced with pig fencing by Mr Bond. This was again cut down and Mr A Smith carried out more repairs in 2003/04.

- 11.3 On 20 September and 17 November 2014 **Kerry Mole**, who worked for Mr Freeman from 1993 to 2000, submitted letters stating that during her employment she helped to move sheep into the small paddock (A – B) and on many occasions printed and laminated signs that were affixed to the fence saying it was private property. During the last few years of her employment the fences were cut and the gate removed, she presumed by local people. Until the time this “vandalism” commenced she states that there was no evidence of a footpath through the area.
- 11.4 On 29 September 2014 **Mrs J Lock** submitted a letter in which she explained that from the age of 8 (1984) she would go to Mr Freeman’s house to meet her cousin, who worked there looking after the sheep and the house and grounds. Mrs Lock helped with the sheep, including moving them to and from the land in Mill Lane (A – B). Mrs Lock stated that “there was never a footpath going through this paddock” and she believes that, as the paddock was used for holding Black Welsh Mountain Rams, people supposedly using the path would have complained. She also stated that she was aware that the fences had been cut through.
- 11.5 On 30 September 2014 **Mr R Edmunds** wrote confirming that he worked for Mr Freeman and, amongst other duties, fenced and re-fenced the land in Mill Lane. He had read Mr Freeman’s letter of the 18 August and agrees entirely with his description of events and confirms that there was never any sign of a footpath through the land.
- (a) On 29 November Mr R Edmunds submitted a further letter in which he confirmed that he had lived at Penselwood from 1984 to 1999. He states that he used Mill Lane on many occasions and the land (subject to the application) was fenced in the early 1990s, being in place long before he started work at Freeman Foods Ltd in 1995.
- 11.6 On 3 October 2014 **Mr A Smith** e-mailed to confirm that he did re-fence the land where it had been “maliciously” cut in 2003 and again in 2004/05, making three repairs in total. He stated that the area was impassable as it was filled with tree cuttings and in his opinion “there was never a footpath”.
- 11.7 On 26 October 2014 **Mr R Bond** wrote confirming that he had undertaken work on a piece of land at Mill Lane at the request of the owner, Mr Freeman. Mr Bond confirms that this involved repairs to a wire fence that had been vandalised, which was repaired in 1999 and 2002. Mr Bond concluded by stating that he had lived in and around the Bourton area since the age of 7 and was now 61 years of age. Having worked at Bourton Mill for most of his working life he felt he knew the area but had never been aware of a footpath across this piece of land.
- 11.8 On 14 November 2014 **Mr T Traves** submitted a letter in support of the landowners, “Mr and Mrs Freeman”. Mr Traves made two points. The first of these concerned a planning application affecting the site, which he made on behalf of Mr and Mrs Freeman in 2002. During the negotiations with North Dorset District Council no mention or evidence was adduced in respect of a footpath affecting the site, nor was there any mention of a footpath in the reasons for refusal.

- (a) The second point relates to the purchase of the land “by Mr and Mrs Freeman in 1991”, which Mr Traves states was immediately fenced in order to keep sheep in.
- The statements provided by the objectors to the application corroborate the landowner’s statement and belief that the the land was used for the holding of sheep from the time of its purchase in 1991. As, on balance, this seems to be the case it seems unlikely that the land was not fenced at this time as stated by the owner.

## 12 Analysis of other submissions

- 12.1 The letter from Burges Salmon (Treasury Solicitor) explains the position of the Crown Estate (see also paragraphs 1.6 and 8.16). It provides no evidence as to possible use of the way or in respect of any measures that may have been taken to prevent such use. However, it does confirm that part of the land in question, as shown between points B and D, has been vested with the Crown Estate since January 1998. Consequently, from that date the land has enjoyed immunity from any application for a public right of way made under Section 31 of the Highways Act 1980
- 12.2 Mrs Peers’ evidence establishes a date, 1998, as to when the fences were taken down (see paragraph 13.1(f) below) and therefore is a possible date of challenge to users of the route.
- 12.3 The other letters contain no evidence to be considered.

## 13 Date public use was brought into question

- 13.1 Although Section 31 of the Highways Act 1980 does not specify the minimum number of users required to raise a presumption of dedication it does require that their use must have been for a minimum period of 20 years preceding the date the right to use the route was brought into question.
  - (a) There is a suggestion of bringing the use of the route into question in the statement by the landowner in which he states that he erected a fence in 1991 or 1992. This statement is corroborated by the statement of Mr R Edmunds.
  - (b) A number of the user witnesses refer to action being taken to remove a fence. One witness, Mr Mann, confirmed in a telephone conversation on 23 October 2014 that he believed this had taken place in 2009.
  - (c) Mr Smith stated that he had to repair the fence(s) after they had been “maliciously” cut in 2003 and again in 2004/05.
  - (d) Miss K Mole suggests that the fences were in place throughout her employment, which commenced in 1993, being cut towards the end of her period of employment in 2000.
  - (e) Mr Edmunds agreed with the content of Mr Freeman’s letter of 18 August in which Mr Freeman stated that the he had fenced the area shortly after purchasing the land in 1991 and referred to Mr Edmund’s repairing the fence in 2002.

- (f) In a telephone conversation on 23 October 2014, Mrs Peers, a resident of Bourton since the mid 1970s, suggested that the fences at the boundaries of the land containing that part of the route from A to B were probably removed by users of the way in or around 1998.
- (g) In a telephone conversation on 23 October 2014, Mr A Stallard confirmed that to the best of his knowledge the fence to which he refers in his witness statement was erected on or around 1998.
- (h) The application was made on 18 April 2009 and is a further date of bringing public use of the route into question.

13.2 It is considered that the earliest evidence of a date of a challenge to public use of that part of the route as shown from A to B is as a result of the erection of a fence at point B, which has been in place since 1991.

13.3 There is no or insufficient evidence of a challenge to the use of the remainder of the route as shown from B to D prior to the making of the application in 2009. Consequently, it is considered that the date of challenge for this part of the route is that of the application, namely 18 April 2009.

#### 14 **Conclusions**

14.1 As no part of the claimed route is currently recorded with public rights it is necessary for members to decide whether a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.

14.2 With respect to that part of the claimed route as shown from **A to D**, the historic documentary evidence considered that pre-dates the development of New Close, **Tithe Apportionment in 1841, Finance Act 1910 and the Ordnance Survey Maps**, provide no evidence as to the existence of the route as shown on Drawing 14/20/1.

14.3 **The 1974 Planning Approval** clearly shows that a condition of the development was the provision of an Open Space before any of the dwellings were occupied, the accompanying plan indicating that this was the land crossed by that part of the application route as shown between points A and B. This condition was also discussed by the Inspector at a **Public Inquiry in 1990**, which was held to determine an appeal against the refusal of planning permission for a house and garage on this plot.

14.4 It should be noted that, although the user witnesses are of the opinion that the land from A to B is an 'amenity space' to which they believe they have a right of access, the planning condition was never enforced by the planning authority and is now time barred from any such action. Indeed, the Land Registry documents and the archived planning documents demonstrate that several unsuccessful attempts have been made by both the previous owner the developer of New Close, **Williams Brothers (Shaftesbury) Limited** and the present owner **Mr Freeman** to develop this plot of land.

- 14.5 The Land Registry documents identify the owner of the land between points A and B as **Mr Freeman**, who purchased the land in 1991, The land between points B and D is currently unregistered but was owned by **Williams Brothers (Shaftesbury) Limited** and upon the liquidation of the company in 1998 the land reverted to the **Crown Estate**. **Burges Salmon**, who acts on behalf of the **Crown Estate**, confirms that the **Crown Estate** cannot participate in any consultation exercise as it may be construed as an act of management, possession or ownership but that it is highly unlikely they would seek to interfere in such an exercise carried out by an appropriate body.
- 14.6 **Crown Land**, including that of the **Crown Estate**, is normally exempt from the provisions of the **Highways Act 1980 (Section 31)** although the Act does provide for the **Crown Estate** to waive such protection. From the response by **Burges Salmon** on their behalf it could be construed that, in this instance, the **Crown Estate** would not seek to exercise the protection afforded to them under the Act. However, they have not indicated categorically that this is the case and consequently it is considered that the land should be treated as benefitting from this protection as from January 1998.
- 14.7 If members are satisfied that the documentary evidence does not show, on balance, that a public right on foot exists they should consider whether it, in conjunction with the user evidence constitutes an inferred dedication, or whether the user evidence alone is sufficient to demonstrate a deemed dedication under Section 31 of the Highways Act 1980.
- 14.8 The land between B1 and D is also subject to private rights of access to the garages and garage forecourt, which at least five of the user witnesses enjoy. Consequently, their evidence of use of this part of the route cannot be taken into consideration in determining the application.
- 14.9 Mr Freeman is of the opinion that he first erected a fence on or soon after his purchase of the property (A – B) in 1991 and provides further evidence to support this. Mr R Evans provides a statement in which he states that, to the best of his knowledge, the land was fenced during the early 1990s, prior to 1995 when he started work for Mr Freeman. In addition, Miss K Mole, who worked for Mr Freeman from 1993 to 2000, managed the sheep and states that the land was used as a paddock, which she states was fenced.
- 14.10 Seven of the user witnesses claim to have used the route post-1994 and would not have been aware whether a fence had been erected prior to this time. Of those user witnesses that had used the route prior to 1994 two state that a fence had been erected but could not remember when. The majority of user witnesses and the witnesses who have provided evidence on behalf of Mr Freeman suggest that the earliest date the fence was erected was during the late 1990s.
- 14.11 In respect of that part of the route as shown from **A to B**, the relevant period of use by members of the public, as of right and without interruption, to establish rights by presumed dedication under **Section 31 of the Highways Act 1980**, is taken to be 20 years or more prior to the date of challenge in **1991** and with respect to that part shown from point **B to D**, prior to the date of the application in **2009**.

- 14.12 With respect to that part of the route as shown from B to D, as this was vested with the **Crown Estate** from **January 1998, Section 31 of the Highways Act 1980** cannot be applied to it and consideration ought to be given as to whether any dedication may have arisen under common law.
- 14.13 There is evidence of public use of the route as shown from **A to B** that is considered, on balance, as being insufficient to demonstrate that public rights on foot exist along this part of the claimed route as it does not fulfil the requirement of 20 or more years use by the public, as of right and without interruption, prior to the date public rights were brought into question by the erection of a fence in 1991. Nor is it considered that the user evidence alone even when considered in conjunction with all of the available documentary evidence is sufficient to raise any inference of a dedication under the common law.
- 14.14 There is also evidence of public use over that part of the route as shown from point **B to D** that is also considered on balance, due to the very limited number of users and the period of time over which that use took place, as being insufficient to raise any inference of a dedication under common law.
- 14.15 It is therefore recommended that the application be refused.

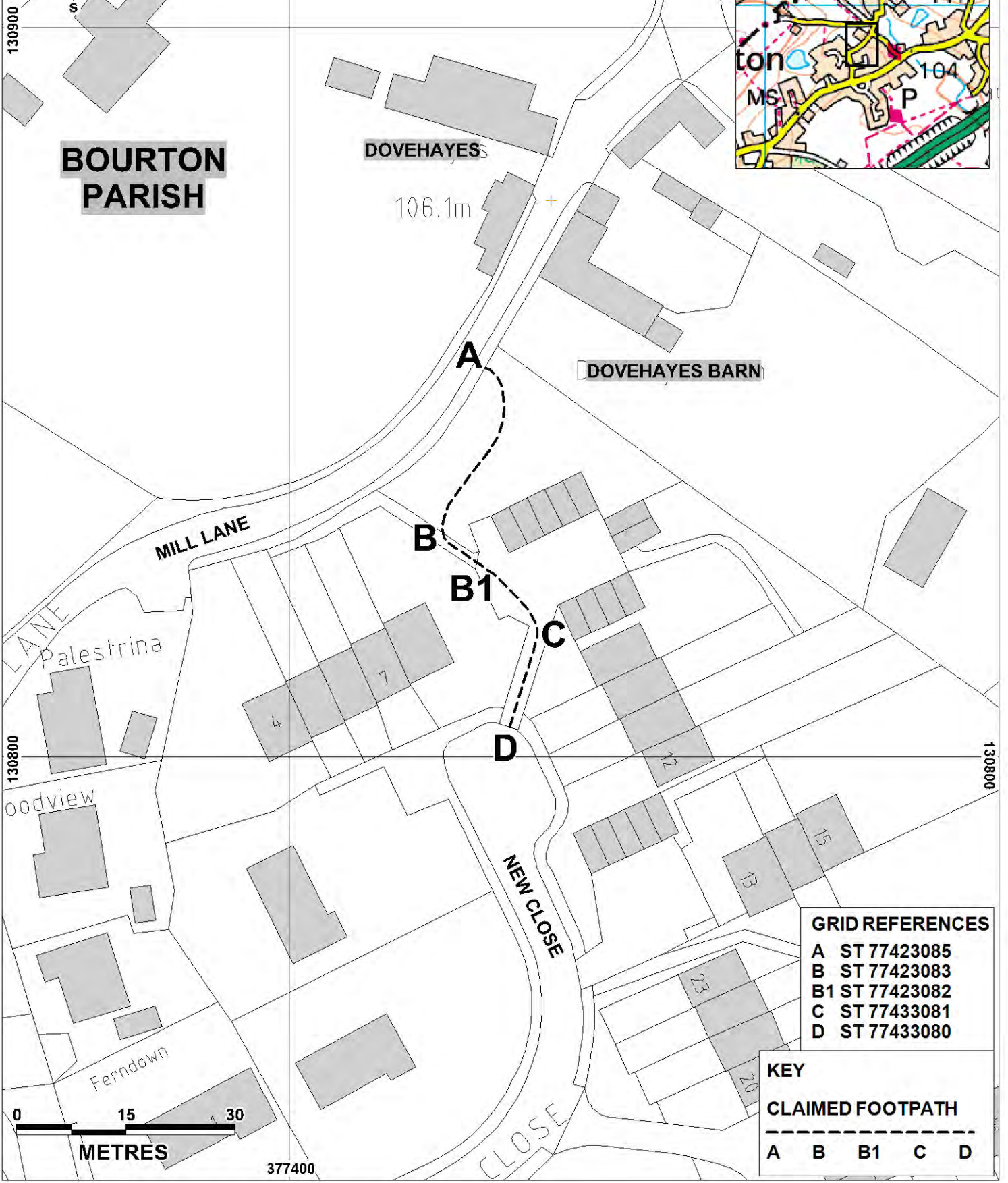
**Mike Harries**

Director for Environment and the Economy

July 2015



Page 17 Application for a definitive map and statement modification order to add a footpath from Mill Lane to New Close, Bourton



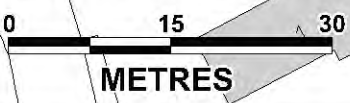
**GRID REFERENCES**

- A ST 77423085
- B ST 77423083
- B1 ST 77423082
- C ST 77433081
- D ST 77433080

**KEY**

**CLAIMED FOOTPATH**

- A
- B
- B1
- C
- D



**WILDLIFE AND COUNTRYSIDE ACT 1981**  
**APPLICATION TO ADD A FOOTPATH FROM MILL LANE TO NEW CLOSE, BOURTON**

**THIS MAP IS NOT DEFINITIVE AND HAS NO LEGAL STATUS**

**Ref: 14/20/1**  
**Date: 03/11/2014**  
**Scale 1:700**  
**Drawn By: ACWH**  
**Cent X: 377429**  
**Cent Y: 130829**

GEOGRAPHICAL INFORMATION SYSTEMS



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## LAW

### General

#### 1 Wildlife and Countryside Act 1981

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

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).

- 1.5 An order can be confirmed if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 Where an objection has been made to an order, the County Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the County Council can itself confirm the order, provided that the criterion for confirmation is met.
- #### 2 Highways Act 1980
- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought into question.
- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.

- (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
  - (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.
- 2.3 Section 31(3) of the Highways Act 1980 says that where a landowner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.
- 2.4 Section 32 of the Highways Act 1980 says that the Committee must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

### 3 Human Rights Act 1998

- 3.1 The Human Rights Act 1998 incorporates into UK law certain provisions of the European Convention on Human Rights. Under Section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a convention right. A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) and that he is (or would be) a victim of the unlawful act may bring proceedings against the authority under the Act in the appropriate court or tribunal or may rely on the convention right or rights concerned in any legal proceedings.
- (a) Article 8 of the European Convention, the Right to Respect for Private and Family Life provides that:
    - (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
    - (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
  - (b) Article 1 of the First Protocol provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

### **Case specific law**

#### **4 Finance Act 1910**

4.1 The Finance Act 1910 required the Commissioners of Inland Revenue to cause a valuation of “all land in the United Kingdom” and plans were prepared identifying the different areas of valuation. In arriving at these valuations certain deductions were allowed, including deductions for the existence of public rights of way.

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

#### **5 National Parks and Access to the Countryside Act 1949**

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

**Table of documentary evidence**

<b>Date</b>	<b>Document</b>	<b>Comment</b>
1808/09	Ordnance Survey Drawings	Claimed route not shown.
1811	Ordnance Survey First Edition map scale 1 inch:1 mile	Claimed route not shown.
1841	Gillingham Tithe Apportionment	Claimed route not shown.
1884	NOTE: The classification of roads by administrative status was practiced on Ordnance Survey maps from 1884. All metalled public roads for wheeled traffic were to be shaded.	
1885	Ordnance Survey First Edition Map (Somerset) scale 6 inches:1 mile	Claimed route not shown.
1887	Ordnance Survey First Edition Map (Wiltshire) scale 25 inches:1 mile (1:2500)	Claimed route not shown.
1888	Ordnance Survey First Edition Map (Wiltshire) scale 25 inches:1 mile (1:2500)	Claimed route not shown.
1889	Ordnance Survey First Edition Map (Wiltshire) scale 6 inches:1 mile	Claimed route not shown.
1889	NOTE: The statement that “the representation on this map of a road, track or footpath is no evidence of a right of way” has appeared on Ordnance Survey maps since 1889.	
1896	NOTE: By 1896 roads on Ordnance Survey maps were to be classified as first or second class according to whether they were Main or District roads, other roads were to be classed as second class if they were metalled and kept in good repair. Both first and second class roads are shown on published maps in the same way, by shading on one side. Third class metalled and unmetalled roads are shown without shading.	
1898	Ordnance Survey Revised Map scale 1 inch:1 mile	Claimed route not shown.
1901	Ordnance Survey Second Edition Map (Dorset) scale 25 inches:1 mile (1:2500)	Claimed route not shown.
1901	Ordnance Survey Second Edition Map (Wiltshire) scale 25 inches:1 mile (1:2500)	Claimed route not shown.
1902	Ordnance Survey Second Edition Map (Dorset) scale 6 inches:1 mile (1:10560)	Claimed route not shown.

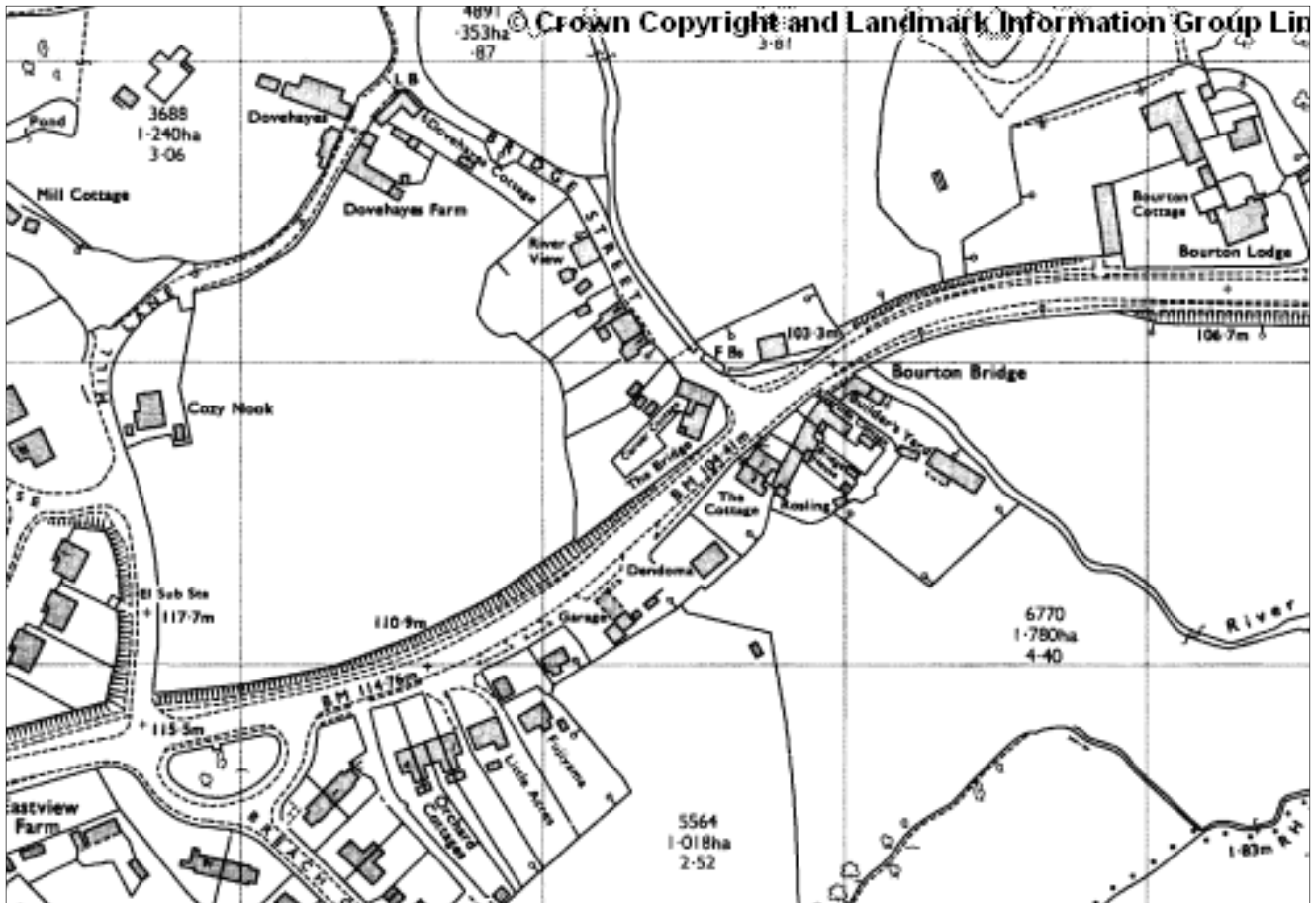
Date	Document	Comment
1904	Ordnance Survey Second Edition Map (Dorset) scale 6 inches:1 mile (1:10560)	Claimed route not shown.
1910	Finance Act plans	Claimed route not shown.
1912	NOTE: The system of classification adopted on Ordnance Survey maps in 1896 was abolished in November 1912.	
1946	Ordnance Survey 1 inch to 1 mile New popular edition (Sheet 166)	Claimed route not shown.
1947	Aerial photograph	Area shows pre-development state, pasture fields, no route shown.
1949	National Parks and Access to the Countryside Act 1949 NOTE: Parish Councils received advice on the recording of public rights of way in a booklet provided to them by the Open Spaces Society. The booklet included information on the different classes of rights of way which included the designations of CRB (Carriage or Cart Road Bridleway) and CRF (Carriage or Cart Road Footpath). Parish Councils were advised that a public right of way used mainly by the public on foot but also with vehicles should be recorded as a CRF and a route mainly used by the public on foot or horseback but also with vehicles should be recorded as a CRB.	
1959	Parish Survey	Route not claimed.
1959	Draft map for the North area	Claimed route not shown.
1958	NOTE: In 1958 the National Parks Sub-Committee determined that the designation of certain rights of way as CRF or CRB be abandoned and that in future such rights of way be shown only as footpaths (F.P.) or bridleways (B.R.)	
1962	Ordnance Survey Revised Map (Somerset) scale 6 inches:1 mile (1:10560)	Claimed route not shown.
1964	Provisional map	Claimed route not shown.
1967	First definitive map	Route not recorded.
1972	Aerial photograph	Area shows pre-development state, pasture fields, no route shown.
1974	Revised draft map	Route not claimed.
1974	Planning Application	Plan shows area designated as 'open play area'.
1975	Ordnance Survey Revised Map (Dorset) scale 6 inches:1 mile (1:10560)	Claimed route not shown.
1989	Current definitive map	Route not recorded.
1993	Ordnance Survey Revised Map (Somerset) scale 1:10000	New Close is shown but the claimed route is not

<b>Date</b>	<b>Document</b>	<b>Comment</b>
1997	Aerial photograph	Poor quality photograph, lacks sufficient detail.
2005	Aerial photograph	B to D visible, tree cover hides A to B.
2009	Aerial photograph	B to D visible, tree cover hides A to B.

**Extracts from key documents**

(See the Director for Environment's file RW/T489 for copies of other documents mentioned)

**1975 Ordnance Survey 1:2500 (Dorset)**





**User Evidence**  
**Table summarising user evidence from forms mainly completed in 2009**

Name	Dates	Frequency Of use	Type of use	Details of use / comments
Mr M Brady	2005-2009	2-3 times per week	On foot and bicycle	Used for pleasure. Others also used the route on foot and bike. No stiles, gates, notices or other obstructions. Never challenged. Land owned by members of New Close.
Mr B J Edwards	2003-2009	Twice weekly	On foot	Used for pleasure. Others also used the route. No stiles, gates, notices or other obstructions. Never challenged. Believes Mr Freeman owns the land. On deeds land is shown as open space.
Ms V Hounsell *Has a private right (LR search)	1990-2009	Variable	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates, notices or other obstructions. The route is on deeds of house marked as open space. Width depends on season 2ft-5ft. Never challenged.
Mrs A Love	1999-2009	50-60 times per year	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates, notices. Was obstructed for 24hrs. Land is on deeds as open space. Path is about a metre wide and about 50 metres long. Husband has trimmed the area in the past.
Mr J Mann	2005-2009	50 times per year approx.	On foot	Used for pleasure. Others also used the route on foot and bicycle. No stiles, gates or notices. A fence was put up and taken down by users. Path is one metre wide, 50 metres long approx. Believes it is owned by residents.
Mr A Martin *Has a private right (LR search)	1994-2009	300 times per year approx.	On foot	Used for pleasure. Others also used the route on foot. No gates or notices. A fence was erected and removed by users the next day with no further action. Has enjoyed a private right for access to Mill Lane. About 1 metre wide and about 50 metres long. On deeds land belongs to the estate of New Close as open space.

Name	Dates	Frequency Of use	Type of use	Details of use / comments
Miss C Martin *2 forms completed  *Has a private right (LR search)	2008-2009  2009-on going (form completed in 2014)	Weekly  Daily	On foot & bicycle  On foot	Used for pleasure. Others also used the route on foot and bicycle. No stiles, gates, notices or other obstructions. Never challenged. Believes land is owned by residents of New Close estate.
Miss L Russell * No description of route on form but map shows route.	1987 to date (form completed in 2009)	Daily 1987-1992 Less frequent since	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates or notices. Overgrowth was cleared as necessary. Never challenged. Believes land is owned by house owners in New Close.
Mrs J Slimm	2001-present (form completed in 2009)	Every day	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates, notices or other obstructions. Never challenged. Open space and owned by New Close.
Mr A C Stallard	1979 to present (form completed in 2009)	60 times per year	On foot	Used for pleasure. Others also used the route on foot. Stiles and gates present. No notices. Obstructed by a fence (post and wire) which was removed as objected to it being there. It was only up for 24 hours. Has enjoyed a private right along route. Path is about 1 metre wide and about 50 metres long. Land is on deeds as open space.
V & D Tomlinson	1990 to present (form completed in 2009)	12 times per year	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates, notices or other obstructions. Never challenged.
Mr D Watts *2 types of handwriting on form	1981 to present (form completed in 2009)	Daily	On foot	Used for pleasure. Others also used the route on foot. No stiles, gates or notices. Hole in hedge bank fenced off with barbed wire - Not at entrance to footpath. Fence was erected for 48 hours only. Has enjoyed a private right along route. Mr Freeman claims to own the land.

Chart of user evidence to show periods of use

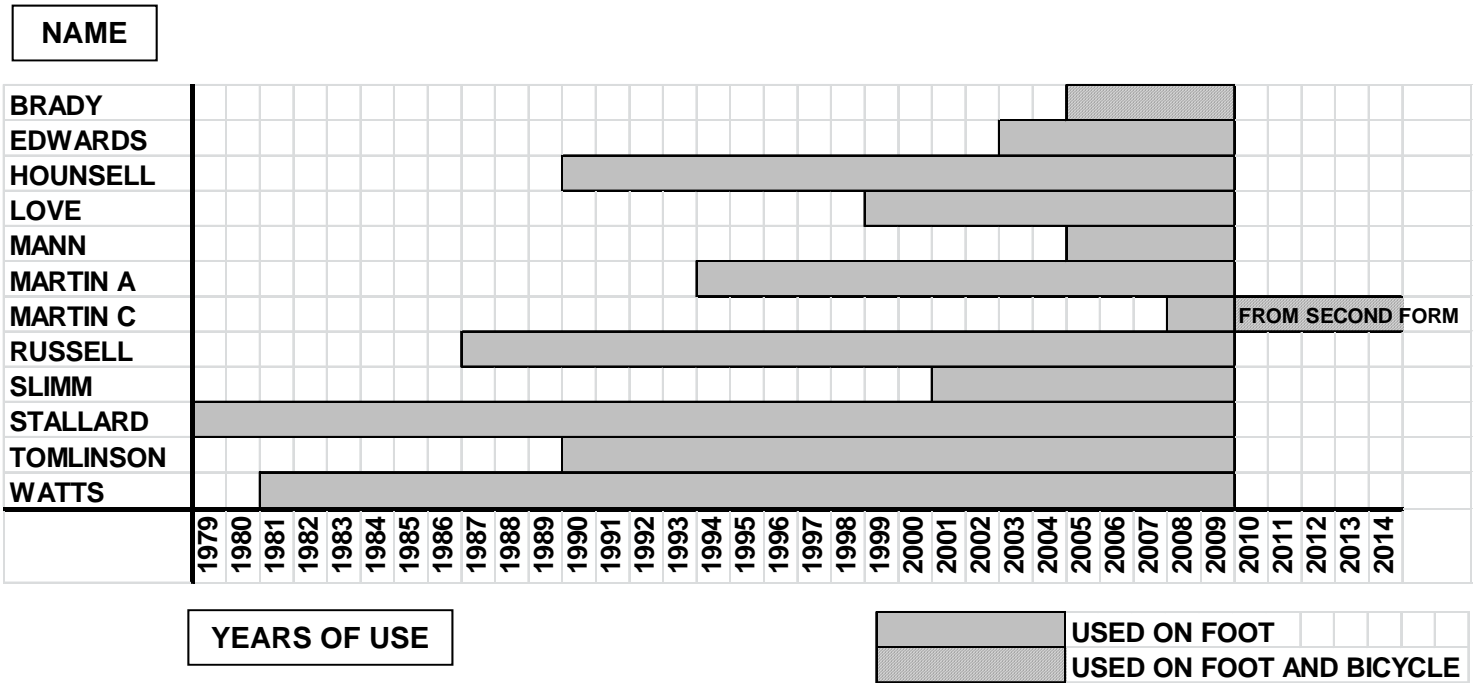


Chart to show level of use

