

SUBMISSION

DMMO D/2023/002

Down Ampney Estate: FP applications

1. This Submission is lodged by Mogers Drewett, solicitors, Wells, Somerset (ref: MJCC) acting on behalf of Farmcare Trading Ltd, owner of the Down Ampney Estate ("the Owner").

Executive Summary

(1) The only basis for this application for two footpaths is the Latton Inclosure Award, which described the dual status of the two intended routes as being public FPs and private carriage roads.

(2) There is no other evidence, applicable to Latton parish, of any FP status on these routes. Thus this case depends on whether or not the two claimed routes came into being as public footpaths pursuant to the Inclosure Award.

(3) The legal position, relying on the General Inclosure Act 1801 and the case of *Cubitt v Maxse* (1873) is that just awarding the route is not enough: it had not only to be described in the Award but also laid out on the ground and formed and completed, and taken to by the public.

(4) No evidence appears of that happening on our two routes.

(5) Path 7 (certainly from points B – C – D) was not laid out, formed or completed, or taken to by the public as a public FP. It was never any more than an intended FP.

(6) Path 8 was formed and completed as a private carriage road (as far as point C) but not as a FP. The FP ran from the A419 (point E) south-east to the bend (point F), and then further south-eastwards via path 9. It was never intended to run along route 8 (green).

(7) Post-Inclosure evidence is all against these two routes enjoying public status

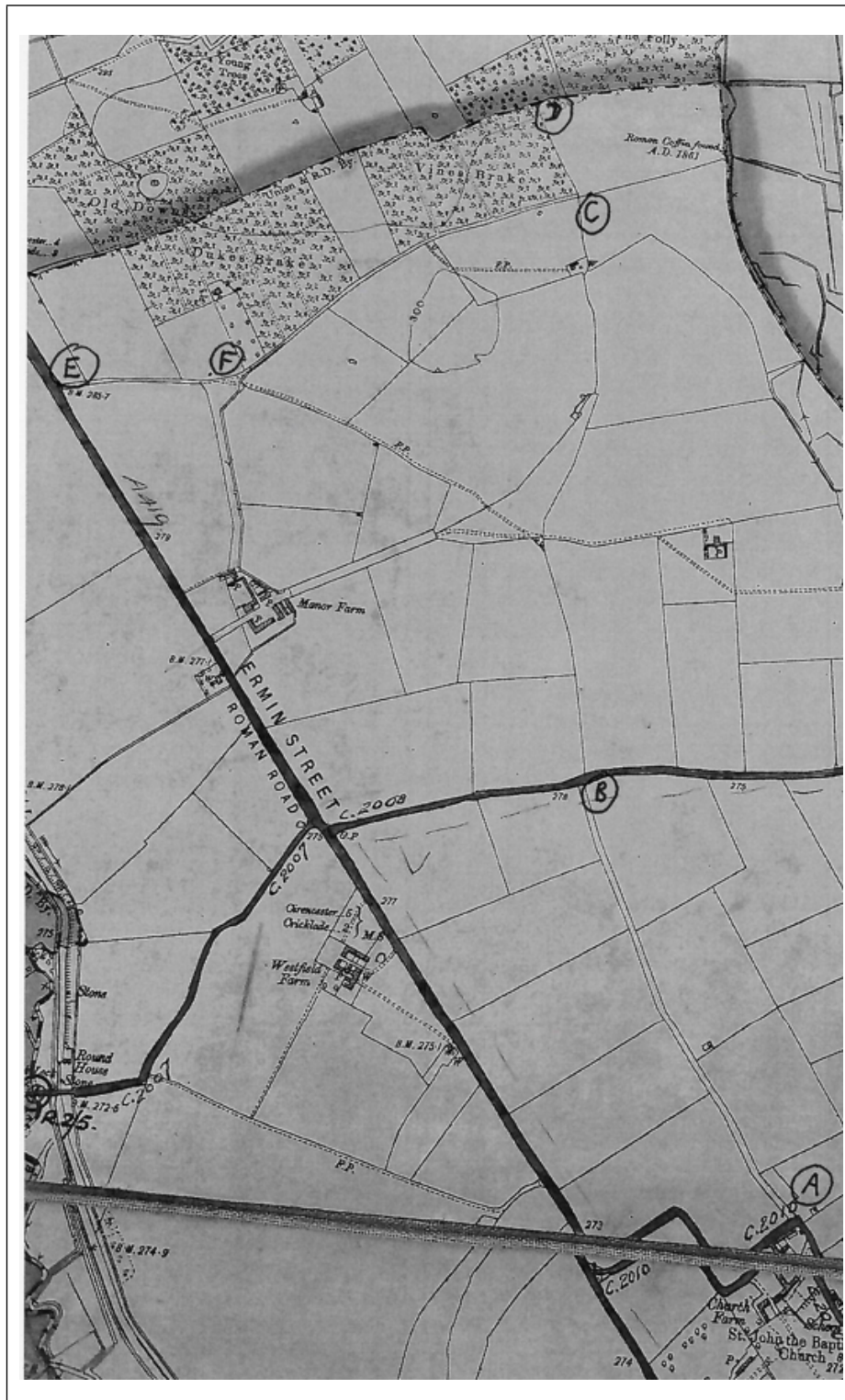
- OS map evidence shows no physical existence of path 7 (points B – C – D), and no physical existence east of point C;
- OS Book of Reference applies the "road" category but on A – B only. In any event, the term road encompasses private as well as public roads. North of B, all the fields that the intended route would have passed through were in arable use, and fenced off;
- Boundary records – these show that no route in Latton existed on C – D.
- Finance Act 1910 – both routes are shown privately owned, and included in the respective hereditaments;
- Deductions – none which expressly related to either path 7 or path 8.
- Handover map: no reference to these intended footpaths;
- Parish claim 1950: no claim for path 7, and no objections to non-inclusion. Path 8: originally claimed as FP F – C, and then continuing eastwards from point C, but it was then deleted; there was no objection to that deletion.
- No evidence of public maintenance or public use.

(8) On this basis, no reasonable allegation of FP status can be made out. The application should, we submit, be refused.

2. The Applicant lodged two FP applications in March 2023. The Owner takes issue generally with these applications. The Applicant describes the claimed routes as roads, but they are not public roads in the vehicular sense. They are private estate roads,

although parts of the alleged route 7 do not exist at all and most likely never did. The reason for the numbering of 7 and 8 comes from the wording of the Latton Inclosure Award.

3. For ease of identification, we apply lettering to route 7: A – B Croft Lane, Latton to Down Ampney Way; B – C from Down Ampney Way north and north-east to junction with route 8; C – D from that junction with route 8 north to county boundary. We show route 8 F – C, the entrance off the A419 being point E. Please see illustration of lettering below.



4. These two FP applications must be looked at in the context only of land in Wiltshire. Whatever aspiration the Applicant may hold in relation to land in Gloucestershire, those matters are of no account in this Wiltshire application. We draw your attention to para 2.4.12 of the Consistency Guidelines "*An Inspector may well meet a situation where an Order highway continues into the next administrative area and be invited to accord it the status already awarded there. An Inspector should not feel bound to do so. It would not be safe to draw any firm inference from the awarded status without knowing the diligence of the procedure leading to its award*". Thus we urge the officer to give no weight to any implication arising from land in Gloucestershire, and to concentrate only on land within Wiltshire.

5. Had it not been for the Latton Inclosure Award provisions, the evidence in this case would not have amounted to any reasonable allegation of any public status on route 7 or route 8. We look at the other evidence later in this Submission but for the meantime concentrate on the Latton Inclosure evidence.

General Inclosure Act 1801

6. The 1801 Act (full title Inclosure Consolidation Act 1801 41 Geo III cap 109) provided a common framework and standard conditions for post-1801 Inclosures. Each Award still needed an authorising Act which could impose its own local provisions but the 1801 Act still applied, unless varied in the local Act.

7. Sections 8 & 9 of the 1801 Act deal with the appointing of "*public Carriage Roads and Highways*". They had to be and remain 30ft wide at the least. The Commissioner had to appoint a surveyor who was tasked with forming and completing the newly made roads and putting into complete repair the roads previously made. Until such time as the roads were declared by the justices to be fully and sufficiently formed, completed, and repaired, they would not be repaired at local public expense and would only remain as an intended road.

8. The effect of this was that until the route had been formed and completed (i.e. physically made on the ground and put into repair), the public would not be liable for its repair.

9. Section 10 empowered the Commissioner to set out private roads, BRs, and FPs but the same provisions as to ensuring that the way had been formed and completed on the ground and put into repair, as applied in the case of public roads, would also apply in the case of private roads or paths, which would then become repairable by the adjoining owners. What we have here is an intended dual purpose path, being a public FP, combined with a private carriage road. The combined effect of sections 9 & 10 of the 1801 Act is that one way or the other the private carriage road and public footpath would only be intended routes and not become repairable until they had been formed and completed and put into repair.

10. That process may well have happened in respect of A – B, but clearly on the post-Inclosure map evidence it did not happen on B – C - D.

Latton Inclosure Act 1801

11. [to be completed once we have acquired a copy of the Act from Parliamentary Archives]. In the meantime, we have a copy of the Latton Inclosure Bill 1778, which refers to the open and common fields in Latton (Home Field, Muddleford Field, Charlham Field etc) to be inclosed, and then gives power to the Commissioners to set out and appoint convenient public and private ways and roads through and over the new inclosures; public roads to be kept in repair in the same manner as other public highways; and that it shall not be lawful for any person to use any road or way, either

public or private, through the said new Inclosures on foot or with horses, cattle, or carriages, other than such new roads or ways as shall be appointed as aforesaid. No width dimensions were given in the bill. It remains to be seen whether the Latton Act reflected those provisions; no doubt it will have imposed the width dimensions.

Latton Inclosure Award 1805

12. **Path 7** was described as a public foot way and private carriage road and drift way of the breadth of 30 feet, branching out of the Abbey Croft Road and extending through and over Home Field **in its usual course** to Ampney Way. Ampney Way is what is now known as the Down Ampney Road, leading from that village to the turnpike.

13. It will be seen that path 7 consists of two different lengths : A – B, the more southerly length, from Latton village to Ampney Way appears to have been a pre-existing route (apparent from the use of the words "*in its usual course*"), but not a public route. It was, and still is a private estate road owned by the Down Ampney Estate. The more northerly length B – C is described differently: it was said to continue north of point B with a width of 20 feet "*through and over Charlham Field to its entrance into Winston Hill Lane*". Thus, the contrast is apparent, that A – B was to be 30 foot wide whereas north of B was to be 20 foot, and not described as being "*in its usual course*". This suggests that, even if A – B was a pre-existing route, B – C – D wasn't.

14. Having gone over Charlham Field, path 7 comes to what is described as Winston Hill Lane, where the route was said to finish. It has not been possible to discern what was meant by Winston Hill Lane. It must have been within the county of Wiltshire, because otherwise the Latton Award would not have mentioned it, since the Commissioners only had power to deal with land in Latton parish in Wiltshire. The Applicant suggests that Winston Hill Lane was path 8. That may be the case. If it was path 8, it would have meant that path 7 went north from point B as far as the junction with path 8 at point C. The written provisions of the Award suggest that it went no further than that.

15. It is highly likely that the route north of B was never formed and completed on the ground. Post-Inclosure map evidence shows no route at all north of point B.

16. We conclude from this that the length of path 7 which runs north from point B was never set out on the ground as a public route at all. It was not a pre-existing route (the absence of the words "*in its usual course*") and therefore would have had to be formed into a route on the ground for the public to use (albeit only on foot). It is our case that there is no evidence that the awarded path was ever laid out.

17. The Inclosure Plan (map B) suggests that the intended route would have gone to the county boundary, including the slight turn to the east at the north end, but we believe that that stretch north of B was never formed on the ground.

18. **Conflict between words and plan:** The Award wording is as described above. In respect of route 7, B – C – D was not an existing route so it had to be formed and completed on the ground before it could come into being as a repairable public route. Thus B – C – D remains only an intended route. By contrast, the Award plan shows the whole of B – C – D. In the case of such a conflict, we argue that the route B – C – D was more particularly described in the written provisions of the Award, but on the Inclosure plan was only shown for the purposes of identification. The wording must therefore prevail over the plan.

19. The Commissioner specified the status of path 7, that it "*shall be and remain a public foot way to all intents and purposes whatsoever and a private Carriage Road and Drift Way for the use of the owners and occupiers for the time being of the lands in the*

parish of Latton adjoining the same and of the ancient inclosures belonging to the parish of Latton north of Muddleford Field and north and east of Charlham Field. The dominant lands entitled to use the private road were thus defined, making it plain that the private carriage road was for specifically limited local use.

20. Only the fields abutting on the route would be entitled to use it. This would exclude from the dominant land fields described as Gastons, The Brakes, and Hill Ground, because those sets of fields had no connection with path 7.

21. Path 7 was intended to be a public footpath, available to the public at large, but only once the route had been formed on the ground; but no evidence of a formed route, nor any public maintenance of it, nor public use of it, has been adduced.

22. Sauvain's Highway Law (6th Edition) at paras 2.112 – 2.114 deals with the interpretation of Awards, and the need for caution to be exercised in that process. It deals with the *Dunlop* case, and refers to the judgment of Sedley J as follows: "*by the beginning of the 19th century references in the legislation and awards to public and private carriage roads were intended to distinguish between roads open to all the monarch's subjects on the one hand and roads open to a limited if unspecified class on the other*". In the case of the Latton Award, the Commissioner did not leave it unspecified, but rather set out clearly which fields were to be entitled to use route 7. Sauvain says that in many Awards it is far from clear that awarded routes may have a dual status of providing for a public right of way on foot together with a private right of way for carriages and carts. No such doubt exists here: route 7 is expressed clearly as a public FP and private carriage road.

23. Sauvain also mentions widths, that the width of the awarded route may be evidence of the intended status of it. Here we know that B – C – D was to be a maximum of 20 feet in width – so too narrow to be a public carriage road according to the minimum width provisions in the 1801 Act.

24. **Path 8** was also said to be a public foot way and private carriage road and drift way of the breadth of 20 feet, branching out of the Cricklade and Cirencester turnpike (at point E), at the north corner of Muddleford Field and passing over the north-east side of the same "*to its usual entrance*" into Mowsdowns and Mowsdowns Lane (point F). This path was also said to be and remain a public footway to all intents and purposes whatsoever, and a private carriage road and drift way for the use of all the owners and occupiers for the time being of lands and inclosures adjoining the same or adjoining Mowsdowns Lane.

25. The Award wording gives no indication of where path 8 terminated. It says it went as far as the usual entrance into Mowsdowns and Mowsdowns Lane (point F), but it does not say that it continued **along** Mowsdowns Lane (or even what Mowsdowns Lane was), but that it went as far as the usual entrance into that field and lane.

26. The provision in the Inclosure Award which followed, related to path 9 "*and the last mentioned foot way continued after passing over the south-west of Mowsdowns of the breadth of 4 feet (number 9 in map B) through and over Charlham Field in its usual course to its entrance into an ancient Inclosure called Ampney Close*". That route through and over Charlham Field "*shall be and remain a public foot way to all intents and purposes whatsoever*".

27. That south-east continuation of the route was marked on the 2nd Edition OS as a double-dotted track labelled "F.P.". It is now shown on the definitive map as being LATT6, a bridleway.

28. Thus the intention of the Commissioner was that the public foot way and private carriage road came off the A419 together (at E), and went south-east along the eastern edge of Muddelford Field, as a dual status path, as far as the bend at F. At the bend, the footpath continued south-easterly down to Ampney Close, as just mentioned. The Award does not say where the private carriage road went, but it can be assumed it went north-east on path 8 (F - C). It could not be that the private carriage road went down path 9, because it was to be a footpath of only 4 feet in width. There is no basis for believing that the FP also went along path 8. The policy of the Award seems to have been that FPs were to be of a standard width of 4 feet.

29. Thus, it is our case that there is no Inclosure evidence that path 8 was anything more than a shortish stretch of private carriage road (F - C), so it would rule out any FP status on path 8. Thus the suggestion that path 8 carried any public status, falls away.

Conclusions on the Inclosure Evidence.

30. In respect of route 7, there is no indication that the route north of B ever came into existence. It would have had to be formed and completed on the ground as a dual status route of 20 foot in width, and taken to by the public (as far as the FP element was concerned). No matter that route 7 north of B was an intended route, it still never came into being, as it was not formed on the ground. No post-Inclosure map evidence shows there being a formed route on the claimed alignment (north of B).

31. In respect of route 8, the wording of the Award suggests that the FP continued south-eastwards on route 9. Route 8 was a private estate road running eastwards, but then stopping at the south-east corner of Vines Brake (point C), free of any public FP status.

32. The private carriage roads were self-evidently to be private routes, because they were expressly only to be used by the owners and occupiers of specific fields. The Applicant may wish that the *Dunlop* judgment could be overturned, but, until such a time, it remains the law.

33. It is a well known principle of statutory interpretation that words should be given their ordinary meaning as far as this is possible to achieve. Here the express provision of the Award and Act was that the private carriage roads were to be for the use of, and repairable by, the owners and occupiers of the adjoining holdings. With respect to Mr McKay (whose Note is relied upon by the Applicant), who thinks that it is time that *Dunlop* was reviewed, the fact is that it remains the law until it is changed.

34. This application, as far as Wiltshire is concerned (and it can only be considered by Wiltshire Council as far as land in Wiltshire is concerned) cannot, we suggest, succeed in reliance only on the intended Inclosure Award descriptions of routes 7 & 8. There has to be post-Inclosure evidence that a FP was set out and formed and completed on the ground and taken to by the public by use, because the Inclosure evidence alone is insufficient.

35. We rely on the case of *Cubitt v Maxse* [1872 -73]. It is not enough to rely on the written provisions of the Award as being evidence of the path having been formed and completed on the ground. Until that physical work is done to make the route, it remains simply an intended highway.

36. The judgment of Keating J at page 713 in *Cubitt v Maxse* is important here: "*I take the intention of the legislature to have been that the moment a way was ascertained to be a highway it became repairable by the parish as at common law: and, when the Act of Parliament says that the road shall not be repairable by the parish until*

certain preliminaries are gone through, it appears to me that it was not intended that it should be a highway at all until these things were done".

37. There was a further judgment in *Cubitt v Maxse*, that of Brett J who said (at p 715-6): *"Applying that here, the Commissioner, acting under the local Act and the general Act, was bound to carry out the enactments in s8 of the General Inclosure Act before the road could become a public highway, or any liability could be cast upon the parish to repair it. That is all that is necessary for us to decide here. The language of s9 would seem to confirm this view; for it treats the road as set out and mapped as an intended road. Where, therefore, the intended road has never been taken to by the public, before it can be considered as a common and public highway, it must have been completely formed in the manner prescribed by the Act"*.

Post-Inclosure Evidence

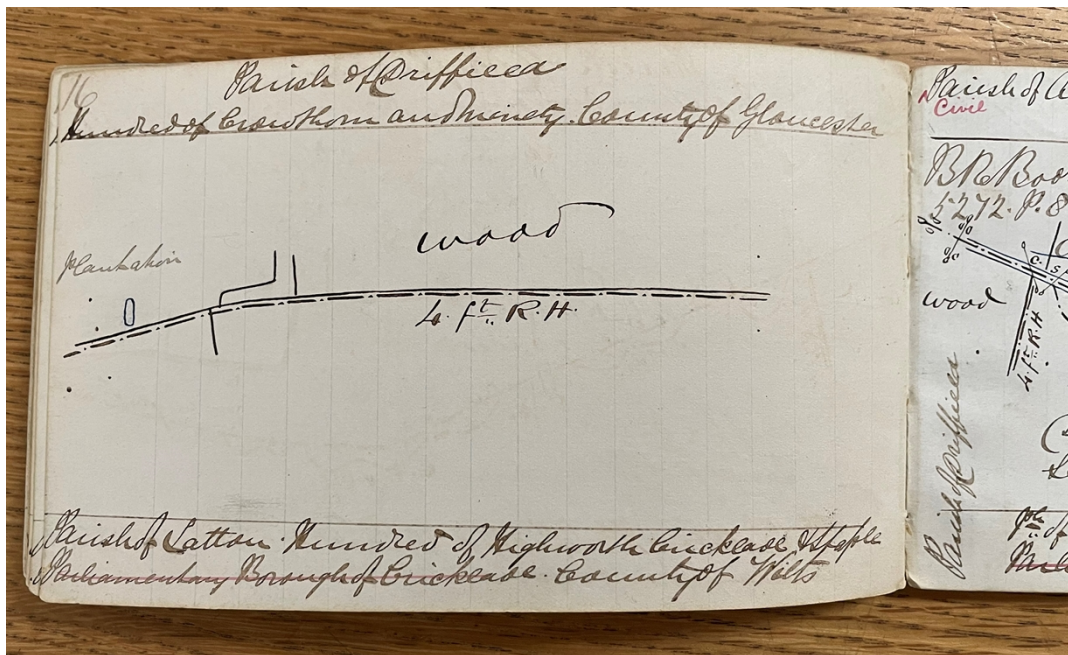
38. There is no tithe evidence for Latton available, nor any other non-OS map evidence in Latton, after the Inclosure, until the start of the 20th century.

39. **1875 OS map.** This shows the southern length of route 7 A - B as a double-fenced route, gated on the southern edge of Ampney Way. It does not continue north of Ampney Way, save for one single line which must be taken to be a field boundary line. There is no route to be seen north of B. The 1900 OS map shows exactly the same picture, of an established route south of Ampney Way and no route shown north of it. The same boundary line proceeds in a northerly direction, and then north-westerly along the side of Vines Brake. There is no indication of any route existing on the ground north of Ampney Way up to the county boundary (B - C - D). The OS surveyors were there to show what was on the ground. Clearly there was no route shown on the ground north of Ampney Way, otherwise the OS surveyors would have shown it. They did show several routes in the vicinity, which they showed with double-pecked lines and the letters "F.P.", but they did not do so in respect of route 7 or 8.

40. **OS Book of Reference 1875.** The Applicant relies on this, but the only part of route 7 which is given a description in the remarks clause is A - B which as expected is described as "road". The word road is applied irrespective of whether it was public or private. Significantly, the two fields immediately north of point B, parcels 50 and then 31, are both described as arable. This means that the whole field was in arable rotation right up to the western boundary line. There is no reference to a 20 foot dual status path having come into being. Between B and D there are as many as five fence lines shown across where route 7 would have run had it existed.

41. **Boundary Records.** We have carried out research at National Archives, Kew, both of the boundary sketch map and the boundary remarks.

(a) the sketch map: this dates from March 1874. Interestingly it depicts what may be the application route (path 7) going north from point B as far as C **but no further north than that**. Instead, it joins up with path 8 at point C and runs C - F - E. This is the only map which even shows B - C as a route, although it gives no indication of status. Crucially, it does not show C - D at all. This junction with path 8 echoes the Applicant's conjecture that 7 joined with 8. We now know that path 7 never went north from C to D. We conclude from this that, even if a physical route existed on the ground (which no other map has shown) it didn't go north from C, and in any event you cannot take from this boundary sketch map that B - C - F had any public status. See photo below



(c) In conclusion on the boundary records, what you see from the sketch map, at most, is a depiction of a private farm route (B – C) linking up with another private farm route (C – F – E). The sketch map does not show that the Inclosure Award's intended route 7 came into being as a public footpath, and nor route 8 either. This cannot be taken as being a depiction of a public route, of any status. It could certainly **not** be taken as indicating that the intended routes (7 and/or 8) actually came into being as a through-route FP; in fact, this sketch map is express evidence that it did not come into being as a footpath. What you see from the boundary remarks book is that, at the point where the Latton Inclosure Award suggested a route in Latton going north to the county boundary, no such route existed. Whatever is signified on that boundary remarks sketch, on the north side of the county boundary, is not the concern of Wiltshire Council. This is further proof, following the sketch map, that C – D never came into effect as a public right of way.

42. **Finance Act 1910.**

- (a) The base map was the 1900 OS map. The colouring made under the Finance Act shows a clear distinction between the uncoloured nature of Abbey Croft Road in Latton village (point A), on the one hand, and the line of path 7 north-west from there up to Ampney Way (point B), which was shown included within hereditament 7 and coloured with the rest of that hereditament. It was marked in pencil at the time with the words "accommodation road". That expression indicated that it was not thought to be a through route for the public. North of the Ampney Way (point B) the alleged path 7 passes into hereditament 57, which extends right up past Vines Brake to the county boundary. By contrast, the OS surveyor did show a double-dotted line labelled "F.P." going westwards from the farm building south of Vines Brake. The OS surveyor made no attempt to mark any route north of Ampney Way because none existed.
- (b) The FA 1910 maps at Kew show the colourwash unbroken at points A and B (hereditament 7), and in respect of hereditament 57, at points B, C, and D. Hereditament 57 also owned part of the Brakes on the north side of path 8, as well as the corresponding section of path 8 itself, but the colourwash is unbroken. Likewise, the rest of path 8 is contained within hereditament 83. Thus, no part of either route 7 or 8 was shown excluded from any of the hereditaments.

43. **Deductions claimed.**

- (a) Hereditament 7 mentioned an "*alleged public right of way*" but sought no deduction for it. If that alleged route was A – B, it shows that in 1914 any public status on the A – B stretch had not been established. Deductions for "*Rights of Way*" were claimed, of £2 x 25 years purchase = £50. Hereditament 7 spreads some distance to the east and may well have incorporated existing public rights of way but A – B remained only alleged, if that.
- (b) Hereditament 57 (which included 58 and 59) also revealed an "*alleged public right of way*", but made no claim for it by way of deduction. There were "*Rights of Way*" mentioned under hereditament 57 in the field book, for which deductions were claimed of £100. There were several possible candidates within 57 for public rights of way. Likewise, if the section of path 7 in hereditament 57 was the "*alleged public right of way*" it cannot have been established on the ground as a public right of way, which means why one can presume that the owners at the time claimed no tax deduction for it.
- (c) Hereditament 83, which was shown to include the majority of path 8, claimed no deduction for rights of way at all, and made no mention of any alleged public right of way either.

44. 1929 Sales Particulars and plan re sale of Down Ampney Estate. The plan seems to be based upon an OS map, probably the 1920 edition. Once again, it shows the whole of the southern route up to Ampney Way (A – B) as part of Church Farm. North of Ampney Way (B – C – D) there is again no route shown on the claimed path 7.

45. **Handover Map 1930.** This was likewise based on the then contemporary OS map and again shows an uncoloured route between Latton and Ampney Way, but no route at all between Ampney Way and the county boundary.

46. **Parish Survey under the 1949 Act.** The Latton parish survey map showed no route claimed by the parish on Inclosure path 7, from point A all the way to point D. On Inclosure path 9, the parish claimed a FP (giving that path the parish number of 6). They also claimed route 8 (green), as parish path 8, which went to point C and then straight on to the vertical county boundary. However, that entry for a FP on green route 8 was deleted from the draft map with the explanation "*take out – not described in statements by P.C.*". It was also struck off the survey card with the explanation "*take out – see Glos CC letter 14 8 52. NOT DESCRIBED BY PARISH COUNCIL*".

47. **Objection files.** These files will contain any objections there were to paths having been included in the parish claim which should not have been or paths not included which should have been. We have seen the objections file at the Wiltshire Archives. There were several routes in Latton referred to in the objections file, objecting either to inclusion or non-inclusion. As a result of the objections, one new path was added and five routes were discussed but would not be added, for lack of evidence. None of these comments was in any way connected with route 7, 8, or 9. Thus route 7 had no claimed public status, and no objection was raised to that absence. Route 8 was proposed as a FP eastwards to point C, and thence further east to the lateral county boundary, but (as mentioned above) it was deleted, and no objection was made to that deletion.

48. **Site inspection.** This shows no indication on the ground of there ever having been a route B – C – D. The Applicant says at his para 25 that "*more or less the whole length to the county boundary follows a field edged track*". We take issue with that.

There was no indication of any field edged track B – C – D. Pedestrian Gate. There is on the horizontal county boundary with Gloucestershire a wooden pedestrian gate. This was put in after the time of the parish survey. The name of the makers of the gate is nailed to the gate. They are GLC Williams, who have confirmed to Owner that the gate was put in between 1979 and 1982. The gate (the size of a normal pedestrian gate) was not put in by reference to any PROW, but purely in connection with deer management and/or other estate husbandry purposes.

49. **Conclusion.** For all these reasons set out above and in the Executive Summary, it is the Owner's case that there is no basis for a finding that it is reasonable to allege a public right of way existing on either of these claimed routes 7 or 8.

Dated 20th February 2025

Mogers Drewett

Signed

Mogers Drewett
Solicitors, Wells office (ref: MJCC)