

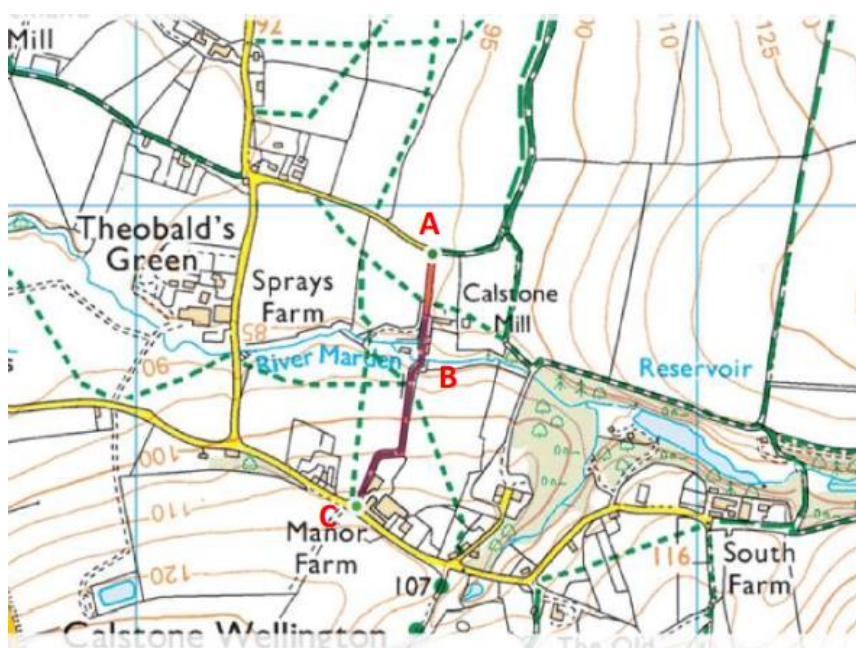
## DECISION REPORT

### WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53

#### APPLICATION TO UPGRADE BRIDLEWAY CALNE WITHOUT 89 TO RESTRICTED BYWAY

## 1. The Application

- 1.1. The application under consideration is dated 28<sup>th</sup> January 2022 and is made by Natalie White on behalf of the British Horse Society, Abbey Park, Stareton, Kenilworth, Warwickshire, CV8 2XZ. It applies for “An Order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement for the area by upgrading to restricted byway the bridleway CALW89 which runs from Point A on the application map (OSGR SU 02531 68925), at the junction between the public highway at Theobalds Green, in the Parish of Calne Without and proceeds along the bridleway CALW89 in a southerly direction along the lane to Point C (OSGR SU 02396 68471) at the junction between the bridleway and the public highway in the Village of Calstone Wellington. With a width of approximately 7 m.”
- 1.2 The application comprises 23 pages setting out what is applied for as above, a map showing the claimed route and a summary and explanation of historic documentary evidence relied upon for the application. The application was assigned reference D/2022/020 by Wiltshire Council once registered. The application can be seen at appendix 1.
- 1.3 The below image is the map depicting the claimed route between points A,B and C, which is included with the application.



## 2. Purpose of Report

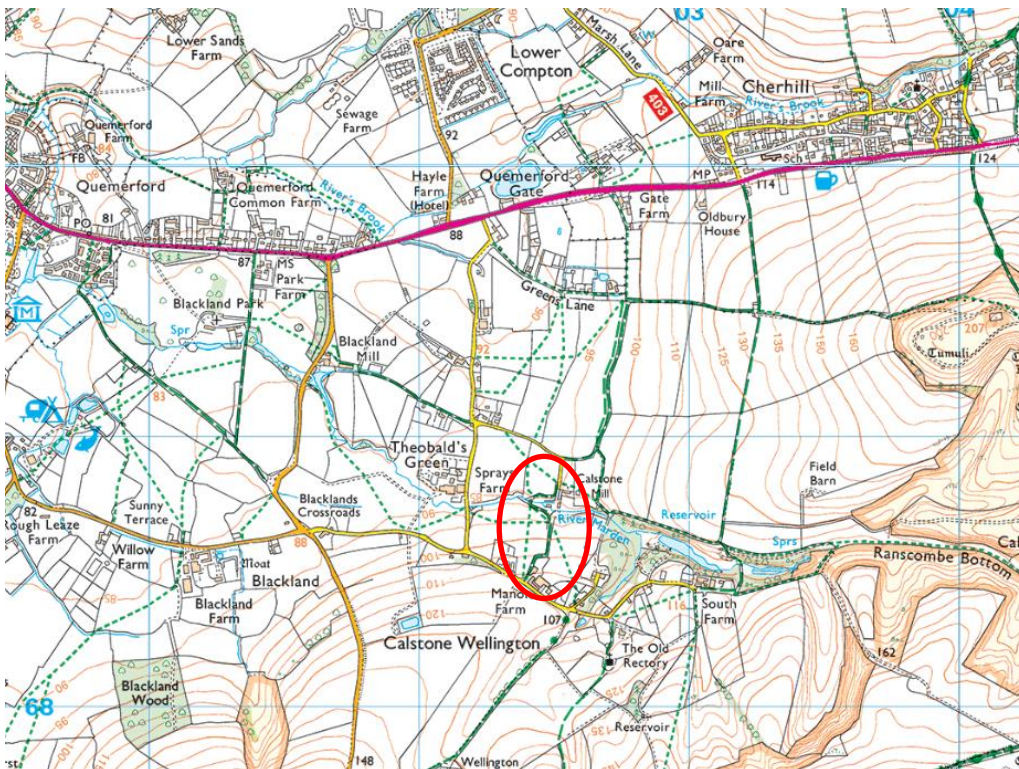
- 2.1. To determine an application, made under Section 53 of the Wildlife and Countryside Act 1981, to upgrade bridleway Calne Without 89 to a restricted byway and amend the definitive map and statement of public rights of way for the area if appropriate. A decision will be recommended on the application and will be determined by the documentary evidence adduced and any other evidence found and investigated by officers.

## 3. Relevance to Council's Business Plan

- 3.1. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

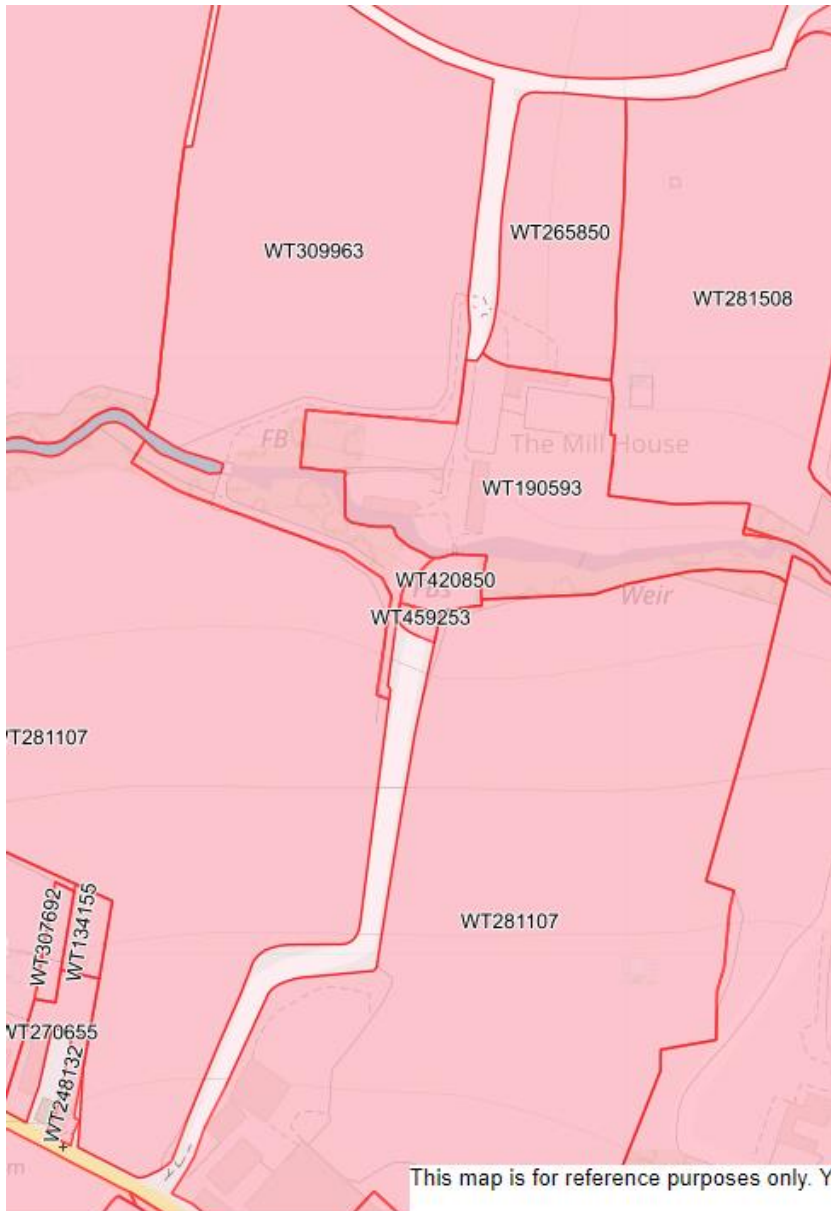
## 4. Location

- 4.1 The application route (CALW89) is located within the parish of Calne Without in the village of Calstone Wellington which itself is south of Cherhill and south east of Calne. The route leads from its southern junction with the U/C 7005 broadly north, past The Mill House, SN11 8QF, to its northern junction with the U/C 7008. The route is circled below.



## 5. Registered Landowners

- 5.1 The application route is partly unregistered at its southern and northern extents. The central section of the application is registered in the ownership of Mr John Edward Moore and Mrs Lucy Anna Moore. The below map extract taken from land registry shows the registered and unregistered land.



## 6. Main Considerations for the Council

- 6.1 The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, however this is without prejudice to any question whether the public had at that date any right of way other than that right. Wiltshire Council is the

Surveying Authority for the County of Wiltshire, excluding the Borough of Swindon. The Surveying Authority is the body responsible for the preparation and continuous review of the definitive map and statement of public rights of way. The Wildlife and Countryside Act 1981 Section 53(2)(b) applies:

*“As regards every definitive map and statement the Surveying Authority shall-*

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.”*

6.2 The event referred to in subsection 2 (as above) is:

*“(3) (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –*

- (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to section 54A, a byway open to all traffic.*
- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*
- (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

- 6.3 Section 53 (5) of the Act allows any person to apply for a definitive map modification order under subsection 2 (above), as follows:

*“Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.”*

- 6.4 Schedule 14 of the Wildlife and Countryside Act, states:

*“Form of applications*

1. *An application shall be made in the prescribed form and shall be accompanied by:*
  - (a) a map drawn to the prescribed scale and showing the way or ways to which, the application relates; and*
  - (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.”*

The prescribed scale is included within the “Statutory Instruments 1993 No.12 Rights of Way – The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993”, which states that “A definitive map shall be on a scale of not less than 1/25,000.”

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

*(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description “owner” or “occupier” of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*

- (3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*



*(4) Every notice or certificate under this paragraph shall be in the prescribed form.*

- 6.5 Section 32 of the Highways Act 1980, states that the authority may consider a range of historical documents and their provenance:

*“Evidence of dedication of a way as highway*

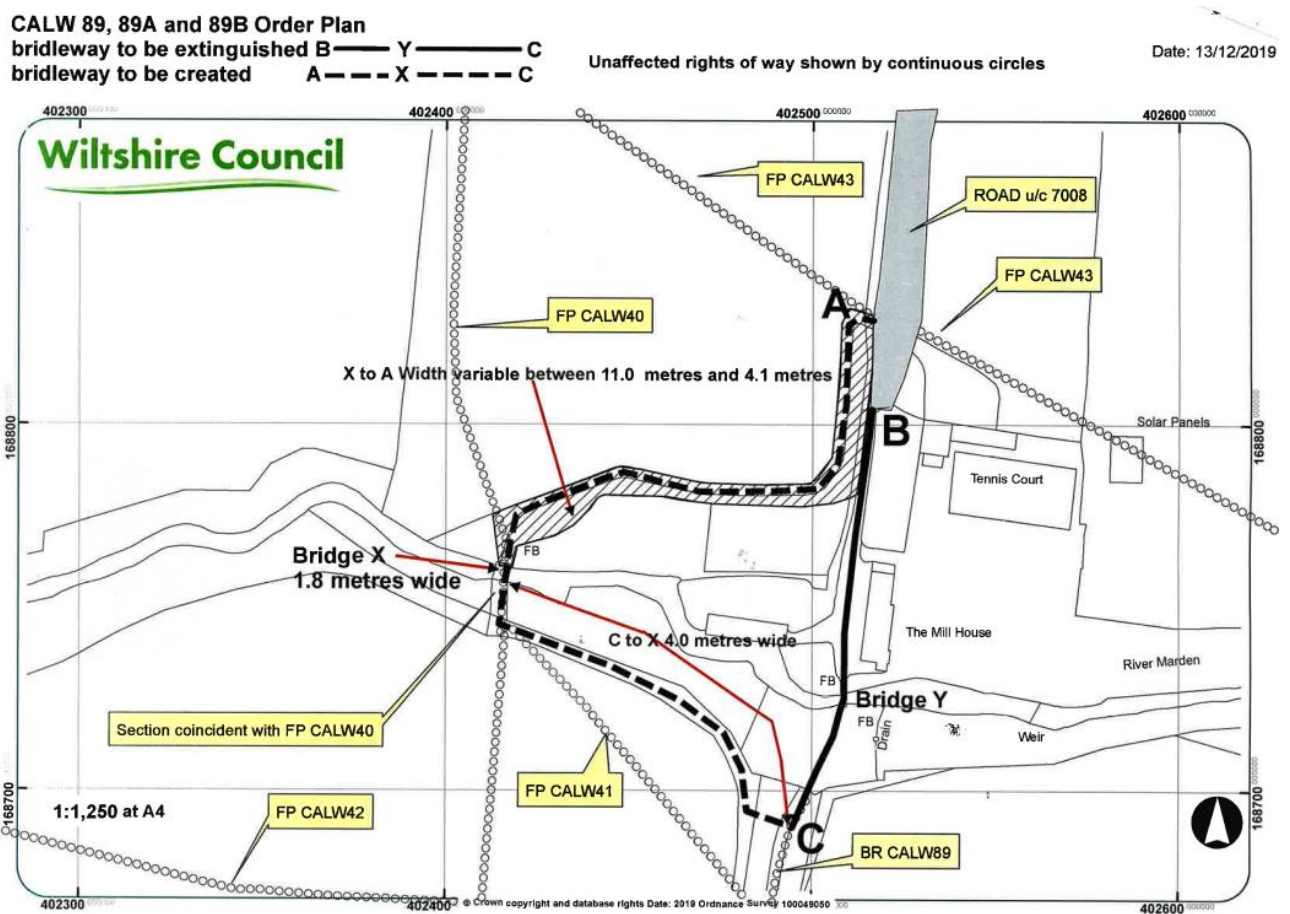
*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”*

## **7. Current Records and Background**

- 7.1 Prior to 2008 the path now called CALW89 was only recorded in the highway record by the highway authority (Wiltshire Council) as a road maintainable at public expense (u/c 7005). Further to an application by the owner of The Mill House public vehicular rights (both mechanically propelled and horse drawn) over this road were stopped up by the magistrates acting under the powers of s.116 of the Highways Act 1980 on 23<sup>rd</sup> April 2007. The reserved footpath and bridleway rights were recorded in the definitive map and statement in March 2008.
- 7.2 The order of the magistrates also stopped up public vehicular rights over a section of highway north of the bridge leading past The Mill House. Hence public vehicular rights were stopped up over a continuous length leading from Manor Farm to a point north of The Mill House and those sections were then recorded as bridleways CALW89, 89A and 89B
- 7.3 Although CALW89 and CALW89B were added to the definitive map using ‘legal event orders’ (s.53(3)(a) Wildlife and Countryside Act 1981) the order that added CALW89A to the definitive map was the result of historical research which showed that on the balance of probability, a public vehicular right had subsisted and that although extinguished by the 2007 s.116 order, the remaining rights fell to be recorded in the definitive map and statement. The order was made under a different section of the Wildlife and Countryside Act 1981, duly

advertised and no objections or representations to it were received. It was confirmed in May 2009 and recorded in the definitive map and statement as a result.

7.4 The route was then subject to a diversion order made in December 2019 and confirmed in July 2023. That diversion and definitive map and statement modification order amended the statement for the path to record the route solely as Calne Without 89, deleting the statements for 89A and 89B. The diversion itself diverted the section of the route directly in front of the property, The Mill House, to a route to the west. See below diversion route as per the confirmed order.



7.5 Following the diversion order the definitive statement for CALW89 now reads:

Calne Without      89      BRIDLEWAY. From the unclassified road at Manor Farm (u/c7005), leading in a general north easterly direction to a point 28 metres south of the River Marden where turning west north west and north west to its junction with footpaths number 40 and 41 where north over bridge over River Marden to lead north east, east and north to join road u/c 7008 at its junction with footpath number 43.

Width from u/c7005 to point 38 metres south of the River Marden = 4to10 metres.

Width from point 38 metres south of the River Marden along track to bridge over River

Marden= 4 metres.

Width over bridge = 1.8 metres

Width from bridge to junction with u/c7008 varying between 11.0 metres and 4.1 metres as shown on order plan by black hatching. This width of the bridleway from bridge X to

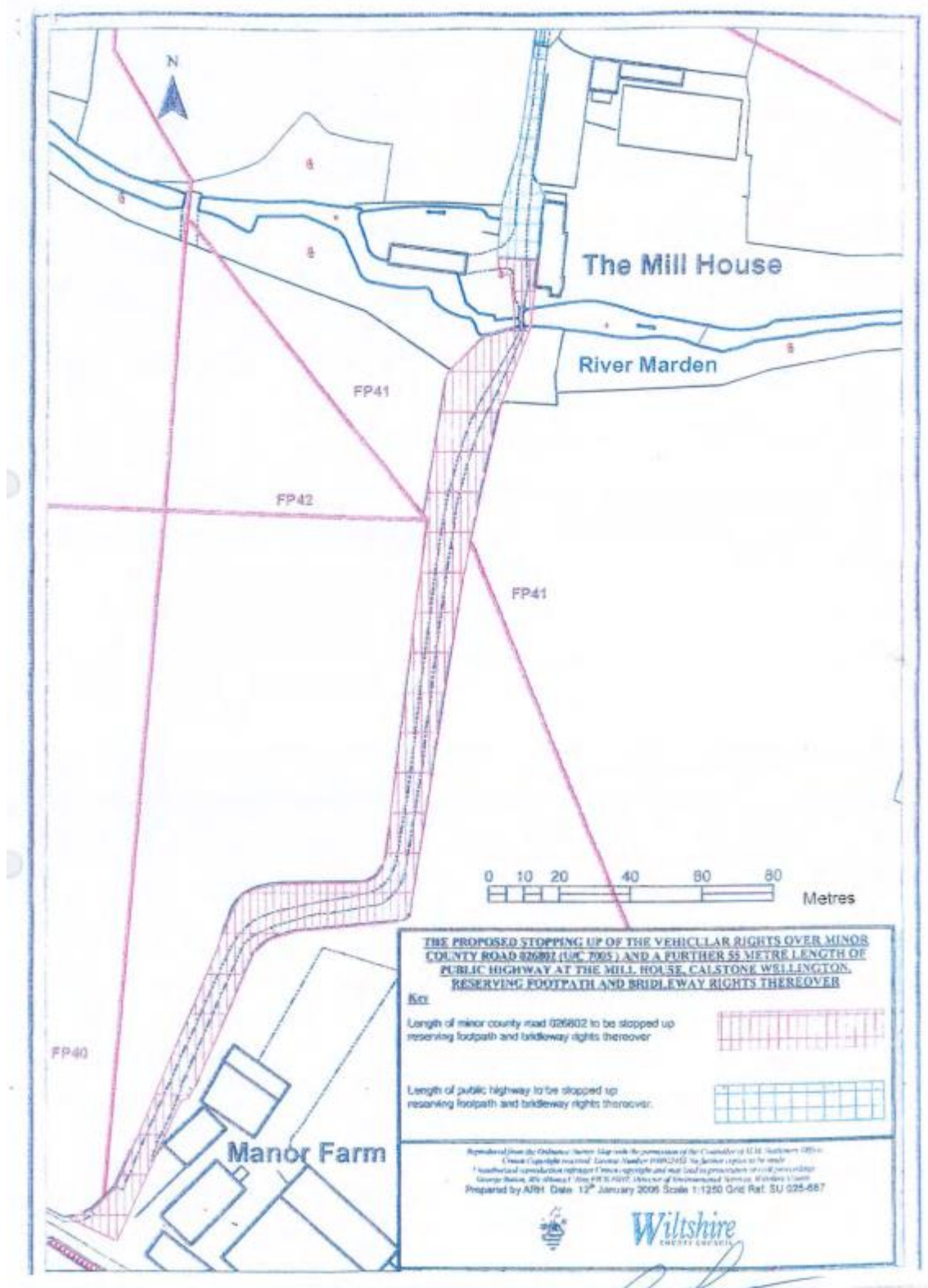
u/c7008 includes the track and the verge.

Approximate length: 537 metres

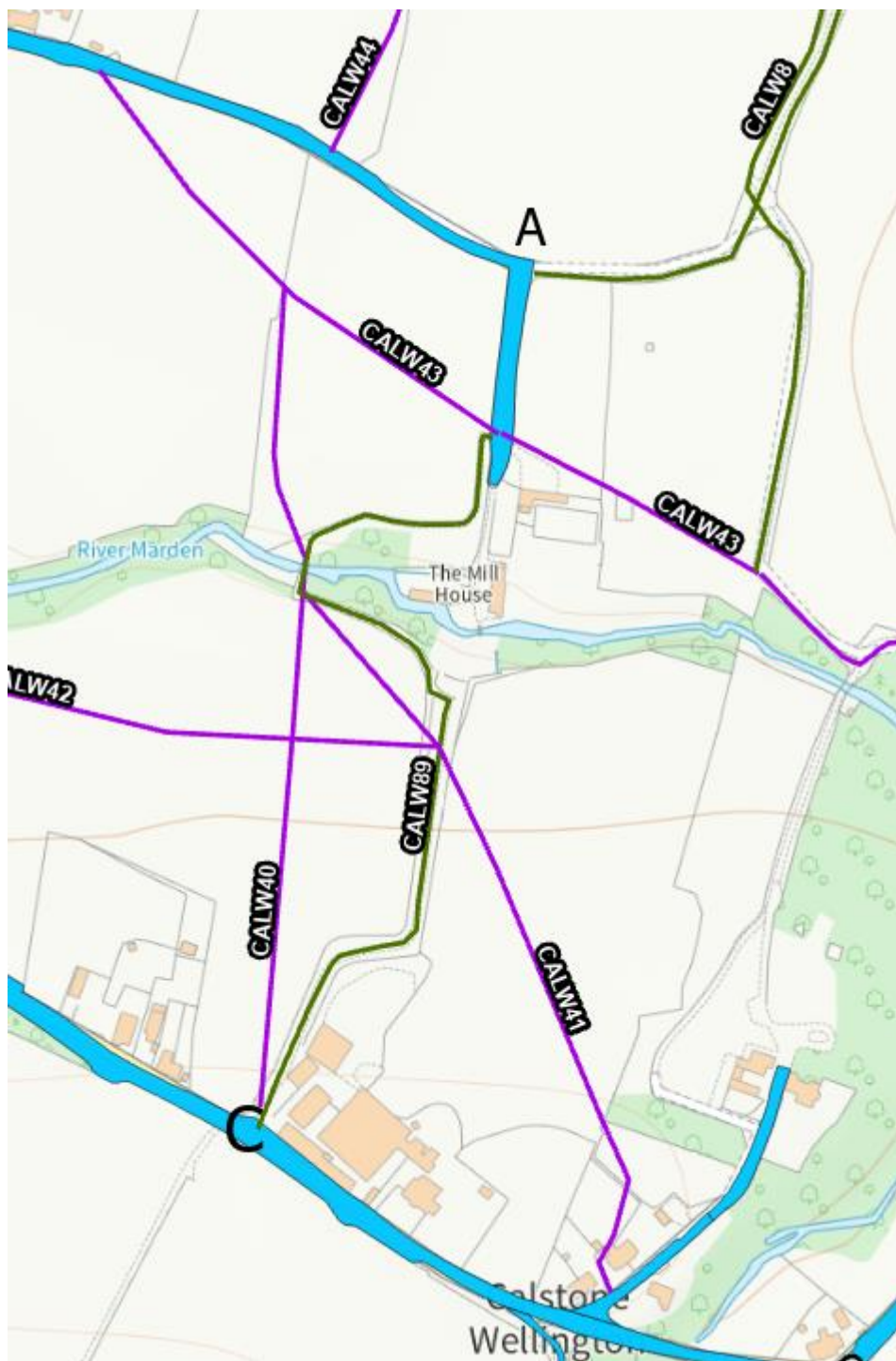
7.6 The stopping up order referred to above made on 23<sup>rd</sup> April 2007 under section 116 of The Highways Act 1980 ( see appendix 2) , extinguished public vehicular rights over the route retaining footpath and bridleway rights. The effect of the 2007 order is that any public vehicular rights over the areas described in the schedule of the order and shown on the order plan are extinguished and cannot be subject to any higher public rights than that of public footpath and public bridleway rights unless they are dedicated at a future date.



7.7 The area of highway for which public vehicular rights were stopped up are described in schedule 1 of the order , the order plan can be seen below. The areas of highway subject to the order are hatched red and blue.

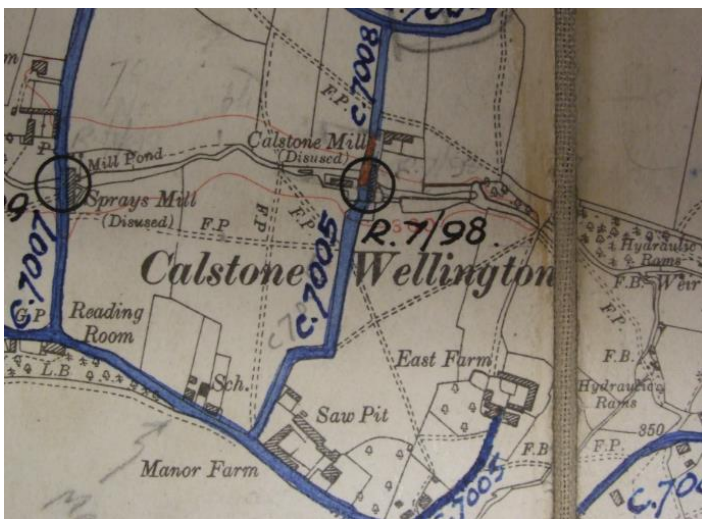


7.8 The working copy of the definitive map and highway record below show the current recorded rights in the area subject to this DMMO application. Bridleways are depicted by green lines, footpaths by purple lines and the unclassified roads at either end of the bridleway shaded blue. The application route is between points A and C over its historical route , prior to the diversion order confirmed in 2023, see application map at 1.3.



7.9 The 2007 s.116 order stopped up public vehicular rights over the majority of the application route , except the northern section which is currently recorded as part of U/C road 7008.

7.10. Unclassified road 7008 is recorded within Wiltshire Councils highway record. The earliest records held by Wiltshire Council relating to the extent of maintenance liabilities over the route are the Takeover Maps arising from the Local Government Act 1929 when the responsibility for rural roads was handed over from the Rural District Councils to the County Council. This record shows the route coloured blue and brown ( over the bridge, number R.7/98) labelled C.7008.



7.11. The route of the u/c7008 is recorded as highway maintainable at the public expense in the Council's records. Publicly maintainable highways can be created in a number of ways including:

- i) by historic precedent if it pre-dated the Highways Act 1835 (thereby an 'ancient highway')
- ii) By formal dedication or conveyance for highway use
- iii) By formal adoption as public highway (i.e. s.26, s.38, s.119 (and others) Highways Act 1980)
- iv) Specifically by Act of Parliament (i.e. parliamentary inclosure)
- v) see also s.47 National Parks and Countryside Act 1949 for highways recorded in the original definitive map and statement

On the balance of probability, the inclusion of this road in the highway authority's records as being publicly maintainable arises from it being an 'ancient highway' within the usual use of the term.

7.12. Under s.36(6) of the Highways Act 1980 Wiltshire Council is required to maintain a list of highways maintainable at public expense.

*36(6) The council of every county and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.*

U/C 7008 is recorded as a non – principal unclassified road within the list of streets maintained by Wiltshire Council. It is listed as road number 026901 and described as "Theobalds Green to end before Calstone Mill (Calne), length 544 metres, starting coordinates 402206 169055 , ending coordinates 402516 168802." This is subsequent to the s.116 order.

It is important to note that the list of streets is not a record of rights over a route, but a list of highways maintainable at the public expense.

## 8. Initial Consultation

- 8.1 Wiltshire Council undertook an initial consultation regarding the application on 9/10<sup>th</sup> May 2024 with responses requested by 14<sup>th</sup> June 2024. User groups, Calne Without Parish Council, directly affected landowners, adjoining landowners, the council member for the area, and all interested parties were consulted as part of this process. A copy of that consultation letter and responses can be seen at **appendix 3- consultation**.
- 8.2 A total of 12 responses were received to the initial consultation. Including responses from Mr Moore ( the affected landowner), and The British Horse Society ( the applicant). All responses request that the application is refused or dismissed based on the grounds that the 2007 stopping up order prohibits the application route from being recorded at any higher status than its current status of bridleway. Respondents also state that the stretch of the U/C road subject to the application already has higher rights than that of a restricted byway. It is noted that the applicant, the BHS , “ *would welcome the Council determining the application and refusing the request to record the route as a restricted byway*”. Additionally, Graham Bennett ( BHS Wiltshire Bridleway Officer) states “*BHS Wiltshire had absolutely nothing to do with this DMMO application*” and “*had we been consulted we would have stopped it from being made*”.
- 8.3 All respondents’ comments are noted and form part of the officer’s decision on this matter.

## 9. Historic Records

- 9.1 The application was submitted with a list of historic documents to consider and an explanation of the applicant’s interpretation of those documents , see appendix 1. The council may consider documentary evidence as per section 32 of the Highways Act when investigating the dedication of a highway and as part of its process in determining s.53 applications to amend the definitive map and statement. However, in this case it is clear that the public vehicular rights over the route have been stopped up by the 2007 s.116 order, retaining only footpath and bridleway rights over the route of CALW89. The route of CALW89 is currently recorded as a bridleway in the definitive map and statement and is recorded at its highest possible status. It is therefore unnecessary to consider the historic documents in relation to the route recorded as CALW89.

9.2 The application route also applies to record part of U/C road 7008 as a restricted byway. As described earlier in this report this part of the route is recorded in the list of streets as a non-principal unclassified road but does not definitively record the public rights over that road. It may still be possible that it would be appropriate to record the route within the definitive map and statement as a restricted byway or byway open to all traffic ( if it is shown to be exempt from Natural Environment and Rural Communities Act 2006 and is shown to be of the character of a byway open to all traffic).

9.3 It can be advantageous ( and appropriate) to record a route within the definitive map and statement where section 56 of the wildlife and Countryside Act provides conclusive evidence of public rights, whereas the list of streets is not conclusive evidence of public rights.

Section 56(1)(c) states; *where the map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic.*

9.4 The documentary evidence for the path has been investigated previously by Wiltshire Council as part of its considerations into the diversion application affecting the route. That officer decision report dated 24<sup>th</sup> October 2019 by Sally Madgwick, Definitive Map and Highway Records Manager, considered a number of documents and concluded that at 5.12 of that report *“On the balance of probability the inclusion of this road in the highway authority’s records as being publicly maintainable arises from it being an ‘ancient highway’ within the usual use of the term.”*

9.5 In reaching the above summarisation of the historical nature of the road , officers considered a number of maps and documents. These included maps relating to enclosure of land in Calne in 1818, the road through the Mill was shown as a continuous lane bordered in the most part by hedges, the road was not created by the award and pre dates it. A map of Calstone Wellington 1830 depicted the road in the manner of other roads in the area. The tithe map for the area dated 1845 depicts the road coloured sienna in the manner of other roads. The 1910 finance act map excludes the road from the valuation of surrounding hereditaments, this is usually interpreted as showing that the route was a public vehicular highway. This historic nature of the lane is supported in 20<sup>th</sup> century records depicting the route as a highway maintainable at public expense and referenced as U/C 7008 and U/C 7005.



## 10. Natural Environment and Rural Communities Act 2006 (NERC)

10.1 The NERC Act 2006 came into force on 2<sup>nd</sup> May 2006 and section 67(1) of this Act had the effect of extinguishing the right to drive any mechanically propelled vehicle on any route that, immediately before commencement:

*S.67 (1) (a) was not shown in a definitive map and statement, or*

*(b) was shown in a definitive map and statement only as a footpath, bridleway, or restricted byway.*

*Subject to subsections (2) to (8)*

S.67 (2) to (8) are parts of the Act that detail exemptions to the extinguishment of vehicular rights.

*s.67 (2) states that subsection (1) does not apply to an existing public right of way if –*

*(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles*

*(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) list of highways maintainable at public expense),*

*(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles*

*(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or*

*(e) it was created by virtue of use by such vehicles during a period ending before 1<sup>st</sup> December 1930.*

*S.67 (3) states that subsection (1) does not apply to an existing public right of way if -*

*(a) the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c.69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,*

*(b) before commencement the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or*

- (c) before commencement a person with an interest in land has made such an application immediately before commencement, use of the way for mechanically propelled vehicles –*
- (i) was reasonably necessary to enable that person to obtain access to the land or*
- (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had an interest in that part only.*

*S.67 (4) states that the relevant date in England means January 2005*

*S.67 (5) deals with private rights*

*S.67 (6) states that for the purposes of subsection (3) an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act*

10.2 It is appropriate to consider each exemption in turn in relation to this application, over the section of the application route currently recorded as U/C 7008.

**S.67 (2)(a)** *‘it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles’.*

No evidence has been brought forward to suggest the main use of any of the application route was by MPVs in the 5-year period before commencement. It was not possible for MPVs to use the whole of the application route where no vehicular bridge has been in place to form a through vehicular route since the 1960s. It has only been possible for vehicles to use the application route up to the Mill House approaching from the north since the 1960s and the applicant has not presented any evidence to prove this exemption over the part of the application affecting U/C 7008.

10.3 **S.67 (2)(b)** *‘immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense, also known as the List of Streets).*

This exemption is met. The application route , over the section currently recorded as U/C 7008, was not recorded in the definitive map and statement but was shown in the list of streets.

10.4 **S.67 (2)(c)** *‘it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles’.*

The route subject to this application was in physical existence at least from the 18<sup>th</sup> century or earlier, this is a time before mechanically propelled vehicles were widely in use on public roads.

10.5 **S.67 (2)(d)** *'it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles'.*

No evidence has been found that public MPV rights have been preserved by this section.

10.6 **S.67 (2)(e)** *'it was created by virtue of use by such vehicles during a period ending before 1930'.*

The mechanically propelled vehicle did not exist as a distinct class of highway user before the 2<sup>nd</sup> of May 2006; hence it is difficult to consider this section. It is likely that as mechanically propelled vehicles became more common (in the mid-1800s) people started using them on roads that would support their use.

Since the distinct category did not exist and since prior to 2006 the right to drive a horse drawn carriage was the same as the right to drive a motorised one it is not considered that the right was created by any actual MPV use, any such use was merely use continuing.

Public MPV rights are not preserved by this section.

10.7 **S.67 (3)(a)** (3) *Subsection (1) does not apply to an existing public right of way over a way if –*

(a) *'before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c.69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic'.*

This application is dated 28<sup>th</sup> January 2022, after the relevant date of January 2005. As such this exemption does not apply for this application.

10.8 Section 67 (2) (b) does apply to this application where part of the route was not recorded within the definitive map and statement but was recorded in the list of streets kept under s.36(6) of the Highways Act 1980, prior to the commencement of NERCA. As such NERCA does not exempt the section of the application route over U/C 7008 from being recorded as a byway open to all traffic in the definitive map and statement. Other considerations as to recording a byway open to all traffic must be considered.

## 11. Definition of Byway Open To All Traffic (BOAT)

- 11.1 Where the route of U/C 7008 is shown historically to be a public vehicular road , and it is exempt from NERCA it may be possible and appropriate to record it within the definitive map and statement as a byway open to all traffic. This would give conclusivity to the public rights recorded over the route. What must also be considered is whether it meets the definition of a BOAT. Section 66 of the 1981 WCA81 defines a BOAT as *“a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”*.
- 11.2 The court of appeal judgement in the *Masters* case set out how to consider the definition of a byway open to all traffic. Advice note 8 was issued by The Planning Inspectorate on the effect of *Masters v Secretary of State for the Environment, Transport, and the Regions*. That advice note states at 5.1 *“To summarise, the effect of the judgment is that it is not a necessary precondition for a carriageway to be a BOAT for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test for a carriageway to be recorded on the Definitive Map and Statement as a BOAT relates to its character or type.”*
- 11.3 The routes character and type therefore must be assessed. The route of U/C 7008 has formed part of a through road past the Mill and linking to U/C 7005 for likely 100s of years. Since 2007 and the s.116 stopping up order it no longer forms a through road and is now a cul-de-sac vehicular road , with access to the Mill House only by vehicle for the public. It still forms a through route for bridleway users ( on its now diverted route). The character of the route has therefore changed since 2007. Physically the route may still look like a road, where it is surfaced in the manner of a road with tarmac but is has changed in character and in use since 2007.
- 11.4 Evidence also shows that the physical character of the whole route has been altered since 1968 when the stone road bridge by the Mill was removed due to safety concerns and replaced by a narrow wooden bridge, not likely accessible by 4 wheeled vehicles. No vehicular bridge has been in place since 1968. Although this is not part of the route which may be recorded as a byway open to all traffic.

- 11.5 An order decision report published on 28<sup>th</sup> July 2023 by The Planning Inspectorate which determined The Hertfordshire County Council ( Bushey 76) Modification Order 2019, considered similar matters, i.e. whether to record a BOAT over a vehicular highway. The inspector Nigel Farthing does not confirm the order as he concludes it does not meet the definition of a BOAT. Within that decision the inspector considers the judgement of Masters and states at 26 “ *Applying the principles set out in Masters, I am required to assess the eligibility of the Order route for recording as a BOAT by reference to its type or character rather than by reference to an assessment of the actual balance of use at any particular moment in time. If I were to apply the latter test, I accept that currently the Order route does fit the literal wording of section 66. However, the decision in Masters makes it clear that is not determinative, and that it is necessary to look beyond current use to assess the character or type of the route*”. Further at 27 he states “*The judgement of Masters also establishes that the character of a route does not alter in consequence of periodic changes to the pattern or balance of use. It seems to me this is consistent with the established common law principle ‘ once a highway, always a highway’*”.
- 11.6 The Hertfordshire case considers a route which has been subject to a temporary suspension of public vehicular use since 1973, rather than in this case which is subject to permanent suspension of rights over the continuation of the road. However, we are not considering the section of the road which has been stopped up, we are considering a section of road which may be subject to change in the pattern of use or user , since 2007 (or 1968) in comparison to its historic use, due to it now being a cul-de-sac, but it remains a vehicular highway, a route which has been considered part of the normal road network, and remains part of the normal road network and is accepted and used as such. It also maintains the appearance of part of the normal road network for a rural location, a single lane surfaced carriageway with verges either side. It does not differ in appearance in comparison to many other roads in the vicinity.

11.7 The below photos are a demonstration of the physical appearance of the route being that of a 'normal road'. The first two photos at 11.8 and 11.9 are of the section of U/C road approaching the application route at approximately the location depicted by the red arrow below on the map extract. The section of the road subject to the application is shown by the photos at 11.10 and 11.11 as depicted by the black arrow on the map extract below.





11.8



Section of U/C road not subject to application.

11.9



Section of U/C road not subject to application.



11.10



Section of U/C road that is subject to the application.

11.11



Section of U/C road that is subject to the application.

11.12. The photos show that the section of the road subject to the application has the same appearance generally as the normal road network in the area. It is a single lane surfaced carriageway with hedges either side.

11.13. The inspector also considered in the Hertfordshire case at 28 that “ *Prior to the 1973 Order, Finch Lane was very much part of the ordinary road network, and indeed that part unaffected by the Order remains so. The character or type of the Order route prior to 1973 was manifestly that of a vehicular highway mainly used by motor vehicles. The fact that the Order route has not previously been considered for inclusion on the Definitive Map and Statement corroborates that. The 1973 Order has not changed the underlying character of the route, although it has altered the current balance and pattern of use. On that basis, and having considered all the available evidence, I find, on a balance of probabilities, that the Order route does not meet the definition of a BOAT*”. A similar consideration can be applied in this case , i.e. the section under consideration is part of the ordinary road network and remains so, post the stopping up order affecting its continuation. It was also not considered for inclusion in the definitive map and statement in the 1950s where the whole route was considered part of the ordinary road network and not a route of such a character to be recorded in the definitive map and statement.

11.14. It is accepted that use of U/C 7008 is now highly likely to be in greater numbers by pedestrians, cyclists, or horse riders in comparison to public vehicular use, where it now forms a cul-de-sac vehicular route, which would meet the literal definition of a BOAT as per S.66 of the WCA81. However, the Masters case makes it clear that the interpretation of a BOAT is not to be considered so literal and it is appropriate to consider the character and type of the route.

11.15. In this case officers conclude that the section of U/C 7008 subject to the DMMO application does not , on the balance of probabilities, meet the definition of a BOAT due to its character and the reasons discussed.

## **12. Conclusion**

12.1 Where the application route is subject to a s.116 stopping up order over the current route of CALW89 , it is not possible to upgrade it to the status of a restricted byway ( unless dedicated in future) as per the application. The application route also applies to record a restricted byway over a section of U/C 7008 , officers have concluded that whilst this section

is exempt from NERCA it does not meet the definition test of a BOAT and will not be recorded as such in the definitive map and statement. It remains recorded in the list of streets and Wiltshire Council consider it has public vehicular rights as part of the normal road network.

### **13. Overview and Scrutiny Engagement**

13.1 Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981.

### **14. Safeguarding Considerations**

14.1 Considerations relating to the safeguarding of anyone affected by the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

### **15. Public Health Implications**

15.1 Considerations relating to the public health implications of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

### **16. Environmental Impact of the Proposal**

16.1 Considerations relating to the environmental impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

### **17. Equalities Impact of the Proposal**

17.1 Considerations relating to the equalities impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

## **18. Risk Assessment**

- 18.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety.
- 18.2 The Council is the surveying authority for the County of Wiltshire (excluding the Borough of Swindon) and has a duty to keep the definitive map and statement under continual review (s.53(2)(b) WCA 81). There is therefore no risk associated with the Council pursuing this duty correctly.
- 18.3 If the Council fails to pursue this duty in this case it is liable to complaints being submitted through the Council's internal procedure leading to the Ombudsman. Ultimately a request for judicial review could be made. In this case Wiltshire Council has made a commitment to determine the application by December 2024.

## **19. Financial Implications**

- 19.1 The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly is a statutory duty for the Council. The costs of processing such orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
- 19.2 Where no definitive map modification order is made, the costs to the Council in processing the definitive map modification order application are those required by the statutory administrative procedures.
- 19.3 Where a definitive map modification order is made, and objections received which are not withdrawn, the order falls to be determined by the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA). An Independent Inspector appointed on behalf of the SoSEFRA will determine the order by written representations, local hearing, or local public inquiry, which have a financial implication for the Council. If the case is determined by written representations the financial implication for the Council is negligible, however where a local hearing is held, the costs to the Council are estimated at £200 - £500 and a public inquiry could cost between £3000 - £5000, if Wiltshire Council supports the order (where legal representation is required by the Council) and around £200-£500 if it does not support the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant). Any decision taken by SoSEFRA is liable to challenge in the High Court,



the council would bear no financial burden at this stage as the decision has been made by the SoSEFRA.

## **20. Legal Considerations**

20.1 Where the Surveying Authority determines to refuse to make an order, the applicant may lodge an appeal under schedule 14 of the WCA with the SoSEFRA within 28 days of notice of the decision, who will consider the evidence and may direct the Council to make an order. Although the applicant has made it clear they consider the application should be turned down, they still have the right to appeal.

## **21. Options Considered**

To:

- (i) Refuse to make a definitive map modification order under Section 53 of the Wildlife and Countryside Act 1981, where it is considered that there is insufficient evidence any additional rights exist that are not currently recorded on the definitive map and statement or is reasonably alleged to subsist, or
- (ii) Where there is sufficient evidence that a right for the public on foot, bicycle, equestrians, and carriage drivers (i.e., restricted byway rights) subsist, the authority is required to make a definitive map modification order to upgrade lower status routes to restricted byways on the definitive map and statement of public rights of way, under Section 53 of the Wildlife and Countryside Act 1981. In addition, where historical widths have been discovered to amend the statements of those routes to record those widths also under Section 53 of the WCA81. Also to record part of the route as byway open to all traffic in the definitive map and statement where it may be appropriate to do so.

## **22. Reasons for Recommendation**

22.1. The stopping up order made under s.116 of the Highways Act 1980 in 2007 has extinguished public vehicular rights ( including restricted byway rights) over the majority of the application route. The 2007 order retained footpath and bridleway rights , which are currently already recorded over the ( now partly diverted) application route. Therefore, the application over this part of the route to record a restricted byway is refused.



22.2 The section of the application route not subject to the 2007 s.116 order is recorded as unclassified road U/C 7008 and in the authority's list of streets. Officers conclude that section of the application route is exempt from NERCA and is likely an ancient highway and so should be considered as a byway open to all traffic rather than a restricted byway as applied for. However, it does not meet the character test of a BOAT and should not be recorded in the definitive map and statement and as such this section of the application to record a restricted byway is also refused. Wiltshire Council consider U/C 7008 has public vehicular rights.

## **23. Recommendation**

23.1 That the application is refused, and the applicant informed of their right to appeal under schedule 14 of the Wildlife and Countryside ACT 1981.

Craig Harlow  
Definitive Map Officer  
18<sup>th</sup> June 2024

### **Appendices to report.**

Appendix 1- Application

Appendix 2- 2007 stopping up order

Appendix 3- Consultation responses