

COMMONS AND RIGHTS OF WAY COMMITTEE

4 October 2019

AGENDA ITEM:

APPLICATION FOR A MODIFICATION ORDER TO ADD A LENGTH OF PUBLIC FOOTPATH CONNECTING MOUNT PLEASANT & VAN DER BREEN STREET, BISLEY, GLOUCESTERSHIRE

REPORT OF THE LEAD COMMISSIONER COMMUNITIES & INFRASTRUCTURE

1. PURPOSE OF REPORT

To consider application; 573/11/29(14)

Nature of Application: The addition of a length of public footpath connecting Mount Pleasant and Van der Breen Street, Bisley.

Parish: Bisley-with-Lypiatt

Name of Applicant: Bisley-with-Lypiatt Parish Council

Date of Application: 20 May 2018

Landowner: Unregistered

Witness Evidence forms: Total of 14 PPEFs submitted by 14 individuals.

2. RECOMMENDATIONS OF THE CASE OFFICER

That an Order be made to add the claimed footpath to the legal record of public rights of way on the basis of the evidence supplied.

3. RESOURCE IMPLICATIONS

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which has to be done twice, is approximately £500 per notice. In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application. If the application were successful, the path would become maintainable at the public expense.

4. SUSTAINABILITY & EQUALITY IMPLICATIONS

No sustainability implications have been identified.

5. DEPARTMENTAL CONTACT

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6.

STATUTORY AUTHORITY

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section [3]. Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

Section 53(3)(c)(i) relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

HIGHWAYS ACT 1980 - Section 31: Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate the way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

REPORT

7. BACKGROUND

A location map at scale 1:5,000 is attached (**JH1**) showing the location of the path in the Parish of Bisley, Stroud District. It is found within Ordnance Survey Grid Square SO9006.

- 7.1** The Definitive Map Modification Order ("DMMO") application, made by Bisley Parish Council on 20 May 2018, included Form 1 and an accompanying plan of the path drawn at 1:1250 scale. The claimed route is drawn in orange marker. Form 3 was also supplied, dated 2 July 2018, certifying that the application had been served upon;

Mr R. Smith, Cartref, Bisley,
Mr L. Nicholas, The Nest, Bisley
Mr M. Conisbee-Smith, Oakleigh Cottage, Bisley
Mrs D Entwistle, Woodside, The Roundabouts, Stroud
Mrs C Bulcock, Kimberley Cottage, High St, Bisley
Mrs A FrenchHomeland, Van der Breen St, Bisley

7.2 As the track is unregistered, Form 2; Notice to Owners and Occupiers was posted along the path also.

8. DESCRIPTION OF CLAIMED PATH (“PATH”)

8.1 No historical indication has been found of a name for the claimed highway. The path runs for a length of 68m across unregistered land connecting Mount Pleasant (C200 road) and Van der Breen Street (41329 road). Mount Pleasant is a single track lane which forms one of the main arteries through the village and is thus extremely well used by motor vehicles. The claimed path provides pedestrians with an almost direct connection across Mount Pleasant to Public Footpath MBL170 and onto George Street and the main village. In the other direction, it provides a direct connection from the village via Mount Pleasant to King George V playing field along Van Der Breen Street.

8.2 A plan at a scale of 1:1250 is attached (**JH2**) on which the claimed path (“path”) is marked A-B. The path was inspected by me on 3 July 2019.

8.3 The path starts at its junction with Mount Pleasant Street at a point marked A on the plan at Ordnance Survey Grid Reference (“OSGR”) SO 9049/ 0603. At this point there is a safety barrier in the form of a chicane made up of 3 sections of tubular metal fencing. As a point of interest there is a similar construction across the road at the junction of Mount Pleasant with Public Footpath MBL170. The claimed path is bounded on each side by stone walls along its length. For the first 27m, the path has a tarmac surface with a width of 1.2m (Google maps suggests that in 2009, this section of path had a grass unmade surface). The semi-detached properties, Cartref and The Nest abut the path but whereas Cartref fronts onto Mount Pleasant, The Nest fronts onto the path. Opposite The Nest, there is a small gate leading to a private garden in the ownership of The Nest. A manhole cover and a separate drain cover are set into the surface indicating the presence of utilities running under the path. The path continues as an unmade grass and earth track with a varying width of 1- 2m to its junction with Van der Breen Street, marked B on the plan at OSGR SO 9055/ 0604. Photos are held as (**JH3**).

9 DOCUMENTARY EVIDENCE

9.1 **Under Section 32 of the Highways Act 1980, when 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 in 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.**

9.2 **Ordnance Survey Pen and Ink 2”:1 mile drawing No. OSD172; Cheltenham - 1811 – Robert Dawson (British Library online)**

The British Library holds 351 of the original preliminary drawings made by the Board of Ordnance Surveyors at the Tower of London between the 1780s and 1840. The collection includes maps drawn by Robert Dawson, whose work set the style for British military map making. The path is not shown.



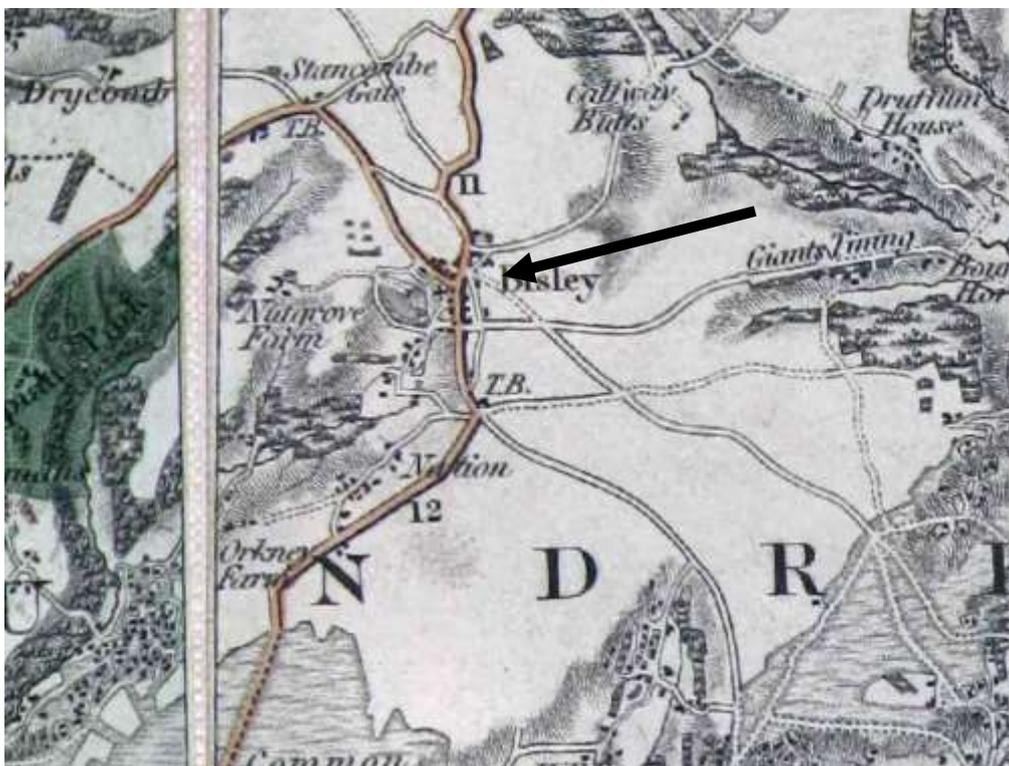
Pen and Ink OS drawing 1811

9.3 Commercial Map Makers of Gloucestershire; Bryant Map 1824 - 1.45 inches: 1mile. Ref: CW/G912GLO1824 & Greenwood Map 1824 - 1inch: 1mile. Ref: CW/912GRE1824, both of Gloucestershire Archives

Andrew Bryant and Christopher Greenwood's Maps of Gloucestershire, both dated 1824, were drawn from original surveys. Their depiction is much more accurate (like an Ordnance Survey map) rather than being schematic. This may be due to survey equipment (theodolites) becoming commercially available in the 1790s. The "explanation" (or legend) on Bryant's Map lists "Turnpike and Mail Roads", "Good Cross or Driving Roads" and "Lanes & Bridleways" whereas Greenwood identified turnpike roads and cross roads. Neither purported to show footpaths. Bryant and Greenwood's maps were sold to members of the public and cost 3-4 guineas. The commercial nature of the map means that routes shown are likely to be public unless there is strong contemporary evidence which shows that routes are private. As public roads prior to 1835 were maintainable by the parish, it is likely that routes shown are now publicly maintainable. The path is not shown on either map.



Bryant 1824



Greenwood 1824

9.4 'Reprint of the first edition of the one – inch Ordnance Survey of England and Wales – 1828'; Sheet 69; 'Cirencester & Swindon'

These maps were produced by engineers and draughtsman of the Board of Ordnance in the Tower of London at the reduced scales of one inch to one mile taken from the pen and ink drawings of the surveyors as described in paragraph 9.2 of this report. The path is not shown.



OS 1828

9.5 Bisley Tithe Map 1842 (13.3inches to 1 mile) Glos Archives ref: GDR/T1/28

Although not produced to record public rights of way, Tithe Maps provide important evidence as to the physical existence of such paths. The maps were drawn up under statutory authority by the Tithe Commissioners under the provisions contained in the Tithe Commutation Act of 1836 to show all cultivated land, arable and pasture, as tithe was payable on land producing crops. It is unlikely that a tithe map will show public footpaths and bridleways as their effect on the tithe payable was likely to be insignificant. They were required to show wasteland and roads, because tithe was not payable on these, although this is not necessarily an indication that the land was public. Lord Denning said in *Kent County Council v Loughlin 1975* "If a road passed over a man's land, he would naturally require it to be shown so as not to pay tithe on it". Thus a distinction is made between tithable and untithable land, with roads clearly marked as untithable.

9.6 An 1837 amendment to the Act provided for Tithe Maps to be either first or second class. First class maps, being signed and sealed by the commissioners, are considered to be a true record of matters relating to the purposes for which the map was designed. Second class maps, signed but not sealed, which failed in some, often minor way to meet the stringent test for first class status, are not necessarily

inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence (Smith v Lister 1895).

9.7 The Bisley Tithe Map which encompassed Chalford (until 1894) is first class. The claimed path is shown as an established through route in a manner similar to other known highways in Bisley Parish with regard to its colour, being un-numbered and excluded from adjacent plots of land. There is a boundary feature shown at its junction with Mount Pleasant Road but it connects freely with Van der Breen Street. The Tithe Map shows pasture fields edged blue and arable fields edged sienna. The land to the north of the claimed path is shown un-numbered without a coloured edging denoting waste land and the plot to the south is an arable field numbered 663 which the accompanying Apportionment states is in the ownership of Mr Mills Esquire and in the occupation of Thomas Blanch. A copy of the Tithe Map 1842 showing the path is held **(JH4)**.

9.8 Bisley Inclosure Award 1869. Ref: Q/R1/22

This document does not cover the area of Bisley where the path is located.

9.9 Ordnance Survey Maps

The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

9.10 The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

9.11 Ordnance Survey Maps 25":1mile, Coloured first edition (1873-84). National Library of Scotland – sheet 42.14

9.12 The claimed path is shown as an established track on the ground on the same line as the application route. It is depicted as a narrow through-route with solid boundaries to each side with a dashed line at its junction with Van der Breen Street denoting a change of surface. Due to the annotation 'W' to indicate the well associated with the property, The Nest, it is impossible to identify whether there is a physical feature at its junction with Mount Pleasant Road. It is un-numbered and unbraced to adjacent land but is uncoloured unlike other highways in Bisley at the time. It is noted however that Rose Hill, recorded today as a class 5 road and Van Der Breen Street, a class 4 road are similarly uncoloured. A copy of this map is held **(JH5)** and an enlarged inset map is held as **(JH5A)**.

9.13 Ordnance Survey Maps 25":1mile, Second Edition (1898-1902) & Third Edition (1912-22) - National Library of Scotland – sheet 42.14

The narrow path is shown on both maps as a through-route with solid boundaries to each side in a similar manner to other known highways of the time. There is a dashed line at each end of the path denoting a change of surface. The path is braced with other fields under plot number 733. Copies of these maps are held (**JH6 & 6A**).

9.14 Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25": 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheet 42/14. (D2428/1/3, Gloucestershire Archives) / National Archives (IR58/20943)

9.15 The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (1898 in Gloucestershire) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

9.16 Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.

9.17 Where a route is shown uncoloured on the plans and excluded from the taxable land this provides strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it can be difficult to establish which route is considered to be the right of way without additional details.

9.18 The path is shown as a narrow established track in a similar manner to other highways of the time; uncoloured, un-numbered, free of physical barriers at either end which could impede access and excluded from adjacent hereditaments; (north of the path) - No.75 in the ownership & occupation of Mr W Roe and Nos.74, 78 & 79, although having different occupiers, all were in the ownership of Miss E. Jaines and (south of the path); No.78 in the ownership of Miss E.Jaines. No deduction for public rights of way is recorded. Section 11 of the Planning Inspectorates Consistency Guidelines (2nd revision June 2008) says in paragraph 11.7; "*The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as*

included in the hereditaments, i.e. they will be shown uncoloured and unnumbered.....So if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion". A copy of the Finance Act showing the path is held (JH7).

- 9.19** It could be suggested that the reason for the exclusion of this route is because it was a shared access/ occupation road that none of the adjoining landowners claimed to own and which may or may not have also carried public rights of some sort. The consistent narrowness of the path running between solid boundaries would prevent landowners from using this path with cattle, carts and horses. It could however have been a private access track used mainly by the owners of Cartref, The Nest and Oakleigh Cottage for pedestrian access between their properties and the centre of the village. The base map used for the Finance Act valuation plan was the 1902 second edition Ordnance Survey map which shows the path braced to the land in which Oakleigh Cottage was situated. However, this same map shows the path as a through route connecting 2 other roads without barriers at either end. There are 5 other routes shown on the Finance Act within walking distance of the claimed path that are similarly shown to be excluded from adjacent fields, uncoloured and un-numbered but which, unlike the claimed path, all connect to and continue across coloured and numbered hereditaments. These too could seemingly fit the description of being private occupation routes shared by local people for their own private uses. However three are designated today as class 4 roads; 41364 (Manor Road) / 41341 (School Road) & 41329 (Van der Breen Street), one is designated as the 51156 (Calfway Lane) and one is designated as Public Footpath MBL116 as shown at **(JH8)**.
- 9.20** **County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 ("NPACA 1949"). Glos Archives – K687/1/11 & Bisley Parish Council minutes – P47a/PC/1/3 & 4.**
- 9.21** Under this legislation, all highway authorities were required to carry out a survey of public paths and draw up a Definitive Map and Statement which together would form the legal record of public rights of way. Gloucestershire County Council initially provided parish councils with Ordnance Survey 6":1 mile, 1924 edition maps to record their local public path networks. The returned documents are referred to as 'Original Submissions'.
- 9.22** The original submission for Bisley upon Lypiatt Parish Council includes a working copy based on the Ordnance Survey 1:25000 or 2.5"; 1 mile map sheet 32/ 90 which covers the whole parish. A hand written key at the bottom of the map identifies; parish boundary; yellow, bridle paths; green, footpaths; purple and county roads; brown. The parish boundary is highlighted yellow and the base map County roads, originally denoted as broken brown lines have been hand coloured as solid brown lines. The key only appears to have been applied to the bridle paths and footpaths to the south of the parish. The bridle paths and footpaths to the north are merely marked with pencil with some annotation. It appears that the claimed path is so marked with a pencil tick against it in a similar manner that the route known today as MBL116 is marked. A copy is held **(JH9)**. The supplied 6":1mile 1924 edition Ordnance Survey map shows the roads hand drawn brown and the footpaths coloured red. There is some annotation of paths and road numbers in pencil. The claimed path is coloured red and is un-numbered. It could be suggested that it is shown as the continuation of MBL116 however the entry in

the written statement for MBL116 does not include the ordnance survey parcel number of the field over which the claimed path crosses. A copy of this plan is held as **(JH10)**.

- 9.23** The subsequent stages of the process called for the highway authority to collate the original submissions and produce a 'Draft Map' and 'Provisional Map' before the final 'Definitive Map'. The path is not shown on any of them.
- 9.24** County Councils were required to carry out statutory five-year reviews of the legal record of public rights of way. Although they were allowed to publish their first definitive maps on a piecemeal basis, reviews had to be undertaken of the whole county at the same time. In Gloucestershire however, the initial process of compiling the Definitive Map was not complete until the 1980s by which time the Wildlife and Countryside Act 1981 had overtaken the NPACA49 (and the intervening Countryside Act 1968) providing for reviews of definitive maps to be carried out on a piecemeal basis, one path or more at a time. Under this review, there was an opportunity to add paths which should have been included during the first survey but which were missed for various reasons.
- 9.25** Although the Definitive Map does not record the claimed path, it does have attached an insert map covering the area of Van Der Breen Street. On this inset map, three paths marked in blue and are identified on the key as 'Public Footpaths to be added at Review'. A file reference is noted but this file has become lost. This appears to reinforce the view that Bisley Parish Council was intent on claiming this path as a public path **(JH11)**.

9.26 DOCUMENTARY EVIDENCE SUMMARY

Documents executed under a legal provision and which were in the public domain, thus enjoying a high evidential weight, such as the Tithe Map of 1842 and the Finance Act Map 1910, portray the path consistently as an established through-route in a manner similar to the existing highway network of the time when considering the colouring, being un-numbered and excluded from adjacent fields and hereditaments. No evidence was found to suggest that it was merely a private access to a few properties and enjoyed by a few householders. Further, it is evident that Bisley with Lypiatt Parish Council considered that the path carried highway rights and claimed it as a public footpath during the 1950s national process of officially recording the public rights of way network. No objections were found with regard to its inclusion on the legal record and due to its apparent omission it was recommended to be added at the review (which did not take place).

10. CONSULTATIONS

- 10.1** The owners of Cartref, Oakleigh Cottage, Eversley & Rectory Farm, County Councillor Keith Rippington, The Open Spaces Society, The Ramblers Association & Stroud District Council were consulted on 22 February 2019. The owner of Rectory Farm was consulted on 26 June 2019. Upon being made aware that pupils at the Blue Coat primary School used the path to access the King George V playing field, I emailed Dawn Lane, School Business Manager to seek clarification on 13 August 2019.

11. CONSULTATION RESPONSE

- 11.1 The owner of Oakley Cottage wrote on 30 March 2019 with regard to her garage located at the end of her property and accessed via Van der Breen Street. She stated that *"I would obviously resist anything that would block or impede access to the garage. I would be grateful to have confirmation that my access will not be affected by any decision"*. This use would be by private easement or licence and Juliette Walker, Asset Data Technician therefore responded on 11 April 2019, *"I can confirm that access to your garage will be unaffected by the possible addition of the new public footpath to the Definitive Map"*.
- 11.2 The local representative of The Open Spaces Society responded by email on 25 February 2019 to say *"I do not recall ever using the route. Nonetheless I support the application"*.
- 11.3 An email dated 15 August 2019 was received from Dawn Lane, School Business Manager, Blue Coat School. She stated; *"I moved to Bisley 19 years ago. My children attended Bisley Blue Coat School from that time. I have worked at the school for 18 years and have been resident in Middle Lypiatt for the same duration."*

In order to get to the King George Playing Fields from the majority of the village, you have to cross the Bisley By-Pass Road. This by-pass road is in part Mount Pleasant and the Cheltenham Road which aims to reduce traffic travelling through the village along the High Street. This road is very busy and is the main through road from Bussage/ Eastcombe to Cheltenham.

If people were to cross the Cheltenham Road directly to Van Der Breen Street, it would be necessary to cross from outside the Stirrup Cup pub. However this is a junction where Mount Pleasant, The High Street and Cheltenham Road all meet. It is a reasonably wide section of road. You cannot see the oncoming traffic, which makes the crossing dangerous, especially with children. In order to cross with school children, we would need a minimum of 3 adults to cover each road to allow the children to cross safely.

For the past 19 years I have personally used the crossing from the High Street, across Mount Pleasant and up to Van Der Breen Street in order to access the playing Fields. The school has also used this path when staff and/or parents have taken children to/from the playing fields for sporting activities during the school day and for after school activities. It is a much shorter crossing and traffic is visible in both directions making it a safer crossing point. The school would use this path at least once a week during term time (38 weeks per year). The school does not have its own playing fields and as such we are reliant on using the village facilities.....

I can also confirm that I seen many local residents using this path over the years, especially dog walkers. It tends to be a path that locals know about as it is not obvious to passers-by".

- 11.4 On clarifying the number of years that pupils were walked along the claimed path to access the playing field, I received the following response on the same date;- *"I used to run the after school football club about 15 years ago and would have used it"*.
- 11.5 I sought further clarification from teachers who actually used the path with their pupils. I received the following email from Mrs Batten on 31 August 2019: *"I have*

worked at the school for 20 years and the path between Mount Pleasant and Van Der Breen Street has always been used, to varying degrees, by pupils and staff during that time. A big part of my role at the school is being PE and Sports Co-Ordinator. The school does not have a playing field so is reliant on the King George Playing Field and pavilion, which is accessed from Van Der Breen Street. Consequently, during term time I am frequently involved in taking groups of pupils to the field and often use the footpath in question because it is the safest way to cross the village with a group of less than 30 children.

A number of After School Clubs take place at the field and the footpath is often used to safely walk the children to the King George Playing Field. For example, this term I have Archery Club (18 pupils), Football Club (20 pupils) and Cross Country Club (approximately 25 pupils) taking place at the field on a regular basis each week. A minimum of two or three adults accompany the children each time. The number and range of clubs varies each term, depending on the time of year and the weather conditions, so in the winter there may be only one club taking place at the field each week whilst there are more during the summer months.

In addition to this, other groups of children from the school use the path on an irregular basis. Sometimes it might be a small group of three to six children taking part in activity around the village (for example, geography research or photography) or it might be a whole class of thirty pupils taking advantage of the good weather to have their PE lesson of cricket at the field.

The use of the footpath is usually the best way for us to take groups of children to the field. However, when we need to take larger numbers of pupils (for example, the whole school when it is Sports Day) we cross at the Stirrup Cup pub with more adults in attendance. The reason for this is the limitation of space on the path with steps between Mount Pleasant and the High Street which we need to use before crossing Mount Pleasant to the start of the footpath.....”.

12. USER EVIDENCE

- 12.1 Section 31(1) of the Highways Act 1980 (“s31HA80”) states that where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, has been actually enjoyed by the public ‘as of right’; without force, secrecy or permission and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless “there is sufficient evidence that there was no intention during that period to dedicate it”.**
- 12.2 Section 31(2) states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether through an overt act by the landowner which makes it clear to the public that their right is being challenged or otherwise.**
- 12.3 It is not essential for the paths or ways to have been used for the full period of 20 years by the same persons; the period may accrue as a result of use by different persons for shorter periods (Davis v Whitby (1974)). Nor does it matter that the use is not continuous in the sense that it may not have occurred every day.**
- 12.4 The main issues to be considered in relation to the s31HA80 legal provision are therefore:**

12.5 When the status of the claimed route was called into question; No action was taken by the landowner to question or challenge the public's use of the path. In such cases, Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) provides that the date of the DMMO application can be used in accordance with paragraph 1 of Schedule 14 to the Wildlife & Countryside Act 1981.

For the purpose of this report therefore the user evidence will be assessed over the 20 year period 1998 - 2018 leading up to the application.

12.6 The extent and nature of the claimed use;

12.7 A total of 14 Public Path Evidence Forms ("PPEFs") were completed by 14 individual members of the public in support of this application dating back to 1935 on foot. Mrs French submitted 2 PPEFs, one of which detailed a length of path from the steps on High Street to Waterlane. There are no specifics pertaining to the claimed path and therefore this PPEF has been discounted.

12.8 Another of the individuals, Mrs Entwistle, who lives in Minchinhampton, supplied the first page of the PPEF which contains questions 1-6 but not the second side which contains questions 7- 10, and the signed and dated declaration. She also did not supply a plan. Mrs Entwistle was contacted by letter on 13 July 2018 and supplied with a new PPEF and plan but nothing further was received. Section 5.7 of the Planning Inspectorate's Definitive Map Orders; Consistency Guidelines, states "*Analysis allows the rejection of invalid UEFs (e.g "no signature or no clear description of the way or of how it was being used")*". Mrs Entwistle's PPEF has therefore been discounted and although appearing in the summary of use, is not included in the evaluation.

12.9 Mr & Mrs Smith of Cartref jointly submitted a PPEF. However they used this form to object to the path being recognised as a public right of way. Their evidence therefore, although included in the summary, is not included in the evaluation of use. Instead it is addressed in paragraph 12.18 & 19 of this report under the sub heading; **'Whether there is sufficient evidence of a lack of intention to dedicate a public right of way'**.

12.10 As a result there are 11 PPEFs submitted by 11 individual members of the public included in the analysis of use. When considering the statutory period, all 11 individuals claim to have used the path for part or all of the qualifying period; 1998-2018 and of those 8 claim use of this path across the whole 20 year period. A summary of the PPEFs and a useful bar chart of use are held at **JH12** and **JH13** respectively.

12.11 In addition to establishing twenty years user, for a claim to give rise to a presumption of dedication, user must be without force, secrecy or permission. Use that complies with these three requirements is termed user 'as of right'. The House of Lords in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) reasserted an ancient principle namely, that if sufficient people carry on an activity openly and for long enough without anyone trying to stop them, it is right and proper that the activity should be treated by the law as having a lawful origin. The House of Lords held that it was only necessary to prove that they have made use of the paths without resort to force, secrecy and as if they had a right to do so – that is, without having been granted any licence/ permission by the landowner. There is no evidence of use of the path by force, secrecy or permission.

- 12.12** With regard to frequency of user based on the 11 PPEFs; 1 individual claims daily use of the path, 5 claim weekly use, 2 claim monthly use, 1 claims use of 300+ times per year, 1 claims 'numerous' use and 1 claims use of only 3 times per year. Use of the route for part or all of the qualifying period is fairly consistent as being for the purpose of dog walking, leisure and access to the village or King George V playing field which is located along Van der Breen Street. Ms Neighbour stated in her PPEF in response to Q.9 'Can you give any further particulars?'- "*This footpath is vital to pedestrians to avoid the dangerous 5 road junction by the Stirrup Cup meaning only 1 road has to be crossed*". Mrs Bashford, who has lived at Eskdale, Van der Breen Street for 65 years since 1953, responded with regard to the claimed path, Q.9 'Can you give any further particulars?' "*There has always been a shortcut to the village*".
- 12.13** The route, as described and marked on the maps accompanying 7 of the 8 PPEFs, is consistent in their depiction of the claimed route. Mrs Saunders did not mark up the plan accompanying her PPEF.
- 12.14** The chicane located at the junction of the claimed path with Mount Pleasant has been in situ for many years. Yakub Mulla, Area Highway Representative, although working for the County Council for over 20 years and being aware of this structure, was unable to supply any information with regard to its installation. Upon making the same enquiry by email of the applicant, Bisley Parish Council, Mrs Saunders responded "*We moved here in 1983 and it was there then*". From these comments, it would not be unreasonable to suggest that the chicane had been in situ for the whole 20 year qualifying period under consideration. The purpose of the chicane is suggested by Mrs Saunders when she stated in her PPEF in response to Q.5.Gates; "*There is a sort of barrier to prevent children running into the road*".
- 12.15** Blue Coat Primary School, which has existed since 1732, caters for students aged 5 -11. Statements made by personnel working at the school indicate that the claimed path has been the favoured route of teachers and students for years due to it being considered safer. Dawn Lane, School Business Manager, supplied a statement as found at 11.3 of this report "*For the past 19 years I have personally used the crossing from the High Street, across Mount Pleasant and up to Van Der Breen Street in order to access the playing Fields. The school has also used this path when staff and/or parents have taken children to/from the playing fields for sporting activities during the school day and for after school activities. It is a much shorter crossing and traffic is visible in both directions making it a safer crossing point. The school would use this path at least once a week during term time (38 weeks per year). The school does not have its own playing fields and as such we are reliant on using the village facilities.....*"
- 12.16** Mrs Batten, a teacher and PE & Sports Co-ordinator, provided a statement found at 11.5 of this report. She stated "*I have worked at the school for 20 years and the path between Mount Pleasant and Van Der Breen Street has always been used, to varying degrees, by pupils and staff during that time..... The school does not have a playing field so is reliant on the King George Playing Field and pavilion, which is accessed from Van Der Breen Street. Consequently, during term time I am frequently involved in taking groups of pupils to the field and often use the footpath in question because it is the safest way to cross the village with a group of less than 30 children*"....."*A number of After School Clubs take place at the field and the footpath is often used to safely walk the children to the King George Playing Field. For example, this term I have Archery Club (18 pupils), Football Club (20 pupils) and Cross Country Club (approximately 25 pupils) taking place at the field*

on a regular basis each week. A minimum of two or three adults accompany the children each time”

12.17 Separately, Mrs C Bulcock, who has lived at Kimberley Cottage on Mount Pleasant for 18 years, responded to Q.9- Can you give any further particulars? *“It is a well used footpath”.*

12.18 **Whether there is sufficient evidence of a lack of intention to dedicate a public right of way;** The land over which the claimed path crosses is unregistered. There is no explicit reference in section 31(1) HA80 to use having to be of a level to have come to the attention of the landowner. It does not speak of a *landowner being deemed to have dedicated* the way, but of the *way being deemed to have been dedicated*, i.e., irrespective of the existence or non-existence of a person capable of dedicating the way. Therefore, the fact that the path crosses unregistered land does not preclude a claim of presumed dedication and it follows that the absence of evidence of a lack of intention to dedicate a public right of way on the part of a landowner will also not prevent the presumption of dedication.

12.19 Although there has been no evidence provided of use being publically challenged or of a lack of intention to dedicate prior to 2018, Mr & Mrs Smith of Cartref, Bisley whose property abuts the claimed path (although their frontage is on to Mount Pleasant Road), used their Public Path Evidence Form to object to the path being dedicated as a public footpath. They have known the path for a period of 15 years since 2003 and use it on a weekly basis for maintenance of their property. They are not aware of any stiles, gates, notices or obstructions. They provided additional information on a separate page attached to the PPEF. It states *“We object to the path being shown on the map as a public footpath which would mean extra foot traffic past and immediately next to our window. This path was originally between the property and garden to give access to the front door of the property built in 1682. The path is only about 1 metre wide and now goes up past Oakleigh Cottage as well. The cottage ‘Cartref’ has now been split and the cottage ‘The Nest’ now exists. The Nest now has a sewer and drain which goes down the footpath and out onto the road. There is also a water drain in the path which is blocked and which is never cleaned out when drain cleaning takes place as it is not on the highway. Would the parish council be responsible for any maintenance work arising from extra traffic on this path?”* This application is made under the legal provision of the Wildlife and Countryside Act 1981 which is only concerned with ascertaining the existence of highway rights and does not allow factors such as suitability and desirability to be taken into account. It is noted however that there are many properties, particularly within Bisley with Lypiatt village which front directly onto pavements and even roads under which public utilities are located.

13. CONCLUSIONS

13.1 Section 53(3) (c) (i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

13.2 Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence discovered by the Council, when considered with all other relevant evidence available, shows that, on the balance of probabilities, the Definitive Map and Statement require modification because a right of way which is not shown on the map and statement subsists, or is reasonably alleged to subsist. The relevant

tests are now set out in section 4.4 of the Defra Rights of Way Circular 1/2009, version 2 (October 2009).

- 13.3** The PPEFs shows that 11 members of the public claim use of this path on foot for part or all of the 20 year qualifying period; 1998-2018 and of those, 8 used the path over the whole period. This use is without interruption and 'as of right' (without secrecy, force or permission) and there is no evidence this use has been challenged in any way or of a lack of intention to dedicate prior to 2018. The user evidence would support a case for deemed dedication as a public footpath. Although we cannot take into account factors such as suitability, desirability and even safety when considering this application, the additional statements provided by personnel of Blue Coat Primary School, corroborate the claimed use in the PPEFs, stating that for many years the claimed path has been used by students and teachers to access the King George V playing field along Van der Breen Street for sports and after school club activities.
- 13.4** Documents show that the claimed path has retained the same physical characteristic over a period of at least 176 years. The Tithe Map 1842 and the Finance Act Map 1910, both executed under legal provisions which were in the public domain, thus enjoying a considered evidential weight, show the path, albeit narrower, in a similar manner to other known highways in the area at the time, i.e., a through-route connecting 2 existing highways with similar colouring, being unnumbered and excluded from adjacent plots of land. Further Bisley Parish Council claimed this path as a public footpath to be added to the legal record of public paths drawn up under another legal provision; National Parks and Access to the Countryside Act 1949. No objections were received and documents found during the course of this investigation indicate that this omitted path was to be added during the review which did not materialise.
- 13.5** On the balance of probability therefore, a combination of the documentary and user evidence suggests that the path subsists. It is submitted that this section of path should now be protected by being recognised on the Definitive Map as public footpath.
- 13.6** The recommendation therefore is that an Order be made to add the public footpath to the legal record of public rights of way.

14. APPENDICES:

JH1	1:5,000 location map
JH2	1:1250 scale map of path
JH3	Photos
JH4	Tithe Map 1842
JH5 & 5A	1884 OS Map & inset
JH6 & 6A	1902 & 1923 OS Maps
JH7	Finance Act 1910
JH8	Finance Act (other excluded uncoloured paths)
JH9	Original Submission 25" map
JH10	Original Submission 6" map
JH11	Review map
JH12	Summary of PPEFs
JH13	Bar Chart