

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	17 April 2024
Title:	DMMO 1135 - Applications for Definitive Map Modification Orders to record three restricted byways in the parish of Ringwood
Report From:	Director of Universal Services

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1. Purpose of this report

- 1.1. The purpose of this report is to assist Members of the Regulatory Committee in determining whether the available evidence is sufficient for a Definitive Map Modification Order (“DMMO”) to be made, recording public rights of way in the parish of Ringwood.

2. Recommendation

- 2.1. That the application be accepted, and that authority is given for the making of a DMMO to record the claimed routes plus an additional route as restricted byways.
- 2.2. The routes to be recorded are shown on the draft order plan referenced Appendix A:
- Claimed route A as shown from D-E
 - Claimed route B as shown from F-G
 - Claimed route C as shown from H-E-G
 - and the additional route linking claimed routes A and B (shown from E-G as a circular route to the east).
- 2.3. The width of all routes should be 4m wide, all the routes should be to be recorded without limitations.

3. Executive Summary

- 3.1. In May 2021, the County Council received an application, made under Section 53 of the Wildlife and Countryside Act 1981, by a resident of Romsey (the “Applicant”), to add three restricted byways in the village of Bagnum, which is situated on the western border of the New Forest National Park, in the parish of Ringwood. The application is supported by historic evidence, which the Applicant believes is sufficient to demonstrate that the claimed routes should be added to the Definitive Map and Statement (the “DMS”).
- 3.2. The current application follows two previous decisions made by the County Council regarding the claimed routes which were made in 1992 (the “1992 decision”) and 2020 (the “2020” decision). The County Council had previously concluded that there was insufficient evidence to add the claimed routes to the DMS. The Applicant believes that the County Council has come to the wrong conclusion and has submitted further historic evidence and commentary to support their claim that the routes should be recorded.
- 3.3. In the first instance, Officers had to consider if there had been a ‘discovery of evidence’ that would justify further consideration of whether public rights could be reasonably alleged to subsist (see Section 12). In doing so, Officers have examined the relevant case law and Planning Inspectorate Appeal Decisions (see Appendix B pages 1-5), to confirm what constitutes the discovery of evidence. In light of those authorities, Officers consider it reasonable to accept any new evidence (that has not been previously considered) as constituting a discovery of evidence. Having examined the new evidence, Officers consider that there has been a discovery of evidence pursuant to Section 53.
- 3.4. Having undertaken the review of case law, officers also now accept that the 2020 decision was partially incorrect. When new evidence constitutes a discovery of evidence, the County Council are required, when making a formal decision, to consider the new evidence with all other available evidence (including evidence previously considered). In the 2020 decision, Officers only considered documents that had not been considered within the previous 1992 Decision.
- 3.5. Having deemed that there had been a ‘discovery of evidence’, Officers then needed to consider a second question, as to whether there is sufficient evidence to show that ‘public rights’ subsist over the claimed routes. In this case, where the application concerns routes that are not already recorded on the Definitive Map, it is simply necessary to demonstrate that it can be ‘reasonably alleged’ that public rights subsist. this is a lesser burden of proof than ‘balance of probabilities’, which is the test to be applied when the application routes are already recorded on the definitive map at a different status, and in all cases when considering whether to confirm a made order.

- 3.6. Officers have examined a variety of documentary evidence from the 18th Century to modern day, including Taylor's Map of Hampshire 1759, Ringwood Inclosure Award of 1811, Greenwoods Map of Hampshire 1826, Ringwood Tithe Map of 1845, Bartholemew's Map of New Forest and Isle of Wight 1902, Philip's Cyclists Map of Hampshire 1920, and a comprehensive range of Ordnance Survey maps. The documentary evidence indicates that the claimed routes were in existence prior to the Ringwood Inclosure Award of 1811 and have continued to be recognised as highways into the period of living memory.
- 3.7. Officers consider that prior to the Enclosure Award of 1811 that the routes were recognised as carriageways and drove ways and that early use of the claimed routes would have amounted, at a minimum, to bridleway status. From the early 19th Century, the claimed routes are referred to as 'cross roads' on contemporary commercial maps indicating carriageway status, until the early part of the 20th century, when use of the routes appears to have declined. The alignment of the southern section of route C between the terminus of routes A and B is also shown as a semicircular route on maps between 1870 and the 1960s.
- 3.8. Although no single documentary exhibit provides conclusive evidence of an express dedication, there is also no evidence that any of the claimed routes have been formally stopped up. Overall, the balance of evidence is in favour of public rights having been established. Officers therefore consider that the documentary evidence provides a reasonable allegation of a presumed dedication at common law.
- 3.9. Officers have also assessed evidence of use from 82 local people, some of which was submitted within previous claims, and new user evidence received during consultation, which has also been considered. The evidence is summarised in the chart provided as Appendix D. The use documented on the user evidence forms and written letters commenced in 1914 and is recorded to have continued until 1995, all use appears to have been for recreational purposes, for accessing Kingston Great Common, or onward journeys to the New Forest.
- 3.10. Of the 82 local people that have reported to have used the claimed routes, approximately 68 people have used claimed route A, 58 people have used route B, and 80 people have used route C. 70 people have travelled on foot, 6 people have travelled on a bicycle, 71 people have travelled on horseback, and 12 people using a horse and cart or motor vehicle. Officers consider that the evidence of use supports carriageway status and provides a reasonable allegation of dedication under statutory prescription and presumed dedication under common law.

- 3.11. Lastly, officers needed to consider the effects of the rights of way provisions within the Natural Environment and Rural Communities Act 2006 (“NERC”), which in certain circumstances, curtail the future scope for establishing public rights of way for mechanically propelled vehicles. Officers have examined the exemptions in Section 67 of NERC and found that none apply. It is therefore considered that public rights of way for motor vehicles have been extinguished over the claimed routes, meaning that they should be recorded as restricted byways.
- 3.12. Having examined the available documentary and user evidence, Officers consider that there are sufficient grounds to recommend the recording of all three claimed routes, plus an additional semicircular route extending from claimed route A to claimed route B. Officers recommend that all routes are recorded as restricted byways.

4. Legal framework for the decision

Wildlife and Countryside Act 1981

- 4.1. Section 53: Duty to keep definitive map and statement under continuous review.
- (2) As regards every definitive map and statement, the surveying authority shall:
- b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.
- (3) The events referred to in sub-section (2) are as follows: -
- 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 on 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 to which this Part applies.
 - 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.

Highways Act 1980

- 4.2. Section 31: Dedication of way as highway presumed after public use of 20 years
- (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Presumed Dedication at Common Law

- 4.3. 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 that 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 circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

Natural Environment and Rural Communities Act 2006

- 4.4. Section 67: Ending of certain existing unrecorded public rights of way
- (1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement-
- (a) was not shown on a definitive map and statement, or
 - (b) was shown on a definitive map and statement only as a footpath, bridleway or restricted byway.
- But this is subject to subsections (2) to (8)
- (2) 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 1st December 1930.
- (3) Subsection (1) does not apply to an existing public right of way if –
- (a) before the relevant date, an application was made under section 53(3) 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 and, 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 would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

4.5. Section 12: Effect of right of access on rights and liabilities of owners.

(3) For the purposes of any enactment or rule of law as to the circumstances in which the dedication of a highway or the grant of an easement may be presumed, or may be established by prescription, the use by the public or by any person of a way across land in the exercise of the right conferred by section 2(1) is to be disregarded.

5. Relevant Case Law

5.1. The case law that Officers consider relevant to this case is provided in Appendix B.

6. Issues to be decided

6.1. Firstly, it must be decided whether the County Council, as surveying authority, has 'discovered' evidence. If there has been a 'discovery' of evidence, then a second question arises as to whether there is evidence to show that 'public rights' subsist.

6.2. In this case, where the application concerns a route not already recorded on the Definitive Map, it is simply necessary to demonstrate that the 'reasonably alleged' test has been met, which is a lesser burden of proof than 'balance of probabilities' (which is the test for making an order to upgrade a recorded right of way, and for confirming all DMMOs). If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry.

6.3. If a right of way is considered to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the DMS should be given.

6.4. Where a DMMO is made, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm

the Order, and the matter would need to be referred to the Secretary of State for determination. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.

- 6.5. In the event of an application under Section 53 being refused, the applicant has the right to appeal against the County Council's decision to the Secretary of State, who may direct the County Council to make the order that is sought.

7. Description of the Routes

- 7.1. The claimed routes are located within the village of Bagnum, on the western border of the New Forest National Park, in the parish of Ringwood. Please refer to Appendix A – Draft Order Plan.

Route A commences at the end of the public road U121 Bagnum Lane, an unclassified cul-de-sac road. Route A continues eastwards and terminates at Kingston Great Common, and a junction with Route C. The length of Route A is approximately 950m. (shown as D-E on the draft order plan Appendix A).

Route B commences as at the end of T121 Park Hill Lane, an unmetalled cul-de-sac road. Route B continues eastwards, across the dismantled railway towards Kingston Great Common. Route B terminates by Bagnum Bog and at a junction with the commencement of Route C. Route B is approximately 1330m. (shown as F-G on the draft order plan).

Route C commences at the edge of Kingston Great Common at a junction with Route B. Route C travels north to a junction with U121 Charles's Lane. The length of Route C is approximately 1160m. (shown as G-E-H on the draft order plan).

8. Background to the application

- 8.1. An application was submitted by a resident of Romsey (the "Applicant") and was received by the County Council on 17 May 2021. The current application follows two previous decisions regarding the claimed routes which were made in 1992 (the "1992 decision") and 2020 (the "2020" decision).
- 8.2. Records have revealed that officers of the County Council had attempted to negotiate with landowners in the 1970s, who in principle agreed to the establishment of a 'new' public right of way, to be dedicated over claimed routes A and C, in return for culvert works and surface improvements to the track. However, no formal agreement was ever reached.
- 8.3. The 1992 decision was made in consideration of an application submitted in 1991 by the Ringwood and Fordingbridge Footpath Society. The County

Council concluded that the claim had not sufficiently evidenced that a public right of way subsisted over any of the claimed routes.

- 8.4. The 2020 decision was made in consideration of an application submitted by the current Applicant, which was submitted in 2007. The Applicant had reviewed the 1992 decision and believed that the wrong conclusion had been reached. The County Council examined some newly discovered evidence but had not considered this newly discovered evidence 'alongside' the other relevant evidence that had been considered as part of the 1992 decision.
- 8.5. Within this current application, the Applicant has reviewed the 2020 decision and the 1992 decision and believes that the wrong conclusion has again been reached.

9. Land ownership

- 9.1. Officers have completed Land Registry searches in relation to land over which the claimed routes travel. At the time of the search, Route A was predominantly unregistered, the most westerly end of the route is covered by parcel HP652739 in title to "Landowner 1". Much of route B is also unregistered apart from a section at its western end, which is registered as parcel HP652739 in title to "Landowner 2". The southern end of Route C is covered by parcel HP462300 in title to "Landowner 3". "Landowner 4" owns a property adjacent to the northeast section of Route C.
- 9.2. Inclosure is the name given to the process whereby land was taken out of a communal, or common farming system, and allotted to individuals who subsequently retained sole ownership of their individual parts of it. More information about Inclosure Maps and Awards can be found in Appendix C – Documentary Evidence Guide. The Ringwood Enclosure Map of 1811 is also further examined within this report (see paragraph 13.21).
- 9.3. Regarding land ownership, the Applicant has suggested, that "*It is important to note that this identification of the droves in the Inclosure Award means that it is not possible that the adjoining landowners have any legal right to restrict or challenge public access to these routes. There are no allotment numbers, and the area is included in the general roads and waste heading. They had no legal owners in the award, and therefore it is not possible for the present adjoining landowners to claim right of ownership and to restrict access over them*".
- 9.4. Prior to the Ringwood Enclosure Award of 1811, the land over which claimed routes A and B travel and Kingston Great Common was likely to have formed part of the common waste lands, which within the manorial system was looked upon as being owned by the lord of the manor in addition to their demesne (a piece of land attached to a manor and retained by the owner for their own use).

At this time there were freehold and copyhold tenements which had customary rights and these rights were exercised over Kingston Great Common.¹ The lords of the manor of Ringwood can be traced back beyond the Norman conquest to when the title was held by the Earl of Tostig. In more recent times, within the 17th century the manor passed to the Arundells of Wardour, who in 1974, sold the manor to John Morant of Brockenhurst.²

- 9.5. The Ringwood Inclosure Act of 1807 included “*Kingstonefield*” within the “*open and common fields, common meadows, commons, and wastelands herein-before directed to be divided, allotted, and inclosed*”. The Act also provided that expenses accrued from dividing and allotting and inclosing the land “*shall be paid, borne, and defrayed by the sale of such part or parts of the said waste lands, as the said commissioners shall think necessary for the purposes aforesaid*”. The Ringwood Inclosure Act also prohibited the Commissioners from inclosing land which “*would in their judgement materially prejudice or diminish the present usage and customary rights of... turning out cattle or sheep for the purpose of depasturing them in the New Forest...*”.³
- 9.6. In 1956 Mr L Tavener (Senior Lecturer in Geography, University of Southampton) was asked to undertake a survey of the 'Commons in Hampshire' by Hampshire County Council. In his published book, entitled *The Common Lands of Hampshire*, Tavener states that “*Kingston Great Common was not dealt with in the Inclosure Award of 1811, nor has the land been inclosed since that date*”.⁴ The Ringwood Award of 1811 schedules all rights of common regarding the other commons within the parish of Ringwood but does not include Kingston Great Common. The land over which Claimed routes A and B travel is described as “*lands left for a droveway to the Forest*”.⁵
- 9.7. Tithe Maps and Awards were produced to record tithes which were local takes usually payable to the church. They provide a valuable picture of land use and ownership. More information about Tithe Maps and Awards can again be found in Appendix C - Documentary Evidence Guide. The Ringwood Tithe Map and Apportionment Map of 1841 is discussed in detail later within this report (see paragraph 13.28).
- 9.8. The Tithe Apportionment Map of 1841 shows a small sum of vicarial tithe rent for Kingston Great Common (plot 2903) charged to John Morant. Officers therefore consider that either Kingston Great Common was sold to the Morant family to pay the Inclosure Commissioners expenses, or that the land remained

¹ *The Common Lands of Hampshire 1957* by L Ellis Tavener (page 2, 85-86)

² British History Online (www.british-history.ac.uk)

³ Hampshire Record Office 6M80/Z3 (hants.gov.uk)

⁴ *The Common Lands of Hampshire 1957* by L Ellis Tavener (page 85-86)

⁵ Hampshire Record Office (hants.gov.uk) 121A13/1/4/20; Hampshire Record Office (hants.gov.uk) 107M86/10

common waste and was deemed by the authorities at the time to have been owned by the Morant family. The land over which claimed routes A and B travel, however, is listed in the Apportionment under roads and waste, with no owners or occupiers and with no tithe rent payable. This means that it is less likely that this area of land was thought to be in private ownership at the time.

- 9.9. The Morant family retained ownership of the Manor of Ringwood until 1861, when it was acquired (along with other freehold lands, including Kingston Great Common) by the Mills family. The land exchange of 1861 details that plot 2903 - Kingston Great Common - was transferred subject to "*common rights if any*". However, the plot over which claimed routes A and B travel does not appear to have been included in the exchange, apart from a small plot of land in relation to Route B that extends to the railway line – plot 2818, which is described as "*arable field*".⁶
- 9.10. The Ringwood Estate Plan (c.1890) shows landholdings coloured in respect of different landowners. The land over which claimed routes A and B travel is also not shown as being owned, the adjoining parcels are shown as being freehold in the ownership of Mr Mills and King's College Cambridge.⁷
- 9.11. In 1920, Landowner 1 purchased the freehold of Kingston Great Common, along with other land forming the Gaddens Estate from the Mills family. The land over which claimed routes A and B travel was included in the sale.⁸ The Letter from Jackson Solicitors Fordingbridge dated 4 June 1935 confirms that when Kingston Great Common was transferred from the Mills family to Landowner 1, that it was conveyed as "*absolute freehold and not subject to any restrictions or commonable rights whatsoever*".⁹ Landowner 1 has stated that they have made application for registration of the land, however, this is not currently showing on the Land Registry portal.
- 9.12. In 1971 there was a hearing regarding disputed common rights over Kingston Great Common. In the award made under Section 4 of the New Forest Act 1949 and Section 2 of the New Forest Act 1964, Mr Alan Donger stated that "*there are no common rights over Kingston Great Common*" and "*those properties of the Manor of Burley, which on the 1st December 1963 were entitled to Forest Rights within the New Forest have a right of pasture for their animals per causa de vicinage over Kingston Great Common*"¹⁰ This is in line with Tavener, who states that "*no actual rights of common over Kingston Great*

⁶ Hampshire Record Office (hants.gov.uk) 20M56/1; Hampshire Record Office (hants.gov.uk) 6M80/E/B758

⁷ Hampshire Record Office (hants.gov.uk) 6M80/E/P4

⁸ Conveyance and Indenture Mills to Landowner 1 1920

⁹ Hampshire Record Office (hants.gov.uk) 51M76/P/2A/137

¹⁰ Donger Judgement 1971

*Common can be produced in respect of any property in the Manor of Ringwood...*¹¹

- 9.13. As detailed above the Applicant has questioned whether the adjoining landowners have any legal right to restrict or challenge public access to these routes. As noted above the land over which claimed routes A and B travel has been conveyed to Land Owner 1 as part of the sale in 1935. Officers consider that it is probable that previous land owners had acquired ownership prior to the transfer through some form of possession or *ad medium filum*. Officers therefore consider that, in answer to the Applicant's assertion regarding ownership, that the ownership of Kingston Great Common and of the land over which claimed routes A and B travel has been established for the purposes of the consideration of this claim.

10. Consultation with other bodies

- 10.1. In addition to the landowners, the following people and organisations have been consulted in relation to this application:

The Ramblers, Open Spaces Society, Byways and Bridleways Trust, British Horse Society, Trail Riders Fellowship, Cycling UK, British Driving Society, Auto-Cycle Union, Land Access and Recreation Association, The Verderers, Bagnum Equestrian Centre, Natural England, New Forest District Council, New Forest National Park Authority, Ringwood Town Council, HCC Property Services, HCC Local Member, and Countryside Access Team.

The following responses were received:

10.2. British Horse Society

"I would like to respond on behalf of the British Horse Society by confirming our support for DMMO 1135 to add three restricted byways in the parish of Ringwood. They will provide useful off-road riding/driving in the area for local equestrians. I have spoken to two people who have either ridden or have knowledge of the routes pre-1980. When Bagnum Riding Stables was established the proposed RB that passes the stables and through Little Bagnum Farm was open to equestrians but was then closed when a property along the route was sold... I have been told that the route starting near to Sanford Copse (where a 300 year old pub used to be - The Swan?) going towards Kingston Great Common and then up towards Strodgemoor Bottom would probably have formed part of the old route from Ringwood to Burley - but I am assuming the applicant has provided you with this information".

¹¹ The Common Lands of Hampshire 1957 by L Ellis Tavener (page 85-86)

10.3. Cyclists Touring Club

“The addition of these three restricted byways would be extremely useful for cyclists as there is a lack of bridleways and RBs in the area. In addition, they would link into the aspiration of the New Forest NPA to open up the Castleman Trail in that area. However, we have no direct knowledge of use by cyclists. I have spoken to Kieran Foster, off-road consultant for Cycling UK and he will send you a copy of a map indicating the presence of roads ‘from Sandford’ in that area” [see para 36 below].

10.4. Cycling UK

“For info, please find attached a segment from 1789 Drivers map (parliamentary copy) that was submitted with my New Forest restricted byway Claims. You will see that this identifies two roads specifically identifies as ‘from Sandford’ headed North Eastwards. Plus a number of other routes. Hopefully this offers some additional supporting evidence for the claims submitted”.

10.5. Hampshire County Council Property Services

“I believe these proposals affect the very western end of the County Council’s landownership of part of the old railway at Bagnum. This land is managed by Pete Durnell and his team so I am copying to him for comment. From an Estates point of view I have no particular comments to make”.

10.6. New Forest Commoners Defence Association

“We would like to object to this application on the following grounds: Kingston Great Common is a Nature Reserve and designated SSSI, as such it needs to be given protection; There is already open access for walkers and horse riders to Kingston Great Common negating the need for the proposed restricted byway; A restricted byway could be upgraded in the future; To record it as a Right of Way would mean it would be published on a map which may increase the footfall in a sensitive area; Current visitors come to appreciate an area defined as a Nature Reserve, folk pursuing byways on a map may not have the same care of the environment or wildlife; There is a curlew nesting site close by, its success completely dependent on the lack of disturbance”.

10.7. The Verderers

“Our objection will be based on the principle of putting a new right of way in that location, because of the effect it may have on the New Forest SSSI. We are particularly concerned about cyclists accessing sensitive habitat”.

10.8. The following representations were also received from consultees in relation to the 2020 decision, the comments have been taken from the report text, as the original correspondence is no longer available:

10.9. Countryside Service Area Access Team

The Area Manager stated that the claimed routes may have been used by the public due to the proximity to the open forest.

10.10. Cyclists Touring Club

The CTC conferred with a representative of Cycling UK and responded that there was data on Strava which showed 'considerable' use of part of Route C by cyclists, although much of this use appears to be linked to cycling events. Additionally, the response included images of an 1846 Ordnance Survey map and Milne's Map of Hampshire (1791) and states that the routes are shown on the maps.

10.11. The Ramblers

"Ringwood & Fordingbridge Footpath Society and Ramblers support this claim as we have long believed that these routes should be part of the Right of Way network. The claimed routes would take users away from very busy narrow highways reducing the risk of accidents and enabling good connections with other parts of the Right of Way network. A claim for three of the routes A, B and C was made in 1979 based on user evidence of 20 years unobstructed use, however much of the user evidence, although not disputed, was discounted at the time. We welcome this later claim and hope that the additional historic evidence will persuade HCC to grant the claim".

10.12. Ringwood Town Council

"The Council has now had an opportunity to consider this application and, whilst we are unable to provide evidence, the Council wishes to support the claim and would welcome the addition of the four routes to the Definitive Map".

10.13. The following representations were also received from consultees in relation to the 1992 decision:

10.14. English Nature

"I understand from the owner of Kingston Great Common, with whom NCC is negotiating a lease, that there is an intention to establish a bridleway across the property. The Common is part of the New Forest SSSI, within which there is an acute problem of horse-riding erosion which we are negotiating. I would therefore be grateful for information about the County Council's intentions".

10.15. Ringwood Town Council

"My Council has discussed your letter of the 31 January 1992, and fully supports the Ringwood and Fordingbridge Footpath Society in its application for the addition of bridleways to the definitive map... Some members of the Council claim to having been using these bridleways since childhood (a period of at least 50years)".

10.16. The Verderers

“The Verderers do not have a legal interest in the land but do have powers over it. The land is subject to common rights from people living in Burley and from the New Forest Commoners by virtue of vicinage. The Verderers believe they have and would expect to continue to have an unrestricted access for riders in pursuance of their rights; i.e. if someone went to look for their depastured stock. There would be a right to use these tracks and the Verderers are satisfied that all the tracks have been used by commoners for generations.

Tracks A and B are old drove ways leading into the Forest and the Verderers would be reluctant to see the loss of any drove which would be of considerable benefit to the Commoners. We believe that one of the Verderers... has given a statement as to the use of these paths. The Verderers have received complaints from Commoners who have experienced attempts to impede legitimate use of the common land in recent times”.

10.17. The following representations were also received from consultees in relation to the 1992 decision:

10.18. The Nature Conservancy Council

“As you probably know, the District Council, Forestry Commission and NCC have been jointly studying the problems which are currently being generated by escalating use of the New Forest by riding stables, trekking centres, etc. I think all three organisations feel that the repeated use of the same areas is creating almost as big a problem as the motor vehicle did before it was restricted to carparks. Certainly in the present case the damage done to Kingston Great Common is unacceptable”.

10.19. Hampshire and Isle of Wight Naturalist’s Trust

“Kingston Great Common has of course wildlife interests in its own right, so it is regrettable that such damage is being done to it by horses. The presence of an unfenced bridleway will make it more difficult to control trespass on the area”.

10.20. Crow Hill and District Residents Association

“We have recently discussed in Committee the proposal to create a Bridle Way over the Kingston Great Common and I now write to inform you that this Association feels compelled to voice its objection to such a move. Residents in this area know the Kingston Great Common as a habitat for rare birds and rare plants and the creation of a Bridle Path there would be prejudicial to the interests of this area for wildlife. We do not deprecate the growing commercialised Riding Enterprises in this district but we do suggest that alternative routes are readily available to them and they should not be allowed to despoil the Common which for over 25 years has been dedicated to Nature Conservancy”.

11. Representations from the landowners

11.1. The following landowner representations were received:

11.2. Landowner 1

Landowner 1 has submitted a multipart objection to this application including commentary on discovery of evidence, enclosure evidence, user evidence, legal procedure, and relevance of SSSI designation. Landowner 1 also submitted an objection to the 2020 Decision including a 33 page document providing their views on the documentary evidence. Landowner 1 also submitted two detailed letters of objection to the 1992 Decision. The 1992 Decision Report confirms that correspondence between the County Council and Landowner 1 in relation to the claimed routes had begun in 1972, at this time Landowner 1 disagreed that a right of way existed but agreed in principle to voluntarily establishing one.

11.3. Landowner 2

Landowner 2 has submitted a 6page objection to this application. Landowner 2 also submitted two letters of objection relating to the 2020 decision and are recorded as opposing access on foot or horseback within the 1992 decision report.

11.4. Landowner 3

Landowner 3 has submitted objections in relation to the 2020 and 1992 decisions. The 1992 Decision Report confirms that Landowner 3 disagreed that a right of way existed but agreed in principle to the establishment of one.

11.5. Landowner 4

Landowner 4 has submitted comments in relation to the 2020. Landowner 4 has stated that *"To our knowledge, the lane has only been used to service the campground south of our house. We have seen very little activity down the lane other than the owner of the campground now and then. We feel there is no history of the lane being used as a public right of way"*.

11.6. Letters of objection

Sixteen objection letters were received in 1978 from residents and people living further afield, the majority of which were submitted by one of the Landowners. The letters raise opposition to the recording of a bridleway on the grounds of nature conservation and state that no bridleway exists. A letter of objection was also received in 1992 from a couple who wanted the land to remain private as they camped there two or three times per year.

12. Has there been a discovery of evidence?

- 12.1. As set out in para 6 above and in Appendix B, before the County Council can make an order under the 1981 Act, it must first establish that there has been a 'discovery of evidence' (s.53(3)(c)(i)). The Applicant has stated that "*...the Enclosure Award and Map of 1811 had been given insufficient weight in the 1992 investigation*" and suggests that "*the serious failure by HCC map review department to present a proper report on the contents of the Award in the 1992 investigation means that such evidence is now new evidence*". The Applicant also alleges that other exhibited documents (see paragraph 12.10 below) constitute 'discovered' evidence.
- 12.2. Landowner 1, in their submission dated 4 March 2022, alleges that "the Enclosure Act was fully considered in the 1992 investigation and nothing new has been discovered to warrant this being re-opened". Their position being that "whilst 'new', as in previously 'not seen' documents were provided in 2007 and again in 2021, none of these documents contain any new information or information previously unknown to the council in 1992".
- 12.3. The County Council, in paragraph 40 of the decision report dated 23 June 2020, stated that "*Section 53 of Wildlife and Countryside Act empowers the surveying authority to review the Definitive Map and Statement following a 'discovery of evidence', and the judgment in the case of Burrows v Secretary of State for Environment, Food and Rural Affairs (2004) stated that: a definitive map can be corrected, but the correction (...) is dependent on the 'discovery of evidence'. An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification... Applying this judgement and the principle of res judicata to this case, any new evidence which was not taken into account during the 1992 investigation can be considered relating to routes A, B and C...*".
- 12.4. The Applicant in their statement dated 26 March 2020, has stated (page 13) that "*HCC have now put forward the argument that because the Enclosure Award was considered by the map review officer at the time then it cannot be considered now as it is not new evidence... I submit that this is not the correct interpretation of the res judicata principle. The evidence has to be submitted to the decision making authority. If it is suppressed as in this case, the decision makers, the Rights of Way Subcommittee, were not able to consider it*". The Applicant also states (page 31) that should there be a discovery of evidence, that the new evidence needs to be "*considered together with that previously considered*".

- 12.5. Landowner 1 has referenced *Mayhew v Secretary of State for Environment (1993)* (see Appendix B for further discussion). It is their position that the case law requires that for evidence to constitute a 'discovery', the "*discoverer must apply his mind to something previously unknown to him*". In *Mayhew*, the court had held that "*To discover, means to find out or become aware. 'Discovery,' means finding out or making known (Concise Oxford Dictionary). It connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgement, the 'event' in Section 53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared*".
- 12.6. George Lawrence KC drew a comparable inference in his report on the *Mayhew* case, published in *Rights of Way Law Review* in September 1992.¹² In the article he states that "*It is a reasonable inference from the judgement that... As long as that evidence was enough to raise a serious question about the status of the ways... it did not matter that, by itself, it may not have been enough to justify the council in making an order*".
- 12.7. Officers have been unable to find any judicial precedent on the extent of the new evidence required to trigger the provision in Section 53(3)(c). Officers have also consulted with other surveying authorities who have confirmed that there appears to be no bar on what evidence constitutes a discovery of evidence, with the Lake District National Park Authority confirming that one occasion it had been instructed (on appeal) to make an order when the applicant had only submitted one additional historic Ordnance Survey map when compared with an earlier application, and this map did not even show the claimed route. The Inspector came to a similar conclusion in Planning Inspectorate Order Decision [2017] FPS/M1900/7/86 - "*There appears to be no judicial guidance on the extent of the new evidence required to trigger the provision in Section 53(3)(c)*".
- 12.8. With no judicial precedent or guidance, officers consider it reasonable to accept new evidence (that has not been previously considered) as constituting a discovery of evidence for the purposes of Section 53(3)(c).
- 12.9. Having undertaken the review of case law, officers also now accept that the decision report dated 23 June 2020 was partially incorrect, as if new evidence had constituted a 'discovery' of evidence, the County Council were required, when making a formal decision, to have regard to all other relevant evidence available, rather than only considering documents that had not been previously considered separately. Officers consider that the evidence submitted in support of the 2007 application that was not considered with all other relevant evidence

¹² *Rights of Way Law Review* 1992 (Volume 8 Section 2 Pages 39-40)

within the 2020 Decision, should be treated as 'new' evidence, when determining whether there has been a discovery of evidence.

- 12.10. In relation to the 1992 Decision, the Applicant had submitted copies of Ordnance Survey map 1" (1810); Ordnance Survey map 6" (c. 1872); Thomas Milne's Map of Hampshire (1791); and Isaac Taylor's 1" Map (1759). However these maps were not considered within the committee report. In relation to the 2020 decision Landowner 1 had also submitted a 'consideration of old maps' which included a copy of Isaac Taylor's 1" Map (1759), W M Faden's Map (1791), Ordnance Survey Map 6" (1872), a photograph missing from the application, aerial photograph HRO 134M87, and Weather in 1947. These documents were not considered as part of the 2020 decision.
- 12.11. In total officers consider that there are at least 20 pieces of archive evidence that could constitute 'discovered' evidence, along with additional user evidence. It is therefore considered that there has been a discovery of evidence pursuant to Section 53(3)(c). Two papers - Drove Roads, Driftways and Vehicular Rights (1999) and Cross Roads (2002), prepared by the Applicant, are regarded as their commentary rather than objective evidence, and officers therefore do not consider these documents to be 'discovered' evidence.

13. Documentary evidence

- 13.1. The new evidence provided will be considered with all other relevant evidence. Where documents are held in archives, such as the Hampshire Record Office, National Archives, or online, details of the source are provided within the footnotes. Appendix C also provides a brief background and introduction to typical source material considered in rights of way claims.

Isaac Taylor's Map - 1" to the mile (1759)¹³

- 13.2. Isaac Taylor's Map of Hampshire was first submitted to the County Council in May 1991 by the Ringwood and Fordingbridge Footpath Society in relation to the 1992 Decision. The Map was also submitted to the County Council by Landowner 1 in October 2012 in relation to the 2020 decision. The map does not appear to have been examined within the 1992 or 2020 Decisions.
- 13.3. The map shows a route running eastwards from Crow to Burley along what is now the C104 Crow Hill. To the south of this there is also a route corresponding with what is now U121 Barrack Lane. There is also a route running eastwards to Burley from Wattons Ford along what are now Ringwood BOAT 84, U121 Dragon Lane, and Ringwood Footpath 79.

¹³ Old Hampshire Mapped (www.oldhampshiremapped.org.uk)

13.4. Landowner 1 has stated that “A road is shown running East from Wattons Ford, through Kingston and Sandford (not named), across Bisterne Common and the open forest to Burley Beacon. This is now public footpath NO. 78/9. From Burley Beacon another road is depicted running Northwest, joining up with the road from Lyndhurst through Burley Street and Vereley Hill and going back across the open forest to Crow and on to Ringwood. This is now the public highway, the C104. In the space between these two roads virtually nothing existed of the current road network... This map supports the view that there were no roads on the claimed routes at this date”.

13.5. There is also a route running east that corresponds with the commencement of what is now the U121 Charles’s Lane, however the route travels south eastwards and joins the route from Wattons Ford to Burley. The Applicant has stated that the Map “shows the route from Wattonsford up to the forest, along the line of claimed route B”. Officers consider that Route B does not correspond with the route from Wattons Ford, and that none of the claimed routes are shown.

Drivers’ Map of the New Forest (1789)¹⁴

13.6. Drivers’ Map of the New Forest, named after two of its original surveyors was published in 1789 by William Faden, Geographer to the King, in support of a parliamentary report into the New Forest. The map was submitted to the County Council by Cycling UK in response to the consultation on this application - the map was not examined within the 1992 or 2020 decision. Although the map identifies a route from Sandford, the route corresponds with the route running eastwards to Burley from Wattons Ford along what are now Ringwood BOAT 84, U121 Dragon Lane, and Ringwood Footpath 79. The claimed routes are not shown.

Milne’s Map of Hampshire – 1” to the mile (1791)¹⁵

13.7. Milne’s Map of Hampshire was first submitted to the County Council in May 1991 by the Ringwood and Fordingbridge Footpath Society in relation to the 1992 Decision. The Map was also submitted to the County Council by the Landowner 1 in October 2012 in relation to the 2020 decision titled ‘Wm. Faden’s Map’. The map does not appear to have been considered within the 1992 or 2020 Decisions.

13.8. The map shows a route running eastwards from the Globe Inn at Moretown to Burley along what is now the C104 Crow Hill. To the south of this there is also a route corresponding with what is now U121 Barrack Lane. The map also shows a route running from the Green Dragon Inn eastwards to Burley along what are now Ringwood BOAT 84, U121 Dragon Lane, and Ringwood Footpath

¹⁴ New Forest Knowledge (www.nfknowledge.org)

¹⁵ Old Hampshire Mapped (www.oldhampshiremapped.org.uk)

79. Routes travelling east towards Park Hill corresponding with what is now U121 Charles's Lane and T121 Park Hill Lane which extend out towards Kingston Great Common. The claimed routes are not shown.

Ordnance Survey Drawing of Christchurch Bay – 3 inches to the mile (1797)¹⁶

13.9. The Ordnance Survey Drawing of Christchurch Bay was not considered within the 1992 or 2020 decision. Unlike most inland drawings which are drawn at 2 inches to the mile, the map was drawn to a scale of 3 inches to the mile and therefore provides more detail. The map was drawn at this larger scale as at the time the area was perceived to be vulnerable to naval invasion. A small section of Route A is shown, route B is also shown, and route C is shown as a continuation of route B.

13.10. Officers, having georeferenced the map and overlaid contours, consider that a short section of route A is shown, route B is also shown, and route C is shown as a continuation of route B. The northern section of route C on the 1797 map appears to terminate slightly to the east of its current alignment, deviating towards the northern terminus of Ringwood Footpath 50 at Knaves Ash. The Ordnance Survey drawing confirms the physical presence of the routes, but not their status.

Ordnance Survey Map – 2" Manuscript Drawing (1808)¹⁷

13.11. The Ordnance Survey Map of 1808 was first submitted to the County Council in May 1991 by the Ringwood and Fordingbridge Footpath Society in relation to the 1992 Decision, on the back of the photocopy there is a Hampshire Record Office stamp with 'OS 2" Drawing c. 1808'. The Map was also submitted to the County Council by the Applicant in April 2007 and by Landowner 1 in October 2012 in relation to the 2020 decision (titled 'OS 1:25000 Drawing Sheet 8 1807/8'). The map was considered within the 1992 decision, although the map was examined within the 2020 decision, it was not considered with all other relevant evidence.

13.12. The 1992 Committee Report states that the "1808 2" OS map shows tracks B and C as a continuous route. Only a small part of route A can be seen". The 2020 Decision Report states that the "map is very elementary and demonstrates that the claimed routes partially existed at the time the area was surveyed but there is no indication that there are public rights of access along the routes".

13.13. The Applicant has stated that "The 1992 report refers in Section 2.1 to the '1808 2" map'... This is an unusual way of describing what is available. It may be supposed that what is being referred to is the OS manuscript drawing that was

¹⁶ British Library (www.bl.uk)

¹⁷ Hampshire Record Office

prepared in 1807/8 for this area, but this was not at 2", but at 3" to the mile in this particular area, and showed rather more detail of field boundaries etc. than was shown on later surveys... Route B is more clearly marked on both the drawing and the published map than Route A, and the 1992 report says that it, and the claimed route over the unfenced Kingston Great Common form a continuous route. In fact it is more than that; they form a continuous route over the Common to join the Burley road (Crow Lane) at Vales Moor, making a connection with the ongoing forest track now known as the Smugglers Road which leads up to Picket Post and the main road".

13.14. Landowner 1 has stated that "*Claimed route A is not shown. Claimed Route B is shown leaving the Bransgore Road, (the C49), at Sanford, heading east on the north bank of the Ripley Brook to the old enclosure of Hannah Harris... The track continues east until it is forced into a northerly direction by the arm of the brook which drains Strodgemoor Bottom. At Knaves Ash it crosses the C104 at right angles, continues north to Hurn Farm (map ref. SU1815,0450)... One final point should be made about this map, the cross roads depicted on this map, the cross roads depicted on this drawing are at Knaves Ash. From this point the track around Kingston Great Common goes slightly east of south. By no stretch of the imagination is this the hard surfaced road running down the 1964 Act perambulation boundary which was made by my predecessors and myself, to facilitate timber extraction farming, and a camp site. Our track did not exist as a continuous single entity until the [Landowner 1] started development of the land that they bought from the Bisterne Estate. It is easy to say that the drawing could be inaccurate and indeed [the applicant] has rubbished Mrs Maskell's report of 1992 for saying that this drawing was at 2" to the mile and not 3". In fact both are just out".*

13.15. Officers, having georeferenced the map and overlaid contours, consider that a short section of route A is shown, route B is also shown, and route C is shown as a continuation of route B. The northern section of route C on the 1808 map appears to terminate slightly to the east of its current alignment, deviating towards the northern terminus of Ringwood Footpath 50 at Knaves Ash. The Ordnance Survey map confirms the physical presence of the routes, but not their status.

Ordnance Survey Old Series Map – 1" 1811¹⁸

13.16. The OS Old Series Map of was first submitted to the County Council in May 1991 by the Ringwood and Fordingbridge Footpath Society in relation to the 1992 Decision. The Map was also submitted to the County Council by the Applicant in April 2007 and by Landowner 1 in October 2012 in relation to the

¹⁸ Old Hampshire Mapped (oldhampshiremapped.org.uk), Hampshire Record Office (hants.gov.uk) 110M89/P2

2020 decision. The Map was not considered within the 1992 decision, although the map was examined within the 2020 decision it was not considered with all other relevant evidence.

- 13.17. The 2020 Decision Report states that *“Bagnum Lane, the termination of which is the start point of Route A in the present day, is shown as being open ended to Kingston Great Common. This suggests that the route was used for access to the open forest. Routes B and C also appear to be shown on the map as routes depicted by a parallel pair of pecked lines, which cross Kingston Great Common. The alignment of Route B does not entirely match the current alignment of the claimed route”*.
- 13.18. Landowner 1 has stated that *“This map shows exactly the same layout as No. 3 above (OS Map 2” Manuscript Drawing 1808) and the conclusion is that no tracks existed beyond Charles Farm, Bagnum Farm or Little Bagnum Farm. A track did exist beyond the old enclosure of Hannah Harris in Sandford which went round the Ringwood commons. An acetate of a 1” OS Map published in 1960 confirms that the track shown, circumnavigating the commons, is much closer to the commons’ boundary than the modern hard surfaced track through the National Nature Reserve Camp Site that is the subject of this claim. The likely purpose of this track was in the management of stock on these commons and that the track was a private track, not a public highway”*.
- 13.19. Landowner 2 has stated that *“Ordnance Survey Maps and other maps make a valuable contribution to the overall history of an area and its features. If a way of path was visible on the ground an Ordnance Survey Map is likely to depict it however, the depiction of a route does not determine the status of a way or route. The Ordnance Survey Maps are therefore useful for identifying whether or not a way or route existed at the time the survey was carried out but does not identify whether or not a route is public or private”*.
- 13.20. The map is similar to the 2” Manuscript Drawing of 1808. Officers, having georeferenced the map and overlaid contours, consider that a short section of route A is shown extending from what is now Bagnum Lane, route B is also shown, and route C is shown as a continuation of route B. The northern section of route C on the Old Series map appears to terminate slightly to the east of its current alignment, deviating towards the northern terminus of Ringwood Footpath 50 at Knaves Ash. The Ordnance Survey map does not confirm status of the routes.

Ringwood Enclosure Map and Award 1811¹⁹

- 13.21. The Ringwood Enclosure Map of 1811 was requested from the Hampshire Record Office and was considered by the County Council as part of the 1992 decision. The Map and Award were also examined within the 2020 decisions but were not considered with all other relevant evidence.
- 13.22. Claimed route A is shown on the Enclosure Map extending from Bagnum Lane to Kingston Great Common, the route is labelled “*Drove 100feet*”. Allotments abutting the route are described as being bounded by “*lands left open for a Drove way to the Forest*”. Claimed route B is also shown extending to Kingston Great Common and is labelled “*Drove 100feet*”. Abutting lands are also described as being bounded by “*lands left for a Drove way to the Forest*”. Other routes are also labelled as ‘drove’ extending from Crow Lane, Basket Lane, Sandford Lane, and Charles’s Lane, which are all now part of the public road network. Claimed route C is not shown.
- 13.23. The 1992 Committee Report and the 2020 Decision Report acknowledge that routes A and B are labelled as “Drove 100feet” on the Enclosure Map. The 1992 Committee Report states that “*However there is no mention of the tracks in the lists of public and private roads in the accompanying Enclosure Award... The enclosure award does list two short ‘private carriage roads and Driftways’ running from A and B. These private roads are described as leading from ‘lands left open for a drove way’. This would not, however, necessarily imply public status*”.
- 13.24. The 2020 Decision Report states that “*Routes A [and] B... are shown on the map. Each is shown as an enclosed route in the same style as routes which are currently public highways (including Charles’s Lane, Bagnum Lane, and Sandford Lane). Routes A and B are annotated with ‘Drove 100feet’, which is also written on the eastern end of Charles’s Lane, Bagnum Lane, and Sandford Lane*”.
- 13.25. The Ringwood Enclosure Act of 1807 prohibited the Commissioners from dividing or allotting “*...any part of the commons and waste lands within the said parish of Ringwood which would in their judgement materially prejudice or diminish the then usage and customary rights of collecting drying or carrying away malm or mud from the river Avon or any branch or stream thereof or running out of the same and of turning out cattle or sheep for the purpose of depasturing them in the New Forest*”. The Act also states that the common and waste lands required for this purpose “*should not be deemed part of the said lands and grounds to be divided allotted and enclosed by virtue of the said act but should be and for ever remain for the purposes aforesaid subject in all*

¹⁹ Hampshire Record Office (www.hants.gov.uk) 121A13/1/4/20
Hampshire Record Office (www.hants.gov.uk) 121A13/1/4/21

respects to such orders rules and regulations as should be made by the said commissioners in and by their said award as to the whole or any part or parts thereof and which orders rules and regulations should be binding and conclusive to all persons whomsoever interested respectively”.

- 13.26. The 1992 Committee Report states that *“It may thus be that tracks A and B are part of these inalienable areas. They would presumably have been part of the manorial common lands, in the ownership of the lord of the manor, and for use by people who had forest rights”.* The 2020 Decision Report states that *“Neither routes A [and] B... contain reference numbers or the name of the landowner; this may mean that the routes were owned by the parish”.*
- 13.27. Landowner 1 has stated that *“If the Commissioners were not to restrict this latter means of depasturing sheep and cattle on the Forest they had to retain an area of unfenced land adjoining the Open Forest as it was necessary to maintain the principle of intercommoning in order for Vicinage to continue”.* They have also stated that the Inclosure Map and Award shows that the *“droves are unallotted common/waste of the manor and have been private since enclosure. A drove is not a public road. No roads are shown on the maps on these routes, and nowhere does it say they were public or for use by the public”.*
- 13.28. Landowner 2 has stated that *“The Map and Award do not identify the route as being public or private, but to the Forest. The Forest at that time and before was known to be Crown Land... and was used as common land where there were rights of common. That is, rightsholders could benefit from Forest resources; there was no reason therefore, for the Drove to be deemed a public highway. The route does not appear to extend through and beyond the forest to other public highways, again suggesting the route was not public but merely a private access route to the forest, common and allotments of land”.*
- 13.29. In 1991 officers had requested the view of the County Archivist on the opinion of Landowner 1 that the two droves are their property, because at the time of Enclosure they belonged to the Lord of the Manor, from whom he ultimately derives his title to the land. The response from the County Archivist states that *“As the tracks were not listed with the public or private roads set out by the Enclosure Award, the conclusion appears to be that the status of the tracks was unaffected by the Enclosure”* and *“As the tracks lead to the boundary of the New Forest, it could be argued that they should be regarded as “such parts of the commons and waste lands, which [were used in connection with] the present usage and customary rights of ... turning out cattle and sheep for the purpose of depasturing in the New Forest. The Act specifies that these areas are to remain dedicated to the common purposes. As such they would have been part of the manorial common lands, in the ownership of the lord of the manor, and for the use of those people who had common rights”.*

- 13.30. Landowner 2 has stated that *“Another indication Route B is not public is the labelling of width 100 foot. If the route were public roads the widths would be subject to the Inclosure Consolidation Act of 1801 which set out public roads at a width of 30 feet”*. Although it is generally accepted that Commissioners did have powers to set out driftways and drove roads within enclosure awards, officers consider that the land over which claimed routes A and B travel was regarded by the Commissioners as land that was required for the purposes of depasturing animals in the New Forest and was therefore excluded from the allotted land. It is therefore probable that the routes were already used as droves and were unaffected by the Inclosure Award.
- 13.31. The Applicant has stated that *“the description of the routes A and B on the map as ‘Drove 100 feet’ is very significant when taken in conjunction with the new evidence presented in the paper ‘Drove roads, driftways and vehicular rights’... which explains the role droves played in former times as general-purpose highways”*. Within the paper, the Applicant concludes that *“...it is probable, as a general proposition, to say that the two species of highway rights have coexisted for centuries, and that there is a compelling presumption that driftway implies carriageway? We suggest there is just a well-founded presumption”*.
- 13.32. Officers, having reviewed the paper, and considered contemporary legal commentary, relevant case law, and decisions of the Secretary of State (see Appendix B – paragraph 22) are of the view that the terms ‘driftway’ or ‘drove’, although implying a higher status than a ‘prime way’ (a way for the prime mode of transport - a footpath), does not differentiate between bridleway or carriageway status. Officers also do not consider that the use of the terms ‘driftway’ or ‘drove’ in historic documentary evidence makes a distinction between public or private status unless specifically set out as such. The term driftway or drove is a right to drive or lead animals, although it can be presumed that a public carriageway will usually include the right to drive animals, the category of user that can be implied from the terms ‘driftway’ or ‘drove’ can only be based on evidence of associated user.
- 13.33. Due to the distance to the New Forest across Kingston Great Common, it is evident that the droves were used by pedestrians and equestrians at a minimum and that such rights also included the right to drive animals. The use of the route at this time by pedestrians and on horseback is supported by Landowner 1 in their letter of objection regarding rights of common over Kingston Great Common dated 1970 - *“Common rights belonged to and were exercised by small holders who relied on their cow or three cows and their calves for their living. They brought their cattle home at night to milk. At most they had the odd pony. They saw to it that their animals did not have to be brought in by a man walking from halfway across the forest”*. Routes A and B are also

extensions of carriage roads and driftways, Officers therefore consider in all probabilities that the droves were used as carriage roads.

- 13.34. The Applicant has suggested that as there are private roads leading from the droves, that the droves would have had public access rights - “...*anyone trying to access these private roads would have had a problem if these droves were not in fact public ways, as no rights over them were given to those with the private roads*”. Officers, having reviewed relevant legal commentary and case law (see Appendix B paragraph 34), are of the view that, routes set out as private roads within an enclosure award are private regarding user, unless the permitted class of user is large enough to evidence that it would make the route a public right of way under section 54(3)a of the Wildlife and Countryside Act. Due to the case law regarding partial dedication (see Appendix B paragraph 45), the permitted class of user would need to be larger than a parish. A route being set out as private would not normally prevent public access or public rights being accrued post enclosure, and if there was evidence to show that a route was public prior to enclosure then it would remain so, as an enclosure award cannot deprive a public road of its status unless it is expressly stopped up as part of the award.
- 13.35. A 15th century custumal quotes a lost Pipe Roll from 1108 as establishing that tenants of the manor of Ringwood had common rights in the New Forest.²⁰ Up until the Enclosure Award of 1811 there were also tenants in the manor of Ringwood who, through ancient freehold or copyhold tenure, had right of common of pasture appendant over all the waste of the manor, which would have extended to Kingston Great Common.²¹ The right to depasture animals on the New Forest also extended to other parishes within the New Forest through ‘vicinage’ (a right of common by reason of neighbourhood). Officer’s therefore take the view that the private carriage roads and driftways leading to the droves must have permitted a class of user greater than a parish and large enough to evidence public rights. The occupants of the dwellings accessed by the private roads leading from the droves also would have had right of access over the droves.
- 13.36. The Applicant has also drawn attention to the description of the routes being alike other routes which now form part of the ordinary road network: “*Based on this representation there is no reason for the two claimed routes A and B to have any different status than these two former droveways which are now highways*”. The Applicant has also noted that the other routes are also detailed as being situated within “*land left for a droveway to the forest*”. Officers consider that limited weight can be afforded to this analogy as the land where the droves

²⁰ 1911 A History of the County of Hampshire: Volume 4 - British History Online (british-history.ac.uk) (pages 606-614)

²¹ 1957 The Common Lands of Hampshire by L Ellis Tavener (page 86)

are shown lies outside the allotted land within the award, meaning that any dedication would be *ultra vires* to the powers afforded to the Commissioners. Officers consider that the other routes that have come to form part of the public road network have accrued public rights post enclosure.

13.37. Overall, the Inclosure Map and Award evidence that at the time the Commissioners saw the routes as extensions of the carriageways and drove ways which they had set out within the award. Although the map and award are inconclusive regarding the public or private status of the routes, officers consider that supportive evidential weight can be drawn from the routes being extensions of routes that have been set out for use by the public.

Greenwood's 1" to the mile Map of Hampshire (1826)²²

13.38. Greenwood's 1" Map of Hampshire of 1826 was first submitted to the County Council in May 1991 by the Ringwood and Fordingbridge Footpath Society, the map was considered by the County Council as part of the 1992 decision.

13.39. Greenwood's 1" Map shows claimed routes A, B, and C. Officers, having georeferenced the map, consider route A is shown extending from what is now Bagnum Lane, route B is also shown, and route C is shown as a continuation of route B. Unlike the early OS Maps, Greenwood's Map appears to show the northern section of route C terminating on its current alignment at Knaves Ash.

13.40. The 1992 Committee Report states that the "*Greenwoods Map of 1826 shows tracks A, B and C*". The 2020 Decision Report states that "*Charles's Lane, Bagnum Lane, and other roads which are currently public highways are also shown as crossroads. Routes A, B and C are shown as routes depicted by a pair of pecked lines which cross Kingston Great Common. This map is evidence that the routes appear to have physically existed at the time the area was surveyed but this does not necessarily mean that the public had a right of access along the claimed routes*".

13.41. In summary, Landowner 1 has stated that formation of the tracks was due to increased farming activity and engineering efforts post Inclosure, but that this was "*without adding anything in the way of travelling public or causing the lord of the manor to consider the dedication of his newly acquired land to the public*". Landowner 2 has stated that "*Greenwood map depicts Route B however, the map does not define the status of the route*".

13.42. The claimed routes are shown as roads bounded by pecked lines which are defined in the map legend as "*cross roads*". Other roads which are currently part of the public road network are also shown as 'cross roads', including Crow

²² Old Hampshire Mapped (oldhampshiremapped.org.uk)

Lane, Basket Lane, and Charles's Lane, which are all now part of the public road network.

- 13.43. The Planning Inspectorate Consistency Guidelines provide advice on the subject of cross roads at section 2.4 – ‘*what is a cross road?*’²³. The Guidelines reference the case of *Hollins v Oldham (1995)* and conclude that “...*the recording of a way as a cross road on a map or other document may not be proof that the way was a public highway, or enjoyed a particular status at that time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the available evidence in reaching a decision*”.
- 13.44. The Applicant has submitted a paper prepared by them, entitled ‘Cross Roads’, which provides a detailed explanation of the use of the term ‘cross road’. The paper references the publication ‘What is a Cross Road?’ by Susan Taylor which argues that “*a cross road marked on an authentic map drawn up to be mass produced and sold commercially and intended to be used by the public at large may be considered cogent evidence of a general purpose carriageway secondary only to a direct, main or turnpike road*”.²⁴ The Applicant also references *Hollins v Oldham* and suggests that the Planning Inspectorate Consistency Guidelines do not consider the full context of the case.
- 13.45. The Applicant disagrees with the 1992 Committee Report, stating that “...*the report does not recognise the generally accepted status of the route shown by Greenwood and misapplies the balance of probabilities. The balance of probabilities in the case of Greenwood is that routes shown as crossroads (as in this case) are public roads*”.
- 13.46. This map was produced by C and J Greenwood, brother cartographers, who produced large scale maps of England and Wales in the 1920s. The map of Hampshire was produced from an actual survey rather than being copied from a previous author. The map is split into 6 foldable sheets and would have been produced for the benefit of wealthy people who would have travelled either on horseback or by carriage. In *Hollins v Oldham* the judge noted that “*There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use*”. This rationale could also be applied to Greenwood’s map.

²³ Planning Inspectorate Consistency Guidelines (www.gov.uk)

²⁴ What is a Cross Road? by Susan Taylor (1997) (www.bhsaccess.org.uk)

13.47. In *Hollins v Oldham* the Judge also analysed the two categorisations ‘turnpike road’ and ‘cross road’ and concluded that a “cross road” “...must mean a public road in respect of which no toll is payable”. This would also be the case for Greenwood’s map.

13.48. Officers consider that the term cross road in relation to Greenwoods Map denotes the archaic meaning of a road running between two principal public roads. It is considered that the map, although not providing conclusive evidence, is a reliable source providing strong supportive evidence that the claimed routes were used as public carriageways at this time.

Greenwood’s 3 miles to 1” Map of Hampshire (1829)²⁵

13.49. Greenwood’s 3 miles to 1” Map of Hampshire of 1826 was first submitted to the County Council in October 2012 by Landowner 1 as part of their ‘consideration of old maps’ relevant to the 2020 Decision. The map was not considered within the 1992 or 2020 decisions.

13.50. Greenwood’s 3 miles to 1” Map does not appear to show the claimed routes. Landowner 1 has stated in relation to Greenwood’s 1” to the mile Map of 1826 that “*The legend on this map suggests that all the roads shown are public roads. There must have been a lot of angry purchasers of this map who lost their carriages in the mire. This probably accounts for the fact that Greenwood brought out a revised addition in 1829... which drops any suggestion of highways in these positions and restricts itself to showing turnpike and secondary cross roads*”.

13.51. Officers consider that the reason that the claimed routes are not shown on Greenwood’s map of 1829 is due to map being reduced from the Map of 1826 and is not of a smaller scale, rather than that it being the case that the routes did not exist. Other roads that are shown on the 1826 map have also ‘dropped off’ the 1829 map, including Barrack Lane and Charles Lane.

Railway Plans – Southampton and Dorsetshire Railway (1844)²⁶

13.52. The Southampton and Dorsetshire Railway Plans, dated 1844, were requested from the Hampshire Record Office and was considered by the County Council as part of the 1992 decision. The plans were examined within the 2020 decision but were not considered with all other relevant evidence.

13.53. The 1992 Decision Report states that the plans “*show track A at the railway as partly owned by the Ringwood Surveyor and partly by John Morant. Track B is owned by John Morant and John Mills. Today track A is a publicly maintained*

²⁵ Old Hampshire Mapped (oldhampshiremapped.org.uk)

²⁶ Hampshire Record Office (hants.gov.uk) DP/B10/1; (hants.gov.uk) DP/B10/2

highway at the railway and the deposited plan does not therefore offer evidence relevant to the claim. Track B was considered private by the railway surveyor in 1844. Track C is not covered by the deposited plans". The 2020 Decision Report states that the plans "*Part of route B is visible, and it is described as a privately owned road or drift way*".

13.54. The plans show several routes crossing the railway line, including routes numbered 167, 177, 184a, 195, 204, and 220. Route 167 relates to the modern C104 Crow Hill, the Book of Reference records the route as a *parish road* and the owner as being *Harry Ayles, Surveyor*. Route 177 relates to the modern U121 Barrack Lane, the Book of Reference records the route as a *parish road* and the owner as being *Harry Ayles, Surveyor*. Route 184a relates to a level crossing, the Book of Reference records the route as an *occupation road* and the owner as being *J Morant*. Route 195 relates to a bridge over U121 Charles's Lane, the Book of Reference records the route as a *parish road* and the owner as being *Harry Ayles, Surveyor*. Route 204 relates to a bridge over the modern U121 Bagnum Lane (the continuation of which is route A), the description of which is both a *parish road* owned by *Harry Ayles, Surveyor*, and *waste* belonging to *J Morant*. Route 220 (which is route B) relates to a bridge over the railway, the description of which is *road and driftway* belonging to *J Morant*.

13.55. Landowner 1 has stated that "*...the Railway Deposit Plan is neutral on claimed route A because it does not show it, but Bagnum Lane is not labelled as going anywhere. It is however strong evidence against Route B and C being a public highway. The Dorchester and Southampton Railway Book of Reference tells us that the South end of this track from Sandford is Private*".

13.56. The Applicant has stated that "*Route A was beyond the line of deviation of the railway, but Bagnum Lane of which route A was a continuation, was described as a parish road and waste (ref. 204). Route B was ref. 220 on the railway plan and was described as a Road or Drift Way in the ownership of John Morant and John Mills. Whilst this indicates that the road was not considered to be the responsibility of the parish to maintain, it does not indicate that there are no public rights. To the contrary, it is quite usual where an old enclosure had been formed (as here) the responsibilities for maintenance of adjacent highways rested with the enclosing landowner*".

13.57. Officers consider that the plan relates to U121 Bagnum Lane leading up to claimed route A, rather than the claimed route itself. Claimed route A being the continuation of a public road provides some supportive evidence of public use, it would be unlikely for the parish to maintain a route that was solely used to access a private residence. Route B is shown as a road and driftway which travel over land belonging to J Morant. Officers take the view that the maintenance of the track was the responsibility of Mr Morant and was not

publicly maintainable. It is not considered that the private maintenance responsibility was accompanied by limitations to public use. Route C falls outside the area shown, and so no inferences can be drawn in relation to that route.

Ringwood Tithe Map and Apportionment (1848)²⁷

- 13.58. The Ringwood Tithe Map and Apportionment was requested from the Hampshire Record Office and was considered by the County Council as part of the 1992 decision. The Map and Apportionment were examined within the 2020 decision but were not considered with all other relevant evidence.
- 13.59. Claimed route A is shown on the Tithe Map extending from U121 Bagnum Lane to the boundary of Kingston Great Common, route B is shown extending out past the boundary of Kingston Great Common to a pond, some of route C is shown extending south from what is now the U121 Charles's Lane.
- 13.60. All the claimed routes are sepia coloured bound by pecked lines and are labelled "3101", route B is also labelled "The Drove". Other routes are also sepia-coloured, bounded by pecked lines, and labelled "3101", including what are now Charles's Lane, Swan Lane, Ringwood BOAT 84, U121 Dragon Lane, and what is now Ringwood Footpath 79 where a route is shown on the Map extending to the "*public gravel pit*" and on to Burley. There is correlation between the other sepia-coloured routes on the Map and the modern public highway network.
- 13.61. Within the Apportionment, private roads are recorded under the relevant owner, whereas public roads are recorded in the roads and waste section. The claimed routes are recorded within the Apportionment under the "*Roads and Waste*" section and defined as "*roads and waste*". They are shown as having no owners and no tithe rents payable.
- 13.62. The 1992 Committee Report concludes that "*The Tithe Map would seem to imply public status for A and B but would not be conclusive*". The committee report does not appear to have considered that the routes were coloured sepia, this may have been due to officers working from photocopies of the original map. The 2020 Decision Report states that "*...the routes are shaded with sepia*", however this information was not considered with all other relevant evidence.
- 13.63. The Applicant has stated that the Tithe Map "*shows all the claimed routes as part of the roads and waste and all numbered 3101 identically with other roads, such as the Christchurch Road and coloured brown. The private roads set out*

²⁷ Hampshire Record Office (hants.gov.uk) 21M65/F7/195/1; (hants.gov.uk) 21M65/F7/195/2

under the enclosure award are shown as still in private ownership; for example the private roads at Charles Farm which were numbered 53 on the enclosure map are given on the Tithe Award as numbers 2643 and 2614, both in the ownership of John Morant. At Martins Farm private roads on the enclosure number are described in the tithe award as “roadway” in the ownership of John Mills ref 2466 and 2464. Contrast this with the claimed routes A and B which are not shown with private ownership and are included within the general ‘roads and waste’. This is good evidence of these routes public status”.

13.64. Landowner 2 has stated *“The point the Applicant has made with reference to the separate listing of ‘roads’ and ‘private roads’ is noted however reference to ‘roads and waste’ does not necessarily mean the status of the ‘roads’ are public. The tithe records were drawn up specifically to assess the amount landowner and parishioners needed to pay to support the church and parish priest not to assess the status of the road network. The references made in the Tithe records cannot therefore be relied upon as it is not clear whether or not the ‘roads’ are deemed public and does not make a distinction which areas or parcels of land are ‘roads’ and which are ‘waste’. There could be other reasons for ‘roads and waste’ to be listed separately from ‘private roads’”.*

13.65. Although Tithe Maps and Awards were not chiefly concerned with showing public or private status of highways, officers consider that the claimed routes being shown in a similar manner to, and sharing numbering with, other routes that now form part of the public highway network, and being listed within the Apportionment under “Roads and Waste” (in a different manner to private ways), is supportive of public status in this case.

Ringwood Enclosure Map – copy (1865)²⁸

13.66. The copy of the Ringwood Enclosure Map dated 1860 was originally submitted to the County Council by the Applicant in relation to the 2020 decision. The map does not appear to have been considered within the 1992 or 2020 decisions.

13.67. The Applicant has provided a detailed comparison of the copy Enclosure Map and the original dated 1811, highlighting differences in names of plot owners, different spellings of roads, and that the 1865 map contains an additional plot. The Applicant makes the point that *“the 1865 Enclosure copy map is new evidence... it is not the same as that supposedly considered in the 1992 report”.*

13.68. Landowner 1 has stated that *“The difference in lettering from the 1811 map and the 1865 map from the Enclosure Award does not give rise to the discovery of*

²⁸ Hampshire Record Office (hants.gov.uk) 107M86/9

new evidence. The 1811 and 1865 may slightly differ but the words did not change in the award and this gives no new evidence that has not already been discovered. Hence the Enclosure Award information has already been fully considered in the 1992 investigation and should not be reconsidered”.

13.69. Officers do not consider that this map provides any further information relating to this case than the 1811 original.

Ordnance Survey 25 Inch to the Mile ‘County Series’ Map (1870)

13.70. The OS 25 Inch Map of 1870 was requested from the Hampshire Record Office and was considered by the County Council as part of the 1992 decision. The Map was also examined as part of the 2020 decision but was not examined with all other relevant evidence.

13.71. The 1992 Committee Report states that *“The 1870 OS 25” Map shows tracks A and B as ungated. The accompanying book of reference lists A and B as ‘rough pasture and furze’; i.e., there is no indication of public status”.*

13.72. The 2020 Decision Report states that *“Four maps were published by the Ordnance Survey at a scale of 25 inches to the mile between 1870 and 1947. All four routes are shown on each edition of the County Series maps. Routes A, B and C are depicted with a pair of parallel pecked lines which mostly match the alignment of the claimed routes”.*

13.73. Claimed routes A and B are shown on all County Series maps. Claimed route C is also shown, but instead of heading north from Route B to the end of Route A, there is a semi-circular track shown prior to the route leading north to Naves Ash. Officers have looked at the accompanying book of reference to the map, however, there does not appear to be any correlation between the plot numbers that are written in the book, and the parcel numbers shown on the map, making it impossible to draw any inferences relating to how parcels of land were recorded by the surveyor.

Ordnance Survey 6 Inch to the Mile Map (1872-1945)

13.74. The OS 6 Inch Map of 1872 was submitted to the County Council by the Ringwood and Fordingbridge Footpath Society in May 1991 in relation to the 1992 Decision. The map was also submitted to the County Council by the Applicant in April 2007 and in October 2012 by Landowner 1 as part of his ‘consideration of old maps’. The Map was not considered within the 1992 decision or the 2020 Decision.

13.75. Landowner 1 has stated that *“The most important and obvious fact about this map is that the track across Kingston Great Common between Claim A and*

Claim B runs in a large half circle at its end. There is no track across Kingston Great Common between Claim A and Claim B”.

13.76. Landowner 2 has stated that “*The Route B is depicted on this map but again the status is not defined*”.

13.77. Four maps were published at a scale of 6 inches between 1872 and 1945. Claimed routes A and B are shown on all County Series maps. Claimed route C is also shown, but, as with the 25inch maps, instead of heading directly north from Route B to the end of Route A, there is a semi-circular track prior to the route leading north to Naves Ash.

Ringwood Estate Plan (c.1890)²⁹

13.78. The Ringwood Estate Plan was not considered as part of the 1992 or 2020 decisions. The Ringwood Estate Plan provides information about the estate owned by Mr Morant. Areas coloured green are in Mr Morant’s possession; areas coloured yellow are lands leased by Mr Morant, areas coloured black indicate college lands; and areas coloured red are freehold.

13.79. The claimed routes and other routes on the plan are unshaded. Route A is shown on the plan and is labelled as “Drove Way 100 feet”, Route B is also shown and is labelled “Drove 100 feet”. Officers consider that the plan indicates that Routes A and B were considered by Mr Morant to have been drove ways at the time the map was produced. The map does not indicate public or private status. Route C falls outside the area shown, and so no inferences can be drawn in relation to that route.

Guide to the New Forest by William Henry Rogers (1895)³⁰

13.80. Roger’s Guide to the New Forest was not considered within the 1992 or 2020 decisions. Claimed routes A and B are shown on the map, claimed route C is also shown, however, instead of heading directly north from Route B to the end of Route A, there is a semi-circular track prior to the route leading north to Naves Ash. The map shows the claimed routes similar to other highways although they are bordered by pecked lines rather than continuous lines. The map does not however indicate public or private status.

Bartholemew’s Half Inch Map Sheet 33 New Forest and Isle of Wight (1902)³¹

13.81. Bartholemew’s Half Inch Map 1944 was not considered within the 1992 or 2020 decisions.

²⁹ Hampshire Record Office (hants.gov.uk) 160M86/367

³⁰ Hampshire Record Office (hants.gov.uk) TOP232/1/12

³¹ National Library of Scotland (maps.nls.uk)

13.82. Bartholemew's Maps were made for sale to the public. Although there is a disclaimer stating that the map does "*not provide evidence of right of way*", the maps do not generally show routes that the public could not use. The maps were partly based on Ordnance Survey maps but with additional input from the Cyclist's Touring Club (CTC) and the key to the map also identifies the quality of the routes and whether the route is suitable for cyclists.

13.83. Claimed routes A and B are shown on the map, claimed route C is also shown, however, instead of heading directly north from Route B to the end of Route A, there is a semi-circular track prior to the route leading north to Naves Ash. All the claimed routes are depicted as 'Secondary Roads (Good)' with broken red lines. Uncoloured roads are described in the legend as being 'inferior and not to be recommended for cyclists', and so it can be inferred that the claimed routes were recommended for such use. Other roads which are shown similar to the claimed routes also form part of the modern public road network, including U121 Barrack Lane, C49 Ringwood Road, and U121 Rod Lane.

13.84. Although they are not conclusive regarding public or private status, Bartholemew's map series are useful as they identify the classification of the routes through a process partially independent of the Ordnance Survey. Officers consider that the map provides some supportive evidential weight that the claimed routes were used as public roads at this time.

Finance Act Map (1910)³²

13.85. The Finance Act Map of 1910 was considered within the 1992 Decision, the map was not considered within the 2020 Decision. The 1992 Committee Report states "*The Finance Act Maps of 1910 show the tracks included within hereditaments and no deduction from valuation was made in respect of rights of way. These maps do not therefore indicate public status*". The map viewed was a working copy annotated during the land valuations, officers have not viewed the original as this could not be located. The Map shows claimed routes A and B within hereditaments, officers do not consider that this evidence is supportive of public status.

Philip's Cyclist's Map of Hampshire 1" to 4 miles (1920s)³³

13.86. Philip's Cyclists Map of Hampshire was not considered within the 1992 or 2020 decisions. Routes B and C are defined in the key as 'cross roads', route A is not shown. The map being a commercial map specifically for cyclists is not likely to have shown routes that were not accessible to the public. Other roads which are currently part of the public road network are also shown as 'cross roads'.

³² Hampshire Record Office (hants.gov.uk) 160M86/367

³³ Old Hampshire Mapped (oldhampshiremapped.org.uk)

13.87. Having regard to section 2.4 of the Planning Inspectorates Consistency Guidelines ‘what is a cross road?’³⁴, officers consider that Philip’s Cyclist’s Map adds supportive evidence that claimed routes B and C were routes used as public carriageways at this time but is not conclusive evidence of this status. Officers consider that it is likely that route A is not shown due to the reduced scale of the map, rather than it not physically existing at the time the map was produced. The route of claimed routes B and C are shown on similar alignments to older maps such as Greenwoods 1inch Map of 1826 and the Ordnance Old Series - officers consider that this is also due to the reduced scale.

Bartholemew’s Half Inch Map No 33 Sheet 5 New Forest and Isle of Wight (1924)³⁵

13.88. Bartholemew’s Half Inch Map 1924 was not considered within the 1992 or 2020 decisions. The routes are shown in a similar location and width to the 1902 edition described above. However, in contrast to the depiction on the 1902 map, on this map the routes are shown as uncoloured roads, which the legend describes as being ‘inferior and not to be recommended’.

13.89. Officers consider that the change probably indicates that there may have been a deterioration of the surface of the routes since they were first surveyed by the CTC.

Ringwood Rural District Council Highways Handover Map (1929)³⁶

13.90. The Ringwood Rural District Handover Map was not considered within the 1992 Decision, the map was examined as part of the 2020 decision but was not examined with all other relevant evidence.

13.91. The 1992 Decision states that “*None of the claimed routes are annotated on the map. This indicates that they were not considered to be publicly maintainable routes at the time the map was produced. Other footpaths in the locality (Ringwood footpaths 48, 50 and 80) are depicted with pecked lines*”.

13.92. Landowner 1 has stated that the map “*...gives no indication of any public maintenance responsibility identified over any of the claimed routes... This does not indicate that these roads had fallen out of use as suggested by the claimant. What it does show is that the tracks claimed have never been used by the public and have continued to be private*”.

³⁴ Planning Inspectorate Consistency Guidelines (www.gov.uk)

³⁵ National Library of Scotland (maps.nls.uk)

³⁶ Hampshire Record Office (hants.gov.uk) H/SY3/6/15

13.93. Officers consider that as none of the claimed routes are annotated on the map, that the claimed routes were not considered to have been publicly maintainable at the time the map was produced.

Russel's Guide to the New Forest (1935)³⁷

13.94. Russel's Guide to the New Forest was not considered within the 1992 or 2020 decisions. Claimed routes A and B are shown on the map, claimed route C is also shown, however, instead of heading directly north from Route B to the end of Route A, there is a semi-circular track prior to the route leading north to Naves Ash. The map shows the claimed routes in the same way as other principal routes, the map does not however indicate public or private status.

Geographia New Road Map (1942)

13.95. The Geographia Road Map was first submitted by the Applicant within this current application and was not considered within the 1992 or 2020 decisions. The Applicant has stated that "*This shows routes A B and C in the same style and continuous with Crow Lane, Sandford Lane etc*".

13.96. The Geographia maps were based on Ordnance Survey Maps. The Geographia Map of South Hampshire and the Isle of Wight references the routes within the key as "*other roads (subject to a right of way)*" which suggests that further surveying or enquiries were also made into the status of routes as the OS disclaimer stated that "*the representation of a Road, Track, or Footpath, is no evidence of the existence of a right of way*".

13.97. Officers therefore consider that the Geographia map provide slightly more evidential weight in support of the application than contemporary Ordnance Survey maps, however this evidence is also inconclusive regarding public or private status of the routes.

Bartholemew's Half Inch Map Sheet 33 New Forest and Isle of Wight (1944)³⁸

13.98. Bartholemew's Half Inch Map 1944 was not considered within the 1992 or 2020 decisions. The routes are shown in a similar location and width to the 1902 and 1924 editions described above. The claimed routes are labelled as 'Other Roads & Tracks', in contrast to other categories (and not as 'Serviceable Motoring Roads', which is the next category above).

³⁷ Hampshire Record Office (hnats.gov.uk) TOP232/1/12

³⁸ National Library of Scotland (maps.nls.uk)

Highway Maintenance Map – Ringwood and Fordingbridge Division (1946)³⁹
13.99. The Highway Maintenance Map was not considered within the 1992 Decision, the map was examined as part of the 2020 decision but was not examined with all other relevant evidence.

13.100. The 2020 Decision states that “*None of the claimed routes are shown on the map, indicating that they were not being publicly maintained at the time the map was produced. However, no other public rights of way are shown on the map (e.g., Ringwood Footpaths 48, 50 and 80)*”.

13.101. Landowner 2 has stated that “*This Map identifies Public Highways and Carriage Ways. The claimed route B is not identified as being public*”.

13.102. Officers consider that the map shows the publicly maintained road network and that the public rights of way network is not shown. The Maintenance Map indicates that, at the time, the routes were not considered to be publicly maintainable highways.

Ringwood Parish Map (c.1950)
13.103. The Highway Maintenance Map was not considered within the 1992 Decision, the map was examined as part of the 2020 decision but was not examined with all other relevant evidence.

13.104. The 1992 Decision states “*On the Ringwood Parish Map, none of the claimed routes, whilst largely shown on the base map, have been annotated. This indicates that that the Parish Council did not consider that the routes were public rights of way at the time the map was produced. Interestingly, Footpath 80 has been annotated and then crossed out in pencil; this may indicate that there was some uncertainty about whether the route should be added to the map*”.

13.105. Officers consider that the Parish Council did not consider the routes to be public rights of way at the time the map was produced.

Aerial Photograph (April 1950)⁴⁰
13.106. The aerial photograph was first mentioned by the Applicant in relation to the 2020 Decision, however they did not provide a copy of the photograph as it apparently did not reproduce satisfactorily. The Applicant has suggested that “*examination of the photo assists the identification of where exactly the routes went*”. The aerial photograph was not considered as part of the 1992 or 2020 decisions.

³⁹ Hampshire Record Office (hants.gov.uk) H/SY3/3/24/9

⁴⁰ Hampshire Record Office (hants.gov.uk) 134M87/134

13.107. Landowner 1 has provided a copy of the photograph and stated that it does not show any of the claimed routes – *“In fact anybody who can find a continuous route A, B or C deserves a prize for imagination”*.

13.108. Officers consider that some limited interpretation of the location of the claimed routes can be made from the aerial photograph.

First Definitive Map (1955)⁴¹

13.109. The First Definitive Map was not considered within the 1992 Decision, the map was examined as part of the 2020 decision but was not examined with all other relevant evidence.

13.110. The 2020 Decision states *“None of the claimed routes are shown on the map as public rights of way. Footpaths 48, 50, and 80 are shown on their current alignment”*.

Ordnance Survey National Grid Map 1:25,000 (1957 to 1965)⁴²

13.111. The OS National Grid Map was not considered within the 1992 or 2020 decisions. Claimed routes A and B are shown on the map, claimed route C is also shown, however, instead of heading north from Route B to the end of Route A, there is a semi-circular track prior to the route leading north to Naves Ash. The routes are shown as tracks. A footbridge is shown on Claimed Route B.

Ordnance Survey National Grid Map 6inch Map (1963)⁴³

13.112. The OS National Grid Map 1963 was not considered within the 1992 or 2020 decisions. The map is the most detailed map after the second world war. Claimed routes A and B are shown on the map and are described as footpaths. Claimed route C is also shown and is described as a track. Instead of heading north from Route B to the end of Route A, there is again, a semi-circular track prior to the route leading north to Naves Ash. A footbridge is shown on Claimed Routes B and C.

Third Definitive Map (1964)⁴⁴

13.113. The Third Definitive Map was not considered within the 1992 Decision, the map appears to have been examined as part of the 2020 decision but was not examined with all other relevant evidence. The Ordnance Survey base map shows the track over which route C travels running north between the terminus

⁴¹ Hampshire Record Office (hants.gov.uk) H/CL1/2/8

⁴² Sheets SU1602, SU1702, SU1802, SU1803, SU1902

⁴³ National Library of Scotland (www.nls.uk) Sheet SU10

⁴⁴ Hampshire Record Office (hants.gov.uk) H/CL1/2/8

of routes A and B, rather than the semicircular route on previous maps. None of the routes were recorded as public rights of way on the map.

Advert in The Journal (1974)

- 13.114. The advertisement in The Journal, dated 13 November 1974, states “*The private path from Uppacot to Kingston Great Common will be closed from 15th to 30th November*”. The notice indicates that Landowner 1 was aware that the public were using the path, as they were motivated to put a notice in the local paper for the public to see. The advert indicates that the landowner was allowing the public to use claimed route A as a permissive path rather than acquiescing in that use. This would not however negate any historic evidence that indicates that the route was public.

Photographs of signs and gates (1991)

- 13.115. Landowner 1 has submitted eight photographs taken in 1991 of signage and gates on the claimed routes.



- 13.116. Photo 1 (above) is of a gate adjacent to route C. Landowner 1 has written on the back “*1964 gate and fence put in by the New Forest Protection Society who wrote that it was only to replace an older fence*”.



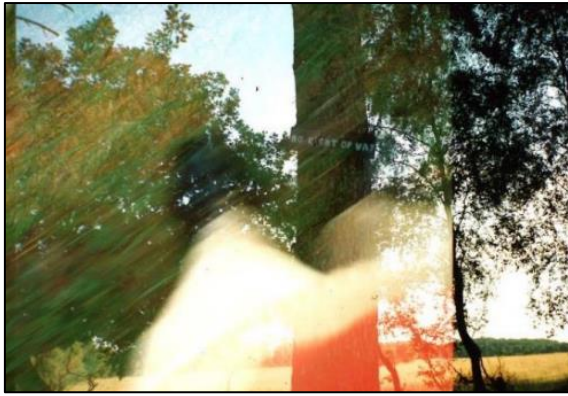
- 13.117. Photo 2 (above) is of a sign on Route B, Landowner 1 has stated on the back “*Notice on tree close to where drain and bridge had been*”.



13.118. Photo 3 is of a sign on Route B, Landowner 1 has stated on the back of the photograph *“Notice on track near my Sandford boundary”*.



13.119. Photo 4 is of a sign adjacent to Route C; the sign is by a gate at the end of Route A. The Sign states *“No public right of Way”*. Landowner 1 has stated that the sign is situated *“on gate leading from Route A onto Kingston Common dating from 1976 when gate was first made in fence by farm tenant”*.



13.120. Photo 5 is of a sign on to Route C, Landowner 1 has stated "*notice on tree at my Valesmoor boundary*". The sign states "*NO RIGHT OF WAY*".



13.121. Photo 6 is of a sign adjacent to Route C, the sign is by a gate to the north of the end of Route A. The sign states "*No public right of way*". Landowner 1 has written on the back of the photograph that this gate was "*probably used by [a user of the route] as a child when there was no right of way from Route A to Kingston Great Common*".



13.122. Photos 7 and 8 are of a notice in a tree and gate next to the tree, Landowner 1 has stated on the back of the photographs “*Notice by 1978 gate put up long before gate*” and “*1978 gate put up by New Forest Protection Society*”.

13.123. Officers consider that the signage stating ‘no public right of way’ would prevent the acquisition of a public right of way by statutory prescription and common law principles from the time they were erected. However, as there is no objective evidence that proves that the signs were in situ prior to 1972, the status of the routes cannot be said to have been brought into question at an earlier time. The contemporary mapping suggests that there was no obstruction at the end of Route A onto Kingston Great Common at this time.

Landowner Deposit (1992)

13.124. On 7 February 1992, the County Council received a deposit from Landowner 1, under Section 31(6) of the Highways Act 1980. The claimed routes A and B were not acknowledged as being public on the accompanying plan. The deposit prevents the public acquiring a public right of way by prescription over the claimed routes from the date it was submitted to the County Council but would not have retrospective effect.

Countryside and Rights of Way Act (2000)

13.125. The Countryside and Rights of Way Act 2000 normally gives a public right of access to land mapped as ‘open country’ (mountain, moor, heath, and down) or registered common land. Parts of Kingston Great Common including the southern end of claimed route C have been mapped as open access land by Natural England.⁴⁵ Section 12 of the Countryside and Rights of Way Act prevents use of open access land contributing to the establishment of a public right of way, either by presumed dedication at common law or establishment by prescription, following its designation.

Analysis of the Documentary Evidence

13.126. The Committee Report regarding the 1992 Decision concludes that “*On balance therefore it does not seem that a case for public rights of way can be made on the basis of archive evidence. Tracks B and C seem to form part of an old pre-enclosure route, and the Tithe Map suggests the possibility of public status, but other evidence is against it*”. Officers consider that where the report states “*on balance*”, that the County Council may have only considered whether a public right of way subsists on the standard of proof of balance of probability, rather than under the appropriate standard of proof for making an order under s.53 (3) (c) (i) in the first instance i.e that it subsists or is reasonably alleged to subsist.

⁴⁵ Natural England (www.openaccess.naturalengland.ork.uk)

- 13.127. The 2020 Decision Report concludes that *“In relation to Routes A, B and C, none of the additional evidence reviewed was sufficient to overturn the initial determination in 1992”*. However, the only evidence that was considered was the Ordnance Survey Old Series, Highways Handover and Maintenance Maps, Parish Map, and the First Definitive Map. It is now accepted that any newly discovered evidence should have been considered with all other relevant evidence.
- 13.128. Landowner 2 has stated in relation to claimed route B, that *“There is no evidence in any of the above-mentioned documentation which deems Route B to be public highway or carriageway status. The decision to make an order should be purely based on the evidence, any assumptions or deductions cannot be taken into account. It is clear from the evidence that Route B does not exist as a public highway, carriageway or right of way of any status”*.
- 13.129. From reviewing the documentary evidence, Officers consider that it indicates that the claimed routes have existed since the mid-18th century and continued to be recognised as highways into the period covered by living memory. Officers consider that the evidence reveals that prior to the Enclosure Award of 1811 the routes were recognised as carriageways and drove ways, and that that from the early 19th century the routes have been shown as cross roads until the early part of the 20th century, when use of the routes appears to have declined.
- 13.130. The alignment of the northern section of claimed route C, at Knaves Ash, appears to align more with Ringwood Footpath 50 on the early OS Maps from 1797 to 1811. Greenwood’s map of 1826 then shows route C approximately on its current alignment. The alignment of the southern section of route C between the terminus of routes A and B is also shown as a semicircular route on maps between 1870 and the 1960s.
- 13.131. Although no single exhibit provides conclusive evidence of an express dedication, there is also no evidence that any of the claimed routes have been stopped up. Overall, the balance of evidence is in favour of public rights having been established. Officers therefore consider that the documentary evidence provides a reasonable allegation of a presumed dedication at common law.
- 13.132. Regarding the status of routes A, B, and C, the evidence indicates that the early use of these routes was at least bridleway status, with the Inclosure Act evidence indicating that the routes were used for onward travel to the New Forest. Claimed routes A, B, and C being referred to as ‘cross roads’ on contemporary commercial maps indicates that the routes were used as carriageways.

13.133. Although parts of the claimed routes are recorded as having a width of 100feet (30.5metres) within the Inclosure Act evidence, as no formal dedication was completed by the Inclosure Commissioner's, Officer's consider that only the used track width should be recorded. The Ordnance survey County Series maps of the 19th Century record the width as being 4 metres wide over all routes.

14. User Evidence

14.1. The 1992 Decision was supported by user evidence forms from 37 users which included some of the 25 claimants from when the claim was originally presented in 1978. The earliest recorded use of the claimed routes occurred in 1914, with 19 people beginning to ride or walk from the 1950s. The 1992 report concluded that *"The evidence which remains after discounting both use after 1972, and the evidence of tenants and their relatives, is not very great and appears insufficient to sustain the claim. For route A there would possibly be four 20year plus users, none of whom would be likely to attend an enquiry"*. The 2020 Decision did not consider the user evidence over the claimed routes.

14.2. The Applicant does not consider the conclusion made in the 1992 Decision to be sustainable and believes that *"all the users evidence quoted in the 1992 Decision is fully acceptable and should be given full weight"*.

14.3. Landowner 1 has stated that *"Historically there is no proof of anyone using the routes A, B or C"*. Landowner 2 has taken the view that claimed route A is a *"private Drove way"*, and that claimed route B travels over *"private Estate ground"*, Landowner 2 has confirmed that *"The Estate has not granted any public right of access of any sort along either of these tracks and has taken such steps as are possible to ensure that trespass does not occur"*. Landowner 3, who owns the northern end of track C was interviewed as part of the 1992 Decision, they stated that they had no objection to the bridleway claim.

14.4. The current application is now supported by 82 local people, several local people have also written letters stating that they have known that the claimed routes have been used as bridleways. The evidence is summarised on the chart at Appendix D. The table is, by necessity, a generalisation, but it provides an insight into the evidence which has been put forward in support of the application.

14.5. The use documented on the user evidence forms and written letters commenced in 1914 and is recorded to have continued until 1995, all use appears to have been for recreational purposes, for accessing Kingston Great

Common, or onward journeys to the New Forest. All users have reported to have seen other pedestrians and horse riders using the route.

- 14.6. Of the 82 local people that have reported to have used the claimed routes, approximately 68 people have used claimed route A, 58 people have used route B, and 80 people have used route C. 70 people have travelled on foot, 6 people have travelled on a bicycle, 71 people have travelled on horseback, and 12 people using a horse and cart or motor vehicle. Use by bicycle appears to be lower than might be expected, however the user evidence may not provide an accurate insight into the use over the claimed routes as earlier evidence forms do not appear to have recorded bicycle use as a separate category (instead referring simply to use by 'vehicles').

Analysis of the user evidence under Section 31 of the Highways Act 1980

- 14.7. For Section 31 of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:
- the physical nature of the path must be such as is capable of being a right of way at common law.
 - the use must be 'brought into question', i.e. challenged or disputed in some way.
 - use must have taken place without interruption over a full period of twenty years before the date on which the right is brought into question.
 - use must be as of right, i.e. without force, without stealth and without permission.
 - use must be by the public at large.
 - there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed.

Physical nature of the routes

- 14.8. Claimed routes A and B link to public highway at their western terminus, and route C at eastern terminus. Route C travels north to public highway. The routes are therefore capable of existing as rights of way at common law and all the routes have existed as well-established tracks in the past.

The bringing into question of the public's right to use the path

- 14.9. The period of 20 years is calculated retrospectively from the date on which the public's right to use the routes was first brought into question. Officers consider that the date that the public's right was brought into question was 1972 when Landowner 1 told a user of claimed route A that it was not a public right of way, in the same year Landowner 1 also removed part of a sleeper bridge on claimed route B, preventing onward travel on horseback. Landowner 3 had also stated in 1972 that he did not agree that a public right of way existed over claimed route C, but would agree to the establishment of a new one.

Twenty years use without interruption

- 14.10. To establish that a way has become a right of way it is necessary to evidence uninterrupted use over the full period of 20 years. The 1992 Decision Report states that "there would possibly be four 20 year plus users". Landowner 1 has

also stated that “*There is not any evidence of independent users accumulating 20 years of use. Many users, in order to claim 20 years use, claimed use since birth*”. It appears that the 1992 Decision may have discounted use from people whose use had not covered the full 20 year period, however, this is unnecessary. It is only necessary for the combined use to cover each year within the 20 year period.

- 14.11. Landowner 1 has submitted photographs of gates and signs along the claimed routes, these have already been discussed within the documentary evidence section of this report. Landowner 2 has stated that their tenant erected a gate on the western end of route B. The tenant was interviewed in relation to the 1992 Decision and stated that they erected the gate ‘about 20 years ago’, which would have been around 1972. The gate had not been locked but is alleged to have borne the notice “*Private Estate*”. Landowner 3 has also stated that a gate was erected on Route C without his consent.
- 14.12. Some of the users have reported that there were gates along the claimed routes, however this is not uncommon within the New Forest and did not appear to have impeded access until after 1972. Several of the users have also reported to have seen signs along the claimed routes which stated “private” and “no public right of way”, but these are also reported to have been erected after 1972.
- 14.13. Landowner 1 has stated that users were challenged by their Game Keeper, and by the Army who were stationed at Kingston Great Common in the 1950s. Landowner 2 has also stated that their tenant was required to warn off trespassers as part of his tenancy. The tenant when interviewed in relation to the 1992 Decision had stated that there had only been a low level of use by riders and walkers over the years and that he had seen no riders for very many years. The tenant is recorded to have viewed claimed route B as a private accommodation road and to have challenged people on about half a dozen occasions.
- 14.14. Apart from one user who states that they were chased by a man with a shotgun between 1970 and 1976, the user evidence makes no other reference to any interruptions to their use prior to 1972. Officers have also found no contemporaneous evidence to support the assertion that their use was challenged by the Army, the Game Keeper, the landowners, or their tenants, prior to 1972. There is also no contemporaneous evidence to support that signs were erected on the claimed routes prior to 1972. Officers therefore consider that there is no evidence to indicate that use was interrupted over the 20 year period and that, in the absence of any further evidence, 1972 has been correctly identified as the date that the rights were brought into question.
- 14.15. The user evidence submitted covers every year within the relevant 20 year period from 1952 to 1972. 61 people have reported to have used the claimed routes within the 20 year period, with at least 20 people using the claimed routes in any one year.

As of right - without force, stealth, or permission

- 14.16. The uninterrupted use over the full 20 year period must also be ‘as of right’ – without force, stealth, or permission. The 1992 Decision Report summarised that “*The most recent user forms would appear to be insufficient owing to the fact that they include evidence from tenants and their relatives and from those with Forest rights and because of challenges*”.
- 14.17. *Force – to be as of right, use must not be as the result of the use of force.* The public appear to have enjoyed uninterrupted access along the claimed routes until 1972.
- 14.18. *Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look.* The Landowners have either confirmed that they were aware of the use over the claimed routes, Landowner 1 stated in [date] “*I am deeply concerned at the rapid build-up of this new riding centre - I myself counted parties totalling over 50 in one day*”.
- 14.19. *Permission – users ‘as of right’ should not be using the way ‘by right’ that is with any kind of licence or permission.*
- 14.20. Landowner 1 has stated that a user had ridden ‘virtually’ with their permission. The user was interviewed in relation to the 1992 Decision, the user had been interviewed and had confirmed that they had known Landowner 1 but that the question of them riding on the common had not been raised. The user also stated that they did not know Landowner 3 very well because they had been abroad much of the time.
- 14.21. The user in question does not appear to have had permission, either expressed or implied, to use the claimed routes. The referenced case of *AG & Newton Abbot RDC v Dyer (1945)* established the position that being on friendly terms with the landowner should not be given weight. Even if it was considered that a user had an implied permission use can still be as of right, and even if a single user was considered to have had permission it would not dilute the strength of the rest of the evidence.
- 14.22. The 1992 Decision also discounted use from those with Forest rights, it appears that their use was deemed to have been ‘by right’ rather than ‘as of right’ due to the Inclosure evidence. The Inclosure evidence was examined within the documentary evidence section of this report. Although the land providing access to the Forest is required by the Ringwood Inclosure Act of 1807 to “*forever remain for the purposes aforesaid*”, it is considered that as the land was outside of the allotted land, that the Commissioners did not have powers to create highway or other rights over the land. This viewpoint is

substantiated by the fact that in 1920 the land over which claimed routes A and B travel was sold, as “*absolute freehold and not subject to any restrictions or commonable rights whatsoever*”. Officers therefore consider that the use of the claimed routes by those with Forest rights is ‘as of right’ and should therefore not be discounted.

- 14.23. The 1992 Decision also discounted use by those who were deemed not to be “*entirely independent*” users, which included the tenants of the landowners. This included a tenant of Landowner 2 who rented Bagnum Riding Stables, whose use appears to have been discounted, apart from the challenge to their use of claimed route A by Landowner 1 in 1972. The Applicant raises that it is questionable to assert that one of the users who had been challenged was not an entirely independent user as “*the challenge was not from her landlord, but from a neighbouring (adjoining) landowner...*”. The Applicant goes on to state that “*...a reappraisal of [the user’s] position is essential, certainly as regards her use of the parts of the routes in the claimed possession of [Landowner 1]*”.
- 14.24. A tenant would only have rights associated with their tenancy and would not normally have a right to access the whole estate and would also not have a right of access over the land owned by a neighbouring landowner. Landowner 2 has stated that the tenant of Bagnum Riding Stables was “*specifically prohibited from riding her horses or allowing her clients to ride on Estate land*” so it cannot be said that they had permission or licence.
- 14.25. Two users of the claimed routes were discounted because they were relatives of the tenant of Bagnum Riding Stables. The relative of a tenant would only normally have a right to access over land required to visit the property of the tenant and not a right of access over a whole estate. The turning to Bagnum Riding Stables is accessed from the public highway, it therefore cannot be said that the use of the claimed routes was in connection with visiting their relatives.
- 14.26. Another user of the claimed routes was discounted within the 1992 Decision because they were a relative of a tenant of Landowner 2 who rented Bagnum Farm. Bagnum Farm is also accessed from the public highway, however use associated with the tenant and their relatives appears to have been discounted because some of the farmland associated with the tenancy is adjacent to the claimed routes.
- 14.27. In 1964 the perambulation of the New Forest changed to include parts of claimed routes B and C. Landowner 1, who owns Kingston Great Common, has confirmed that the common “*does fall within the perambulation of the New Forest*”. The Applicant has raised whether it would be “*possible for anyone other than the Forest authorities to challenge use over [the routes], and there is no evidence that they did so*”. The land does not form part of the crown

lands managed by Forestry England and therefore the Forest authorities would not have been able to challenge use and Forest bylaws would also not have been applicable.

- 14.28. Landowner 1 has stated that *“The only rights over KGC are that of vicinage and the Crow Act”*, that *“the Countryside and Rights of Way Act only covers part of Kingston Great Common”*, and that (regarding claimed route C), that it is *“not a right to roam”*. Having checked the Natural England website it does appear that parts of routes B and C have been recorded as Access Land under the Countryside and Rights of Way Act 2000. Although this would prevent the accrual of public rights over the claimed routes through use post-2000, it would not prevent any pre-existing highway rights from being recorded.

Use by the public

- 14.29. The use must be of a volume capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.
- 14.30. Landowner 1 has stated that *“Few of the users who have given evidence could be considered to be the general public. They were tenants or relatives of tenants of the landowners and clients of Little Bagnum Stables. The inhabitants of Bagnum were not the general public being tenants”*. Although users should reflect the public at large and not just employees, tenants, or licensees of the landowner, officers do not consider that the use of employees, tenants, or licensees should be discounted if their use is deemed to encompass use as of right.
- 14.31. Officers consider that use over the claimed routes was of a volume capable of coming to the attention of the landowner. The users are reflective of the locality and although some users are tenants of the landowners or their relatives, other local people and those living further afield have also reported that they have used the claimed routes.
- 14.32. At least 16 people using the routes in any given year. The highest number of users recorded is 53 in 1972.

Analysis of the user evidence under Common Law

- 14.33. This matter can also be considered under common law where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied

from a sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use.

- 14.34. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed or turning people back.
- 14.35. Unlike under Section 31, the total period spanned by the user evidence can be considered. The evidence of use submitted over the claimed routes covers every year and spans 37 years from 1935 until 1972, with overall use recorded to have taken place back to 1914. It is evident that the use of the routes by the public had come to the attention of the landowners, but although there has not been an express act of dedication it is not considered that the landowners have taken effective steps to rebut the use.

Conclusions regarding the User Evidence

- 14.36. Further investigation and interviews would be necessary to enable more weight to be placed upon any of the above information. However, the user evidence does offer a useful insight into how the route has been used in the latter part of the 20th century.
- 14.37. Even since the rights over the claimed routes have been brought into question by the Landowners, the public have continued to assert that they have a right to use the paths. Officers consider that their continued assertion of their perceived right, despite Landowners 1 and 2 attempting to prevent use, may have, as in the referenced case of *Eyre v New Forest Highway Board (1892)*, strengthened the inference of an earlier dedication.
- 14.38. Officers consider that the user evidence provides a reasonable allegation of dedication under statutory prescription and presumed dedication under common law. The user evidence supports carriageway status.

15. Effect of Part 6 of the Natural Environment and Rural Communities Act 2006

- 15.1. The rights of way provisions in the Natural Environment and Rural Communities Act 2006 (“NERC”) curtail the future scope for establishing public rights of way for mechanically propelled vehicles where these are based on either evidence of historic use, or dedication for use, by vehicles that were not mechanically propelled. Officers will now consider the effect of NERC and whether the routes

should be recorded as Restricted Byway or Byways Open to All Traffic ("BOAT").

- 15.2. Subsection 67(1) of NERC effectively extinguishes public rights of way for mechanically propelled vehicles over every highway not already shown on the Definitive Map as a BOAT, subject to the exceptions set out in subsections (2) and (3).
- 15.3. Subsection 67(2)(a) excepts ways that have been lawfully used more by motor vehicles than by other users, in the five years preceding commencement (2006). There is no evidence to suggest that this was the case, it is therefore deemed that this exception does not apply.
- 15.4. Subsection 67(2)(b) excepts ways that were, immediately before commencement, both recorded on the List of Streets as being maintainable at public expense and not recorded on the Definitive Map and Statement as a right of way. This was not the case for any of the claimed routes, and so it is therefore deemed that this exception does not apply.
- 15.5. Subsection 67(2)(c) excepts ways that have been expressly created or constructed for motor vehicles. There is no evidence to suggest that a public right of way for mechanically propelled vehicles was expressly created by primary or secondary legislation, or by an instrument in respect of the claimed routes. In consideration that there must be 'express words in order', it is therefore deemed that this exception does not apply.
- 15.6. Subsection 67(2)(d) excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles. The claimed routes were not constructed as a road intended to be used by mechanically propelled vehicles, and documentary evidence clearly shows the routes to have pre-dated the advent of the motor car. It is therefore deemed that this exception does not apply.
- 15.7. Subsection 67(2)(e) excepts ways that had been in long use by mechanically propelled vehicles before 1 December 1930, when it first became an offence to drive 'off-road'. There is no evidence that confirms an earlier creation of vehicular rights (through use by non-mechanically propelled vehicles, by express dedication, or by some other means), it is therefore deemed that this exception does not apply.
- 15.8. Subsection 67(3) contains transitional arrangements, which except those highways that are the subject of an outstanding definitive map modification application for a BOAT made before the relevant date, which under Subsection (4) means 20 January 2005 in England. The applications were made after the

relevant date and are for Restricted Byways, this exception therefore does not apply.

- 15.9. As none of the exemptions apply under NERC, officers consider that any public right of way for mechanically propelled vehicles would have been automatically extinguished over the claimed routes by the provisions of the 2006 Act.

16. Conclusions

- 16.1. That the application be accepted, and that authority is given for the making of a DMMO to record the claimed routes plus an additional route as restricted byways.

- 16.2. The routes to be recorded are shown on the draft order plan referenced Appendix A:

- Claimed route A as shown from D-E
- Claimed route B as shown from F-G
- Claimed route C as shown from H-E-G
- and the additional route linking claimed routes A and B (shown from E-G as a circular route to the east).

- 16.3. The width of all routes should be 4m wide, all the routes should be to be recorded without limitations.