

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	11 September 2019
Title:	CR993 - Application for a Definitive Map Modification Order to record a public Bridleway from The Middleway to London Road in Harewood Forest.
Report From:	Director of Culture, Communities and Business Services

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Purpose of this report

1. The purpose of this report is to assist Members in determining whether the available evidence is sufficient for a public right of way to be recorded on the Definitive Map in Longparish.

Recommendation

2. That authority is given for the making of a Definitive Map Modification Order to record a Bridleway, 3.5 metres in width over the section of the claimed route that travels over the existing Andover Footpath 68, 3metres over the rest of the route which is not currently recorded as a right of way, as shown between points A - B on the attached plan.

Executive Summary

3. This is an application made by a resident of Andover (the 'Applicant') in 2007 under Section 53 of the Wildlife and Countryside Act 1981, to record a public Bridleway from The Middleway to Andover Footpath 68, and to upgrade Andover Footpath 68 to a Bridleway from SU 402 461 to its junction with London Road. The application is supported by user evidence that the Applicant believes demonstrates that a Public Right of Way should be recorded on the basis of long-term use of the claimed route.
4. Having considered the supporting user evidence and taken additional research of historic documentary evidence into account, it is considered that there are sufficient grounds to record the route as public Bridleway, as shown between points A - B on the attached plan.

Legal framework for the decision

5. WILDLIFE AND COUNTRYSIDE ACT 1981 – 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.
6. HIGHWAYS ACT 1980 - Section 31: Dedication of way a highway presumed after public use of 20 years.
 - a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
 - b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.
7. PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate 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 particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

Issues to be decided

8. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. Regarding this particular investigation, evidence to show that rights subsist will be required for the section of the claimed route that travels over the existing public right of way, Andover Footpath 68, and evidence that rights are reasonably alleged to subsist will be required for the rest of the route, which is not currently recorded as a right of way.
9. Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. 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.
10. If a right of way is considered to subsist or reasonably alleged 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 Definitive Map should be given.
11. Where a Map Modification Order 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.
12. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.
13. 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.

Description of the route (please refer to the map attached to this report)

14. The route that is the subject of this investigation is approximately 807 metres long. Commencing at C87 The Middleway (point 'A' on the attached map), the route travels north-eastwards through Harewood Forest to meet Andover Footpath 68 at SU 402 461, where it then follows the line of the footpath northwards. It terminates at B3400 London Road (point 'B' on the attached map).
15. The width of the claimed route over the existing public right of way, Andover Footpath 68 is recorded as being 12 feet wide (approximately 3.5 metres). Where there is no public right of way recorded over the claimed route, OS

mapping has been used to establish that the width of the track is approximately 10 feet wide (approximately 3 metres wide).

Background to the application

16. The route that forms the subject of this investigation is located within Harewood Forest and falls within the parishes of Longparish and Andover. The physical path on the ground appears to have been created during World War II, as part of a network of concrete roads, when Harewood Forest was used as an ammunition depot by the Royal Airforce.
17. In 1993, under the provisions of Section 31(6) Highways Act 1980, the owner of the Estate through which the claimed route travels submitted a declaration to the County Council, acknowledging those rights of way already recorded on the definitive map, and stating that they had no intention to dedicate any further public rights of way over their land. Subsequent deposits were received in 1997, 2005, and 2014.
18. In around 2007 the owner of the Estate fenced along the boundary of Houndshott Copse at The Middleway, which prevented access to the claimed route, and which in turn prompted the application to be submitted to the County Council.

Consultations with other bodies

19. In addition to the landowners, the following people and organisations have been consulted on this application: The Ramblers, Open Spaces Society, Byways and Bridleways Trust, British Horse Society, Cycling UK, Test Valley Borough Council, County Councillor Andrew Gibson (Test Valley Central), and the Area Countryside Access Manager. Responses are included below:
20. The Ramblers
"The Ramblers fully support this application".
21. No other responses were received.

The Landowner

22. The owner of The Middleton Estate has raised an objection to the application. They have provided several statements from Gamekeepers and Stalkers asserting that, in instances where members of the public were encountered other than on a public right of way, that they had been told it was private property and asked to return to designated rights of way.
23. The land over which Andover Footpath 68 travels, the short distance from London Road to the parish boundary, is unregistered land.

Documentary Evidence

24. Parish Maps – Andover and Longparish – 1950s

The preparation of the first Definitive Map started in the early 1950s, following the passing of the National Parks and Access to the Countryside Act 1949, initial surveys being carried out by the local councils. The map provided by Andover Borough Council, dated 1952, does not show the claimed route from The Middleway to Andover Footpath 68 as a public right of way, Andover Footpath 68 is shown on the map and is recorded as a public footpath.

25. The map provided by Longparish Parish Council, which is undated (although it will have been submitted during the early 1950s), does not show a public right of way over the claimed route.
26. Definitive Map and Statements – 1951
The claimed route from The Middleway to Andover Footpath 68 is not shown on the first Definitive Map published in 1951. Andover Footpath 68 is shown on the map and is recorded as a public footpath.
27. The Definitive Statement for Andover Footpath 68 records the path as travelling from SU 4027 4625 at London Road to SU 4026 4619 at Parish Boundary. The longer description is recorded as *'From Road B3400 southwards along grass path between hedges 12 feet apart then between edge of wood and hedge 10 feet apart to Borough Boundary'*.

Ordnance Survey Maps - 1873 to 1971

28. Ordnance Survey maps were produced to record topographical features and were not intended to record public rights of way. The England and Wales Maps Twenty-five-inch edition of 1946 shows that a path was discernible on the ground over the claimed route, the earlier editions from 1873, 1895, and 1910, do not show a path over the claimed route. The OS National Grid map of 1971 also shows that a route was discernible on the ground over the claimed route.
29. The creation of the physical path within Houndshott Copse after 1910, but prior to 1946, correlates with the building of sidings at Longparish Station and a network of roads within Harewood Forest, when it was used as an ammunition depot by the Royal Air Force during World War II, and the evidence put forward by the local residents, that the claimed route is a concrete road.

User Evidence

30. The application is supported by evidence from 18 local residents collected on user evidence forms, although 2 people who have submitted evidence appear not to have actually used the route. The user evidence is summarised on the charts which are provided at Appendix A and B, by necessity, the tables are a generalisation, but provide an insight into the evidence which has been put forward in support of this application.

31. The use documented on the user evidence forms commenced in 1951, the majority of which continues up until the application was submitted in 2007. However, a couple of people have said that they have continued to use the path until 2019. All use appears to have been for recreational purposes and has ranged from annual to daily use. Most users have reported to have seen other people using the route including other pedestrians, cyclists, and horse riders.
32. The overall volume of use is significant, with 8 users claiming to have used the route more than once a week, 5 users claiming to have used the route between twice a month and once a week, and 2 users claiming to have used the route less than twice per month.
33. Three of the people who have submitted evidence have reported to have seen "Private" or "No public right of way" signs along the route, which are reported to have been erected between 2000 and 2007. Three of the people have reported to have been told by the landowner that the path was not public, these incidents are reported to have occurred between 2000 and 2009.
34. One of the users has detailed that in the 1980s *"it was locally known that Harewood Forest was enjoyed by the public... in fact at that time, such was the rapport, that poaching/motorbikes were reported by the locals to the Estate Office"*. They have also noted that *"over the past few years there has been a marked change in attitude by the owners – including the public footpath which is not in dispute!"*.

Analysis of the evidence

35. There is no documentary evidence to indicate that there has been any formal dedication of the routes that are the subject of this report, and so the application must therefore be determined upon the user evidence that has been put forward. The evidence of long use under Section 31 of the Highways Act 1980 and common law is considered below.

Analysis of the evidence under Section 31, Highways Act 1980

36. 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 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

37. Physical nature of the routes

The route that is the subject of this investigation is capable of being a right of way at common law. The path is a linear route, which is acknowledged on current Ordnance Survey maps as a physical feature.

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

In 1993, under the provisions of Section 31(6) Highways Act 1980, the owner of the Estate through which the claimed route travels, submitted a declaration to the County Council, stating that they had no intention to dedicate any further public rights of way over their land. This deposit covered the land over which the claimed route runs, and so this event is deemed to have brought the use of the claimed route into question. It will also have the effect of nullifying any use of the claimed route after 1993. The relevant twenty year period of use to be considered will therefore be 1973 to 1993.

39. Twenty years' use without interruption

The user evidence submitted covers a period of use that spans the 20-year relevant period. Although three users have admitted being challenged whilst using the route, and signs have been erected stating that the route was not a public right of way, these events are reported to have taken place after 1993 (and are therefore not relevant to the twenty year period under consideration). None of the other users of the claimed route have reported being challenged whilst using the route between 1973 and 1993.

40. 'Use without force, stealth or permission'

41. *Force – to be as of right, use must not be as the result of the use of force.*

The user evidence indicates that there were no fences, locked gates, or other intentional obstructions restricting use of the claimed route, and the public appear to have enjoyed uninterrupted access over the claimed route between 1973 and 1993.

42. *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.*

Use of the claimed route has been open and without secrecy and of a type that would have been capable of coming to the attention of the landowner.

43. *Permission – users as of right should not be using the way with any kind of licence or permission.*

Two of the users have reported that they were granted permission to use the route in 1980, in which case it is questionable whether their use could be considered to have been 'as of right'.

44. Use by the public

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.

45. The volume of use put forward in the user evidence records that the path has been used approximately 30 times per week throughout the 20-year relevant period, indicating that the path has been a well used route. The use by walkers ranges from approximately 12 to 22 times and use by cyclists and horse riders ranges from approximately 15 to 18 times per week.
46. *Use of a way should not consist solely of a particular class of person, such as the employees of a particular employer, tenants of a particular landlord, or customers of a particular business, if it is to be recorded as public.*
47. None of the users appear to have a particular connection to any of the landowners, and the use of the route also does not appear to have been restricted to a particular family or group of people. 6 of the users have indicated that they have exercised private access rights when using the path (when using the path to visit friends). However, given that no properties are accessed exclusively via the claimed route, it is not considered that any such private access rights exist over it.

Summary of user evidence

48. The evidence of use indicates that local people have used the claimed route between The Middleway and London Road since 1951 until the application was made in 2007, following the obstruction of the route by the fencing that was erected along the boundary to Houndshott Copse at The Middleway. The volume of use put forward is considered to represent use by the public, is sufficient to have come to the attention of the landowner and covers the full 20-year relevant period. The volume of use by walkers, cyclists and horse riders also correlates to the bridleway rights that are being claimed and is reflective of the rural area.

Actions of the Landowners

49. There is no evidence put forward by the applicant (or discovered by officers) to indicate that the landowner has ever expressly dedicated a public right of way over the claimed route. In 1993, under the provisions of Section 31(6) Highways Act 1980, the landowner submitted a declaration to the County Council, stating that they had no intention to dedicate any further public rights of way over their land.
50. It is also apparent that the landowner erected fencing along the boundary to Houndshott Copse at The Middleway, and signage within the copse, which stated "No public right of way". However the user evidence indicates that this occurred between 2000 and 2007, after the date which has been established as when the right to use the route was brought into question. The landowner has not submitted any evidence confirming when the signs or fencing were erected.
51. The landowner has submitted statements from three employees of the Estate, which state that, in instances where they encountered members of

the public on areas of the Estate away from public rights of way, they had asked them to return to the designated paths. These employees worked for the Estate from 1996 onwards, and so any challenge issued by them to members of the public will have fallen outside the relevant period of 1973 - 1993. The web based forum, hosted by Single Track Magazine (<https://singletrackworld.com>), also has a post (reference 5878471) dated 2014, related to cycling within Harewood Forest, which details that several cyclists have been challenged in 2013 and 2014, when riding within the forest.

52. Although there is evidence to suggest that in recent years the employees of the Estate have actively challenged members of the public when found walking away from the designated rights of way within the forest, this has occurred after the date on which the public's right to use the claimed route is deemed to have been brought into question. It is also considered that as many users have used the route for many years without challenge, or have never been challenged, that these individual challenges were an ineffective means of conveying to the public at large that the claimed route was not a public right of way.

Conclusions under Section 31, Highways Act 1980

53. It is considered that the evidence of public use is sufficient for a deemed dedication of public bridleway rights over the claimed route to be inferred under Section 31.

Analysis of the evidence under Common Law

54. 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.
55. This is required 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.
56. Unlike under Section 31, the total period spanned by the user evidence can be considered. The evidence of use put forward covers every year over a period of 56 years from 1951 until 2007, although some users have indicated that their use of the route had continued up until 2019, the landowner had

erected fencing and put up signage which would have rebutted the suggestion that they had intended to dedicate the route for public use.

57. It is considered that the submission to the County Council in 1993, under the provisions of Section 31(6) Highways Act 1980, whereby the landowner made a declaration stating that they had no intention to dedicate any further public right of way over their land, would have also rebutted the suggestion that they had intended to dedicate the route for public use after this time.
58. It is however considered that evidence of use put forward prior to 1993 indicates that the claimed route was a well used path and that use was of a sufficient volume to have come to the attention of the landowner.
59. There is no evidence to suggest that the landowner has taken any effective steps to prevent use of the claimed route between 1951 to 1993, and it is therefore considered that the landowner has acquiesced with the use of the claimed route by the public during this period of 42 years, and that a dedication at common law can be inferred.

Conclusions under Common Law

60. It is deemed that use of the route by the public has given rise to an inference of a common law dedication of a public bridleway over the claimed route from The Middleway to London Road.

Conclusions

61. The available evidence is sufficient to infer that there has been a route corresponding to the claimed route dating back to 1951. The volume of use put forward is considered to represent use by the public, is sufficient to have come to the attention of the landowner and covers the full 20-year relevant period. The volume of use by walkers, cyclists and horse riders also correlates to the bridleway rights that are being claimed and is considered to be sufficient bearing in mind the rural nature of the area. The available evidence is also deemed to be sufficient for a common law presumption to be inferred (i.e. that the landowner intended to dedicate the claimed route as a public bridleway).

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

Hampshire maintains strong and sustainable economic growth and prosperity:	yes/no
People in Hampshire live safe, healthy and independent lives:	yes/no
People in Hampshire enjoy a rich and diverse environment:	yes/no
People in Hampshire enjoy being part of strong, inclusive communities:	yes/no
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as ‘surveying authority’, has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Location

Claim Reference: Case File (CR/993)

Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

EQUALITIES IMPACT ASSESSMENT:

1. Equality Duty

The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act with regard to the protected characteristics as set out in section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within section 149(7) of the Act (see above) and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant protected characteristic that are connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic that are different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

2. Equalities Impact Assessment:

See guidance at <http://intranet.hants.gov.uk/equality/equality-assessments.htm>

Insert in full your **Equality Statement** which will either state:

- why you consider that the project/proposal will have a low or no impact on groups with protected characteristics or*
- will give details of the identified impacts and potential mitigating actions*