

# HAMPSHIRE COUNTY COUNCIL

## Decision Report

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	16 October 2019
<b>Title:</b>	Application for a Definitive Map Modification Order to record footpaths at Top Field, Springvale Parish of Kings Worthy
<b>Reference:</b>	
<b>Report From:</b>	Director of Culture, Communities and Business Services

**Contact name:** Sylvia Seeliger

**Tel:** 01962 846349

**Email:** sylvia.seeliger@hants.gov.uk

### Purpose of this Report

1. The purpose of this report is to present Members with evidence relating to a claim for public footpaths at Top Field, Springvale, in the parish of Kings Worthy, so that they may determine whether or not to authorise a Definitive Map Modification Order for the application routes, either under the provisions of section 31 of the Highways Act 1981, or through a dedication at common law.

### Recommendation

2. It is recommended that an Order be made to record a number of the paths that are the subject of this application on the Definitive Map and Statement and that one path, and part of another, be refused, as follows:
  - a) That a Definitive Map Modification Order be made to record the route, shown on the Committee Plan between A-B as a public footpath, with a width of at least 1 metre.
  - b) That a Definitive Map Modification Order be made to record the route, shown on the Committee Plan, between C-D as a public footpath, with a width of at least 1 metre.

- c) That a Definitive Map Modification Order be made to record the route E-F as a public footpath, with a width of at least 1 metre.
- d) That a Definitive Map Modification Order be made to record the route L-K as a public footpath, with a width of at least 1.5 metres wide.
- e) That a Definitive Map Modification Order be made to record the route J-M as a public footpath, with a width of 6 metres.
- f) That a Definitive Map Modification Order be made to record the route N-M as a public footpath, with a width of at least 1 metre wide.
- g) That the application to record G-H as a public footpath be refused.
- h) That the application to record I-M as a public footpath be refused.

### **Executive Summary**

3. The matter before Members consists of two applications, made by two individuals, following the confirmation in 2018 of a Map Modification Order for public footpaths over Top Field. This confirmation was the result of a recommendation in the advice report for a non-statutory public inquiry held in 2016 into a village green application made for this land. The present application is supported by a number of user evidence forms. These were collected for the current applications; however, also relevant are the forms put forward for the 2018 confirmed Order in that information contained in these also relates to the present claim. This report will also give consideration to relevant information considered in the non-statutory village green inquiry.
4. Having considered the evidence in tandem with current guidance and relevant case law, it is considered that there is sufficient evidence, on the balance of probabilities to authorise the making of a Definitive Map Modification Order for a number of these routes.

### **Legal framework for the decision**

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...

- ii) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...

#### 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.

#### HIGHWAYS ACT 1980 s.31:

Dedication of way as highway presumed after public use of 20 years.

- (1) 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.
- (2) 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.

#### **Applicants**

- 5. The first application was made by **Mrs. Rosemary Clarke** of Kings Worthy, on 2 June 2017, and consists of four separate paths, shown on the Committee Plan attached to this report as described below. The second application was made by **Ms Sarah White**, of Winchester, on 1 September 2017. This relates to the dismantled railway line to the south of Top Field. This is also shown on the Committee Plan. In addition, the investigation into both the confirmed DMMO of 2018, and the assessment of these two particular applications, revealed evidence of use of another path, with short connecting paths to existing rights of way, indicating another route potentially capable of being recorded on the Definitive Map and Statement. Analysis of the longest claimed path also revealed that a part of it was unlikely to have been used, and that there was another short connecting path to one of the 2008 Order paths. Therefore, the application actually consists of seven potential footpaths at this location. These are shown on the attached Committee Plan.

#### **Landowners**

- 6. The current landowner of Top Field is **Galliford Try** of Guildford, and is represented by **Drew Smith** of Durley, who were the previous freeholders. The

land to the south of Top Field is owned by **Laneys Properties** of Kesh, County Fermanagh, Northern Ireland, and tenanted by **Mr. and Mrs. Patricia Bright** of Kings Worthy. Other parts of the land are owned by **Kings Worthy Parish Council**, and **Network Rail** of London.

### **Description of the Routes (please refer to the map attached to this report)**

7. The majority of these seven routes lie on the land known as Top Field, Springvale, in the parish of Kings Worthy, and those that lie outside it connect with Top Field routes.
8. Route **A-B** is claimed by Ms White, and is one of the latter, running from the unclassified road known as Woodhams Lane, leading from Springvale Road to Woodhams Farm. Aerial photography indicates that this path runs to the east of a hedge that separates an area of grassland from the cultivated field, northwards from Woodhams Lane to meet with the claimed path I-J that runs on the dismantled railway line. Its length is approximately 152 metres.
9. Route **C-D**, claimed by Mrs. Clarke, connects Ilex Close (road U173), where users gained access to the edge of Top Field, to the circular route L-K. The path enters an area of scrubland and runs southwards, curving to cross Kings Worthy FP 507 to reach this circular path. The length of this path is approximately 117 metres.
10. Route **E-F** (Mrs. Clarke) also begins at Ilex Close, and runs due south, again crossing FP 507 to meet the circular path further to the south, at point F, and is approximately 136 metres long.
11. The third route from Ilex Close (as above) is **G-H**, running southwards in a fairly straight line to the west of property fences, to meet the dismantled railway line at point H, a distance of approximately 310 metres.
12. The dismantled railway itself, also part of the claim by Mrs. Clarke, lies between points **I-J**. It commences at point, where Woodhams Lane goes under the main railway line from Southampton to London Waterloo. It is part of the old Mid Hants Railway, and runs north and then curves east to follow a flat path that crosses Springvale Road on a bridge, meeting an unclassified road at point J on the map. Its length is approximately 849 metres.
13. During this investigation and following on from the 2016 non-statutory public inquiry into the village green claims made in 2013, it became clear that, when cultivation of Top Field ceased, and the land was put into set-aside, a second circular path was used by the public. This is shown on the plan as path **L-K**. It is essentially circular, within FP 507, and has two connecting spurs to Blackberry Field at point K and to Burnet Lane, a point L. It is approximately 778 metres long.
14. In the final stages of the investigation, it has become apparent that a small path linking the dismantled railway with Kings Worthy Footpath 507 had been used by a significant number of witnesses and should be put forward for consideration for inclusion in any Order authorised by this Committee, on the balance of probabilities. It is included on the Committee plan as path **N-M**. It

departs from path I-J some 43 metres south from the solid line indicating a fence on the dismantled railway and runs toward Top Field in a north-westerly direction for approximately 38 metres.

### **Issues to be decided**

15. The issue to be decided is whether there is evidence to show, on the balance of probabilities, that the public has acquired public footpath rights over the seven routes shown on the Committee Plan, and described above at paragraphs 7 to 13.
16. 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.
17. Any changes to the Definitive Map must reflect public rights that already exist, through periods of unchallenged use. It follows that decisions as to whether to amend the Definitive Map must not be taken for reasons of desirability or suitability. Therefore, before an Order changing the Definitive Map is made, the County Council must be satisfied that the requested modification is supported by the evidence.

### **Background to the Application**

18. This combined application is the latest for public rights over the land at Top Field, and the history of the processing of applications here is complex. Linear routes, plus village green rights, have been claimed over Top Field:
  - Public footpath rights were claimed over three paths on Top Field in 1997. Part of the claimed routes were confirmed as Kings Worthy Footpath 506a and 506b, under the Town and Country Planning Act 1980 ('TCPA'), in December 2013. This was to allow a development to take place in the north part of Top Field. A Map Modification Order for the original three claimed routes had been made in 2005, and had not been proceeded with because of an objection relating to the consultation carried out. However, it had not been rescinded, because it was hoped that dedications of public footpaths might be obtained from the freeholder. These did not materialise.
  - Village green rights over Top Field were claimed in 2013 and 2015, and a non-statutory public inquiry was held to advise the Regulatory Committee whether such rights could be recorded there. The Inspector, Morag Ellis QC, reported that the required legal tests for village green rights had not been met and recommended that the village green application be refused. However, she did consider the evidence from the 1997 DMMO application. Taken with the village green evidence she had examined, she was of the opinion that the assertion of public rights over Top Field would appear to a 'reasonable landowner' more as contributing to the '*establishment/enjoyment of a PROW* [public right of way] *rather than the unequivocal assertion of TVG* [town and village

green] *rights*' (see attached report to this Committee of 22 March 2017, at **Appendix 1**, page 9). She adds (at page 19, paragraph 10.4) that '*The Highway Authority reached the conclusion in 2005 that these routes [around the perimeter of the field] were of long standing and should be added to the Definitive Map and Statement as Public Footpaths, on the basis of contemporaneous local evidence*'.

- Because the 2005 Order had never been rescinded, legal advice to officers was that another Order could be made, and this was done on 21 June 2017. This Order was objected to, but confirmed after a public inquiry in October 2018, in which the Inspector considered, and accepted, the evidence put forward for this claim, as well as that already submitted in 1997. The three resulting public footpaths are recorded on the Definitive Map as Kings Worthy Footpaths 507, 508 and 509 (see Committee Plan).
  - The Inspector's decision letter for the 2018 statutory public inquiry into the confirmation of the 2017 Map Modification Order (**Appendix 2**) indicates that the current owner of Top Field, Galliford Try, objected to that Order, but did not offer any evidence to the inquiry (paragraph 7, page 2 of the report). Their evidence in relation to the 1972 to 1992 relevant period was '*limited*' (paragraph 29, page 5). Since the development at the northern end of Top Field has taken place, further planning permission for another 35 houses has been granted, to be located in an area to the west of the eastern curve of the set aside path L-K, inside the circle.
  - The very thorough investigations of public use of the land at Top Field prompted the two applicants involved in this application to put in the claims for five further public footpaths on the land or leading to it. This application is supported by completed user evidence forms from 54 witnesses. Inevitably, what is drawn on the maps accompanying the forms is common to both claims and forms a picture of consistent public use over Top Field between 1970 and 2015. The County Council, as the highway authority in this matter, is entitled to consider all evidence available to it, and this will cover evidence from the 1997 claim, the later village green claims and the current application.
19. Aerial photography is available, both taken for the County Council, and supplied to the 2016 village green inquiry by the landowner, to illustrate and assess the wear on the claimed paths caused by users. These will be examined in tandem with the written and drawn witness evidence from all forms available to officers.

## **Documentary Evidence**

20. The large-scale Ordnance Survey Map paper map evidence available for the area of Kings Worthy affected by this claim spans the years 1876 to 1988.

1844 to 1885	The mapping at the scale of 1:2,500 is not available, but the 1:10,000 is, and shows the active Alton and Winchester railway
-----------------	--

line, connecting to what is now the London mainline at Winchester Junction, in the same position as it is now. Hookpit Farm is shown at the northern end of Top Field, and the boundary of the field is larger than that of today, with the eastern boundary being what is now Springvale Road. Part of the land is a detached portion of the parish of Headbourne Worthy. South of the Alton railway line, the field boundary along which the path A to B runs follows a very similar course to the current line. No part of Top Field has any buildings on it.

1885 to 1910 Mapping at the 1:10,000 scale is available, and shows a similar depiction to the earlier mapping, with another railway line converging on the meeting point with the main London Line, at Winchester Junction. This is the Didcot, Newbury and Southampton line, now also dismantled. The boundary line of the claimed route A-B is shown, with a signal post a little to the north-east of it on the curve of the railway line – remnants of this structure can still be found on the claimed path 1-J. The whole field is still without any buildings.

1895 The second edition of the Ordnance Survey County Series, published at the scale of 1:2,500 in 1895, omits all but the western boundary of the internal boundary of the detached part of Headbourne Worthy shown on earlier mapping. South of the railway, this is the boundary to the east of which the claimed path A-B runs. The part north of the railway line is divided by this boundary into plot '68' of 3.187 acres, and plot '69', of 36.094 acres. The signal post is still in place, and the field is empty of buildings.

1905 to 1945 The third edition of the 1:10,000 mapping is very similar to the second, save that the signal post is shown further east along the railway line, the detached portion of Headbourne Worthy is shown with a pecked and dotted line, rather than the solid line of the earlier map, and the words 'Winchester Junction' are shown on the east side of the lines, to the south of Woodhams Lane. The field boundary west of the claimed path A-B is in place and the field has no buildings.

1908 The County Series 1:2,500 mapping also has Winchester Junction at the south of Woodhams Lane. The signal post is shown further east along the Alton line, as in the 1:10,000 mapping, and the field boundary south of the railway along which path A-B runs is in place. The field is not shown as having any buildings on it.

1974 The Ordnance Survey 'National Grid' mapping, at a scale of 1:2,500, indicates that Hookpit Farm no longer exists at the northern end of Top Field, where a property called 'Maylands' is located with a large curtilage. Nine other properties have been built along Hookpit Farm Lane, going south-westwards from the former location of Hookpit Farm. Running along Springvale Road are 19 separate properties directly facing the road, with 12 others behind these, to the south-west, and the course of 'Tudor Way' is indicated with pecked lines. Both sets of houses have straight boundaries, that meet at the 'peak' (where claimed paths 'C', 'E' and 'G' have their northern origin) shown on current mapping (see the Committee Plan). These boundaries have formed the modern boundaries of Top Field, prior to the

development of Burnet Lane and Blackberry Field, in 2013-2014. Once more, the field boundary on the west of the claimed path A-B is shown, and the words 'Winchester Junction' are now shown just north of Woodhams Lane, where it meets the railway bridge. The railway is marked as 'disused' at a point east of Springvale Road, but the rails are still in place, confirming the closure of the line in 1973.

1988

By 1988, when the next revision of the National Grid mapping took place, the plot surrounding Maylands had been developed as 'Sycamore Drive', with 8 buildings. At this date, the OS is showing, by pecked lines, the unmetalled paths that were the subject of the 2005 Order, and confirmed as Footpath 506, 507, 508 and 509. In contrast to the London mainline, rails are no longer shown along its course, and the same is the case with the Didcot Railway and its loop to the west of the mainline, and the words 'dismantled railway' are shown at the same location as in the 1974 map. Towards the northern peak of Top Field, the notation used by the OS indicates that scrub and trees were beginning to grow in, and such scrub is also present in the south-western bottom corner, where the connecting path N-M joins the current Footpath 507 from the dismantled railway. When the aerial photography is considered (below) it will be seen that the main path (marked as 'unmetalled') corresponds to the routes around the cropped field visible in the earlier photographs. This map is a good representation of the situation before first claim for a Map Modification Order was made in 1997.

21. Looking at the photographic evidence, along with the mapping, provides a background for the written testimony of use by the public at Top Field between the years 1972 and 2017. The earliest photography available to this investigation is from 1993. This was supplied by the landowner at the 2016 village green inquiry. Twelve further photographs showing the land clearly are available which, with three editions of the County Council's own aerial photography provide good coverage of use being made of Top Field between 1993 and 2013. These can be found in **Appendix 3**. Bearing in mind the caveat that interpretation of this kind of photography is a specialised skill, these aerial photographs provide good relevant evidence of where, as the Inspector put it in her decision report of March 2017, *'it is logical to deduce, from the clarity and persistence of the track in all relevant photographs, that this is where the majority of feet went, not only in the years 1993 to 2000, but for the rest of the relevant period as well* (**Appendix 1**, paragraph 11.2.9, page 164).

1993

This photograph shows Top Field with a crop on part of it, and the dismantled railway running between well-grown hedges, with a worn path to the east of the fence line in the field north of Woodhams Lane (path A-B). There is a worn route visible around the eastern side of the full extent of Top Field, running between the dismantled railway and Hookpit Farm Lane, with a branch worn route running to the south and west up to the mainline railway embankment (**Appendix 3a**). The farmer has ploughed right up to this embankment, a fact mentioned in the user evidence forms completed for the 1997 Map Modification



Order application. Where the cropped field does not extend to the eastern edge of Top Field, there is a worn path on the edge of the crop, and noticeably heavier wear on the dismantled railway line at its junction with the two paths on the eastern side of the field. The easterly path is now Kings Worthy Footpath 508. The land around the crop is covered by a short sward, apart from the very top north-west corner of the field, where scrub is growing in. East of the hedge line separating Top Field from the housing including Ilex Close, the sward is also short, and no clearly worn path is discernible on this photograph. **Professor Hedley**, in his 2001 evidence, places a date of 1995 for the development here (**Appendix 7**). The photography indicates that this date is at least two years out. However, the unfinished state of the southern boundary with the eastern edge of Top Field, illustrates that the development was not complete in 1993, so it is unlikely that there can have been enough use by the public on foot in this location to produce any worn paths in the location of C-D, E-F or G-H at this stage.

1994 The photograph for this year is in black and white, but has more definition. The worn paths around the field are similar to those mentioned above, but a trodden path equating to claimed path C-D is now visible from Ilex Close. A path runs along the line of route G-H west of the boundary of the gardens of the adjoining properties. A further worn path connects these two routes, running north-east to south-west, and branching from this is a path running south and joining the present Footpath 507 somewhat further east than the claimed route E-F. This whole section is east of E-F and is a separate route. Again, the sward is short over this triangular area south of Ilex Close (**Appendix 3b**). The path north from Woodhams Lane A-B is not visible, as the field appears to be cropped up to the hedge line. However, the dismantled railway line path I-J is visible, and is relatively more worn from the point of connection to Footpath 507 in Top Field. A short sward is visible on the line west of this, between parallel rows of trees.

1995 Cloud obscures Top Field (**Appendix 3c**).

1996 The photograph's poor definition and changes to the growth of vegetation outside the cropped area render some paths as less clear on this photograph. Top Field is cropped right up to its western boundary, with the worn paths are not as clearly visible as those in the two previous photographs, though scrub is beginning to spread at the top of the field. Scrub is beginning to grow in south of Ilex Close, but path C-D is just discernible, along with the path running parallel, but not against, the boundary with the gardens (**Appendix 3d**). Tree growth is increasing along the western section of path I-J, along the dismantled railway.

1997 This black and white photograph lacks the definition of that of 1994, though the paths that were recorded on the Definitive Map in 2018 show up clearly. South of Ilex Close, there is a texture suggesting further vegetation growth, but no clear path is visible at this scale and definition, save part of Footpath 507 and part of L-K, on the eastern

- side of the field (**Appendix 3e**). The whole of the path I-J can be seen, and there is a pale line to the east of the hedge on the route A-B indicating some wear at this location.
- 1998 Another black and white photograph, Top Field has a pale crop on it, right to its western boundary, but the rest of the Definitive footpaths recorded in 2018 around it are visible. Path C-D south of Ilex Close is just discernible, particularly where it meets with Footpath 507 (**Appendix 3f**). The footpath A-B from Woodhams Lane can be seen east of the hedge line, and the worn path along the dismantled railway is visible.
- 1999 This colour photograph, taken in July of that year, shows the walked path around the crop, with increasing scrubby vegetation on the periphery of Top Field itself. The crop appears to have been sown right up to the western boundary of the field. However, the worn path to the north of the dismantled railway is visible to the south-western corner of Top Field, and both the route Footpath 507 and part of the route L-K emerge at a point directly the north, where the two go in separate directions. In the south-east corner of Top Field a worn route parts company with Footpath 507 to run in more of a southerly direction to reach an exit onto the dismantled railway path (N-M). The increasing scrub growth is also seen on the land south of Ilex Close, where C-D is visible and the path formerly running along the eastern field boundary adjacent to the gardens has migrated towards the Top Field hedge, forming something of an amalgamation of E-F and G-H. It is not possible to say if the growth of scrub is accommodating itself to the pattern of walking over this land, or vice versa (**Appendix 3g**).
- 2000 The County Council's own aerial photography from 1999-2000 shows the Definitive footpaths and a well-trodden route around the northern edge of the cropped area, equating to the northern edge of the set aside path L-K (**Appendix 3h**). Unlike the photograph discussed in the previous paragraph, there is a clear walked line to the east of the boundary with the main London railway line. A worn route is visible along part of route A-B, and the path I-J on the dismantled railway line is visible, though harder to discern as it turns south to Winchester Junction. Scrub is growing in on the Ilex Close triangle, and the path C-D is clearly seen joining Footpath 507. The pattern of walking in the scrub echoes that of the previous year's photograph, with a path running westwards over land between two groups of houses and meeting path C-D before it reaches Footpath 507. Only the most northerly section of G-H is visible on this photograph (**Appendix 3i**).
- 2002 Top Field is no longer cropped by 2002, having been put in 'set-aside'. The whole area appears to be under grass, and the worn route round the former cropped area is very clear – this reproduction shows the field from a great height. The scrub over the Ilex Close triangle looks to be increasing and uniform in its distribution, and the path C-D can be seen, where it joins Footpath 507. In the field south of the dismantled railway there is a green strip between the hedge and the crop where the claimed path A-B runs, connecting to a worn route onto the railway line. Much of the route I-J can also be

- identified, though at Winchester Junction the tree cover is complete (**Appendix 3j**).
- 2004 This photograph is also taken from a great height, and the separation of what is the eastern boundary of the set aside path L-K from the line of Footpath 507 is becoming more distinct, with the land to the east a darker green. The dismantled railway path can be distinguished partly by the trees in blossom. The field containing path A-B has been cropped closely to the hedge and, owing to the height from which the photograph has been taken, no worn line can be distinguished. The short connecting path N-M is shown. Path C-D is clear, and is beginning to be separated from the rest of the land south of Ilex Close, which carries increasing scrub, also in blossom (**Appendix 3k**).
- 2005 This photograph is produced in close-up. A path, part Footpath 507 and part of path L-K is the dominant feature, with Footpath 506 reaching it from Hookpit Farm Lane. The dismantled railway path I-J is clearly visible as a worn line between the trees, though the tree cover north of Winchester Junction has increased. The short connecting path N-M is visible, as is path A-B from Woodhams Lane, which continues round the northern boundary of the cropped field lying south of Top Field. On the Ilex Close triangle, path C-D is clear, as is a section of path G-H, to where it approaches Footpath 507. Part of path E-F appears running southwards towards the set aside path, while the line G-H is less distinct where it approaches the line of Footpath 507. Also visible is a figure-of-eight track worn down to the chalk, plus an area in the south-western corner where the 2016 village green inquiry identified BMX activity (**Appendix 3l**).
- 2006 The County Council's aerial photography from 2006 shows clearly a worn path corresponding to Footpath 507 around the southern and part of the western boundary of the former cropped area. This path curves around the set-aside area, and continues to follow this line along this area's eastern boundary. The Definitive line of Footpath 507 runs along the original Top Field boundary, and that path is visible, though not so heavily worn as the line of L-K. The railway path I-J, the short connecting path N-M, and that from Woodhams Lane (A-B) are also visible (**Appendix 3m**). Looking at the close-up of Ilex Close, the scrub continues to encroach on the triangle to the south of Ilex Close, but a worn track corresponding to path C-D can be discerned, along with a connecting path between the set-aside path and the Definitive path. There is a worn route along the line E-F, and evidence of BMX activity can be seen in the south-western corner of the field, and in a figure-of-eight feature just north of the worn track along the southern section of Footpath 507. Again, the line G-H is less distinct (**Appendix 3n**).
- 2007 The aerial photograph from this year is particularly clear, and indicates that the set aside area has received some form of harrowing, presumably to check the spread of vegetation. The path around the field is an amalgamation of Footpath 507 and the path L-K, with the connecting path N-M to the dismantled railway. This path is more

- worn in the east, with tree cover increasing towards its western end. A worn line is shown east of the hedge, corresponding to path A-B. The worn line C-D south of Ilex Close is visible, and there is another worn line branching from it about half-way along its length, though this does correspond to E-F, but is closer in position to G-H. That part of G-H alongside the gardens of the properties in Tudor Way stands out more strongly on this photograph. The path along the dismantled railway line is visible, but the path from Woodhams Lane is not distinguishable because the whole of the field along which it runs has been ploughed right up to the field boundary (**Appendix 3o**).
- 2010 This photograph, taken in September of 2010, provides further evidence of the spread of scrub over Top Field. The area is green with a grass sward, and the worn path around the set-aside area is distinguished by its short sward and width. It is a green strip of shorter grass. The south-western corner of Top Field is now clearly marked off from the rest of the set-aside land, and this is the area where the BMX activity is taking place. The line of C-D is visible. The line E-F in the increasingly wooded area south of Ilex Close is not clear. The line of G-H is not clear on this photograph. Path I-J along with the railway line is becoming grown in with trees, and is visible more clearly in the east. Path A-B from Woodhams Lane is also visible. (**Appendix 3p**).
- 2011 By 2011, scrub is beginning to encroach on the set-aside area sward. The worn path L-K is part of a wider area of short sward around the set-aside part of Top Field, with part of C-D discernible – trees have now grown up on sections of this route, and on E-F and G-H, making the actual paths not visible to the camera. Tree growth has increased on the dismantled railway, but the line is visible, particularly in the eastern section. The path from Woodhams Lane is clear on this photograph (**Appendix 3q**).
- 2012 The photograph of 2012 shows the same features as that of 2011, but further harrowing treatment to control the growth of scrub has taken place. The whole area looks pale and parched, and the area between the set-aside path and Footpath 507 has less green growth on it. The three paths running south from Ilex Close are partially visible, though parts are under tree cover. The railway line path can be seen, though again most clearly in the east. The route A-B from Woodhams Lane is very clear, and continues east to west along the northern boundary of the field to the south of the railway line (**Appendix 3r**).
- 2013 The two photographs of Top Field available are extremely similar, if not identical. One is provided by the freeholder, and the other by the County Council. The major difference between this photograph from the one taken the year before is that work has commenced on the development at the northern end of Top Field. The bare chalk forms a stark white area and the course of the two estate roads is clear. The development takes up the top third of the field, with the trodden route around the set-aside land from the end of the access track from Hookpit Farm Lane taking its current trajectory, a little to the south and on a straighter line than formerly. This change has been dictated by

the extent of the building works and their associated spoil heap alongside the main railway line. The set-aside path is clear, and the path C-D can be traced, though tree cover obscures parts of it. Similarly, path E-F is similarly affected by tree cover. Path G-H is not clear. The Woodhams Lane path A-B may be in the shadow of adjoining trees, as its turn to follow the northern boundary of the field is visible, and the railway line also appears to have heavier tree growth (**Appendix 3s**).

## User Evidence

22. The applicants supplied 54 completed user evidence forms in total to support these two claims. The information contained in the forms was extracted to produce a 'User Evidence Chart' (**Appendix 4**), which lists the users in alphabetical order. It shows the period of use by means of horizontal bars, with the 'relevant period' shown by a blue tint on the chart. This denotes the period in which 20 years of unchallenged use must be demonstrated. The first use of paths at Top Field by these witnesses was in the 1970s, with user increasing in the 1980s. By the time that this evidence was collected, in 2017, only 9 of the 54 users were not recording current use. Of the witnesses, 18 show use of 20 years' duration. The bulk of the user is shown as being within the relevant period, with 21 users also demonstrating use between 1970 and 1997.
23. This material has been combined with the user evidence submitted in 1997 for DMMO 578 (the paths confirmed in 2008), where 32 users said they had used some part of the set-aside path or other paths in Top Field, or the dismantled railway, or the path from Woodhams Lane, all included in the current application. This is **Appendix 5**. Those who had completed forms in 1997 showed increased use in the years from 1970s up to the late 1990s, adding weight to the evidence of use of those paths over a rather longer period. Thirteen users had used the paths for 20 years between 1977 and 1997. A summary was also made of the names of the users of the individual paths, to reach a figure for the long-term use for each one. The Committee Plan shows the 6 paths that are being considered in this report. A modified version of this (at **Appendix 6**) contains information on the number of users for each of the individual paths. It is not necessary that every user has twenty years of use, but there should be consistent use by the public in all years, with no interruptions to use. The numbers result from the addition of the earlier users to those who have put forward evidence for this application. This user evidence has been put into another combined chart (**Appendix 7**) to provide a visual representation of use of routes over Top Field from 1960 onwards.
24. The majority of these users testify to use of the dismantled railway, between Woodhams Lane and the unrecorded 'Kim Bishop Way' leading out to Wesley Road (Road U173). At 57 documented users, it has a very similar level of use as the set-aside path (L-K), developed when the cropped area of Top Field decreased after the year 2000 and the land was left uncultivated. Path L-K, running consistently inside the two footpaths resulting from the 2005 Order, confirmed in 2018, has evidence of user from 52 witnesses. Coming third, in

terms of volume of user, is the path A-B, from Woodhams Lane to the dismantled railway, with 34 users.

25. For those users accessing Top Field from Ilex Close, an area that was relatively open in the 1990s when cropping was taking place on the field (as shown in the aerial photography submitted by the landowner to the village green inquiry), the numbers are rather lower. Recorded in the evidence for this application are:

- Path C-D                      14 users
- Path E-F                      10 users
- Path G-H                      4 users

26. Having set out the presentation of the recorded user in visual form, the actual content of the forms needs to be considered. This material consists of the forms for the 1997 claim, the forms submitted with the 2017 claims, plus any relevant evidence considered during the non-statutory public inquiry into the application for village green registration made in 2013. All relevant evidence must be considered, in order to reach a legally sound recommendation on the application, on the balance of probabilities. Also to be taken into account is the content of the decision letter issued by Alison Lea, the Inspector at the 2018 public inquiry into the Map Modification Order, made as a result of the suggestion made by Morag Ellis QC in her 2016 village green decision letter. The material will be considered in date order, and the evidence will then be assessed against the relevant period of 1997 to 2017 for the claim that is the subject of this report, as required under section 31 of the Highways Act 1980, and will also be considered under common law, if required.

27. While the user evidence charts are, of necessity, a generalisation, they can give a feel for the extent of the use claimed. Detail is provided in the written accounts submitted. All of the 54 users completed their forms in 2017 and all but one (**Mr. Greg Wilson**, whose form has at least one page missing, and thus no information on how he used the routes) used the paths on foot. Thirteen users cycled on the paths and one used a vehicle. One person gave no frequency of use, and three witnesses used vague terms such as '*often*' and '*regularly*'. The frequency of use varies from once a month, to once a week, to daily (16 witnesses). Regular and substantial use is supported by the clarity and persistence of a number of the worn routes on the aerial photography discussed earlier in this report.

28. Everyone, except Mr. Wilson, reported seeing others whilst using paths on or connected to Top Field themselves, with 42 having seen what they identified as 'locals', and some also seeing 'strangers'. The remaining people say that they saw 'unknown' users. All these people cited as having been seen while on the claimed paths, were using the land on foot; there were 37 users who saw others on bicycles, 20 on horseback and 6 with vehicles. This indicates that the majority of use of Top Field, the dismantled railway and the path from Woodhams Lane was on foot, and therefore any Order made as a result of this report should be for public footpath rights.

29. Stiles were seen by 7 witnesses, and the claimant **Mrs. Clarke** described one at Ilex Close, which she said was no longer there in 2017 and had been there 'to prevent motorcycle access'. The forms have 25 reports of gates being seen on Top Field, of which 18 users say the gate they saw was unlocked. **Mr. and Mrs. Barwell** said the gate they saw was locked, but did not say whether it was always locked, or sometimes unlocked, and how often. **Mrs. Derrick** saw a gate 'only in recent years', and **Mrs. Player** refers back to the Hookpit Farm Lane gate with 'big holes in it' and 'not there in earlier years'. **Mr. and Mrs. Fuller** also refer to this and say the obstruction is not there now. **Mr. Smith** and **Mr. Witts** both refer a gate at point L on the Committee Plan, while **Mrs. Stevenson** indicates a kissing gate at points K and L, which she indicates has been locked. On the more general topic of obstructions, **Mr. Brown** refers to the Hookpit Farm Lane gate, present before the development at the north of Top Field, and he says that users 'could walk through gap by gate'. A different type of obstruction is the one described by **Mr. Cossburn**, who describes the builders' compound associated with the development at the entrance to Top Field, but which was removed when the building work was completed. This would have been during 2013 or early 2014, according to the aerial photography (**Appendix 3s**), which shows what may be the compound for the works near Hookpit Farm Lane, but not obstructing the entrance from the Lane. The spoil heap does, however, obstruct what was the original claimed path in the 2005 Map Modification Order. **Mr. Smith** also mentions this obstruction in the 'north west' of the Burnet Lane building site. **Mr. McCleery** refers to the Ilex Close stile and the gates on the entrances to Burnett Lane but says these are no longer obstructions, though **Mr. Welstead** says the fence across Ilex Close is still in place. The travellers are mentioned by **Mrs. Player** as having caused an obstruction in 1995 or 1996, and **Mr. Mason** and **Mrs. Phillips** refer to the double-ploughing of the path at the 'back of the houses'. Both say this ploughing is no longer an obstruction. **Mr. Edwards** said in cross-examination in the 2016 inquiry that 'after the deep ploughing in 2014 there had been a change in the way that people used the land because it was so deep and rough that it was virtually impossible to walk into the centre. Therefore people stopped using it because they could not access it' (**Appendix 1**, paragraph 6.72, page 68). However, this double ploughing affected access to the centre of the field, and **Mr. Edwards** commented that the 'the grass around the perimeter was kept short by people walking it' (*ibid.*).
30. Not one of the 54 witnesses for this application report being stopped while using paths on Top Field, and no-one had any connection with the landowner. None sought permission to use the path. **Mr. Cossburn** reports approaching the tenant farmer in the 1980s to seek permission to allow delivery vehicles to approach the rear of his property, but this has no bearing on his use of paths on the field. **Mr. Elliott** reports 'several signs' being placed around Top Field at an unknown date, but this did not lead him to seek permission to use the paths there, and **Barbara Lambert** also reports a sign 'very recently' on the south eastern boundary of the lower field (though not on Top Field and no longer in place) indicating there was 'No Access'. She too did not seek permission to walk there. **Mrs. Player** refers to the gate at Hookpit Farm Lane,

and says she did not seek permission, as there were other access points to the field.

31. The majority of users did not say they were using a private right on any of these routes. Four witnesses did answer this question. **Ms Clements** said that her house backs on to Top Field, and the map accompanying her form shows that she uses a right along a direct line to the path L-K. However, this straight line is not claimed as a public right of way. Mr. Cossburn uses the path to gain access to his own property, which actually fronts onto Hookpit Farm Lane, and shares no boundary with Top Field. While it is unlikely that this use is private in nature, Mr. Cossburn also visits the property of friends that does adjoin the path, and this would qualify as use with a private right. **Mr. Driscoll** says that he used the path (presumably A-B) as a cut-through to a friend living at Woodhams Farm. As Woodhams Lane is not a public highway, all use of the claimed paths over Top Field and to the south to meet Woodhams Lane to reach Woodhams Farm by Mr. Driscoll to visit this friend would have to be discounted. Mrs. Player now lives in Avington, but formerly lived at Tudor Way, in the house next door to that occupied by Ms Clements. On the map accompanying her 2017 user form, she shows the position of her back gate, close to Kings Worthy Footpath 508, so any use of this access point would not constitute a private right to reach one of the paths that are the subject of this application. It is always difficult to quantify what is private use disclosed on a form of this nature and would be best addressed in cross-examination at a public inquiry, since users often do not elaborate on this despite being asked to give details. However, given the number of people who felt they were using a private right on the claimed paths, it is a very small proportion of the total user evidence, and is unlikely to render any particular path in this application unable to be recorded on the Definitive Map for this reason alone.
32. Users are invited to put forward any other information which would assist in determining the application. **L. Roberts** and **Mr. Ayres** state that the land is used '*a lot for dog walking*', with the railway line used by horse riders, while **Mrs. Fuller** remarks that the dismantled railway line has become overgrown and people have used the '*south side of Top Field*'. This is echoed by **Mr. Jarman**. Mrs. Player says '*it was generally accepted in Springvale that this was a path that could always be accessed from Springvale Road*' at the junction of Footpath 508 and the entrance to the dismantled railway. **Mr. Smith** has '*always understood that Top Field is used by the residents of the village for recreation*', while **Mrs. Butler** asserts that the '*path has been used unopposed by many people on a daily basis to walk along*', referring to both the dismantled railway line, the path from Woodhams Lane north and part of the set aside path.
33. To complete the digest of user evidence in relation to the routes used in this part of Kings Worthy, **Appendix 8** contains information collected during the investigation of the 1997 claim, based on the statements (and their accompanying forms) obtained by the officer in 2001, and compiled in 2018. This information is put forward in the same order as that discussed above.



## Details of Earlier Use

34. One user, living in Kings Worthy from 1923 (**Mrs. Boxall**), started using Top Field in 1926 and continued to use paths along the eastern side of the field, and along the dismantled railway until 1994. This is the earliest recorded use at the site. **Mrs. Hogg** began using the original perimeter path in 1948, but most other users commenced that user in the 1960s. Every one of these users saw either locals on foot, or locals and strangers on foot, with twelve references to bicycle use, 22 mentions of users on horseback and five references to vehicular use, four of these in connection with a traveller incursion in 1995. The frequency of use varied from daily (some use on more than one occasion daily), to weekly, with variations during the year.
35. No users report seeing stiles, though the majority say they saw gates. These were located on Hookpit Farm Lane, and were reported by **Mr. Brindley** to be erected '*temporarily*', but '*only to prevent illegal access by travellers*' (**Mr. and Mrs. Brook**). **Dr. Clarke** reported they were in place '*only for a few days in 1992*', and were '*no longer there*'. **Professor Hedley** said the gates were '*made ineffective in days*' and there were '*other gates erected in 1995, not preventing pedestrian access*'. **Mrs. Tallack** reported that she had passed through gates but that they were '*no obstruction*' and locked '*but uselessly*'. The evidence regarding the Hookpit Farm Lane gate was discussed in some depth in the 2016 inquiry report at **Appendix 1**. All users report that they saw no notices on Top Field, apart from **Mr. Bishop**, who reports that there was a sign saying 'Beware of the Bull' in 1980 for 12 months, though he says in his accompanying statement that it was put up in 1987. This was '*torn down within days*' and that he continued to walk around the field. Mr. Bishop did not attend the village green inquiry in 2016, and there is no information that clarifies which is the accurate account, apart from a remark in Professor Hedley's statement that the field was uncultivated with horses grazing there in 1980 (**Appendix 8**, page 2). He also mentions that, for approximately 6 months, two shire horses were kept on the lower end of Top Field, in answer to the question about obstructions. He confirmed in 2001, in a handwritten letter to the investigating officer Sally Plummer, that it was still possible to walk around the field despite the horses being there. **Mrs. Aldus** included two photographs of two horses grazing in a field with her user form, but there is no confirmation that these were actually in Top Field, though the tenant farmer said in evidence to the village green inquiry that the field had been used for grazing cattle in the past (**Appendix 1**, paragraph 8.1, page 86). No other user confirms the presence of an obstruction. There are only four answers in response to a question about cultivation, and these confirm that the path subject to the application '*runs alongside cultivated field – around edge*' (Mrs. Aldus).
36. Not one witness reports having been stopped while using paths at Top Field. One of the questions asks for details of any connection of users to the owner or owners of the land being used. None answered in the affirmative, but Mrs. Boxall indicated that there had been a period of her use when the land had been owned by **Mr. Bright** of Hookpit Farm, with whom she had no connection, even though she had earlier in the same question indicated that she was not a

tenant of the owner or occupier. **Mr. and Mrs. Duckett** answered in the same way. No users reported having sought permission, but Mrs. Boxall, Mrs. Hogg and Mrs. Player said they had used some or part of the paths being claimed to visit friends in railway cottages (since demolished), friends at Kings Worthy Junction or friends living adjoining the railway line. Again, this private use, which is not qualifying user, would be difficult to quantify from the forms supplied (however, see paragraph 31 above).

37. Twenty-two users from claim DMMO 578 used the dismantled railway as well as paths on Top Field itself, while two users showed that they had used the path A-B from Woodhams Lane. This additional use is shown on the user evidence chart at **Appendix 7**. The earliest user of both Top Field and the dismantled railway line is Mrs. Hogg, from 1948, with Mrs. Aldus, Mr. Bishop and **Mr. and Mrs. Williams** beginning use this route in the 1960s. Nine users used the dismantled railway line for more than 20 years.
38. The investigating officer asked questions about the occupier of Top Field, Mr. Bright. Mrs. Aldus reported that he *'said nothing about people using the field' and 'just chatted about ordinary things'*. Mr. Bishop reports that Top Field was used for a period by the Andover Turf Company, who started to mow the field in 1979, *'apparently with the permission of the landowner'*. It was also his view that, when fences were placed along the southern and western edges of Top Field that *'gaps were deliberately left in the fences at the corners for the public to get through'*, and that these fences could still be seen in the field in 2001 – as, indeed, they were visible during the site visit in 2016 for the village green inquiry. Mrs. Boxall stated that she was *'good friends with the farmer, who did not tell the public they should not walk on the field'*. Professor Hedley said that the tenant farmer *'has used machines to cut back brambles to give unrestricted access to pedestrians'*, and it was **Mrs. Kirby's** view that *'Mr. Bright always let people use the path'*. **Mr. Malphus** stated that he knew the *'farmer leasing the field...who never mentioned anything about not wanting people to walk on the field'*, and that he left a strip by the hedge for people to walk on when there was a crop on Top Field. Mrs. Player said that neither Mr. Bright, or his worker, *'ever said anything about people not walking on the field'* and Mr. Bright's father often checked that there was nothing on the field that could be of danger to dogs *'and said as much, as he was well aware the dog walkers used the field'*. He never *'indicated the owner was unhappy about how the land was being used'*. Comments like this are also made by **Mrs. Prosser** and **Mrs. Elsie Singleton**, who did not fill in a form. Much of what is said here about the tenant farmer Mr. Bright is echoed in the material presented in the decision letter for the village green inquiry held in 2016 (**Appendix 1**).
39. In his evidence to the inquiry (paragraphs 8.1 to 8.10.1, pages 86-93, **Appendix 1**), Mr. Bright sets out the history of farming of Top Field, its use for cattle grazing, dog walking by the locals involving the cutting of barbed wire fences, sometimes multiple times a day. This knowledge led him to use the land for purely arable purposes from 1983 to 2013, with the latter years having the land in set-aside. His visiting regime was about 20 visits annually, for specific tasks, unless called to deal with incidents with motorbikes, and so on.

He said his knowledge of the public using the land during his tenancy was that local people were walking on the perimeter path. Successive owners would keep the fences around this perimeter in good order. His crop records and the aerial photographs demonstrated that the land was not being used by local inhabitants for the lawful sports and pastimes required to register village green rights. Mr. Bright took the view that the maintenance of this secure fencing was a sufficient indication of the freeholder's intentions with regard to public access to Top Field and, in his statement for the rights of way investigation he said that *'the landlord had told him never to stop people from walking'*. From his own point of view he said *'I have been quite happy with an unofficial path running around the field and have never tried to stop people walking there as I wish to maintain good relations with the local people'*. During the 1990s, Mr. Bright carried out most of the work on this land, rather than employees. His principal concern was his crops, and he said that if people walked on the perimeter path *'that produced no inconvenience to me if they didn't damage crops'*, but did interfere *'with anyone who went on the crop I saw them'*. He agreed that the Hookpit Farm Lane entrance had been gated and locked on two occasions, and the area was fenced specifically to prevent access by traveller access, the gate having been put in place by his landlord, thereby also demonstrating a lack of intention to dedicate public rights of way. It was his understanding that there could be no right of way if there was *'let or hindrance and he interpreted this conduct as let or hindrance'*. The gate was pulled down within a few years and, as far as he was concerned, *'people went round the outside of the field which was no trouble to him'*. Between 1993 and 2000 Mr. Bright occasionally caught children on the cropped area and problems with motorbikes became more common. As he put it, *'we farmed quite happily. Everyone walked round the edge and all was happy'*. The problems with children were usually confined to a few times a year. When the land was in set-aside, there was a legal requirement to mow it and Mr. Bright's visits to Top Field were fewer over the year.

## The Landowners

40. Galliford Try is represented in this matter by Drew Smith, the former freeholder of Top Field, whose Mr. Phil Farminer responded to the County Council's consultation letter. He sets out, in a letter dated 22 July 2018 (**Appendix 9**), that there has been a submission of five separate planning applications to Winchester City Council. These seek to divert one of the footpaths which was the subject of the now confirmed 2005 Order (the correct Footpath number is not given, but it is understood to be Footpath 507), divert claimed routes to facilitate the development of the site and avoid *'the destruction of important ecological habitat and to position the route on the current walked route'* and to *'provide Definitive Routes where routes have been claimed'*. These applications have been *'made valid by Winchester City Council on 29 April 2019'*, and *'all these planning applications are due for determination imminently'*. The comments made by Drew Smith do not cover the claimed path A-B and elements of H-J, and the company does not wish to provide any evidence at this point of the investigation *'other than to assert that the path from*

*G-H appears to be incorrect due to the steep slope near to point H'. Drew Smith trusts that 'the above applications will determine all claimed rights of way on the land, as well as take priority over any incoming claims through the determination period. The [planning] applications seek to acknowledge these claimed rights of way and to divert them as necessary. This is not only for the benefit of development, but more importantly, the preservation of established natural habitat, and to secure dedicated future use'. For the avoidance of doubt, the claimed routes shown on the Committee plan are the officer's best interpretation of those put forward by the applicants; these hand-drawn lines are digitised having regard to features shown on the Ordnance Survey background mapping, but are a fair representation of what the applicant has claimed, regardless of the nature of features such as slopes.*

41. Drew Smith and Mr. Farminer were involved with the processing of the 2005 Order, and initially objected to the made Order, but did not make any submission for consideration by the Inspector, though Mr. Farminer did attend the public inquiry in 2018. Like many freeholders of land that has been the property of others in the preceding years, they have had little influence on what has happened there and are not in possession of the relevant evidence for the period of use under consideration. Drew Smith did however contest the village green applications at the 2016 public inquiry, and the evidence that they put forward arguing that village green rights should not be registered over Top Field, and that the *'main or only user was path-based'* (paragraph 4.1, page 11 of **Appendix 1**). This conclusion was endorsed by the Inspector, and led to the confirmation of the 2005 Map Modification Order.
  
42. At the time of writing this report, the only other landowner that has responded to the County Council's letter of consultation is the Bright family. Mr. and Mrs. Bright reside at Hookpit Farm, close to Top Field and the claimed paths connecting to it. They have provided a letter, dated 15<sup>th</sup> July 2019, setting out information on the way that some of the claimed paths have been use, including photographs, and also some of the history of the Woodhams Farm site (**Appendix 10**). The salient points of this letter are given below:
  - referring to the Committee plan, the land south of the dismantled railway and bordered by Woodhams Lane is the first subject
  - the field containing the 'Roman Building' is described as *'mostly tenanted by us'*, with a small part near to point B owned by Nigel Bright, while the paddock shown as 'Winchester Junction' (bounded by points A-B-I) is owned by Patricia Bright
  - they contend that the path shown on the map as running between points A-I has only been used on the purple line of Kings Worthy Footpath 507 around the boundary of Top Field, and the *'remainder has been enclosed by Southern Rail'*
  - further, it is asserted by Mr. and Mrs. Bright that there is no exit at point I, which has been *'heavily gated and padlocked on Woodhams Farm Lane for decades. Any claim should be treated with incredulity – this is the main London Waterloo railway line'*

- in the 1990s the northern side of the larger field was “*rabbit fenced*” and there was no access at point A and this fence was ‘*vandalised over time and torn down in several places including at A, by persons unknown*’
  - Any people walking from A to B have been challenged verbally and told it is not a footpath, though ‘*this has proved difficult to police as the walkers have disappeared before they can be engaged in conversation. It is impractical to stand guard at points A and B for 24 hrs. a day*’
  - this trespass has been on the southern side of the fence in that field
  - some local people have asked permission to cross this field, on occasion, and this has been granted ‘*on the understanding that it is not a public right of way*’
  - Mr. and Mrs. Bright actively farm this field and a public footpath is not ideal because of the interference with active management of crops – they say that in the past ‘*we have had vermin control of rabbits at night, which has been made difficult, if not impossible by people trespassing, even in the dark hours*’
  - notices reading ‘Private No Public Right of Way’ were put up around the Bright’s farm at 8 locations in June 2017, including one at A and one at point B
  - only one is presently left in place, removed by unknown persons, and dated photographs can be supplied
  - by the 11 July 2017, the post and notice at A were missing, while the post at B remains but with the sign snapped off, and the police were informed of this criminal damage and there is a crime reference for it
  - at point B the remains of a fallen tree were mistakenly used by a representative of the Watercress Trail for the placing of arrows to direct walkers to cross the field between points A and B
  - when Mr. and Mrs. Bright removed these arrows and returned them to the Parish Council, the Watercress Trail representatives apologised and redirected walks down Woodhams Farm drive to Springvale Road
  - the fallen tree trunks from B were put in the gap at point A to close that gap and reinforce the fence line in 2018, resulting in a fence ‘*now 5 ft. tall with brush and mud included with the logs*’
  - on one day a group of cyclists had ‘*scaled the fence, with their bikes, and cycled along the path to Woodhams Farm Lane. They had gone before we reached the Lane.*’
  - that ‘*barricade*’ has been ‘*pushed aside and flattened by walkers*’ and the Brights conclude that ‘*any attempts on our part to fence the field are immediately negated*’ as there is evidence in several places that people have pushed through the hedge
  - Mr. Bright comments that Top Field is very overgrown and he would be ‘*surprised if any new footpaths have been established*’ since the ‘*enquiry*’
43. Mr. Bright does not specify which of the two inquiries held in relation to Top Field he is referring to in this last point, but it seems likely to have been that held in 2016, when he acted as a witness. Again, for the avoidance of doubt, under section 31 of the Highways Act 1980, the user that is considered in Map Modification Order applications is always in the past, the relevant period having

been triggered by an action that brings the public's right to use the paths into question. Mr. Bright's comment should not suggest that any use of paths on Top Field since 2016 must have established new rights of way, on the balance of probabilities, in that 3-year period. To establish new paths under common law in such a short period would require extremely heavy use by the public and clear acquiescence in that use by the landowner, neither of which is under consideration in this report.

44. Mr. and Mrs. Bright include a recent history of Woodhams Farm, in which they characterise it as a private drive, owned by a '*private landlord*', with no footpaths crossing the fields to Woodhams Farm Drive. The Drive was only used for access to Woodhams Farmhouse up until the 1990s, by '*farm vehicles, railway workers and people using the pony paddocks on either side at the top of the drive*'. They describe it as '*an extremely private place*' in the 1970s with white gates (usually open) at the entrance, and someone who would tell people they were trespassing. There is a scheduled monument in the field to the north of the Drive, described above, which is protected and periodically inspected. The Drive's surface was formerly hoggin, but has been resurfaced, with the tarmac reaching the grass verge, and recently livery stables, a nursery and other activities have been established there, resulting in '*much more traffic*'.
45. A series of annotated photographs has also been supplied, and these listed chronologically where the dates of the photographs are given:
- dated 16 June 2017, showing a 'Private No Public Right of Way' at point A
  - dated 16 June 2017, showing identical note at point B
  - dated 11 July 2017, showing a post hole at A – post and sign removed
  - dated 11 July 2017, showing a post without a notice at B
  - dated 11 July 2017, showing remains of snapped-off sign at B
  - dated 16 July 2019, path at point A, with overgrowth of vegetation, '*seemingly, no longer in use. "Barricade" of logs has deterred the majority*'
  - dated 16 July 2019, showing a log bank at A, covered in brambles
  - dated 16 July 2019, with log bank at A and looking towards Woodhams Farm Lane, and with concrete marker post '*uprooted by persons unknown*'
  - dated 16 July 2019 – showing a field of oilseed rape and '*evidence of walking through crop*', and looking towards Woodhams Farm Lane
  - dated 16 July 2019, showing a worn path which is '*agronomically*' sprayed around the crop's edge, and is '*now being used as a footpath*', with a '*new entrance on the right*', and point A 15 metres to the top right of the photograph
  - dated 16 July 2019, showing this new entrance and netting trampled on the ground
  - dated 16 July 2019, showing the new entrance, with netting on the ground
  - dated 16 July 2019, again showing the new entrance '*established in the last year*' with fence posts and is '*c. 15 metres*'
  - undated photograph, at A, revealing evidence of the original fence line, '*before forced entry to the field*'

These actions, particularly the use of correctly worded signs indicating that there is no intention to dedicate public rights of way over this field, are themselves a calling into question, reinforcing the relevant period of 1997 to 2017.

46. Mr. and Mrs. Bright were asked by the officer to provide more information about how the land to the south of dismantled railway has been managed prior to 2017. The path A-B lies within the field containing Roman archaeological remains, and the current owner of the land is Laney Properties of County Fermanagh, Northern Ireland. The previous owner was Imerys Minerals of Par, Cornwall. Both have been consulted and have not, at the time of the writing of this report, responded.

### **Analysis of the evidence**

47. For section 31(1) 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.

### 48. Physical nature of the route

Taking the first requirement of section 31(1), all of the paths that are the subject of this report are of a physical nature that they are capable of being public rights of way at law.

### 49. The bringing into question of the public's right to use the paths

The bringing into question for this application is the submission of the two separate applications for Map Modification Orders, in June and September 2017. This results in a 'relevant period' of 1997 to 2017, during which unchallenged and uninterrupted use must be demonstrated to meet the legal test. The total available evidence relating to Top Field indicates that there was a previous bringing into question in 1992, when the Hookpit Farm Lane entrance to Top Field was first gated and the area fenced to prevent incursion by travellers (**Appendix 11**, 2001 report, paragraph 12.1), yielding a relevant period of 1972 to 1992. A number of users at that time provided evidence of

use of the dismantled railway and the path from Woodhams Lane, now relevant to the present application, though it was not considered in 2001. These relevant periods are shown graphically in relation to the user in **Appendices 4, 5 and 10** by the use of a blue tint.

50. None of the users who provided evidence in 1997 refer to the fencing in their forms, but most of them refer to the gates that caused the bringing into question in 1992. In the statements given to the 2001 investigation **Mrs. Aldus** refers to gates put up '*recently*', **Mr. Bishop** refers to fences and gates on Hookpit Farm Lane being put after a traveller incursion. **Mrs. Boxall** refers to '*current gates*' at Hookpit Farm Lane, and there are further references to the gates by **Professor Hedley, Mr. Malphus, Mr. Marlow, Mrs. Player** and **Mrs. Prosser**. Mrs. Player told the village green inquiry in 2016 (which itself was relying on a relevant period of 1993 to 2013) '*the gate and fence were erected after their eviction. She said that the wire only lasted a few days before it was cut*' (**Appendix 1**, paragraph 5.4.6, page 18 of the report). **Mr. Brown**, a witness for the current application, told the 2016 inquiry that '*there was a large gap left at the side where walkers were able to get into the land*' (**Appendix 1**, paragraph 6.41, page 48). It is also evident from the user evidence and testimony given at the inquiry that users of Top Field were not dependent on the Hookpit Farm Lane entrance for access, but also were also able to reach the paths via the dismantled railway, the path from Woodhams Lane and Ilex Close. Nevertheless, the fence and gates at Hookpit Farm Lane, however short-lived, provided the first bringing into question of public use of Top Field. And the applicant in 1997 chose to concentrate on the paths that are now recorded on the Definitive Map and Statement as Kings Worthy 507, 508 and 509.
51. The second bringing into question, and of most immediate relevance to this report, is that of the serving of these applications in 2017. The public inquiry in 2016 into village green rights, with its third relevant period, served to illustrate that, while the use by the public did not qualify for the registration of such rights, there was what Ms Ellis characterised as sufficient use of linear routes that she would consider '*that the reasonable landowner would have been entitled to attribute walking and jogging to the establishment/enjoyment of a PROW, rather than the unequivocal assertion of TVG rights*' (**Appendix 1**, paragraph 11.2.5, page 159). This application is the result of local people wishing to secure the legal recording of any other qualifying routes that were discussed during the village green inquiry but were not included in the unconfirmed 2005 Map Modification Order resulting from the 1997 application. Therefore, these applications satisfy this requirement.
52. The question of uninterrupted use was considered by the Inspector at the 2016 inquiry, and the matter of the 1992 gate was considered. The gate '*was dealt with in greatest detail by Mr Brown and I found his evidence on this point clear and convincing. There was a gate there from 1992, but it fell down at some point (though I note the Footpath officer's photograph of a padlocked gate in 2001). There was also a gap to one side. He considered that the gate was there primarily to deter travellers*' (**Appendix 1**, paragraph 12.5, page 175). Given



that there were other access points available, and a gap to one side of the gate, it seems that its presence was not an interruption to use. Ms Ellis notes that *'this general picture was broadly consistent with much of the other evidence. In any event, whatever the state of play at this access point, there was no evidence to suggest that Accesses 2, 3 or 4 were ever blocked during the relevant period'* (*ibid.*). None of the users in the current two claims for footpaths reports being stopped, and the evidence of the aerial photographs shows that, despite periodic encroachment of scrub on the main field, and on the Ilex Close triangle, the trodden routes persist in being visible, all or in part, increasingly as tree cover became a more important feature. A section of the formerly cropped area was deep ploughed in 2014, presumably by Drew Smith or its agents, which deterred Mr. Graham Mack from crossing the Main Field from that time on (**Appendix 1**, paragraph 6.51, page 54). This still left the perimeter path for his use. There is nothing to suggest, at that inquiry, that the use of the paths in Top Field or along the dismantled railway or from Woodhams Lane had ever been interrupted between 1993 and 2013.

53. The Inspector at the 2018 DMMO public inquiry, looking at a relevant period of 1972 to 1992 for the 1997 rights of way claim, addressed the same question, and noted that none of the 39 witnesses that had completed user evidence forms for the original 2005 Order made *'any reference to any obstructions other than gates, described as having been put in place in 1992 to stop travellers entering the land'*, thus bringing the right to use the way into question (**Appendix 2**, paragraphs 23 and 24, pages 4 and 5).

54. Twenty years' use without interruption

Turning to the evidence submitted to this investigation, questions are asked on the user form to identify any obstructions or actions that might interrupt use of paths. Witnesses are asked for details of gates and obstructions, or whether they were stopped from using them. The gates at Hookpit Farm Lane are referred to by **Mr. Brown**, **Mr. Fuller**, and **Mrs. Player**; there is evidence put forward by other witnesses of a gate at Hookpit Farm Lane before the development, but no dates are given and the association with the development at the north of Top Field suggests this might have been around 2013. However, Mr. Brown and Mrs. Player both appeared at the 2016 inquiry and it is clear from their testimony that this is the 1992 gate. There is reference to the incursion by travellers by Mrs. Player, but she gives no details as to which path or paths might have been obstructed and this happened outside the relevant period for this application. **Mr. Mason** and **Mrs. Phillips** both referring to the ploughing up of 2014, identified in the village green inquiry, which stopped Mr. Mack from crossing the field but not from walking around the perimeter. There is a reference by **Mr. McCleery** to gates at Burnet Lane in 2013, in answer to the question about obstructions. As Burnet Lane is Kings Worthy Footpath 506a, any locked gate preventing public access would be an illegal obstruction. None of the witnesses say that they were ever stopped from using the paths. This information suggests that, given the multiple points of access to Top Field, and the lack of any suggestion of obstructions on the dismantled railway path or that from Woodhams Lane, coupled with the aerial photography, that the use of these paths has never been interrupted. It is notable that Morag Ellis states

she does not have 'clear evidence of a sustained effort to prevent user by fencing' at Top Field (**Appendix 1**, paragraph 12.4, page 175). The Inspector at the 2018 rights of way public inquiry, Alison Lea, says in her decision letter that 'there is no evidence that use has at any time been interrupted between 1972 and 1992' (**Appendix 2**, paragraphs 24, page 5). The evidence put forward by the witnesses for this application indicates there was also no interruption to use. However, Mr. Bright's evidence indicates that blocking of the entrance to the dismantled railway was blocked off by him at point A, in 2018 (see paragraph 42 above). This could constitute an interruption to use of this path, and actually did, since a site visit conducted by the officer 19 August 2019 showed evidence of damage to wire fences and the cutting down of trees and bushes to create another entrance a short distance away. However, the placing of these logs to form a barrier occurred after Mrs. Clarke made her application and therefore falls outside the relevant period, ending in June 2017, and is not an effective interruption to the public's use. Therefore, the test of uninterrupted use for 20 years has been met.

55. 'Without force, stealth or permission'

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

To qualify for inclusion on the Definitive Map and Statement, the users must demonstrate that their use of the paths must be 'as of right', that is without force, stealth or permission. Taking the issue of force first, two of the three witnesses identified in the paragraph above as being familiar with the locked gate in 1992 said that there was a gap at the side and that the wire did not last long. Therefore, there would have been no need to use force. Most of the time that this gate was in place lies outside the particular relevant period relating to this current application.

56. The use of signs placed by the freeholder of the land to indicate to the public that there is no intention to dedicate any public rights of way can make any such use 'contentious', and thus not qualifying to be as of right. During the public inquiry of 2016, evidence was put to the Inspector that a previous landowner had, in June 2010, put notices described as on 'Gleesons' land', Gleesons being a previous owner. Ms Ellis identified one sign towards the north of the Main Field (the cropped area) and the other on a tree in the south west corner of the land. These signs consisted of corrugated white plastic, with black printing on them reading "There is no right to roam on this land nor any public right of access and there is no intention of the Owners to Dedicate it as such or as a Right of Way" (**Appendix 1**, paragraph 8.28, page 107). Mrs. Clarke, one of the applicants, remembers the signs, and described them as 'flimsy' (**Appendix 1**, paragraph 12.5, page 175). It had been intended by Gleesons to check the signs annually, but this was not done. The Inspector considered that 'the wording of the signs was, in my view, sufficient to make it clear that the owner did not acquiesce in TVG user. However, it appears that the signs were only there for a short period of time. They did not make an impression on those users who gave evidence. There were only two signs on a large site and they were made of what appears to have been fairly flimsy plastic. One was nailed to a post. The other was tied to a tree' (**Appendix 1**,

paragraph 12.7, page 176). The key phrase here is that these signs ‘did not make an impression’ on those witnesses at the inquiry, and the evidence from the forms of the 137 witnesses seeking village green rights shows that it was mostly planning notices or those referring to building work that did catch their attention.

57. In her decision report, Ms Ellis identified this issue associated with the force aspect of the ‘as of right’ concept. She says that ‘*user will be “vi” [force] if undertaken in the face of prohibition by the owner. Signs banning access without permission may prevent user from being “as of right”*’: *Lewis<sup>19</sup> and Taylor v Betterment Properties (Weymouth) Ltd and Dorset CC [2012] EWCA Civ 250.20* where the Court of Appeal approved Morgan J’s formulation of the relevant question at first instance as follows: “*Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.*” (**Appendix 1**, paragraph 10.30, page 148). It was her view, this effort by Gleesons fell well short of meeting the Betterment test of determined, proportionate action to contest and endeavour to interrupt use (**Appendix 1**, paragraph 12.7, page 176.)
58. It should be noted that the wording of the 2010 sign can also be interpreted as a calling into question by the freeholder of Top Field at that time, Gleesons, of the public’s use of linear routes over this land. However, given the evidence of how the signs were placed and maintained, the same caveats will apply to their effectiveness as to making clear to users of the paths that there was no intention to dedicate rights of way over Top Field, as it did with regard to village green rights. The wording on the signs went beyond that usually found on inadequate signs (for example, ‘Private Land’ only), and actually refers to rights of way and dedication. But, as Morag Ellis notes above, correct wording is insufficient if the means of conveying it to the targeted users is not sustained to the point that the notices stop users from going onto the land, and serve render any such use as ‘with force’, thereby disqualifying it. In fact, prior to these 2017 applications, the only indication that there were any signs on Top Field that could convey such a message to users came from the village green public inquiry evidence in 2016. There is no evidence available to this investigation that any of the user on paths A-B or I-J prior to June 2017 was with force, either directly or due to the use of such mechanisms of maintained signage, as discussed above, and therefore this part of the test is met. The Inspector at the 2018 public inquiry came to a similar conclusion for the relevant period 1972 to 1992, noting in her paragraph 29 of the decision letter (**Appendix 2**, page 5), that ‘*the evidence from landowners relating to the relevant period is limited. However, there is no evidence of challenge to what appears to have been extensive use of the routes by the public. The evidence is insufficient to demonstrate a lack of intention to dedicate*’.

59. *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.*

Any qualifying user must be ‘without stealth’. The aerial photography presented in **Appendix 3** indicates a consistent presence of worn routes around Top Field, along the dismantled railway line and from Woodhams Lane. While it is true, as contended by the expert witness at the village green inquiry that the soil on Top Field is thin and fragile over the chalk substrate and marks would easily show, the routes used by walkers, and the way that parts of these migrated in line with changes in the use of Top Field, are clear over a 20-year period from 1993 to 2013. As Ms Ellis said in her report (partially quoted at paragraph 21 of this report) *‘my firm impression is that the majority of recreational activity occurred on or associated with the clear perimeter paths. It is logical to deduce, from the clarity and persistence of the track in all relevant photographs, that this is where the majority of feet went, not only in the years 1993 to 2000, but for the rest of the relevant period as well...Although the line changed, the principle or pattern of user did not...I have analysed path user as the role of the paths is, to some extent, relevant when considering the position on other parts of the land because of the importance of these paths when objectively assessing the overall impression of what was going on at the site upon the mind of the landowner’* (**Appendix 1**, paragraph 11.2.9, pages 164-165). Further, the evidence for the 1997 claim, amplified by written statements compiled by the investigating officer, reveal that some of the users prior to 1997 knew the then tenant farming Top Field, Mr. Bright. He talked to the users, and did not tell the public that they could not walk over Top Field (see paragraph 86 of this report). Mr. Bright himself appeared as a witness at the 2016 village green inquiry and what he said there is set out in paragraph 37 of this report. Although Mr. Bright took the stance that the landowner’s installation and maintenance of the fencing around Top Field provided an indication to users of the freeholder in relation to the acquisition of public rights over the land, from his own point of view he was *‘quite happy’* with the *‘unofficial’* footpath on the perimeter of the cropped land, and did not attempt to stop anyone from walking there as he wished to have good relations with the local people. Additionally, his landlord had never instructed him to stop people walking on Top Field. The only time he would actually intervene would be if any walker threatened to damage his crop, which was his main concern. He told in inquiry that *‘we farmed quite happily. Everyone walked round the edge and all was happy’*. Morag Ellis’ view of his evidence was that she *‘found Mr Bright to be a clear and helpful witness who was doing his best to assist the Inquiry. He had a good and detailed recollection of the land for the whole of the period 1993 to 2013 and indeed before that. Insofar as he gave expert evidence about farming practice and the appearance of crops, I take into account his long experience as an arable farmer and give this evidence considerable weight’* (**Appendix 1**, paragraph 8.10.1, page 83). None of the witnesses, in their 2017 forms, mention Mr. Bright or indicate that any users had any kind of even passing acquaintance with him. There is no evidence that the use of paths A-B or I-J has been by stealth, and Mr. and Mrs. Bright make reference to the difficulty of standing *‘guard at points A and B for 24 hrs. a day’*, suggesting consistent use by the public at all times of day. It is therefore the case that this limb of the ‘as of right’ test has been met.

60. *Permission – users ‘as of right’ will not have used the way with any kind of licence or permission.*

Finally, all qualifying user must be without permission. Only one user (Mr. Cossburn, see paragraph 30 of this report) approached Mr. Bright about permission, but this was to allow delivery vehicles to reach the rear of his property, and this has no bearing on the issue as it relates to this application. Three users mention permission in relation to either signs or the gate at Hookpit Farm Lane in 1992 (*ibid.*), but these did not prompt them to seek permission to sue the footpaths at Top Field. None of the users giving evidence in relation to the 1997 claim said that they had sought permission (see paragraph 36 above). The Inspector at the 2018 public inquiry noted that, having looked at the forms for both the 1997 and 2017 applications, ‘*all but one form records that no permission was sought [presumably that of Mr. Cossburn]. The current landowners both state that they have not given permission, but their ownership does not relate to the relevant period*’ (**Appendix 2**, paragraph 23, page 5). Her conclusion is that ‘*there is nothing to suggest that the use was by force, in secret or with permission*’ (**Appendix 2**, paragraph 24, page 5).

61. Use by the public

Use must be by the public, and that should be reflected in its volume and the breadth of the type of users.

*The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of sufficient users, and that 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.*

While the consideration of any claim involving multiple routes requires that possible usage may be complex to assign to individual routes, given that user is always in the past and users may not have been giving their full attention to exactly what they were doing when walking the routes, or have full recall. However, the requirement for each user to show on a map the routes he or she has used reduces the possibility that an ostensible ‘high volume’ of use on one route might be wrongly ascribed to another which in reality may have been used much less frequently. Those users who were interviewed and gave statements were questioned about this in more detail. Unless there is any reason to question whether the use is accurately and honestly recalled, the evidence put forward must be taken at face value. Officers have sought to reflect the volume of use on each route as accurately as possible, as shown by the numbering next to each route on the amended Committee Plan (**Appendix 6**). These numbers have been obtained by scrutinising the routes drawn on these maps. It is also considered that all user on the claimed routes can be considered to have been representative of ‘the public’.

62. The evidence of use put forward, particularly at the village green public inquiry which applies mainly to Top Field, indicates these claimed paths have provided land on which to predominantly walk dogs, walk recreationally, jog, and reach facilities to the east of Springvale Road. Ms Ellis, the Inspector, noted that

*'Most, though not quite all, path use was recreational, according to the witnesses, but the Court of Appeal held in Dyfed County Council v. Secretary of State for Wales (1990) 59 P&CR 275 that there is no rule of law that use of a highway for recreational walking is incapable of leading to a deemed dedication'. (Appendix 1, paragraph 11.2.5, pages 160-161).*

The volume of users, as indicated by the numbers on the plan at **Appendix 6**, and the testimony given at the village green inquiry in 2016, indicates that the volume of user on Top Field, along the dismantled railway line and from Woodhams Lane, used to connect to Top Field, is sufficient to have been capable of coming to the attention of the landowner. The user is of the type and frequency expected in the setting, on the edge of a village, coming mainly from housing bordering agricultural land. Predominantly the users were on foot, though there is evidence of bicycle and horse use.

*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.*

None of the users from either period appear to have any connection with the tenant farmer Mr. Bright, though some of the earlier users knew him as an acquaintance and spoke to him on friendly terms when they encountered him on Top Field. They were not employed by him, or apparently by his own landlord, and the occasional private use by a handful of users was to visit friends living near the railway line or in railway property. It is difficult to quantify this use with a private right, but it is unlikely to significantly diminish the user on any of the paths on Top Field.

63. The volume of user by the public for each particular route in this application varies, as is shown by the plan at **Appendix 6**. As can be seen from the figures for each individual path (derived from the user forms from 1997 and 2017), the totals show that three were heavily used. The three paths from Ilex Close, two of which connect to the set-aside path L-K, have lower figures, with G-H, connecting directly to the dismantled railway line, having the lowest figure of all, at 4 users. It is difficult to gauge the total use of all of these paths, because there are forms relating to the village green use available, a total of 137. These forms are specifically designed for the collection of information about use that could lead to the registration of village green rights, and do not ask for the type of evidence contained in rights of way user forms, though there are overlaps relating to matters such as 'as of right' use, and being stopped. From the 2016 report of the Inspector, she was of the opinion that the majority of use on Top Field by the local inhabitants was on the perimeter paths around the cropped field, and it was highway use, rather than village green use (see paragraphs 21 and 61 above). There is no available evidence giving details of this user. For this reason, it is likely that, on the balance of probabilities, the user recorded on this particular plan is an under-estimate of the actual use.
64. Insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

*There must be insufficient evidence that the landowner took steps to stop public use of the claimed routes, such as challenging users, preventing access by physical means or the use of correctly worded signage, or the making of a CA16 deposit.*

The actions of landowners in such applications are crucial to their determination. Under section 31 of the Highways Act 1980, the public must demonstrate twenty years of unchallenged use on linear routes, and that use must be as of right and uninterrupted. This legislation fixed the period after which, without action from the freeholder of the land, a 'deemed dedication' will be held to have taken place, and the public rights so acquired can be recorded on the Definitive Map and Statement of public rights of way. In effect, it is for the freeholder to manage her or his land for public access, and to make it clear when he or she does not intend to dedicate such rights, clearly and unequivocally to the users. This is a strong theme in the decision of report of Morag Ellis QC following a thorough examination of the purported use of Top Field for lawful sports and pastimes in the 2016 public inquiry. What is a 'reasonable' land owner to take from what the public is doing on the land? What rights are the public asserting by their use?

65. For the paths over Top Field, both public inquiries have concluded the various landowners over the period 1972 to 2017 have not put forward any evidence that has effectively indicated to the public that they do not want to dedicate public rights of way to the public over their land. Mr. Bright took the view that the fencing around Top Field indicated such an intention on the part of his landlord during the 1990s, and the landlord may indeed have done so (see paragraph 39 above). The information about the gate at Hookpit Farm Lane in 1992, from both public inquiries, indicates that it was not a bar for users, who walked around the side, and there have been, in any case, other entrances to Top Field. Because of these, users did not mention secure fencing as an obstruction on their forms, and continued to use the paths, despite the gate. Mr. Bright himself did not take on the fencing and its maintenance himself because the fencing had repeatedly been damaged (see **Appendix 1**, paragraph 8.4, pages 87-88). His landlord did not tell him to turn people away. For Mr. Bright, his farming went on '*happily*', while people walked around his cropped field (paragraphs 39) and 58. No evidence has been found of any declaration made by a freeholder for this land under either section 31(6) of the Highway Act 1980, or its replacement the CA16 combined deposits under the Commons Act 2006. These allow the freeholder to deposit a plan showing the land concerned, acknowledge any existing public rights of way and to confirm that no further public rights of way are to be dedicated through public user. It is a method of showing no intention to dedicate rights of way over land as a replacement for using obstructions, signs and challenges to inform the public that they will not acquire rights by using the land. The only signs seen that directly relate to this matter were discussed at the 2016 public inquiry; these used correct wording, but only two were put up on a large area of land, were flimsy and were not checked once a year, as was intended. They did not last long (**Appendix 1**, paragraph 8.28, page 107 and paragraphs 12.7 and 12.8, page 176), and did not have the required effect on the users. One of the claimants, Mrs. Clarke, was cited by Ms Ellis as the only user who gave

evidence to the 2016 inquiry who recalled these signs and, in her opinion they did not make an impression on the users, and '*fell well short of meeting the Betterment test of determined, proportionate action to contest and endeavour to interrupt use*' (**Appendix 1**, paragraphs 12.5 and 12.7, pages 175 and 176), falling short of the required actions to make it clear to users that there was no intention to dedicate. Drew Smith did actually begin the process of dedicating the footpaths shown as C-D and F-G on a Committee Plan at **Appendix 12**. They were prepared to make the route E-H, along the dismantled railway line, available to the public on a '*permissive basis*'. This dedication proposal was withdrawn on the morning of the Committee meeting, on 19 March 2014.

66. This leaves the route A-B for consideration of the landowner's actions. Mr. and Mrs. Bright are tenants of part of the field containing the path, which has been owned by Imerys Minerals Limited and is currently owned by Laney Properties Limited. No tenancy agreements showing any requirement to manage the land so no new public rights are acquired have been provided by any of the landowners or tenants. The Brights have provided evidence of actions taken in the form of setting up signage on the path A-B, and trampled netting, along with information relating to the use of a barricade '*pushed aside and flattened by walkers*' (see paragraph 42 above). This material relates to mid-2017, when the claims were being submitted, and 2018. Mr. and Mrs. Bright are not recorded as having made either section 31(6) or CA16 declarations for the land that they own. The application from Mrs. Clarke for the route A-B was received by the County Council on 6 June 2017, and it appears from the evidence provided by the Brights that their sign showing that there was no right of way was not put into place until 14 June 2017, after the end of the relevant period. While a tenant's action, such as placing of a correctly worded sign on the land capable of showing the public there is no intention to dedicate public rights can result in the presumption of dedication being rebutted [*Rowley v Secretary of State for Transport, Local Government and the Regions* (2002)], this would need to have been done before the relevant period ended. This is not the case here, so there is no evidence of an action demonstrating no intention to dedicate by any of the landowners of the land over which the paths run. Again, the Inspector at the 2018 public inquiry came to a similar conclusion for the relevant period 1972 to 1992, having also considered the 2017 evidence. She noted in her paragraph 29 of the decision letter (**Appendix 2**, page 5), that '*the evidence from landowners relating to the relevant period is limited. However, there is no evidence of challenge to what appears to have been extensive use of the routes by the public. The evidence is insufficient to demonstrate a lack of intention to dedicate*'. The legal test is met.

### **Summary of the available evidence**

67. Taking the all evidence from two applications for Definitive Map Modification Orders and a failed application to register town or village green rights over Top Field, and that for the dismantled railway path and a linking footpath from Woodhams Lane, it is considered that the requirements of section 31 have been satisfied in this case, on the balance of probabilities for all but one of the claimed paths. It can be reasonably alleged that the public have been using all, or part of, six of the seven routes claimed, or for which evidence has been discovered, 'as of right' for a full period of twenty years, or more, in some



instances. The user evidence indicates that local people have been walking the claimed routes in every year since the 1960s, with the bulk of use falling after 1980. Use has not been secretive or as a result of force and, apart from some use by a few local residents exercising a private right, has been 'as of right'. In the case of each route, there is no objective evidence to suggest that public access on foot was ever physically obstructed, or the use interrupted, during the relevant periods. Further, there is no evidence that any of the landowners have carried out actions that amount to clear indications of a lack of intention to dedicate public rights of way over five of these routes. However, the entire path L-K has only been used since about 2000, because it had previously been part of the cropped land and only became available to users because of a change in agricultural practice by being put in set-aside. Only 17 years of use has been possible, and therefore will need to be considered under the provisions of common law. Each path will be dealt with in turn.

### **Conclusions under Section 31, Highways Act 1980**

#### **68. Route A-B (34 users, earliest evidence of use – 1970)**

The whole of this route is not now actually open, as the entrance to the dismantled railway line at point A was blocked, and users now go through another access 27 metres further along the boundary fence. This will be off the original walked line. The tenant farmer has provided evidence of his 2018 obstruction with logs of the entrance of this path to the dismantled railway line, which has led to the forcible making of a new access close by, achieved by means of trampling down the fence, cutting wires and cutting down trees and bushes. As this action by Mr. Bright took place after the end of the relevant period in 2017, it has no effect on the use during that time. The route is not fully open now, but was in 2017 (relevant periods of **1972 – 1992** and **1997 – 2017**).

#### **Route C-D (14 users, earliest evidence of use – 1981)**

This route is also open and available for use, and does not appear to have been obstructed in the past (relevant periods of **1972 – 1992** and **1997 – 2017**).

#### **Route E-F (10 users, earliest evidence of use – 1982)**

The route is open and available for use, though it is in an area of scrub encroachment, and there is no evidence that it has been obstructed in the past (relevant periods of **1972 – 1992** and **1997 – 2017**).

#### **Route G-H (4 users, earliest evidence of use – 1991)**

The total of users who have provided evidence of use of this route is very small relative to that recorded on other paths on Top Field, given the number of walkers using the area, and not enough to come to the attention of the landowner. The fact that there are two other routes from the end of Ilex Close to the set-aside path L-K, crossing it, and that it meets Footpath 507 about halfway along its length is the most likely reason for the small total of users. It has also become less distinct as a separate entity from the public footpath, at its southern end, over time. Therefore, officers consider that it does not meet

the necessary tests under section 31, and would not meet the tests under common law, due to this low number.

**Route I-J** (57 users, earliest evidence of use - 1948)

This route is the longest of the seven paths in consideration, and runs between well grown hedges, including fully grown trees. It has become very overgrown at its western end, and people have walked to the north on Top Field on the other side of the boundary. But it shows up consistently on the aerial photography, getting more overgrown as time has passed. There is an issue relating to the section from A-I. Although witnesses have drawn on their maps that they have gained access from Woodhams Lane at point A and walked north to the dismantled railway, a number on reaching the railway did not and turned north west at point M (see Committee Plan) into Top Field to connect with what is now Footpath 507. This path, N-M, is discussed in the next section. Of those users indicating that they used the dismantled railway, 23 people did not use any part of A-I, while 28 used that section of it leading to Footpath 507, from point M. Only 6 users testify that they walked the whole of the path I-J. These facts make it unlikely that the whole of the route can be added to the Definitive Map and Statement as only 6 users have shown that they used the whole route. A difficulty lies in the fact that there is a fence across the old railway line, reaching from the north to south boundary, demarcating where this line ended when it was closed. Earlier Ordnance Survey mapping shows the complexity of Winchester Junction, where the Didcot, Newbury and Southampton Railway, the London and South Western Railway and the Alton and Winchester Railway all met. Where the Alton Railway met what is now the mainline (and only working) railway, it was blocked, and that line can be seen on the Committee Plan just to the south of the single letter 'W' (for 'Well', to the west of the words 'Winchester Junction' on that plan. This is confirmed on the two National Grid maps of 1975 and 1988, where a solid black is shown on each map in the same place as on current mapping. This is the location, on the ground, of a post and wire mesh fence, at least 6 feet high (it is hard to examine close to because of the well-grown vegetation), and topped with barbed wire. It is a difficult fence to climb over, partly because of its height but also because of the nature of the supporting posts. Anyone attempting to do so might easily fall on either side, injuring themselves on the barbed wire. The fence must have been erected after the 1973 closure to prevent access to the mainline railway. The Bright family, local tenant farmers, confirm that this fence is well, and regularly, maintained by Network Rail. It is likely that it has been effectively fenced for all but one year of the first relevant period of 1972 to 1992. Prior to this, walkers would have been trespassing on an active, electrified, railway. Even if a walker could climb over the fence that is in place, there is no easy exit, as there is a locked metal gate with signs and barbed wire at point I. The active and electrified line is close by, up a set of steps. Therefore, it is doubtful that this path can be recorded to the south west of point M. Therefore, any Order must be for the route between points J to M, supported by qualifying user between **1972 to 1992** and **1997 to 2017**.

**Route L-K** (55 users, earliest evidence of use – 1997 for the path to the immediate south of the 2014 housing development; 2010 for the whole, or most, of the set-aside path)

This path was not specifically claimed by either of the two applicants, but the maps drawn to accompany the user evidence forms indicated that a substantial number of witnesses had used all, or part, of this path. It resulted from the putting the bulk of Top Field into 'set aside', a policy introduced into the UK by the European Union in 1988 to reduce the large costly surpluses resulting from the Common Agricultural Policy ('CAP'). This change at Top Field happened about 2000. The aerial photography shows the change from cropping in 1999 (**Appendix 3g**), to a field with a short sward in 2002 (**Appendix 3j**). The perimeter path around the cropped area persists on the available aerial photography until 2010, when it is visible in its complete form (**Appendix 3p**), apart from the link K-L from the round path to Footpath 506a. This short section came into being under the Town and Country Planning Act 1990 as a connection from the newly built housing development. Since the top section of this path, from where it passes the right angle turn in Footpath 506b at the southern end of Blackberry Field, to point K is visible in the 1997 photography (**Appendix 3e**), that part of the path is eligible for consideration under section 31 of the Highways Act 1980, as there has been user during the relevant period **1997 to 2017**, and all the legal tests are met under section 31 Highways Act 1980. For the rest of the path, the effect of the major change of use of the field in not being cropped allowed the development of an 'inner' perimeter path. The user for this path divides almost equally (27/28) between those who used the whole of K-L, and those who used parts of it, and it also takes in some users (4) from the earlier period 1972 to 1992, these mostly using the section that now runs just to the south of the boundary of the housing. As has been quoted, in paragraph 58 above, Morag Ellis QC in her 2016 village green report, most of the user was on the perimeter path and *'although the line changed, the principle or pattern of user did not'* (**Appendix 1**, paragraph 11.2.9, page 165). However, as there was no complete inner perimeter path before 2010, there is not the required 20 years' uninterrupted user of the whole path prior to the bringing into question of 2017, so this path must be considered under common law.

Common law puts on the applicant the burden of proving that 'as of right' use of a way has given rise to the inference that the landowner intended to dedicate that way as public, unless there is sufficient evidence to the contrary. There is no automatic assumption that 20 years' unchallenged use leads to deemed dedication of the way. Since there is no minimum period of use required under common law, it is possible that the path K-L could have been dedicated as a public footpath in the space of 7 years, providing the user was of a quantity and nature to come to the attention of the landowner. There were 55 witnesses attesting to such use, and the wear on the paths shown on aerial photography indicates consistent use over the period 2010 to 2017. The applicants (supported by the users) must show that the landowner was aware of the public use and acquiesced in it. Any action by the landowner to show that no dedication is intended will stop deemed dedication taking place. From the evidence put to the village green public inquiry, a former owner of Top Field,

Gleasons, did arrange to put signs up on Top Field in 2010, specifically worded to inform the public that there was no intention to dedicate public rights there (see paragraph 58 above). However, these two signs, described as ‘flimsy’ were not maintained or checked on, important in ensuring the intended recipients get the required message. As quoted in paragraph 58 above, the Inspector considered that the signs were not sufficiently clear to deny acquiescence in village green rights on the one hand, and not in place for long enough to make an impression on users. They did not make an impression on those users who gave evidence (**Appendix 1**, paragraph 12.7, page 176), who reported seeing planning notices, or witnesses for the present application, who reported seeing notices only in 2016, or around the time that the housing development at the north end of Top Field was taking place. The 2016 report mentioned the ploughing of the central part of the Main Field in June 2014, but there is no evidence that this was done by the landowner specifically to stop use of the path L-K, or of any other act to deny acquiescence in the public use of it. Aerial photography from 2018 shows that use is still taking place since the bringing into question of the public’s right in 2017, as this path is now the outstanding feature on Top Field, and is easier to identify on the ground than Footpath 507. Therefore, on the strength of this evidence, this path should be recorded on the Definitive Map and Statement, under common law.

**Route N-M** (28 users, earliest evidence of use – 1948)

**tenanc**This path was, like L-K, not a part of the original applications, but it became clear that there was a difficulty in assessing just what part of the western end of the dismantled railway had been used by witnesses, given the presence of a fence across the line near the present mainline railway since 1973, and overgrowth of the path by vegetation at its western end. A number of maps completed by users for the earlier DMMO 578 application also showed that users had turned off the dismantled railway to join what is now Footpath 507. Twenty-eight users have used this path for 20 years or more, and their use spans both relevant periods. It is considered that the requirements of section 31 have been satisfied for this path, with the relevant periods of **1972 – 1992** and **1997 – 2017**.

### **Consultations with other bodies**

69. The following persons and bodies have been consulted about the application: Winchester City Council, the local Member, the Open Spaces Society, The Ramblers, the Byway and Bridleway Trust, Hampshire Highways and the Area Countryside Access Manager (Central). A former landowner of the field containing route A-B, Imerys Minerals, has also been contacted. At the time of writing, the following response has been received.
70. The **Winchester Ramblers Footpath & Access Officer** says that it always welcomes ‘*the addition of routes to the rights of way network*’, and the respondent is personally familiar with the area since he lived nearby from 1997 to 2002, and has explored the whole area, though not so much recently. In his experience, ‘*the use of “Top Field” by local dog-walkers has grown over the years, but most of the routes used have migrated around over that time*’. Of

most interest to the Ramblers are the routes J-H-A-I and A-B as *'taken together with a formal route under the railway line adjacent to point I...they create options for a through route to the rights of way west of the railway'*. He also notes that *'existing routes from around point H through to Burnet Lane are also used in order to reach Hookpit Farm Lane and the onward network'*. Further, his experience is that *'J-H-A has been available to use in a slowly improving state for many years, first informally and then as a community maintained route. The section from A to I has always vegetation overgrowth... As an alternative, the section A to B linking to Woodhams Lane has also steadily improved in terms of accessibility'*.

### **Comments by the Landowners**

71. The affected landowners have been consulted on this application. **Drew Smith's** comments are set out at paragraphs 40 and 41, and those of the tenant farmer **Mr. Bright** in paragraphs 42 to 45.

### **Conclusions**

72. The intention of this report is to provide the Regulatory Committee with advice on a long-running matter, namely what rights subsist over the area known as Top Field, in Springvale, Kings Worthy. This is the fourth report about rights on this land that has been brought before this Committee, and there have been two public inquiries, after the second of which the Council received the present two further separate applications, combined into one for convenience of processing. It is important for the landowners, the Parish Council and the public residing close to Top Field, to know with as much certainty as can be achieved where public rights of way have been acquired over this land. The landowners who are developing another area of Top Field for housing will know where these (currently) unrecorded rights actually run, and be able to carry out the necessary procedures to allow the building to take place. Local people will know where they can walk, and the Parish Council be able to provide appropriate advice to enquiries about rights of way in this location.

73. The evidence available to the investigation indicates that the routes considered in this report have been in use by the public in the two relevant periods for which there is user evidence, that is 1972 to 1992 and 1997 to 2017. The available aerial photography from the early 1990s consistently shows clear walked routes on the ground as noted by the Inspector at the 2016 public inquiry. The routes have been affected by changes in the cropping on the land, and the earlier perimeter path around the crop was recorded on the Definitive Map in 2008. The current perimeter path has migrated further into the field and forms the path L-K discussed in this report.

74. Apart from the route G-H, and that part of the route along the dismantled railway between points N-I, the evidence put forward in support of the claimed routes is sufficient for it to be reasonably alleged that all have been used by the public as of right and without interruption for a full period of twenty years, meeting the legal test set out in section 31 of the Highways Act 1980, or that a common law

presumption to be inferred. The paths G-H and N-I should not be recorded on the Definitive Map.

75. For the path L-K, a common law presumption (that the landowners were aware of and acquiesced in public use of part of the way, sufficient to dedicate the claimed route) justifies a reasonable allegation that the section of this route used between 2000 and 2017 is now a public right of way and should be recorded as such. The section of the set-aside path from the junction with Footpath 506b and point K on the Committee Plan has been used for 20 years, that is the relevant period for this application of 1997 to 2017, and meets the legal tests of section 31, and should also be recorded on the Definitive Map.
76. If Members agree with these conclusions and consider that, on the balance of probabilities, it can be reasonably alleged that the public have acquired a right of way on the routes as set out in the previous paragraphs, then they should direct that a Map Modification Order is made to record these routes as public footpaths, with two routes as specified in the Recommendation being refused.

**REQUIRED CORPORATE AND LEGAL INFORMATION:**

**Links to the Strategic Plan**

<b>Hampshire maintains strong and sustainable economic growth and prosperity:</b>	
<b>People in Hampshire live safe, healthy and independent lives:</b>	
<b>People in Hampshire enjoy a rich and diverse environment:</b>	
<b>People in Hampshire enjoy being part of strong, inclusive communities:</b>	
<b>OR</b>	
<p><b>This proposal does not link to the Strategic Plan but, nevertheless, requires a decision because:</b>  <b>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.</b></p>	

<b>Section 100 D - Local Government Act 1972 - background documents</b>	
<p><b>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.)</b></p>	
<u>Document</u>	<u>Location</u>
Claim Reference – case file CR/1180	Countryside Access Team Castle Avenue Winchester SO23 8UL

**IMPACT ASSESSMENTS:**

**1 Equalities Impact Assessment: N/A**

**2. Impact on Crime and Disorder: N/A**

**3. Climate Change:**

How does what is being proposed impact on our carbon footprint / energy consumption? N/A

How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts? N/A

**This report does not require impact assessment but, nevertheless, requires a decision because the County Council, in its capacity as the ‘surveying authority’, has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.**