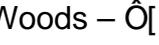


HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Jonathan Woods – 
Date:	16 June 2020
Title:	DMMO 1012 Application for a Definitive Map Modification Order to record public Footpath in Greatham and Whitehill
Report From:	Director of Culture, Communities and Business Services

Contact name: Ben Marsh

Tel: 01962 840043

Email: ben.marsh@hants.gov.uk

Purpose of this report

1. The purpose of this report is to assist the Countryside Access Manager in determining whether the available evidence is sufficient for a Definitive Map Modification Order ('DMMO') to be made recording public rights of way in the parishes of Greatham and Whitehill.

Recommendation

2. That the evidence is not sufficient for a DMMO to be made adding the route to the Definitive Map as a public right of way.

Executive Summary

3. This is an application made by two residents of Greatham (the 'Applicants') in 2008 under Section 53 of the Wildlife and Countryside Act 1981, to record a Footpath from Wolfmere Lane to a track in a copse to the south of Longmoor Road. The application is supported by user evidence which the Applicants believe sufficiently demonstrates that a public right of way should be recorded. However, having considered the supporting evidence and taken additional research of historical documentary evidence into account, it is considered that there are not sufficient grounds to add the route to the Definitive Map as a public right of way.

Legal framework for the decision

4. WILDLIFE AND COUNTRYSIDE ACT 1981

Section 53: Duty to keep definitive map and statement under continuous review.

(2) As regards every definitive map and statement, the surveying authority shall:

b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: - c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way [to which this Part applies].
- ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.

5. HIGHWAYS ACT 1980

Section 31: Dedication of way a highway presumed after public use of 20 years.

a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

6. PRESUMED DEDICATION AT COMMON LAW

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

Issues to be decided

7. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist over the claimed route, which is not currently recorded as a right of way.
8. Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry.
9. If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
10. Where a Map Modification Order is made, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.
11. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.
12. In the event of an application under Section 53 being refused, the applicant has the right to appeal against the County Council's decision to the Secretary of State, who may direct the County Council to make the order that is sought.

Description of the route

13. The claimed route is shown on the map attached to this report as Appendix A. Commencing at Wolfmere Lane, the route travels in a generally easterly direction, for approximately 280 metres, to a track in a copse south of Longmoor Road.

Background to the application

14. The claimed route is located to the east of the village of Greatham in the parishes of Greatham and Whitehill, approximately three kilometres south of the town of Whitehill in the district of East Hampshire. In 2008 an application to add the routes to the Definitive Map was submitted to the County Council.

Consultations with other bodies

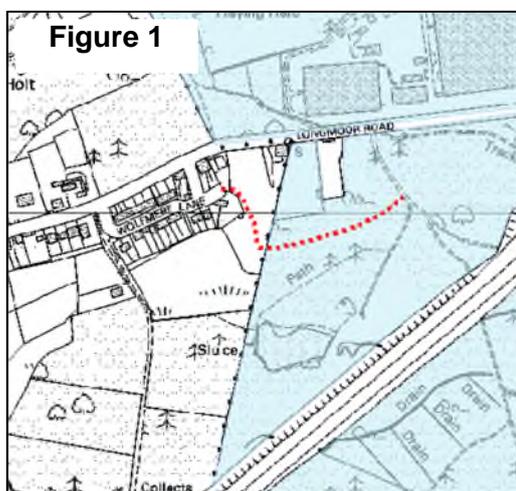
15. In addition to the landowners, the following people and organisations have been consulted in relation to this application: The Ramblers, Open Spaces Society, Greatham Parish Council, Whitehill Parish Council, East Hampshire District Council, South Downs National Park Authority, and Cllr Oppenheimer (Petersfield Hangers) and Cllr Carew (Whitehill, Bordon & Lindford).
16. No comments have been received.

The Landowners

17. At the time of writing this report there are two registered landowners in respect of the land over which the claimed route travels. The proprietor of title number SH26840 (to the west of the parish boundary) is recorded by the Land Registry as a resident of Bordon who purchased the land in 2008. The proprietor of title number SH28392 (to the east of the parish boundary) is also a resident of Bordon who purchased the land in 2001. Prior to 2001 the land was owned by the Secretary of State for Defence, referred to hereafter as the Ministry of Defence ('MOD').
18. The owner of the land to the west of the parish boundary has raised, through their legal representatives, an objection to public rights being recorded over the claimed route. The landowner to the east of the parish boundary has stated within a telephone conversation held with the Map Review Officer that they are also opposed to a public right of way being recorded over their land.

Documentary Evidence

19. The claimed route is not shown on any maps that were viewed whilst researching historical evidence in relation to the claimed route.
20. Aldershot and District Military Lands Byelaws 1976
The land over which the claimed route travels to the east of the parish boundary was previously owned by the MOD and was subject to the Aldershot and District Military Lands Byelaws 1976 ('the byelaws'):
(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/39456/aldershot_district_military_lands.pdf)
21. The land affected by the byelaws consists of land belonging to the Secretary of State, in the Borough of Rushmoor and District of East Hampshire, and includes land over which the claimed route runs. The byelaws permit the public to 'use all parts of the Military Land not specifically enclosed or the entry to which is not shown by notice as being prohibited or restricted, including those Ministry of Defence roads thereon which have been constructed and made up for general use by vehicular traffic, for the purposes of open-air recreation at all times when the Military Lands are not being used for military purposes for which they are appropriated'.
22. The byelaws also prohibit the activities of riding a horse, bicycle or tricycle, or riding, and driving or propelling a vehicle of any kind otherwise than on any carriageway of a road suitably constructed and made up for general use for vehicular traffic.
23. Deposit under s31(6) Highways Act – 1983
In 1983 the MOD submitted a deposit under s31(6) Highways Act 1980, the effect of which was to protect the land against any future claims for prescriptive rights. Subsequent statements and renewals were received by the County Council in 1989, 1994. In 2000, the MOD renewed the plans deposited in 1994, however County Records have been checked for a subsequent declaration, however it



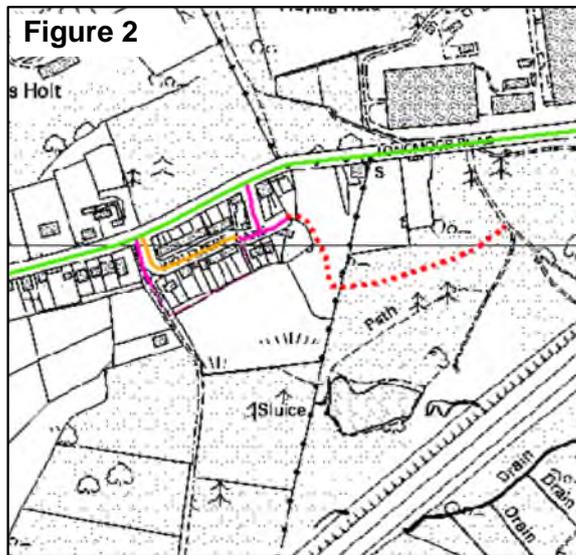
appears that this was not received. The extent of the deposit is shown in Figure 2.

24. Land Registry Title Number SH26840 – 1996

Within the charges register to title number SH26840 there is a grant of access dated 24 April 1996 to all residents of Pine Villas at all times and for all purposes with or without vehicles to pass and repass along Wolfmere Lane.

25. List of Streets – 2020

Figure 3 shows a graphical representation of the List of Streets. Longmoor Road is shown in green and is referenced C48 Longmoor Road, it is publicly maintainable highway. The western section of Wolfmere Lane is coloured orange and is referenced U210 Wolfmere Lane and is also publicly maintainable highway. The eastern section of Wolfmere Lane is coloured pink and is referenced P210 Wolfmere Lane, this section of Wolfmere lane is not publicly



maintainable.

Analysis of the Documentary Evidence

26. Prior to 2001, the land to the east of the parish boundary, over which the claimed route travels, was owned by the Ministry of Defence ('MOD'). s327 Highways Act 1980 provides that the Act does not apply to land belonging to any government department. A statutory presumption of dedication following a full period of use of 20 years can therefore not be made prior to 2001 as s31 of the Act does not apply to the land. The period of use following 2001 will also be too short for a statutory presumption of dedication as the claim was submitted 7 years later in 2008.

27. The use of the route can still be determined under common law principles, however, the MOD have also submitted successive deposits, statements and declarations to the County Council under s31(6) Highways Act 1980. Although the Highways Act does not apply to land owned by a government department, the submission is deemed to sufficiently evidence that between 1983 and 2001, the MOD as landowner, had no intention of dedicating the claimed route as a public right of way.
28. Unlike with a statutory presumption of dedication, there is no minimum period of use under common law principles. The evidence of use of the claimed route over the land to the east of the parish boundary will therefore need to be considered against common law principles between 2001 and 2008 following the sale of the land by the MOD.
29. A public right of way is generally considered to run between two places to which the public have access, the public must have access to the route at one end. The eastern end of Wolfmere Lane is a private road, and therefore the extent of the investigation when considering the user evidence will need to be extended to include the private section of Wolfmere Lane. The residents of Wolfmere Lane and Pine Villas have a private right either through grant or prescription and therefore their use of the private road will not be able to be considered under statutory or common law principles as their use would neither be as of right or by 'the public'.
30. The eastern end of the claimed route terminates at the track that extends south from Longmoor Road. The track is not a public highway and therefore the extent of the investigation when considering user evidence will need to include the track to Longmoor Road, or a cul-de-sac route could also be considered to the ponds which if supported by the user evidence could lead to a 'place of popular resort' (the description used by Lord Justice Atkins in the case of Moser v Ambleside 1925).
31. When the claim was first submitted, the claimed route terminated at the boundary of the land covered by byelaws, having been later changed to terminate at the track. Surrey County Council Bridleway No 587 (Frensham) Definitive Map Modification Order 2016, concerned land that was subject to the Surrey Commons Military Byelaws 1978. The Planning Inspectorate [Decision Notice](#) in relation to the application confirmed that a cul-de-sac route could be created to the boundary of the area of land covered by the military byelaw as the public had a long-established permission to walk over the land. However, in relation to this particular application, the MOD had sold the land in 2001 prior to the rights being called into question, as the land was no longer subject to the byelaw, it is deemed that a cul-de-sac route cannot legitimately exist.

32. In summary, the use by the public will need to evidence that the claimed route commences at a public highway, when considering the use over the private section of Wolfmere Lane the use put forward by the residents of Wolfmere Lane and Pine Villas will need to be discounted as they have private access rights over the lane. The claimed route will also need to terminate at either a public highway or a place of popular resort.
33. The application also cannot be considered under statutory principles as the 20 year period required for a presumption of dedication is not attainable as the Highways Act 1980 did not apply to the land whilst in the ownership of the MOD. The application can be considered under common law principles but only within the period from 2001 to 2008 as there is sufficient evidence to show that the MOD did not intend to dedicate the claimed route as a public right of way whilst in their ownership.

User Evidence

34. The application is supported by evidence of use from 39 local residents collected on user evidence forms, this evidence is summarised on the chart provided at [Appendix B](#). The chart is by necessity a generalisation but provides an insight into the evidence which has been put forward in support of the application.
35. The use documented on the user evidence forms commenced in 1964 and continues up until the application was submitted in 2008. All use appears to have been for recreational purposes and has ranged from once per year to four times every day. All users have reported to have seen other people using the routes, including on foot and by bicycle.
36. The maps accompanying the user evidence forms have all been completed to record use from the end of Wolfmere Lane to the parish boundary/the boundary of the land previously owned by the MOD, which is now in private ownership. Under the description of the path used, people that have submitted user evidence forms have recorded that they have gone to the wood and/or the fishing lakes. Further investigations have confirmed that prior to the A3 being constructed in 1979, people used the path to access the wider extent of Longmoor Enclosure.

Analysis of the Evidence under s31, Highways Act

37. As outlined in paragraph 33, this application cannot be considered under s31 as there is not the required period of 20 years use for a presumption of dedication to be evidenced.

Analysis of the evidence under Common Law

38. Although this application cannot be considered under statutory principles, the user evidence can be considered under common law, where it is the responsibility of the applicant to show that the landowners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowner that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express dedication, or it may be implied from a sufficient period of public use without secrecy, force or permission, and the acquiescence of the landowner in that use.
39. This is required in order to meet the two pre-conditions for the creation of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient use is not fixed under common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed or turning people back.
40. As detailed in paragraph 32, the timeframe in which this application can be considered under common law is 2001 to 2008 as it is deemed that there is sufficient documentary evidence to confirm that the MOD had no intention of dedicating a right of way whilst the land was in their ownership.
41. 33 users have recorded that they have used the claimed route in the period from 2001 to 2008 on foot, which equates to approximately 128 times per week, or 18 times per day. Although the use is deemed to be of a sufficient volume for the landowners to have become aware of the use, it is not deemed that the 7 year period of use is a sufficient period of public use for a dedication to be implied.
42. As also outlined in paragraph 32, the use by the public will need to evidence that the claimed route commences at a public highway. The extent of the claimed route will therefore need to be extended over the private section of Wolfmere Lane, either to Longmoor Road or to the section of Wolfmere Lane that has been adopted as public highway.

43. 19 of the 33 users that used the route within the period of 2001 to 2008 either live in Wolfmere Lane or Pine Villas and their use of Wolfmere Lane cannot be counted as public use, as they have private access rights. The public use therefore equates to 25 times per week, or 4 times per day. The public use will diminish further as some people will have walked from different ends of Wolfmere Lane, and more people may have been using a private right if they were visiting friends and family that had a private right of access along the lane. This volume of use is not deemed to be either of a sufficient volume or over a sufficient period of time for a dedication to be implied.
44. As also detailed in paragraph 32, the claimed route will also need to terminate at either a public highway or a place of popular resort. All of the user evidence recorded on the maps supplied with the user evidence forms, terminates at the boundary of the land previously owned by the MOD. Only one of the users have mentioned that they have used the claimed route to access Longmoor Road, so extending the route to a public highway will not be possible as there is insufficient evidence to support this.
45. Under the description of the path used, users of the claimed route that have submitted user evidence forms, have recorded that they have gone to the wood and/or the fishing lakes. 15 users have recorded that the path terminates at the woods, 7 users have recorded that the path terminates at the lake, and 14 users have stated that the path terminates at the wood and lakes.
46. At the time the claim was submitted the woodland was no longer in the ownership of the MOD and was also no longer subject to the byelaw. The woodland boundary is not deemed to be a place of popular resort and therefore a public right of way cannot be recorded to this terminus.
47. The lakes/ponds could be classed as a place of popular resort, but further evidence would be required to substantiate what routes the users took to ensure that they were all using the same route. Further investigations into this have not been conducted as it is deemed that use does not cover a sufficient period of time for a dedication to be implied.

Actions of the Landowner

48. The current landowners have both asserted that they do not wish for public right of way to be recorded over their land. The landowner of the land to the west of the parish boundary purchased the land in 2008, when the claim was submitted and therefore how they have managed the land is not relevant to this investigation. The previous owner does not appear to have done anything to prevent or discourage public use, none of the users have reported any signs being erected or physical obstructions over the claimed route.
49. The landowner of the land to the east of the parish boundary purchased the land from the MOD in 2001. This landowner disclosed to the investigating officer that they had given locals permission to use the claimed route over their land but was unable to provide names of individuals. The landowner recalled a time that they had told a member of the public that they could not walk around the ponds as their dog had disturbed a fishing match. However, none of the users of the claimed route have recorded that they have been granted permission to use any of the land over which the claimed route travels.
50. The management of the land to the east of the parish boundary whilst in the ownership of the MOD has been discussed within the documentary evidence section of this report (paragraphs 26 to 33).

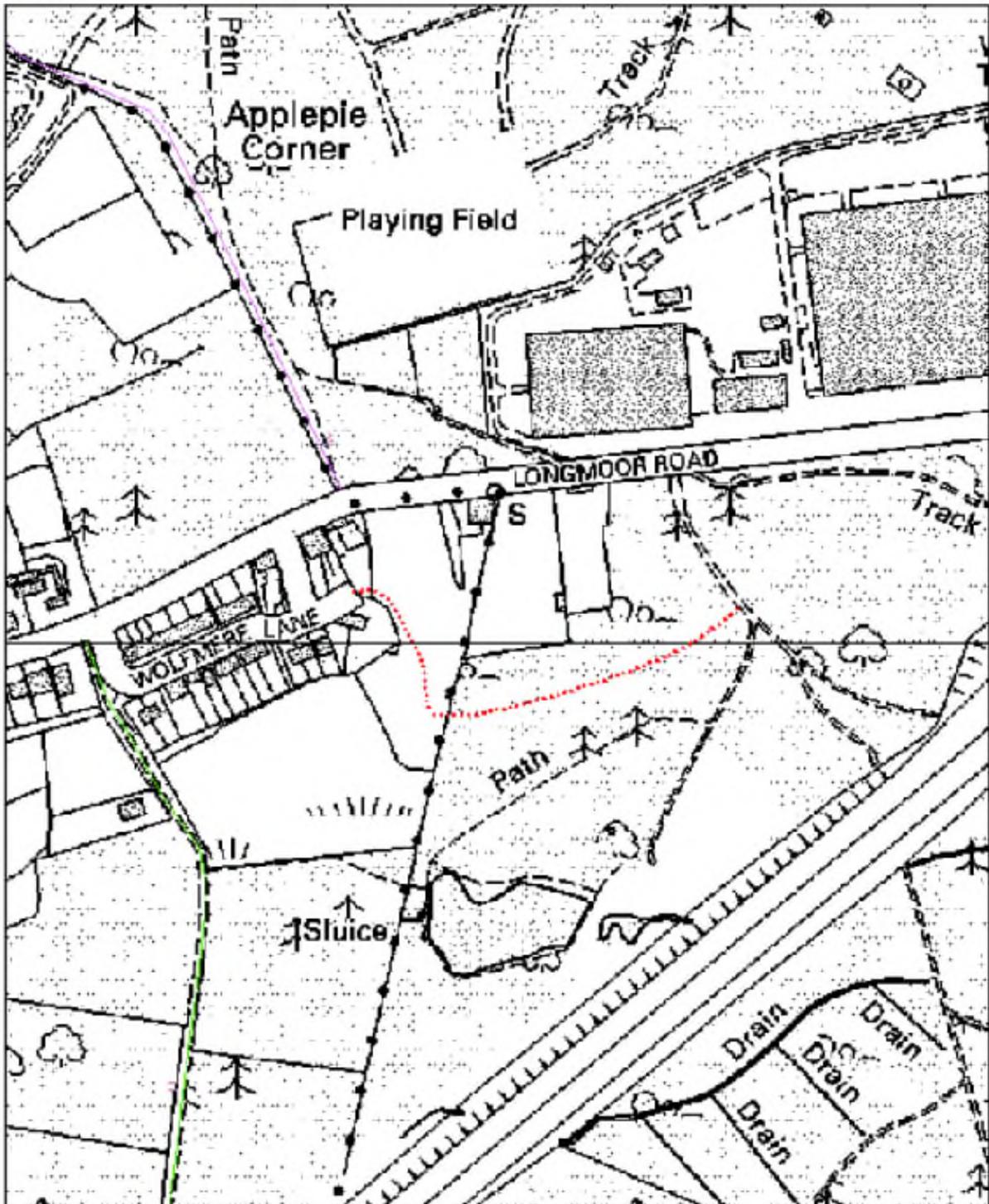
Conclusions

51. The available evidence is not sufficient to infer that that a public right of way exists over the claimed route.

Appendix A – Route Map

<click on map to open document>

Ref: 1012 Greatham & Whitehill



- Definitive Map Modification Applications
- Byway open to all traffic
- Bridleway
- Footpath
- Restricted byway

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Appendix B – User evidence charts

