

HAMPSHIRE COUNTY COUNCIL

Background Report

Decision Maker:	Countryside Access Group Manager
Title:	Application for a Definitive Map Modification Order to record a public footpath between Greenway Lane and Hundry Copse, Buriton

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1 Executive Summary

- 1.1. This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a public footpath between Greenway Lane and Hundry Copse, near the village of Buriton.
- 1.2. It is considered that the evidence submitted in support of the application is insufficient for it to be inferred that, on the balance of probabilities, the claimed route should be added to the Definitive Map. The application is therefore recommended for refusal.

2 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: -

b) the expiration... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

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
- iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

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.

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.

3 Summary of Legal Tests

- 1.1. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. 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. Officers do not consider that there is such a conflict in this case.
- 1.2. 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.
- 1.3. 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.

- 1.4. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.
- 1.5. In the event of an application under Section 53 being refused, the applicant has the right to appeal against the County Council's decision to the Secretary of State, who may direct the County Council to make the order that is sought.

4 Claimant

- 4.1 The claim was submitted in 2007 by a resident of Buriton.

5 Landowner

- 5.1 The majority of the claimed route (A-D on the location map) runs through open fields that belong to the owners of Tithe House, which is situated on Greenway Lane. The current owners have held the freehold to the land since 2006 – prior to this the land was owned by Butser Turf and Timber Ltd (1982 – 2006) and before that by Mr Tony Hall. Unfortunately, both Mr Hall (deceased) and Butser Turf and Timber (company dissolved) are unavailable for interview about their management of the land.
- 5.2 The southernmost section of the claimed route (D-F) runs through land owned by the Secretary of State for the Environment, Food and Rural Affairs, and is managed by the Forestry Commission. A significant part of this section (E-F) is already recorded as a public footpath (part of Buriton Footpath 10) and has therefore been excluded from the investigation, as public rights are already recorded on this section.

6 Description of the Route (please refer to the maps attached to this report)

- 6.1 The route which is the subject of this application runs through three connecting fields, alongside the embankment of the London to Portsmouth railway line. It commences at a junction with Buriton Footpath 11, with access having previously been available through a field gate adjacent to Greenway Lane (Point A). Save for the period 1982 - 2006, when the land was owned by Butser Turf, the ownership of the land between A-D has been connected to Tithe House (previously Glebe Farm). The path continues southward from Point D into the adjacent woodland, known as Hundry Copse, and proceeds for 120 metres to meet Buriton Footpath 10, which continues southward to join Kiln Lane (E-F). In 2016, Hundry Copse was designated as Open Access Land, under the provisions of the Countryside and Rights of Way Act 2000.

7 Background to the Application

- 7.1 The claimed route provides a direct, off-road link between seventeen properties situated at the northern end of Greenway Lane and the village of Buriton. The earliest date at which development at the northern end of Greenway Lane can be identified is in the early 1930s (two dwellings are shown on the Ordnance Survey County Series 4th Edition map of 1931).
- 7.2 From a point during the 1960s until 1982, the land was owned by Mr Tom Hall, who also owned Glebe Farm (situated immediately to the east of the railway line).

Mr Hall used the land for the purposes of grazing during the period of his ownership. He sold the land to Butser Turf and Timber Ltd in 1982, which used the land for the purposes of growing turf (reports conflict regarding whether any livestock was retained in the field during this period).

- 7.3 The land was sold to the current owner in 2006, at which point access to the northern end of the claimed route was permanently obstructed by a locked gate at Point A. The fencing around the southern end of the field was also reportedly renewed. The application to record the claimed route as a public footpath was received the following year, in March 2007.

8 Issues to be decided

- 8.1 The issue to be decided is whether there is evidence to show that, on the balance of probabilities, public rights subsist, or are reasonably alleged to subsist, on the route now claimed.
- 8.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, it must be demonstrated that public rights have come into being at some time in the past. This might be proved by historic documentary evidence or by evidence of use in the recent past.
- 8.3 Historic and documentary evidence has been examined to see whether the past history and use of the route point to it having public rights as a result of dedication in the near or distant past. Rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.

9 Documentary Evidence

- 9.1 Ordnance Survey Maps
- 9.1.1 County Series (25 inches to 1 mile) – 1870 - 1931
Four maps were published by the Ordnance Survey at a scale of 25 inches to 1 mile between 1870 and 1931. No route is depicted between A-D on any of these four iterations, and only on the 4th Edition (1931) are any dwellings shown at the northern end of Greenway Lane. It can therefore be inferred that there was no feature on the ground corresponding with the claimed route between A-D during this period that was significant enough to be included on the map. A route is shown running around the perimeter of Hundry Copse (roughly parallel to Footpath 10), part of which coincides with the alignment of D-E, but no link is shown between this section and Point D.
- 9.1.2 National Grid Series – 1966 (1:2500)
The fields through which A-D runs are set out in much the same way as today. Field boundaries are depicted by solid lines, indicating the existence of fences.

The boundary at Point B is shown by a pecked line, presumably depicting a gap, but no such depiction is present at Point C, where the fence dividing the fields is shown by a solid line. The vehicular entrance into the northernmost field from Footpath 11 is also shown by a solid line, indicating the existence of a gate. A solid line is also shown at Point D, where the field meets Hundry Copse. A path is again shown running inside the perimeter of Hundry Copse, part of which corresponds with D-E, but no link into the field at Point D is depicted.

9.2 Buriton Parish Council Minutes – 1930s-1950s

In considering which routes it wished to be recorded as public rights of way in response to the Rights of Way Act 1932 and the National Parks and Access to the Countryside Act 1949, Buriton Parish Council was particularly attentive, drawing up a detailed schedule of routes which it considered to be public. The claimed route is not mentioned, nor was it put forward by the parish for inclusion on the first Definitive Map.

9.3 Aerial Photography

A number of aerial photographs have been taken over the area in question during the 20th century, as follows:

9.3.1 1971

The 1971 photograph, printed in black and white, shows the land between Points A and D to be divided into several separate parcels, one of which appears to have been ploughed for cultivation. The earth is worn at Point A, indicating the location of the gate providing access to the field from Footpath 11. Another worn section at the boundary between the first and second fields (Point B), coinciding with the line of the claimed route, indicates use of the field by vehicles. A faint line between these two points close to and alongside the railway embankment suggests some separation from the adjacent field, but it can't be said with any certainty whether this indicates a defined path or simply a surface differing from the adjacent field. The boundary between the second and third fields (Point C) coincides with an access track crossing the railway line from the farm (referred to by some users as a cattle crossing, which has since been closed). These fields are separated by a fence, but the photograph is not sufficiently clear for it to be inferred whether or not this fence (which is reflected on the 1966 OS map) included any gaps or gates. A worn area to the west of Point C indicates the location of a gate.

9.3.2 1984

Also produced in black and white, the OS photograph from 1984 shows the fields between A-D arranged in the same way as today. In contrast to the 1971 photograph, the worn areas have largely grassed over, although a lighter area at Point A still hints at the entry point to the field. There are no other discernible features which indicate the existence of a path coinciding with A-D. There appears to be a gap at the location of the worn area to the west of Point C (see 9.3.1), but it is unclear as to whether there is a gap or gate at Point C itself.

9.3.3 1991

This colour photograph presents a similar picture to the 1984 version. No well-defined route is visible between A-D, and the only worn areas along the line of the claimed route fall at the boundary at Point C, apparently coinciding with pinch points brought about by the fencing of the fields. Other worn areas indicate other access points at field boundaries, away from the line of the claimed route.

9.3.4 1996

The 1996 photograph gives some indication as to the land usage during the ownership of Butser Turf and Timber Ltd. Again, the ground is worn at the field boundaries and entrance points, and no defined route is visible that corresponds with the claimed route, although a worn route appears to lead towards the railway embankment in a south-easterly direction from the vehicular entrance gate (south-west of Point A). The process of turf removal is apparently in progress in the third field, just north of Point D, as square strips of earth are visible alongside the grass. The area of bare earth extends right up to the railway embankment.

9.3.5 2000

The 2000 photograph shows the first field in a cultivated state. The second field is grassed, and appears to contain livestock (probably sheep). Worn patches indicate the vehicular entrance to this field from Footpath 11, as well as a wide track which connects the top two fields. The southernmost field is also grassed, but contains no livestock. There is no indication of a path running alongside the railway embankment.

9.3.6 2005

The 2005 photograph shows all three fields as being grassed over, with dividing fences apparently having been removed. There are no signs of any paths or wear from vehicular access points.

9.4 Statutory Declarations under Section 31(6) Highways Act 1980

9.4.1 Forestry Commission - 1992

This statutory deposit, made by the Forestry Commission under the provisions of Section 31(6) Highways Act 1980, had the effect of protecting their land from claims for public rights of way for a period of six years from 1992. The deposit covers the land through which D-E runs, and has the effect of rebutting any presumption of dedication to the public during that time.

9.4.2 Tithe House, Buriton - 2007

This deposit was made by the owner of Tithe House in 2007, also under the provisions of the 1980 Act. Whilst the deposit covers the land through which section A-D of the claimed route runs, it was submitted after the application now under consideration was received. As it has no retrospective effect, it is not relevant to the determination of this matter.

10 **User Evidence**

- 10.1 The application was supported by evidence of use from ten local people, collected on user evidence forms. Three users have also provided statements about their use. The dates of use are summarised on the chart at Appendix 1. The table is, by necessity, a generalisation, but it provides an insight into the evidence which has been put forward in support of the application. Establishing further details regarding user evidence has proved challenging, due to a number of witnesses having moved away from the area, in tandem with the fact that the former landowners are also not available to interview. However, the following information can be inferred from the available evidence.
- 10.2 The evidence charts public use of the claimed route since 1962, up until the time access to the land was prevented by the current landowner of A-D in 2006.

- 10.3 Of the ten users, three put forward daily use. Four further users stated a frequency of use of at least once per week. The remaining three users provided no information as to frequency of use. All users report having seen other people using the route.
- 10.4 All users report walking through gates to access the claimed route, and three make reference to having climbed over stiles. None of the users stated that their use was ever challenged, either by notice or in person, prior to the change of ownership affecting A-D in 2006.
- 10.5 Three users indicated that they sought permission to use the route, one of whom was related to Mr Hall (the owner between the 1960s and 1982). Three further users had a connection to Mr Hall (family or close friend).
- 10.6 Some users also recollect the existence of a fence separating the open fields from the Forestry Commission-owned Hundry Copse. The applicant states that a fence was in situ at this location when he moved to Greenway Lane in 1976, though it was always in a "dilapidated state". It is apparent that this fencing was still there in around 1989/1990, as he references a photo taken from Hundry Copse looking northwards over the field. The fence was subsequently renewed in 2006 by the current landowner, though prior to that it was not (according to the applicant) stock proof as there were no animals during the field during Butser Turf's ownership.
- 10.7 Some users make reference to a closure at Point A during the early 1990s, when a group of travellers pitched camp in nearby fields. Users described the gate at Point A being locked to prevent vehicular access to the field during this time. Nobody can recall a precise date, although the general consensus seems to place the event during the first half of the decade. Accounts also vary regarding the length of the closure – the applicant believes it may have only last for a few weeks, but other users indicate that the closure may have been in situ for much longer (ranging from several months to eighteen months). During this time, users apparently either jumped the gate or made their way into the field via the gate on Footpath 11, further to the west.
- 10.8 All users claim to have always used the same route when walking into Buriton. However, it is also apparent that users have also used the field for purposes other than walking – the applicant indicates that local residents initially used the land for playing games, flying kites, picnics and watching badgers. Other users also indicated that they had free access to the fields. The landowner has also stated that he is aware that some residents entered the field for the purposes of picking blackberries.
- 10.9 Six of the ten users state that their use of the path was brought to a halt in 2006, when the current landowner introduced a locked gate wrapped in barbed wire at Point A. Three users state that their use continued after this date, up until the time they completed their forms in 2007.

11 The Landowners

- 11.1 The current owners of **Tithe House** have been resident in that property since the late 1990s, and acquired the land over which section A-D runs in 2006. They oppose the application on the following grounds:
- They have never been aware of anyone walking on the route now claimed prior to their ownership, though they have seen people entering the field to pick blackberries. They have seen occupants of Greenway Lane exercising their

dogs when no animals are in the field, but access has been via a different gate to that at Point A. This gate has been locked but does not have barbed wire along the top, and so can be climbed over.

- The route is not, and never has been, shown on any map, and the land has been used for grazing.
- The route is fenced at the boundary between their land and that owned by the Forestry Commission.
- There are two alternative routes already in existence that take walkers from Greenway Lane into Buriton (via Footpaths 11 and 10, and via Footpath 12).

As has been established, the actions of the previous owners of the land through which A-D runs can only be inferred from accounts of users.

11.2 The **Forestry Commission** Beat Forester for the area has provided the following statement:

“Historically, the area was probably fenced by the Forestry Commission when it was first planted, to protect the growing trees from stock damage. A fence may subsequently have been maintained by the Forestry Commission as a boundary marker but our records are not clear. It is quite common for our neighbours to erect their own fences for stock control and this may be what has happened here.

Although 2006 is relatively recent I do not have any staff working for me who would have been here at that time and would be able to comment on this location and date.

I should add that the Forestry Commission land in question has been dedicated for access on foot under the CRoW legislation. The area has also recently been leased to Hampshire County Council for the purposes of recreation provision, with the timber rights reserved to the Forestry Commission.”

12 Consultations with Other Bodies

12.1 In addition to the landowner and tenant, the following people and organisations have been consulted on this application: The Ramblers, The Open Spaces Society, Buriton Parish Council, East Hampshire District Council, South Downs National Park Authority, County Councillor Rob Mocatta, and the Area Countryside Access Manager for Hampshire County Council. Responses are set out below.

12.2 Buriton Parish Council

“The parish council supports the application. It was felt that, on general principles, the route could be a useful addition to the RoW network, perhaps avoiding the need to walk along Greenway Lane for some users. It was recognised that the route would need to use part of Kiln Lane – but not the steepest, most dangerous parts – to get to / from the village centre.”

12.3 South Downs National Park Authority

“From a desk based study, the route creates a smaller circular walk not including any roads from an already present, larger circular route that does include roads.

- *Following a site visit on 07 July 2017, the southern end of the proposed route from the Hundry Copse boundary was found to be entirely fenced and the northern section enclosed by a thick hedge. Both points were impassable without forced entry. See photos on page 2 of this response.*
- *I am unable to comment on the middle section, but could see from the northern side that it is fenced in grazing compartments.*

13 Analysis of the evidence

13.1 None of the documentary evidence indicates that there has ever been an established route that corresponds with the claimed footpath, and the application must therefore be determined upon evidence of user. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

13.2 Analysis of the evidence under Section 31, Highways Act 1980

For Section 31 of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:

- the physical nature of the path must be such as is capable of being a right of way at common law
- the use must be ‘brought into question’, i.e. challenged or disputed in some way
- use must have taken place without interruption over a period of twenty years before the date on which the right is brought into question
- use must be *as of right*, i.e. without force, without stealth and without permission
- use must be by the public at large
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

13.3 Physical nature of the route

A public highway must follow a defined route, but it is generally accepted that where a route crosses open land, it need not follow a precise path. It follows that the claimed route is capable of being a right of way at common law, as although the vast majority of the route was not well-defined, the line that is now claimed does follow a linear route. However, the fact that the route was does not appear to have been well-defined (at least based on the available documentary evidence) may have affected the route actually walked by users. This point is considered below.

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

13.4.1 The only event bringing the right of the public to use the route into question that can be ascribed to a definite date in respect of A-D is the locking of the gate at Point A by the current landowner in 2006, giving a relevant twenty year period of **1986-2006**.

13.4.2 The Highways Act 1980 does not apply to land owned by a government department, or land held in trust for a government department. Section D-E falls within the stewardship of the Forestry Commission, with the land being owned by the Secretary of State for the Environment, Food and Rural Affairs. Section 31 therefore cannot operate in respect of D-E (although the application on this section can be considered at common law – see 13.11)

13.5 Twenty years' use without interruption

13.5.1 There are several accounts of the gate at Point A having been locked during the early part of the 1990s to prevent access to the field by travellers (although no precise date has been identified). It is unclear as to how long the gates were locked, but the lowest estimate of the duration is around two weeks. In considering what constituted an effective interruption to use in the House of Lords judgement on *R (on the application of Godmanchester Town Council v Secretary of State for the Environment, Food and Rural Affairs)* [2007], Lord Neuberger stated that:

"...it is clear that an interruption of the user at some point during the relevant twenty year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user "as of right" under section 31(1) during that period. Traditionally, one day a year is the norm...Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of twenty years in order to defeat user as of right....."

Whether it was for two weeks or in excess of a year, it is clear that the gate at Point A was locked for a significant period of time, and during this period it is apparent that people continued to walk in the field by either climbing the gate or by accessing the field by the field gate situated further down Footpath 11.

Whatever was understood by the residents of Greenway Lane as a result of the closure (and it does appear that it was intended to prevent unauthorised vehicular use rather than being specifically directed at residents), to a member of the public unacquainted with the local situation at the time, such an action could reasonably have been interpreted as an indication that members of the public were not permitted to enter the land. This notwithstanding, whatever the landowner's intentions, the closure constituted a factual interruption to use, and so this proviso cannot be said to have been met during the period 1986 – 2006.

13.6 'Without force, stealth or permission'

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

The Planning Inspectorate's *Definitive Map Order Consistency Guidelines* describe the use of force as including *"the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate."* As has been established at 13.5.1, any use of the claimed route during the early 1990s, when the gate at Point A was reportedly locked for a period of time, will have necessitated the climbing of the gate. It therefore follows that any such use would fit the description of 'force' as set out in the Planning Inspectorate guidelines.

13.6.2 Some users also recollect the existence of a fence separating the open fields from the Forestry Commission-owned Hundry Copse at Point D (possibly this accounts for some users' recollection of having to climbing over a stile), though others are less certain about the existence of a fence, or its condition. One user thought that there may have been a gap where the fences didn't meet at this point, allowing

access, others don't recall whether there was a fence at all. The applicant states that a fence was in situ at this location when he moved to Greenway Lane in 1976, though it was always in a "dilapidated state". It is apparent that it was still there in around 1989/1990, as he references a photo taken from Hundry Copse looking northwards over the field. The fence was subsequently renewed in 2006 by the current landowner, though prior to that it was not (according to the applicant) stock proof as there were no animals during the field during Butser Turf's ownership. If users were climbing over a fence at this location, then it is likely that this would be 'use by force'. However, the lack of information regarding the condition of the fence means that this can't be said with certainty.

13.6.3 *Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look.*

The accounts of users of the path indicate that use access to the land was open and without secrecy. Both Mr Hall and Butser Turf and Timber Ltd appear to have been aware of public use.

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

Though three users indicated that their use was as a result of permission, it is not clear whether how this 'permission' was granted, and whether it was revocable. The applicant indicates that Mr Hall was happy for Greenway Lane residents to walk the fields, with or without dogs, on the understanding that the gates would be kept shut, but it is not clear whether this understanding extended to the wider public, as all of the user evidence has been provided by residents of Greenway Lane, and in lieu of any further information from the landowners themselves (which for various reasons it has not been possible to obtain) the nature of the use is unclear. In light of this, it is considered that there is not enough evidence to indicate that use of the land during the relevant period of 1986 – 2006 was anything other than 'as of right'.

13.7 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.

13.7.1 *The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.*

13.7.1.1 All ten users provided evidence of use during the relevant period of 1986 – 2006. Of these, eight users put forward use covering the entire twenty year period, whilst another's use covered 1992 – 2005 (the other user only moved to Greenway Lane in 2005, and could therefore only used the route for a single year). Seven users indicated that they had walked the route at least weekly, and it apparent that this use had come to the attention of successive landowners, and there had even been an understanding on the terms of access to the land. Although the number of users who have provided evidence in support of the application is not particularly high, when considering the setting of the path, and the likelihood of anyone other than residents of Greenway Lane using it, the evidence of use could reasonably be considered to be representative of use by 'the public'. However, the low volume of overall use is problematic when considered in the context of the other use made of the land.

13.7.1.2 It is clear that public use of the land between A-D has not been limited to the claimed route, and the user evidence indicates that, at certain points in time, the public have enjoyed free access over the land (see 10.8). The issue of 'wandering' has been considered in court cases dating back over a century, and is also addressed by the Planning Inspectorate's Consistency Guidelines:

"Wandering at will (roaming) over an area, including the foreshore (Dyfed CC v SSW 1989), cannot establish a public right (Halsbury's Laws of England, Vol.21, paras 2 and 4 refer). Use of an area for recreational activities cannot give rise in itself to a presumption of dedication of a public right over a specific route."

An article by Christine Willmore (then a barrister and Lecturer in Law at the University of Bristol), published in the Rights of Way Law Review in May 1990, also considers this issue. An extract relevant to this case reads:

"...where the shortest route from a housing estate to the bus stop is across a field, even in the absence of a particular route defined on the ground, it may be possible to infer a route on the shortest convenient line between the estate and the bus stop. However, it is easier to draw such inferences from business use than from recreational use. Business users are likely to follow the easiest route between two points. Recreational users may wander, or follow a greater variety of routes".

Both of the above extracts are relevant to this application. Although some use appears to have been for the purposes of accessing Buriton village, it has also been diluted by a significant volume of recreational use, some of which would not be consistent with 'highway' use (ie picnicking, blackberry picking, flying kites, badger watching). It is natural that the public will have wandered (or 'roamed') over land on which such unrestricted access is permitted.

It is also unclear whether there has been any identifiable path on the line of A-D - although the applicant indicates that prior to Butser Turf and Timber's ownership, a worn track was evident, this conflicts with the accounts of other users, who do not recall there being a worn path. None are evident in the aerial photography reviewed as part of this investigation.

Although it appears that both Mr Hall and Butser Turf and Timber Ltd were happy for residents of Greenway Lane to access the land, in the absence of knowing what each party subjectively intended (something which, for various reasons, will never be known), the evidence of public use must be taken at face value. The fact that people have used all of the land, for a variety of purposes, makes it doubtful that any one route could be deemed to have been dedicated to the public by the landowner. It is therefore questionable whether the test set out in Section 31 has been met in this regard.

13.7.2 *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.*

Three users were related to Mr Hall, and whilst their use would be discounted for the period of his ownership (1960s to 1982), this falls outside the relevant period and therefore does not need to be considered under Section 31.

13.8 Summary of user evidence

The evidence of use indicates that local people have been walking between A-F in every year since 1962, with the bulk of use falling after 1975. Use within the relevant period was not secretive, and on balance appears to have been 'as of right'. However, there is evidence to suggest that public access on foot was interrupted during the relevant period of 1986 – 2006 (see 13.5). Further, as set

out at 13.7, the fact that witnesses have made use of the whole of the land for a variety of recreational purposes (which were of a character more consistent with village green use) has had the effect of diluting the strength of any use of the claimed route.

13.9 Actions of the Landowner

Although the current landowner made their intentions regarding public access perfectly clear upon purchasing the land in 2006, it is apparent from user accounts that both Mr Hall and Butser Turf and Timber Ltd acquiesced in public use of the land between A-D during their respective ownerships. As a result, there is no record of either landowner challenging public use, and the extent to which public use may have been permissive is also unclear. However, when considering the nature of public use on the land (see 13.7), it is considered that the absence of direct evidence from these landowners is irrelevant.

13.10 Conclusions under Section 31, Highways Act 1980

As discussed at 13.5.1, Section 31 cannot operate in respect of Section D-E on account of the land being held by a government department. In respect of the remaining section A-D, for the reasons set out at 13.6 and 13.7 (as summarised at 13.8), it is considered that the available evidence indicates that the public can not have acquired a right of way under the provisions of Section 31.

13.11 Analysis of the evidence under Common Law

This matter can also be considered (and in the case of D-E, can only be considered) at common law. For a claim to succeed at common law, the onus is on the applicant to show that the owners were aware of, and acquiesced in, the use of a route by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied from a sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user 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. The more notorious the use, the easier it will be to infer dedication.

13.12 Conclusions under Common Law

13.12.1 Unlike Section 31, the total period spanned by the user evidence can be considered. In respect of A-D, use by members of the public that were not connected to the landowner did not commence until the mid-1970s, but it is clear that use of the land was acknowledged, and acquiesced in, by the landowner after that time. However, up until 1982, when ownership changed hands, four of the nine people using the route during that period claimed a connection to the landowner, casting doubt over whether that use was 'as of right'. The quantity and quality of user evidence in respect of the whole route (A-E) is not considered

sufficient to satisfy the burden of proof required for a claim to succeed at common law.

- 13.12.2 As set out at 13.7, the claim for A-D is weakened by the varying nature of public use on the land, making it harder to make a case for the landowner dedicating any one route over the land to the public.
- 13.12.3 Although potentially vulnerable to a claim at common law, the Forestry Commission made its intentions clear through its deposit under Section 31(6) of the Highways Act 1980, which spanned the period 1992 – 1998.

14 Conclusions

- 14.1 The documentary evidence is insufficient to infer that a route has ever been dedicated to the public between A-E, but there is evidence of public use of the land dating back to 1962.
- 14.2 The evidence put forward in support of the claim is insufficient for it to be reasonably alleged that the claimed route has been used by the public as of right and without interruption for a full period of twenty years, under the provisions of Section 31 Highways Act 1980.
- 14.3 The available evidence is insufficient for a common law presumption to be inferred (ie that the landowner intended to dedicate the claimed route as a public right of way).

15 Recommendation

- 15.1 That the application be refused.