

HAMPSHIRE COUNTY COUNCIL

Background Report

Decision Maker:	Countryside Access Group Manager
Date:	11 April 2019
Title:	Application to upgrade Fawley Footpath 26 to a bridleway

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1 Executive Summary

This is an application, made under Section 53 of the Wildlife and Countryside Act (1981) to upgrade Footpath 26 in Fawley to a bridleway.

It is considered that the evidence submitted in support of the application is sufficient for it to be inferred that, on the balance of probabilities, the claimed route should be recorded as a bridleway on the Definitive Map. The application is therefore recommended for acceptance.

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

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

- 3.1. 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.
- 3.2. 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.
- 3.3. 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.
- 3.4. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.
- 3.5. 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

The claim was submitted in April 2008 by a resident of Blackfield. In October 2008, a further application from a different resident of Blackfield was received. The second application contained errors and was therefore not accepted by the

County Council, although the user evidence forms (UEFs) were retained and have been assessed along with the first batch of UEFs.

4 Landowner

The route runs over land owned by the Forestry Commission.

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

The claimed route is a short stretch of footpath at the end of the public highway; the footpath provides access to Blackfield Common. Footpath 26 originates (point A) at the end of West Common, a cul-de-sac road in Langley. It runs a largely straight course between two residential property boundaries and a line of trees, over a footbridge to a gateway (point B). Beyond the gateway is Blackfield Common, which falls within the perambulation of the New Forest.

It is described in the Definitive Statement as:

From Road U.143, northwest of West Common, to Parish Boundary From U.143 westwards along gravel road approx. 16 ft. wide enclosed 25 ft. wide between hedges, southwest along gravel road 14 t. wide, enclosed 25 ft. wide between hedge and fences, then along gravel road 8 ft. to 3 ft. wide, enclosed 20 ft. to 16 ft. wide between hedges, to Parish Boundary at Sturt Bridge

6 Background to the Application

- 6.1 The user evidence forms demonstrate that horse riders have been using this bridleway for many years. In her covering letter, the applicant refers to the condition of the footbridge on the route:

“...access with horses has never been a problem. We want to secure future access and to make sure that the bridge on the path which is slightly rotten will be rebuilt eventually so that it will withstand the weight of horses and that it is wide enough. At the moment we all ride across the footbridge which is unsuitable.”

From the statement above, it seems that concern about the deterioration of the bridge has been the trigger for the submission of this application, rather than an opposition to equestrian use.

- 6.2 The land is currently owned by the Forestry Commission and designated as open access land under s15 of the Countryside and Rights of Way Act (2000) and s193 of the Law of Property Act (1925). This designation covers all West Common road, in addition to the open forest. Enquiries have been made with the landowner, but the Forestry Commission were unable to provide details about the history of this allocation.

7 Issues to be decided

- 7.1 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.

- 7.2 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.
- 7.3 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.

8 Documentary Evidence

8.1 Ordnance Survey Maps

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. On each of the maps, the route between A-B is shown as an unobstructed continuation of the highway now recorded as West Common. The gate at the end of the footpath is shown from the third edition (1908) onwards.

8.2 New Forest Rural District Council Highway Handover Map (1929)

Highway handover maps were prepared when responsibility for highways transferred from rural district councils to county councils under the Local Government Act (1929). The maps indicated which highways were maintainable by the council. The extent of West Common is shown as a blue line (a metalled public highway, repairable by the rural district council); the line ends before reaching the maintained route, terminating at the bend in the road to the south of the commencement of the route.

8.3 New Forest Highways Maintenance Map (1946)

Highway maintenance maps were produced following the responsibility for highways being transferred to county councils; the maps show the roads maintained by the County Council at the time. The line showing the maintained highway extends beyond the position on the 1929 map to the current position, terminating at the point at which the footpath begins.

8.4 Other sources viewed

The route was not shown on either the tithe map or the railway plans in the local area. Following the National Parks and Access to the Countryside Act (1949), parishes were invited to submit maps of known rights of way to the County Council as the surveying authority responsible for producing the draft Definitive Map. The map submitted by Fawley Parish Council shows a solid blue line that commences at the first bend in the road on West Common, continuing in a northerly direction to meet the current line of FP26, then continuing onto Blackfield Common. There is no legend on the map, but the majority of routes are

recorded in blue ink, with a small number marked in magenta. There were no objections to the proposed route recorded when the draft Definitive Map was open to public scrutiny.

9 User Evidence

- 9.1 The application was supported by evidence of use from 18 local people, collected on UEFs. Only evidence relevant to use of this route as a bridleway has been taken into account, so evidence relating to use of the route on foot has been discounted, as access at that level was already granted (four individuals completed forms stating that they used the route on foot only, therefore their evidence has been entirely discounted. The remaining 14 applications were used in the analysis of this application). Where usage dates and durations are referred to, this is in relation to use on bicycle or horseback only.
- 9.2 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. The following information can be inferred from the UEFs:
- 9.3 The evidence charts public use of the claimed route since 1948 until the submission of the application. All forms were completed in 2008.
- 9.4 No users identified that they used the route solely on horseback or bicycle: all had indicated using the route on foot, and on either horseback or bicycle. Of the 14 individuals that completed relevant UEFs, the regularity of their use of the claimed route varies. 12 users identified that they used the route at least once a week, with three individuals claiming to use the route on a daily basis.
- 9.5 As outlined above, eight users identified that they used the route on foot, on horseback and on bicycle. Three users claimed to use the route on foot and on horseback, and three users stated that they used the route on foot and on bicycle.
- 9.6 The main reason that respondents identified for use of this route was for access to Blackfield Common (the open forest). All users stated that there is a gate at the end of the route (as described on the Definitive Statement), but that the gate was never locked. Users confirmed that there were no stiles affecting their use of the route. Two users identified that there was a 'footpath' sign along the path, although the sign is no longer present: one user said that it fell down. None of the users stated that their use was ever challenged, either by notice or in person, or that they had ever sought permission to use the route.
- 9.7 All users marked the same route on the usage map on the UEF; this is because the route is currently a Public Right of Way. For the avoidance of doubt, the route marked on the forms runs the length of FP26.

11 The Landowners

The current owners of the land are **The Forestry Commission**. The Forestry Commission has been consulted and has indicated that they will not oppose an order to record a footpath across the land, subject to a Traffic Regulation Order (TRO) being made to prohibit bicycles using the route, as they are not allowed on the open forest. As the purpose of this report is to determine the application to upgrade this route, the TRO will not be considered further in this report; the County Council will consult on this possibility in due course.

11 Consultations with Other Bodies

In addition to the landowner, the following people and organisations have been consulted on this application: The Ramblers, The Open Spaces Society, The Byways and Bridleways Trust, the British Horse Society, CTC, New Forest District Council, the New Forest National Park Authority, Fawley Parish Council and the Area Countryside Access Manager for Hampshire County Council. Where responses were received, these are set out below. Additionally, the local County Council Member, Councillor Alexis McEvoy, has been made aware of the application.

Fawley Parish Council supported the application and commented:

The bridge was widened a few years ago and made wider to allow horses to cross it without the riders having to dismount, but to allow it within the Law it should be made a Bridleway. It is access to the open forest and does allow horse riders access without having to traverse busy roads.

New Forest National Park Authority responded:

The New Forest National Park Authority supports the proposal. Please note that this section of the footpath is within Section 15 access land which already provides access to horses under Section 193 of the Law and Property Act 1925.

The Ramblers Association responded:

While we are not familiar with that short section of footpath, we would have no objection to the upgrade

13 Analysis of the evidence

The documentary evidence indicates that the footpath once formed part of a continuous route comprising West Common road. The Ordnance Survey maps show the route as a continuation of the carriageway, indicating that what is now recorded as footpath should be recorded at a higher status. However, it is apparent that this was not the view of the highway authorities of the early 20th century, and so the application must turn on the basis of user evidence.

The provisions of Section 31 of the Highways Act (1980) do not apply to 'Crown Land', and for the purposes of the Act, land held by a government department falls within this classification. As the land over which the claimed route runs is owned by the Department for Transport, Section 31 cannot operate and so the application must be considered at common law. Many of the tests that must be met in order to satisfy a dedication at common law are similar to those under Section 31. However, there is no necessity for use to have been called into question for a common law presumption to be inferred, there is no minimum period of user, and the amount of use which is sufficient to imply the intention to dedicate is dependent on the particular circumstances of the case.

13.3 Analysis of the evidence under Common Law

For a presumption of dedication to be inferred at common law, 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

- use must be as of right, ie. without force, without stealth and without permission
- use must be by the public
- there must be sufficient evidence to infer that the landowner positively intended to dedicate the way as public

Physical nature of the route

The claimed route is capable of being a right of way at common law, as the line that is now claimed does follow a linear route.

'Without force, stealth or permission'

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." There is a gate at the end of the footpath, which is described on the Definitive Statement. All users acknowledged the existence of this gate but have stated that it was always unlocked when they used the route.

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 access to the land was open and without secrecy, as users already had the right to walk the route. One user wrote, "I believed this to be a bridleway as there was a gate onto the forest whereas further in Kings Ride access to [the] forest is gained by style [sic]". Another user wrote, "The path has always been used as a bridlepath".

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

No users indicated that they ever sought permission to use the claimed route.

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 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.

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.

The majority of users cite access to Blackwell Common as their reason for using the path. All users appear to have been using the route as if they were exercising a public right. The proximity of the route to land classified as 'Open Forest' makes it highly likely that the route has, in the main, been used for public recreation and

the user evidence reflects this. None of the users indicated that they were related to, employed by, or a tenant of the owner or occupier of the land in question. The users were all local residents.

According to the evidence of the UEFs, the use of the claimed route on horseback has been considerable, with 14 individuals using the route on a regular basis. Four individuals claimed to use the route on a daily basis; the remaining usage ranged from 12-260 times per year. Two individuals stated that they had been using the route since 1948 and 1950; for the remainder of the users, the bulk of use occurs from 1980 onwards. It seems likely that this volume of prolonged use would have been sufficient to indicate to the landowner that the route was being used by horse riders.

13.4 Summary of user evidence

The evidence of use indicates that local people have been riding along the route of this footpath, either on bicycle or horseback, in every year since 1948, with the bulk of use falling after 1980. Use was not secretive, was without permission and was without force; it therefore appears to have been 'as of right'.

13.5 Actions of the Landowner

The land is owned by the Forestry Commission. There is no record of the landowners challenging public use or otherwise preventing or discouraging horse riders or cyclists from using the route, nor has the landowner reported that this has been the case.

13.6 Conclusions under Common Law

Unlike s31 of the Highways Act (1980), the total period spanned by the user evidence can be considered. There has been regular, unchallenged use of the claimed route that has been without force, without secrecy and without permission, since 1948. The landowner, the Forestry Commission, does not appear to have taken any steps to prevent individuals from using the footpath on horseback or bicycle.; this may be because horse riders already had the right to use this route due to the designation of the land under s193 of the Law of Property Act (1925)

It is considered that the evidence of use is sufficient for a common law dedication of bridleway rights to be inferred.

14 Conclusions

Because the land in question is owned by the Forestry Commission and is therefore considered Crown Land, s31 of the Highways Act (1980) is not applicable to this application.

The available evidence is sufficient 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

That a Definitive Map Modification Order be made to upgrade Fawley Footpath 26 to a bridleway, with a width unchanged from that set out in the Definitive Statement for the path.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

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

Document

Claim Reference: CR/1011

Location

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment:

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

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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

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

2. Impact on Crime and Disorder:

3. Climate Change:

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

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

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.