

HAMPSHIRE COUNTY COUNCIL

Background Report

Decision Maker:	Countryside Access Group Manager
Date:	28 May 2019
Title:	Application to delete Hyde Footpath 746

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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 delete Footpath 746 ('FP746') in Hyde from the Definitive Map.
- 1.2. It is considered that the evidence submitted in support of the application, and other evidence reviewed during the investigation, is insufficient for it to be inferred that, on the balance of probabilities, the claimed route should be removed from 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: -

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows...

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.

3 Summary of Legal Tests

- 3.1. The primary issue to be decided is whether there is clear evidence to show that public rights should be deleted from the Definitive Map.

- 3.2. Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Definitive Map Modification Orders (DMMOs) 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.
- 3.3. Any changes to the Definitive Map must reflect public rights that already exist. 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.
- 3.4. DEFRA’s [Rights of Way Circular 1/09](#) sets out the requirements for considering applications seeking to delete a right of way from the definitive map, or record a route at a lower status:
- “The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
- *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
 - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;*
 - *the evidence must be cogent.”*
- 3.5. Circular 1/09 reflects the decisions of the courts during recent years. In *Burrows v Secretary of State for Environment, Food and Rural Affairs* (2004) the court held that an application to modify the status of a way could not simply re-examine the same evidence that had previously been considered when the definitive map was first drafted – there had to be some new evidence, which when considered with the other evidence, justified the modification. In the case of *R v. Secretary of State for the Environment, ex parte Burrows and Simms* (1991), it was recognised that the term ‘discovery’ could apply to scenarios where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time the definitive map was being prepared. In *Trevelyan v Secretary of State for the Environment, Transport and the Regions* (2001), the Court of Appeal held that an Inspector considering an opposed order to delete a right of way from the definitive map had to start with the presumption that the right of way existed, and that evidence of some substance had to be produced to outweigh this initial presumption. In *Trevelyan*, Lord Phillips MR stated that:
- “Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some*

substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

- 3.6. Circular 1/09 also states that use of a way subsequent to its first being recorded on a definitive map cannot be seen to be ‘as of right’, as rights that cannot be prevented cannot be acquired. It is not possible for a right of way to be acquired through long use when use of the way is by virtue of it having been shown on the definitive map. Consequently, in this case the decision as to whether to modify the map must turn solely on evidence leading up to (and including) the drafting of the first definitive map - after that time vehicular use of the application routes would have been ‘by right’ as a result of their legal status.
- 3.7. A decision letter of an Inspector appointed by The Planning Inspectorate dated January 2018 (ref FPD/P0119/14A/2) states that, “to delete a route from the definitive map it must be shown that there was no public right of way at the relevant date of the first definitive map on which it was shown (...) If an objection had been made when the definitive map was being prepared then the onus would have been on those seeking to record public rights of way to demonstrate that the rights existed. Now that the definitive map has been prepared, it is an onerous task to prove an error.”
- 3.8. 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.
- 3.9. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.
- 3.10. 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 Landowner

The route is part of the Little Brook Farm estate.

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

FP746 is a short stretch of footpath in North Gorley in the parish of Hyde; it runs from Lawrence Lane across a field until it reaches the back of Little Brook Farm, it then cuts through the farm property and terminates at a gravel track. The gravel track is not part of the publicly maintainable highway.

The route is described on the definitive statement as:

From Road U.119 to North Gorley Green From Road U.119 over wire fence, northeastwards and eastwards across pasture, and over fence to North Gorley Green.

6 Background to the Application

- 6.1 The claim was submitted in December 2007 by a solicitor acting on behalf of the former landowner. The initial application was not accepted as it was not compliant with Schedule 14 of the Wildlife and Countryside Act (1981). The application was resubmitted in January 2008 and accepted by Hampshire County Council.
- 6.2 The applicants, who were the owners of Little Brook Farm at the time, wrote to the County Council in February 2008 indicating that they were not aware of the existence of the footpath until August 2007.
- 6.3 The applicants conducted their own research into the history of the route, including taking affidavits from the former owners of the farm; this research was submitted with the application. The affidavits, and the statement from the applicant, indicate that nobody connected with the property was ever aware of the existence of the footpath from the time that the first Definitive Map was published, to the owners noticing the route on a map in 2007.
- 6.4 Little Brook Farm was sold in 2009. Solicitors acting for the current owners have contacted the County Council to pursue the application.

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, the public footpath in question (FP746 in Hyde) was recorded on the Definitive Map in error.
- 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 any change to the map is supported by evidence. This might be proved by historic documentary evidence or by evidence of use in the recent past.
- 7.3 Historic documentary evidence has been examined to see whether the history and use of the route point to FP746 having been recorded on the Definitive Map in error. As outlined at 3.4, any evidence considered must be new, cogent, and of sufficient substance to cast doubt on the accuracy of the Definitive Map. The surveying authority must be certain that, on the balance of probabilities, the evidence demonstrates that a mistake was made at the time the First Definitive Map was produced. The 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.

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 the first two editions of the map (circa 1870 and 1895), there is no indication of a path along the route of FP746. On the third edition of the map, (circa 1908) a dashed line marked 'FP' appears, which follows the route of the FP746, terminating at the corner of the farm property. The dashed line is not present on the fourth edition of the map (circa 1930). The Ordnance

Survey surveyors marked what they observed on the ground; it is therefore possible that the line on the third edition terminates at the corner of the farm (rather than continuing to the track, as the present day route) because there was no visible line of the path across the farm property, and the line of the observed path across the field was no longer visible when the area was next surveyed.

8.2 Fordingbridge 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, and also indicated routes which were not considered to be the responsibility of the highway authority. The Fordingbridge Rural District Council handover map uses an OS base map that shows the line of FP746 as on the third edition of the Ordnance Survey County Series as described above. The line marked 'FP' has been annotated with a black dashed line, which the legend describes as a public footpath 'repairable by the District Council [but] not repaired'.

8.3 Highways Maintenance Map, Ringwood and Fordingbridge Division (1946)

Highway maintenance maps were produced following the responsibility for highways being transferred to county councils; the maps show the highways maintained by the County Council at the time. The map uses the same OS base map as the 1929 Highway Handover map (see above). The line of FP746, which is marked as 'FP' on the base map, is not marked with any annotation or colour-coding. However, two other routes in North Gorley (Footpath 747 and Bridleway 714) which were marked on the Handover Map and are, today, on the Definitive Map, are also not annotated.

8.4 Documents relating to the National Parks and Access to the Countryside Act (1949)

The National Parks and Access to the Countryside Act (1949) required surveying authorities to record Rights of Way on maps, which were to be periodically updated (later legislation required the maps to be kept under continuous review). This legislation resulted in a number of key documents that can assist with tracing the history of Rights of Way.

8.4.1 Parish Map

Parish maps were prepared by Parish Councils for County Councils when the first Definitive Map was being prepared; the map was produced to inform the County Council of the rights of way in each parish in order for the Draft Definitive Map to be produced. The Parish Map (circa 1952) shows FP746 clearly marked as the route currently recorded on the Definitive Map.

8.4.2 Objections Book

The book of objections contains a record of all objections received when the draft definitive map was open to public scrutiny. It also contains records of objections and amendments made when the Definitive Map was open to periodic review. Hyde FP746 was not referenced anywhere within the book of objections, indicating that no formal objection to the inclusion of the route on the Definitive Map was ever received.

8.4.3 Definitive Maps

On both the first (1955), second (1958) and third (c1958-1964) Definitive Maps, the route of FP746 is plotted as on the parish map, and as the route recorded today.

8.5 Other sources viewed

Sales Particulars

Jones Farm (later renamed Little Brook Farm) was sold in 1919. The sales particulars include maps and a description of the area. The map uses the Ordnance Survey County Series Third Edition as the base map, so the route of FP746 is marked as 'FP'. No mention of a footpath is made in the description of the farm, which refers to the field across which FP746 runs as 'pasture'.

Ramblers Association Route Inspection (1979)

The Ramblers Association (RA) surveyed footpaths in Hampshire in 1979 and recorded their observations, submitting them to the County Council. Of FP746, the RA wrote:

"It is apparent that this path is little, if ever, used and there is no access to either end of it."

Whilst these observations have little bearing on the determination of the claim, the comments made by the RA are consistent with the evidence presented by the landowner- that this route shows no sign of use.

Parish File

The County Council maintains a file relating to countryside matters (including countryside management and rights of way) for each of the parishes in the county. These files date back to around the 1940s-50s and contain, amongst other things, correspondence, maps, and work orders. The only documents of relevance were correspondence in the 1950s that corroborate the evidence presented in the affidavit of JP (see below). JP claims that the Parish Council was under pressure from the County Council to complete their map of Rights of Way. The letters indicate that the preparation of the Draft Definitive Map coincided with the Fawley Refinery Expansion Scheme, which took up a lot of Parish Council officers' time. The Parish Council asked the County Council for additional time to complete the map, but this was denied.

8.6 Documents supplied by the applicant

The applicant supplied a number of documents with their application. Where appropriate, these have been anonymised. The initials provided below refer to witnesses who have provided affidavits; these individuals were approached by the applicant on the strength of the individuals' knowledge of the route.

Affidavit of AW

AW's family had lived at the Little Brook Farm since the 1920s and AW lived at the farm until 2000. AW states that her uncle was the dairyman and he used the route of FP746 to get to work; nobody else used the path.

"I am absolutely certain that no one has ever exercised a right to pass over the land on the route recorded as Public Footpath 746. If they tried to do so my father, and I in later years, would have ordered them off the land."

AW states that she and her family were involved in the drafting of the Definitive Map and were unaware of the proposal for FP746, "had we been so aware, then an objection would have been made". AW also states that, to her knowledge,

nobody has used the route since the death of her uncle in the 1960s, after which time the hedge was planted, obstructing access from Lawrence Lane.

Affidavit of WD

WD has been a resident of North Gorley since 1939. He states that, “had there been a path through the farmyard across the field into Lawrence Lane, I would have had no hesitation in taking it” as a shortcut to reach home. WD states that he has never seen any member of the public using FP746.

Affidavit of BW

BW states that he was never aware of FP746, nor of anybody using the route. BW's evidence dates from 1977 and is therefore irrelevant to whether the route was correctly recorded in 1955, although his view corroborates the notion of the path being unused.

Affidavit of JP

JP states that he became aware of FP746 in August 2007: *“This came as a complete surprise to us as no-one has ever sought to exercise the right during our ownership and there is no sign of any public footpath across the land on the ground at all, nor was its existence revealed or disclosed in connection with our purchase.”*

JP conducted research into the history of FP746, including viewing Parish Council minutes from 1946-1955. His findings were as follows:

“It is abundantly clear to us from the Minutes that the Parish Council was under significant pressure from Hampshire County Council to supply data for the completion of the Definitive Map. (...) We believe that the pressure that the Parish Council was under led it to make an understandable mistake in the proceedings in 1953 that lead up to the draft Definitive Map and Statement subsequently thereafter confirmed. (...) There was no formal evidence of any pathway up to 1909 or indeed subsequent to it on Ordnance Survey maps. We do know that a farm path was in existence for the use of farm employees and members of the family who worked on the farm. (...) In the early 1950's the pathway would have been in regular use by the dairyman but not by the general public; and it seems to us that it may be surmised that Parish Councillors, under pressure to effect a return of data to the County Authority for evidence of access, had assumed that this farm path was a public footpath.”

Black and white photograph (undated but likely late 19th Century)

This is referenced within AW's affidavit:

“This land was always a cottage garden until recent years and not an area in respect of which anyone would have thought they had the right of way to walk. Certainly I would have challenged anyone entering the farmhouse garden as a trespasser and I know that my father would have done the same.”

Selection of Maps

The applicants submitted a range of maps:

- The Ordnance Survey maps described above, where the line of FP746 is only shown on one edition of the map, are provided.
- A conveyance map from 1936. This map shows a dashed line along the line of FP746
- The plan from the title deeds to Little Brook Farm. This plan uses an Ordnance Survey map as a base map, so the line of FP746 is not shown.

- An Ordnance Survey map from 1966. The route of FP746 is not marked, although a footpath to the south has been included.
- A map drawn in 1990 titled 'Tarmac – North Gorley – Jones Farm'. FP746 is not shown, although the footpath to the south is marked (FP747)
- HM Land Registry Title Document (1980). This map does not show FP746; the footpath to the south is shown as a dotted line.

Aerial photograph of Little Brook Farm (1969)

The photograph shows a series of worn paths converging at the corner of the field near the farm property. These tracks look to be consistent with those trodden by cattle and there is no single route that corresponds with FP746.

Aerial photograph of Little Brook Farm (2005)

The aerial photograph, which is taken from GIS, shows no signs of use along the line of FP746

9 The Landowners

Solicitors acting for the current owners of the land have contacted the County Council to pursue the original application.

10 Consultations with Other Bodies

The following people and organisations have been consulted on this application: The Ramblers, The Open Spaces Society, New Forest District Council, the New Forest National Park Authority, Hyde Parish Council and the Area Countryside Access Manager for Hampshire County Council. Additionally, the local County Council Member, Councillor Edward Heron, has been made aware of the application.

The Ramblers responded to the consultation to state that they had no objection to the application.

11 Conclusions

11.1 As set out earlier in this report, for an Order to be made to delete a route from the Definitive Map, there must be a discovery of new evidence, which must be cogent, and of sufficient substance to displace the presumption that the current depiction of the route on the definitive map is correct. It is considered that the evidence submitted in support of (or reviewed as part of the further investigation into) this application falls into one of two categories.

11.2 The first category of evidence is documentation that was available during the preparation of the first definitive map, and includes the Ordnance Survey County Series Maps, the Fordingbridge Rural District Council Highway Handover Map, the Highways Maintenance Map for Ringwood and Fordingbridge, the parish map, the objections book, and documentation in the parish file. Some of this evidence provides objective support for the depiction of the route on the Definitive Map (in particular, the Parish Map and Handover Map). This evidence was available during the drafting of the first definitive map, and consequently, it is insufficient to warrant the making of an Order to delete FP746. To do so would, in effect, be a re-examination of the evidence, which is not possible in the wake

of *Burrows*. Moreover, the evidence in this category does not indicate that the route was recorded on the Definitive Map in error. Whilst the depiction of the route on Ordnance Survey maps is inconsistent, it is apparent that the path existed for a significant period during the early 20th century and, according to other evidence, was considered by the highway authorities at the time to be a public footpath.

- 11.3 The second category of evidence includes documents which may not have been known to the decision-makers at the time that the first Definitive Map was prepared but which, when considered alongside the originally available evidence, are sufficient to warrant the making of an order to delete FP746. This category comprises the documents and affidavits submitted by the applicant.
- 11.4 The definitive maps clearly show FP746 as it is recorded today, and therefore do not present any new evidence. Equally, the Ramblers Association inspection reinforces the notion that the path shows no signs of use. However, lack of use of a route does not present evidence that a route was recorded incorrectly.
- 11.5 The affidavits submitted by the applicant provide an interesting history and background to the land, the use of the route, and speculation about how it came to be recorded on the Definitive Map. AW, whose family owned the land at the time the Draft Definitive Map was produced, states in her affidavit that her family did not know that the route had been included and would have objected had they known. However, the drafting of the definitive map was a highly consultative process, with draft maps (which had been produced with the assistance of the Parish Councils) being put on public display so that they could be scrutinised. Any objections were recorded and reviewed and there is no evidence that any objection was received in relation to FP746. The remaining affidavits, although interesting, do not provide any evidence of an error having been made, they only speculate how the route came to be recorded and assert that nobody has ever used it. These are insufficient grounds to compel an Order to be made to delete the route and fall short of the constituting the 'evidence of some substance' described by Lord Philips in the case of *Trevelyan*.
- 11.6 The documentary evidence indicates that the footpath was first recognised as a physical feature by the Ordnance Survey around 1908. The most compelling evidence that indicates that FP746 was not recorded in error is the 1929 Handover Map. The route was clearly marked on the Handover Map, indicating that the highway authority of the day considered the route to be public and when the Parish Council supplied information on Rights of Way within their parish to the County Council, they drew the line of FP746 on the map. It was the Parish Map that became instrumental in the drafting of the first Definitive Map. This evidence demonstrates a consistent period of time from c.1908-c.1952 when FP746 was recorded as a feature on the ground and, since at least 1929 was considered to be a public route, resulting in the route being recorded on the Definitive Map.
- 11.7 It is not possible to reach across the passage of time to establish why the decision was taken to include the route on the 1908 Ordnance Survey Map, the highway handover map, and the Parish Map (and therefore the First Definitive Map). There is the possibility that all maps, separately produced, replicated the same error. However, given that all three documents were produced by different bodies, this

seems unlikely. Further, the Draft Definitive Map was open to public scrutiny and no objections to the inclusion of the route on the Definitive Map were received.

- 11.8 It is apparent that the line of the path has not been used for a considerable period of time and it is understandable that the landowner desires to see the route removed from the Definitive Map. However, the available evidence does not sufficiently demonstrate that FP746 was recorded on the Definitive Map in error. It is apparent that the Rural District Council considered the route to be a public footpath in 1929, and no objections to the inclusion of FP746 were received when the draft Definitive Map was open to public scrutiny during the early 1950s. As there is insufficient evidence to warrant making a Definitive Map Modification Order, the landowners may wish to consider applying for an extinguishment order under s118 of the Highways Act (1980) on the grounds that the route is not needed for public use – given the apparent lack of use of the path for a considerable period of time, it would appear likely that this test could be met.

12 Recommendation

That the application to delete Hyde Footpath 746 from the Definitive Map be refused.

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/1007

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.