

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Countryside Access Group Manager
Date:	17 March 2020
Title:	Application for a Definitive Map Modification Order to record a Footpath between the B3004 (Caker Lane) and Footpath 26 (Hangers Way) Parish of Worldham

Contact name: Jennifer Holden-Warren

Tel: 01962 845326

Email: Jennifer.holden-warren@hants.gov.uk

Purpose of this Report

1. The purpose of this report is to assist the Countryside Access Group Manager in determining whether to accept an application to record a public footpath in the parish of Worldham.

Recommendation(s)

2. That authority is given for the making of a Definitive Map Modification Order to record a footpath 1.5 metres wide, as shown between Points A and B on the attached plan.

Executive Summary

3. This is an application made by resident of Alton ('The Applicant') in 2016 under Section 53 of the Wildlife and Countryside Act 1981, to record a footpath in the parish of Worldham. The application is supported by user evidence that the applicant believes demonstrates that a public right of way should be recorded on the basis of long-term use of the claimed route. If granted, the application would record rights for use by pedestrians.
4. Having considered the user evidence, conducted research to establish whether there is any relevant historic documentary evidence, and carried out a consultation, it is considered that there are sufficient grounds to record the route as a footpath.

Legal framework for the decision

5. WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review
 - (2) As regards every definitive map and statement, the surveying authority shall:

b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order

make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

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

i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way [to which this Part applies]

6. 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.

7. 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.

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

8. The claimed route commences on Caker Lane (B3004) and continues northwards along a field margin, to a junction with Worldham Footpath 26. The claimed route is approximately 380 metres in length.

9. The land over which the route runs is owned by Hartley Park Farm Ltd.

10. Footpath 26 is part of the Hangers Way, a long-distance route running between Alton and Queen Elizabeth Country Park, near Petersfield. The route crosses the A31 near its junction with the claimed route, a busy dual carriageway which bypasses Alton. Use of the claimed route circumvents the need to cross the A31, which appears to be the reason why the route has been used.

Issues to be decided

11. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. 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.

12. 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.
13. 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.
14. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order. 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.

Background to the Application

15. The application was submitted in April 2016. Due to a backlog of applications the matter was not taken up for investigation at the time.
16. In the covering letter, the applicant stated that the application was submitted to try and secure a safer link to the Hangers Way: the route currently involves crossing the A31, a busy dual carriageway.
17. This application was submitted following permission being granted for a solar farm to be established in the field where the claimed route is situated. The solar farm was subsequently created but it does not impact upon the availability of the claimed route, nor was any attempt made to address the application as part of the planning process.
18. During the planning consultation, which was undertaken prior to planning permission being granted, Hampshire County Council objected to the proposed solar farm, stating that it would have a detrimental impact on the public's enjoyment of the countryside. The County Council suggested that: *Should the planning authority be minded to grant permission for this development, we suggest that a mitigating improvement should be made to the local rights of way network, for example by providing a footpath along the western boundary of the site between Worldham Footpath no. 26 and Alton Footpath no. 50. This would provide a link between the Hangers Way and a*

safer crossing point on the A31, as well as improving the local walking network.

Applicant's Statement

19. The following statement was provided within the covering letter which was submitted with the application.

"The Hanger's Way actually crosses the A31 - which is obviously dangerous for families with children and dogs. Local residents have therefore opted for the much safer alternative of taking this track along the side of the field to access the Hangers Way east of the A31.

There is only a 4 second view of oncoming traffic where the official stile [sic] on the Hangers Way meets the A31. This allows very little time for crossing- and there is no warning to drivers on the A31 to denote that pedestrians may be crossing. This application is thus not simply a matter of convenience but of public safety.

The whole issue has become urgent following the recent authorisation for a solar park which is now under construction on the field that the track borders. Therefore, unless an application is granted, walkers may lose their safe and well established access to this very popular walking route."

Consultations

20. The following people and organisations have been consulted on this application: the Ramblers, the Open Spaces Society, Worldham Parish Council, East Hampshire District Council and the Countryside Service Central Area Manager. Additionally, Councillor Kemp-Gee, the County Council Member for Alton Rural has been made aware of the application. Where responses were provided, these are set out below.

21. Councillor Kemp-Gee, elected member of Hampshire County Council for Alton Rural ward

I walked that very route twice when examining the solar farm application, indeed my recollection at the time was that footway rights were already in existence on that route - not knowing that it was not a designated footpath.

So I suppose that is evidence that I walked it, with many others, at the time. It was thought vital to link up to the path to the east/south that leads into the SDNP (...) if the evidence is there then I support this application.

22. Worldham Parish Council

This was discussed at Worldham Parish Council's meeting last week and it was resolved to fully support the amendment to the footpath route. Councillors were concerned about the dangerous road crossing on the current route and therefore felt that this alternative was a much safer and sensible solution.

Comments by the Landowners

23. The landowners have been consulted on this application. They submitted the following separate statements, completed by their employees:

- “I have been working and running Hartley Park Farms Ltd and before that WP Butler & Son since 1969. I have never seen anybody walking from the B3004 road gateway next to Caker Solar Park, Willsom Farm, during this time. I have only seen people crossing the dual carriageway over the stile directly into pylon field and up to the foot path that goes over Neatham Farm.”
- “There is an established footpath which crosses the dual carriageway near Caker Bridge and continues along Neatham Down. This path is in regular use by individuals and groups of walkers, particularly in the summer. There has been a proposal to establish a footpath from Caker Lane along the boundary of the solar farm on the grounds that it is in regular use by walkers. I have been working on this land since the year 2000 and have never seen any walkers on this track which, since the establishment of the solar farm, provides the sole access to the field on the south side of Neatham Down. Indeed there is a strong case to prohibit any public access along this track as in recent years it has been frequently used for illegal dumping of garden waste, building materials, including asbestos, and other general rubbish”
- “I have been working for Hartley Park Farms Ltd since 2009 and in this time have never seen anybody walking along the track by the Caker field solar park on the B3004 on the edge of Alton. I have only seen people cross the A31 and go over the style [sic] into pylon field next door to get to Neatham Down.”
- “I have worked for Hartley Park Farms Ltd since 1994 and have never seen anybody walking the track by the solar park, caker field off B3004 in this time. The only people I have seen along here have been farm workers in tractors using this for farm use. I have only seen people crossing the dual carriageway A31 directly into pylon field via the style [sic] to join the footpath going over Neatham down.”

Documentary Evidence

24. There is no documentary evidence which demonstrates historic evidence of the existence of the route prior to the earliest use given in witness evidence (1960). This case will therefore rely on user evidence.

User Evidence

25. The application was supported by the evidence of use by 32 people, collected on user evidence forms. 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 user evidence forms:

26. The evidence charts public use of the route since 1960, up until the time the user evidence forms were submitted in support of the application. All forms were completed in 2016.
27. All individuals who completed a user evidence form claimed to have used the route on foot. 29 individuals stated that they had seen other people using the route; all of this witnessed usage was on foot, except for one individual who claimed to have seen a cyclist using the route. With the exception of this reference, there is no other information relating to use of the route by anyone other than pedestrians.
28. Frequency of use varies, ranging from once a year to weekly use. 15 individuals stated that they used the claimed route between one and four times a year, seven individuals claimed use between four and ten times a year. Six individuals claimed to use the route either once or twice a month, and two individuals claimed weekly use of the route. The remaining two users responded to the question about frequency of use with 'occasionally' and 'dog walking'.
29. The majority of claimed use of the route occurred within the last 20 years, although the earliest recorded use of the route comes from two individuals who claimed to have used the route between 1960 and 1999. 12 individuals claim to have used the route for the full 20-year period.
30. There was consensus amongst users about the location of the claimed route: users stated that the claimed route runs from the B3004 (Caker Lane) to the Hangers Way. However, there was some inconsistency from users about whether the path features gates or stiles. The majority of respondents stated that there were no gates or stiles along the route, although one user claimed there was a gate, and four users claimed that there were stiles. This may be because users may have been thinking about the route holistically with other routes in the area which include gates and stiles: there are two stiles along Footpath 26 (the Hangers Way), which adjoins the claimed route at the northernmost point.
31. All individuals who completed forms indicated that there had never been any notices or signs along the path, that they had not sought permission to use the route, and that they had never been challenged when using the path. Users also indicated that they never engaged any force during their use of the route, for example, breaking down a fence, or overcoming obstacles or locked gates.
32. Six users indicated that there had been a form of obstruction along the claimed route. One user stated that the route is overgrown in the summer; another user stated that it is muddy after heavy rain. Four users indicated that

there had been problems with access whilst the solar farm adjacent to the claimed route was established; of the comments made by these four users in relation to the establishment of the solar farm, two users referred to actual obstructions to part of the claimed route, and the other two users indicate that use of the claimed route was more difficult whilst the works were ongoing. All individuals who completed forms stated that they were not related to, employed by, or a tenant of the owner or occupier of the land, and that their use of the path was not in exercise of a private right.

33. The final question on the user evidence form asks for any further information that the individual may wish to provide. A number of these responses provide pertinent comments about use of the claimed route. Whilst matters relating to public safety are outside the legal framework, comments relating to safety provide more context about why members of the public have used the claimed route:

- “The path has value as a route to join Hangers Way, Neatham and Holybourne. Even with the solar farm, there is plenty of room for a path to run alongside.”
- “Many people use this, I assumed that there was an agreement with the landowner that this was acceptable”
- “To the best of my knowledge there has always been an opening off the B3004 to the unmade road/path and have never been accosted by anyone while using the path.”
- “I know that the danger of crossing the A31 deters many people from walking the hangers way”
- “For years locals have used this path to access the Hangers Way rather than having to cross the A31 with dogs and children.”

Analysis of the Evidence under Section 31, Highways Act 1980

34. 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: use must be by the public, and that should be reflected in its volume and the breadth of the type of users.
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

35. 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 the line that is claimed does follow a linear route.

36. The bringing into question of the public's right to use the path

The public's right to use the path does not seem to have been brought into question at any stage prior to the application being submitted in 2016. In the absence of any prior event that called use into question, the application itself can be said to have done so, giving a relevant period of 1996 – 2016.

37. Twenty years' use without interruption

12 users stated that they used the path on foot for the entirety of the relevant 20-year period of 1996-2016. The usage chart clearly demonstrates that the claimed route has been in use continuously from 1960 until the time the application was submitted (2016). The longest period of use is two individuals who claim to have used the route from 1960 to 1999. One user indicated that they had used the route between 1983 and 1993, therefore falling entirely outside the relevant 20-year period of use (under s31 of the Highways Act, 1980), yet providing evidence about how long the claimed route has been in use for.

Six users reported obstructions to the claimed route (caused by weather and an adjacent development of a solar farm), but these do not appear to have been sufficient to have interrupted their usage; only one user reported that the muddiness of the claimed route caused a break in their use. Where other users indicated that there had been a temporary break in their use, this was caused by factors irrelevant to the claimed route, for example, ill health or moving away from the area.

38. '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."

The route is open at both ends and there is no indication that users have exerted any force in order to access the claimed 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 demonstrate that access to the land was open and without secrecy. Whilst use of the claimed route ranges from regular usage, to more sporadic or occasional, given that 32 people have completed user evidence forms (and bearing in mind that all users reported seeing other people when walking the path), it is considered that this is a sufficiently large number of individuals to have brought the use of the route to the attention of the landowner.

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

None of the users stated that they had sought permission to use the route.

Use by the Public

40. *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.*

12 of the 32 users provided evidence of use for the duration of the relevant period of 1996 to 2016. There were an additional five users who claimed to have used the route for either a decade or longer within the relevant 20-year period. There is a considerable amount of claimed use outside of the 20-year period, including two users claiming use from 1960 to 1999, and one user whose use occurred entirely outside of the 20-year period.

The frequency of use of the claimed route was variable, ranging from once a year to weekly use. Two individuals claimed to have used the route on a weekly basis, and six individuals claimed to use the route either once or twice a month. Seven people indicated that they used the route between four and ten times a year, and 15 people stated their use to be between one and four times a year.

When considering the setting of the path (near to an urban area and providing a safer alternative to access the Hangers Way), and the strong likelihood of anyone other than those who have completed user evidence forms using the claimed route, the evidence of use could reasonably be considered to be representative of use by 'the public'.

41. *Use of a way should not consist solely of a particular class of person, such as the employees of a particular employer, tenants of a particular landlord, or customers of a particular business, if it is to be recorded as public.*

None of the users indicated that they were related to, employed by, or a tenant of the owner or occupier of the land in question.

42. Summary of user evidence

The evidence of use indicates that local people have been using the route in every year since 1960, with the bulk of use occurring within the 20-year period between 1996 and 2016. Use within the relevant period was not secretive, was without permission and was without force; it therefore appears to have been 'as of right'.

43. Actions of the landowner

The land is owned by Hartley Park Farms Ltd. As set out at paragraph 23 (see above), the owners state that they have never seen anybody using the claimed route. From the user evidence forms, there is no record of any of the landowners challenging public use.

Whilst the application appears to have been submitted as the result of a solar farm being constructed adjacent to the claimed route, this does not impact upon access to the route itself.

44. Conclusions under Section 31, Highways Act 1980

Analysing the evidence reviewed above, the conclusion reached is that the provisions of s31 of the Highways Act (1980) have been satisfied: that the public have enjoyed use of the claimed route as of right and without interruption for a period of 20 years.

45. Analysis of the evidence under Common Law

This matter can also 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.

46. Conclusions under Common Law

Unlike Section 31, the total period spanned by the user evidence can be considered. The user evidence indicates that there has been regular, unchallenged use of the claimed route by pedestrians since 1960 until the submission of the application in 2016. Use of the claimed route has been without force, without secrecy and without permission.

Whilst the landowner has opposed the application to record a footpath along this route and states that they have never seen anybody using the route, they have not taken any practical steps to protect their land from becoming a public right of way. Such steps may include putting up signs to indicate that the land is private, erecting and locking gates across the entrance of the route, or making a landowner deposit with the County Council under section 31(6) of the Highways Act (1980); these steps would have communicated to the public that the landowner did not intend to dedicate the route as public.

It is considered that the evidence of use of the claimed route is sufficient for a deemed dedication to be inferred at common law.

Conclusions

47. The evidence put forward in support of the claim is sufficient 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 of the Highways Act 1980.
48. 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).
49. The landowner, whilst opposing the application, does not appear to have taken any practical steps to prevent access to the claimed route, or communicate to users of the path that it was not a public right of way.

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

Hampshire maintains strong and sustainable economic growth and prosperity:	yes/no
People in Hampshire live safe, healthy and independent lives:	yes/no
People in Hampshire enjoy a rich and diverse environment:	yes/no
People in Hampshire enjoy being part of strong, inclusive communities:	yes/no
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

Location

Claim Reference: Case File (CR/1167)

Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

EQUALITIES IMPACT ASSESSMENT:

1. Equality Duty

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 by or under the Act with regard to the protected characteristics as set out in section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within section 149(7) of the Act (see above) 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 protected characteristic that are connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic that are 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 in which participation by such persons is disproportionately low.

2. Equalities Impact Assessment:

See guidance at <http://intranet.hants.gov.uk/equality/equality-assessments.htm>

Insert in full your **Equality Statement** which will either state:

- (a) why you consider that the project/proposal will have a low or no impact on groups with protected characteristics or
- (b) will give details of the identified impacts and potential mitigating actions