

HAMPSHIRE COUNTY COUNCIL

Background Report

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| Decision Maker: | Countryside Access Group Manager |
| Title: | Application for a Definitive Map Modification Order to record a public footpath on St Catherine's Hill, between Garnier Road and Five Bridges Road, Winchester |

Contact name: Harry Goodchild

Tel: 01962 846044

Email: harry.goodchild@hants.gov.uk

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 across St Catherine's Hill, running between Garnier Road and Five Bridges Road, in Winchester. The claim is supported by user evidence which the applicant believes demonstrates that the public have acquired rights through long use without challenge.
- 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 Mrs Margaret Taylor, a resident of Winchester.

5 Landowners

- 5.1 The majority of the claimed route runs over St Catherine's Hill, the freehold of which has been held by Winchester College since the late 19th century. According to the College, the land has been leased to the Hampshire and Isle of Wight Wildlife Trust (HIWWT) since 1982 (the current lease is dated 2000). The remainder of the route to the south runs through the corridor of land previously occupied by the A33 Winchester Bypass, land which is still owned by Hampshire County Council.

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 over two slopes and the summit of St Catherine's Hill, which is designated as a Site of Special Scientific Interest and is also a Scheduled Ancient Monument (the southern part of the claimed route also runs through a Site of Importance for Nature Conservation). The Hill itself is also designated as Open Access Land under the provisions of the Countryside and Rights of Way Act 2000.
- 6.2 The claimed route itself is approximately 1.75 kilometres long. It commences at a junction with Winchester Footpath 28 (Point A), near Garnier Road and a multi-use route that now runs along the former railway line, and proceeds up the northern slope of St Catherine's Hill along a well-defined earth path, running between hedges (to Point B). After approximately 340 metres, the path opens out into an open area of grassland. From here the path bears westward, past the 'Mismaze' (an ancient maze cut into the grass) and a clump of trees on the summit of the hill, and then down the southern slope, utilising a set of steps constructed by HIWWT during the early 2000s. The route then crosses Winchester Bridleway 30b and continues southward along the corridor of land once occupied by the Winchester Bypass, eventually terminating at a junction with Bridleway 1 (which runs along the Itchen Navigation) and Bridleway 504 (which coincides with Five Bridges Road).

7 Background to the Application

- 7.1 During the latter part of the nineteenth century, St Catherine's Hill was flanked on its western side by the Didcot, Newbury and Southampton Railway, which itself ran alongside the Itchen Navigation. During the 1930s, the A33 Winchester Bypass was built parallel to a newly re-sited railway line.
- 7.2 Following the completion of the section of the M3 motorway immediately to the east of St Catherine's Hill in 1994, the Winchester Bypass was ripped up and the land left to grass over. The southernmost 270 metres (approximately) of the claimed route lies within this corridor of land.
- 7.3 In 1999, Winchester College submitted a declaration under Section 31(6) of the Highways Act 1980, in which it acknowledged the existence of public rights already recorded, and further indicated its lack of intention to dedicate any additional rights, effective from the date of deposit. The College has stated that it has no intention of preventing public access to St Catherine's Hill, and indeed the designation of the area as Open Access Land under the CROW Act 2000 preserves the public's right of access.
- 7.4 Since around 2005, a large area of St Catherine's Hill has been recorded as Open Access Land under the provisions of the Countryside and Rights of Way Act 2000. Save for short stretches at each end, the entirety of the claimed route runs through this area.

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

Four maps were published by the Ordnance Survey at a scale of 25 inches to 1 mile between 1870 and 1940. On all four iterations, St Catherine's Hill is shown as being the site of a former chapel, the Mismaze, and an ancient 'Entrenchment', which circles the summit of the hill. However, whilst these maps show paths and tracks in close proximity to the hill, none are shown that correlate to the claimed route (or any other route which crosses or climbs the hill). This is perhaps unsurprising, as although the public have had access to St Catherine's Hill for centuries, during the period these maps were produced the termini of the claimed route was situated at points that coincided with either the railway or, in later years, the bypass. A large section of the claimed route to the south of the hill would also have run through the corridor of land occupied by the railway and the bypass during this time.

9.2 Extract from the Minutes of the Proceedings of the Highways and Planning Committee – 3 January 1952

This extract reflects discussions regarding St Catherine's Hill that took place during the preparation of the first Definitive Map of Public Rights of Way, pursuant to the National Parks and Access to the Countryside Act 1949. The Committee had this to say regarding the possibility of recording public rights of way on St Catherine's Hill:

"It is quite apparent that the user of the Hill for centuries past by the public has been on a footing entirely different from that of the user of a footpath. The Bursar of Winchester College has confirmed that there is no intention to restrict or interfere with user by the public of the Hill in the way it is now and has in the past been used, although he has indicated that agricultural needs might result in the College being required to use the Hill for grazing, in which case fences and stiles would be needed and dogs would have to be kept under control. The Committee has considered the legal and other practical difficulties involved in attempting to define on a map public rights in this case, bearing in mind that the history of user by the public goes back to the 13th century....To ascertain the full facts would probably involve a long search of archives (mostly in Latin) in the possession of the City, the College and the Dean and Chapter...It is doubtful whether such a search would be warranted at the present time (even if it were possible) particularly in view of the fact that there is no proposal to interfere with the public user of the Hill and that the matter only arises at the present time in view of the passing of the [National Parks and Access to the Countryside] Act. The Act itself provides for marking thereon footpaths which as a result of the due evidence available should be marked as public footpaths.

The Footpaths Consultative Sub-Committee considered the matter and decided that it would be most undesirable to take any action which might restrict now or in the future the facilities which the public have now and have had in the past to enjoy the slopes and top of the Hill generally, and have recommended this Committee that it would not be appropriate to mark public footpaths on St Catherine's Hill on the map now being prepared under the above Act...."

9.3 Newspaper Article – Unknown Publication (1961)

This article is kept at the Hampshire Record Office (the identity of the publication is not known). The article discusses proposed fencing of St Catherine's Hill:

“At first reading, the proposal to fence St Catherine’s Hill, Winchester, came as something of a shock to those who have come to know the hill as among the most favoured recreational areas in the central part of Hampshire. Yet, on reflection, it is the only sensible and constructive step that could be taken if the gorse, scrub and rank growth of the past few years is to be countered and the hill restored to something like the short, kempt, downland turf that it enjoyed a generation ago.

In truth, Winchester College, who own the land and have made it freely available to the public for time immemorial, are to be applauded for their enterprise. Not the least suggestion is made of any restriction to the public enjoyment of the hill...the promise is that in years to come St Catherine’s will return to something like its erstwhile popularity for the week-end Rambler...”

9.4 Aerial Photography

A number of aerial photographs have been taken over St Catherine’s Hill by the Ordnance Survey during the 20th century. Whilst not offering any indication as to the existence of public rights, they do provide a useful insight into the management of the land and how a number of routes have evolved.

9.4.1 1971

The 1971 photograph, printed in black and white, shows a number of routes leading up both the northern and southern slopes of the hill. From the north, two clearly defined paths can be seen heading generally southwards from Point A, directly towards the clump of trees at the hill’s summit. Due to the presence of vegetation, the existence (or not) of a path running on the exact line of the route between A and B is unclear, but there is no onward route apparent between C and D. From here onwards, a number of worn routes are visible leading southward from the summit to the current line of Bridleway 30a, but none of them reflect the line of the claimed route. A faint line to the south of the bridleway hints at the origins of a route leading through the woodland adjacent to the bypass, but the termination point of this route cannot be determined. The bypass itself coincides with the line of the southernmost 300 metres of the claimed route.

9.4.2 1984

As in the 1971 photograph, this black and white photograph from 1984 shows two routes leading up the northern slope of St Catherine’s Hill from Point A. Faint lines indicate the existence of a path between Points E and F, but again, no route on the southern slope coincides with that of the claimed path. However, the section running along the route between F and G is now clearly defined. A line leading south-east from Bridleway 30a runs towards arable fields, but no route is visible that corresponds with the claimed route between the bridleway and the crossroads at Winchester bypass.

9.4.3 1991

This colour photograph presents a similar picture to the photographs of 1971 and 1984. The only clearly defined routes are the two that lead southward from Point A, and north-eastwards from Point G. These routes lead to a perimeter route that skirts around the edge of the fencing on the western side of the hill. Although faint lines can be seen on various alignments between Points E and F, there is no single prominent route on the hill itself, and none which match that of the claimed route. As in the 1984 photograph, a well-worn route can be seen

between F and G, but nothing further south that coincides with the claimed route.

9.4.4 1996

For the first time, a worn path can be seen correlating to the claimed route between Points A and B, C and D, and between F and G, although no dominant route is visible between D and F. Other routes visible on previous photographs are also still discernible. By this time, the M3 motorway had been constructed and was now open, and the Winchester bypass had been dismantled - a corridor of exposed subsoil can be seen running from Garnier Road south-westwards around the western edge of St Catherine's Hill to the former junction with Five Heads Road. A clearly defined route that matches the line of the claimed route can be seen emerging from the southern tip of the adjacent woodland, curving south-westward over the site of the old bypass to meet the southern end of Five Heads Road (I-J).

9.4.5 2000

The 2000 photograph shows little change from the 1996 photograph. The sections between A and B and C and D are now much more clearly established, by now worn to the extent that the chalky subsoil has been exposed. Other routes crossing the hill are also starting to become more established – several routes fan out in a northerly direction from Point F (including one which accords with the claimed line), and two further routes can be seen heading north from Point H, though neither directly corresponds with the claimed route.

9.4.6 2005

The 2005 photograph reflects a further change in walking patterns on St Catherine's Hill. Some sections of the claimed route remain clearly defined, whilst others are less well worn. In contrast, there now appears to be one main means of accessing the hill from the south, along the line of the claimed route between F and G, along a set of steps (apparently constructed by HIWWT, since the 2000 was taken). South of Bridleway 30a, two routes lead southward towards the site of the former bypass, one of which partially corresponds with the line of the claimed route (G-H). A scattering of vegetation in the bypass corridor is now visible, but there is no defined route visible running through it that corresponds with the claimed route.

9.5 The Bar End-Compton Section) Side Roads Order - 1990

This order was one of a several made by the Secretary of State for Transport as part of the closure of the Winchester Bypass during the early 1990s. The effect of this particular order was to extinguish all highway rights on the stretch of the bypass that ran from the junction at Bar End past St Catherine's Hill to the crossroad junction with Five Bridges Road. The order plan shows by hatched shading the extent of highway lands to be stopped up, which includes the areas of land over which the northernmost 30 metres (between A-B) and the southernmost 300 metres (between H-J) of the claimed route run.

9.6 Statutory Declaration – Winchester College - 1999

This statutory deposit, made by Winchester College under the provisions of Section 31(6) Highways Act 1980, set out all the admitted public rights of way which fell within its ownership in the Winchester area, whilst simultaneously indicating a lack of intention to dedicate further rights. Insofar as it relates to this

application, the deposit covers the land to the east of the corridor extinguished by the 1990 Side Roads Order (affecting B-H). The effect of this deposit effectively prevents the acquisition of public rights (over the land in question) through long use after its date of deposit with the County Council.

10 User Evidence

- 10.1 The application was supported by evidence of use from nineteen local residents, collected on user evidence forms. This evidence is 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.
- 10.2 The evidence put forward charts public use of the claimed route since 1940, up until the time the application was submitted in 2007. The bulk of the use documented on the user evidence forms commenced in the mid-1990s and continued up until the time the application was submitted (though due to the designation of St Catherine's Hill as Open Access Land, public access continues to this day). All use appears to have been for recreational purposes.
- 10.3 Of the nineteen users, eight put forward use of twice per week or more. Of the remaining eleven users, seven stated use of between once per week and once per month, with the remaining four not providing information as to frequency of use. All users report having seen other people while walking on St Catherine's Hill.
- 10.4 All users recall walking through gates to access St Catherine's Hill, and some recall climbing over stiles. Some users report seeing notices relating to the control of dogs or stock, but no users indicate that they ever saw signage which challenged their use of the Hill. Similarly, no-one reports ever having been challenged in person.
- 10.5 Save for four witnesses, all users have stated that they used more than one path over St Catherine's Hill. In most cases, several routes have been drawn on the maps accompanying user forms.

11 The Landowner

- 11.1 **Winchester College** opposes the application on the following grounds:
- The whole area is designated as a public open space under the Countryside and Rights of Way Act 2000.
 - The southern descent from the Hill is by a recently created path improved by the Hampshire and Isle of Wight Wildlife Trust.
 - It is not possible to have claimed uninterrupted use of the claimed route because until 1993 it was bisected by the A33 dual carriageway (Winchester Bypass). The claimed route follows part of the bypass.
 - The whole area was closed during the Foot and Mouth epidemic of 2001 and no members of the public had access to Hill.

- In November 1999 the College submitted a statutory declaration under Section 31(6) Highways Act 1980 recognising all public rights of way on land around Winchester that fell within its ownership. The claimed route was not one of them.
- The College has pointed out the difficulty in isolating one individual (amongst the many thousands of people who visit the Hill every year) making his or her way up and down St Catherine's Hill in order to create a public right of way.

11.2 Hampshire and Isle of Wight Wildlife Trust

“Winchester College have informed the Trust that they submitted a section 31 declaration in November 1999 which covered St Catherine's Hill and that part of the proposed footpath follows the line of the old Winchester bypass which was in operation until 1993 and therefore could not have been walked prior to that date.

The Trust feels that it is important that, where landowners follow the procedures laid down by HCC in protecting themselves from prescriptive rights claims, in this case in submitting a section 31 declaration, that HCC give due weight to that process.

In addition as the land has been accessed under the CROW Act access provisions since 2001, those walking the route are not, in our opinion, repeatedly accessing a route in a manner that would establish prescriptive rights they are simply exercising a statutory right that already exists. We therefore do not feel that the route has been walked in an uninterrupted manner for the period required to establish definitive rights.

Unless HCC have evidence that undermines the information provided by Winchester College the Trust would oppose the definitive map modification amendment.”

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, Twyford Parish Council, Winchester City Council, South Downs National Park Authority, County Councillors Dominic Hiscock and Rob Humby and Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager). Responses are set out below.

12.2 Twyford Parish Council

“While Twyford Parish Council do not have any evidence of use themselves to add to what may have been submitted, they do support the application on the basis that access to St Catherine's Hill, Twyford Down and Plague Pits Valley has taken place for longer than any can remember and should continue. Also that while the arrangements for open access are much valued, and seem to be working well, the protection given by designation as a public rights of way is stronger and better understood.”

12.3 Winchester City Council

The City Council has raised no objection to the application.

12.4 South Downs National Park Authority

The SDNPA Access team has no further evidence to either support or refute the claim for public rights along the path between Garnier Road and Five Bridges Road via St. Catherine's Hill. However we would like to make the following observations.

- *St. Catherine's Hill is a well-used CROW Open Access site managed by the Hampshire and Isle of Wight Wildlife Trust; who are committed to managing the site for the benefit of wildlife, cultural heritage and public engagement.*
- *The site also forms part of the Winchester Downs Cluster, a group of 25 local landowners committed to enhancing the local landscape and wildlife, as well as the public's engagement with and understanding of it.*
- *For these reasons I see the proposed DMMO as unnecessary, providing no additional public benefit.*

13 **Analysis of the evidence**

13.1 It is widely acknowledged that public access to St Catherine's Hill has continued without interruption for many years, but the documentary evidence is insufficient to indicate that there has been any formal dedication of any particular route on the land. The application must therefore be determined upon evidence of user. The evidence of long 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

The claimed route is capable of being a right of way at common law, as although parts of it have not always been well-defined on the ground, and is not enclosed, the line that is claimed follows a linear route.

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

Here it is necessary to consider different sections of the route separately. The designation of the land through which B-H runs as Open Access under the CROW Act 2000 could be said to have called use into question, but the earliest identifiable event which can be said to have done this is the submission of the statutory deposit under Section 31(6) Highways Act 1980 by Winchester College in 1999, giving a relevant period of **1979 – 1999** for Section B-H. The remaining sections fall outside the scope of both the deposit and the Open Access designation, and so are unaffected by these events. Public use of these sections (A-B and H-J) can be said to have been called into question by the application itself, giving a relevant period of **1987-2007**.

13.5 Twenty years' use without interruption

13.5.1 There has been no overt challenge to public use by the landowner during the relevant period, and DEFRA guidance is that a break in user as a result of the Foot and Mouth epidemic should not be classified as an interruption to user under Section 31. However, it is clear that public use has been affected by the existence of the Winchester Bypass, which physically coincided with sections A-B and H-J of the claimed route until 1994, but which was extinguished by the Side Roads Order of 1990. The upshot of this is that public footpath rights on these sections can only have been accrued from 1990 onwards. As the application of 2007 does not allow a full twenty year period to have accrued (1990-2007), Section 31 cannot operate in respect of these sections of the claimed route, and so Sections A-B and H-J will have to be considered at common law (see 13.11).

13.5.2 In respect of the area of St Catherine's Hill that falls outside the corridor of land extinguished in 1990, (ie Section B-H) there does appear to have been an uninterrupted period of public use during the relevant period of 1979 – 1999. Sections 13.6 to 13.10 deal exclusively with this section.

13.6 'Without force, stealth or permission'

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

There is no evidence to suggest that access to St Catherine's Hill has ever been as a result of force, and as has been discussed, it is accepted that the public have enjoyed uninterrupted access to the land for a considerable period of time.

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.

Use of the claimed route has been open and without secrecy.

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

There is no indication to suggest that use of the claimed route has ever been subject to any kind of permission, as borne out by the user evidence.

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 Whilst the earliest stated use of the claimed route is over seventy-five years ago, the overall volume of use put forward is sparse, with evidence of only three users during the period 1940 to 1985. There are only two additional users by 1990 – all use by the remaining fourteen users commenced after that date, over halfway through the relevant period. Further, the use of four of those fourteen witnesses commenced after the end of the relevant period (ie after 1999), and so cannot be taken into account.
- 13.7.1.2 Whilst it is clear that, as stated by Winchester College, ‘many thousands of people’ visit St Catherine’s Hill each year, it is also clear that public use is not limited to any of the unrecorded tracks or designated rights of way which cross or circumnavigate the Hill. The public have wandered freely over the land, as stated in the press article of 1961, ‘for time immemorial’ (see 9.3), as reflected by the County Council Highways and Planning Committee’s view that ‘*the user of the Hill for centuries past by the public has been on a footing entirely different from that of the user of a footpath*’ (see 9.2). This is reflected by the land’s subsequent designation as Open Access under the CROW Act 2000. In this context, it can be argued that it would be impossible for a landowner to identify any particular route over which the public may have been asserting a right of way. This point has also been made by Winchester College (11.1.6). It is further reinforced by the fact that of the nineteen witnesses who provided evidence of use, fifteen of them indicated that they had used a variety of routes across and around the Hill.

The issue of ‘wandering’ has been considered in numerous court cases dating back over a century. In assessing the merits of this application, officers have found 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, to be particularly helpful. 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.

Such appears to be the case with this application. Given that all users were accessing St Catherine’s Hill for the purposes of recreation, it is natural that routes will have varied over an area allowing unrestricted public access. This is borne out by the user evidence. Ms Willmore’s article continues:

“The irony of this position is that too much public use can defeat all public use. If public use is low, and one route becomes defined, a public right can be found to have accrued. If the land is very well used, such that a great many tracks appear, and vary from time to time, it can be far harder to show that a public right to use exists on any particular route.”

This characterisation can be applied to this application. A significant number of people access St Catherine’s Hill every year, but the existence of a large number of tracks and pathways over the land (which have varied over the

years) makes it difficult to infer which routes, if any, might have accrued public rights. When considered in the context of the relatively low level of use that can be taken into account, and the fact that much of this use indicates that people have used a number of different routes, it can be said that the level of use of the claimed route is insufficient to meet the tests set out in Section 31.

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.*

None of the use appears to have been in the exercise of a private right, and so it would appear that the use of the route has not been restricted to a particular class of user.

13.8 Summary of user evidence

The evidence of use on B-H indicates that local people have been walking the claimed route (amongst others) in every year since 1940, with the bulk of use falling after 1990. Use within the relevant period was not secretive or as a result of force, and appears to have been 'as of right'. There is no evidence to suggest that public access on foot has ever been physically obstructed. However, as set out at 13.7, the use throughout most of the relevant period is sparse, and though this use increased throughout the mid-1990s, the fact that witnesses have used a number of other routes on the land has diluted the strength of that use which did take place on the claimed route.

13.9 Actions of the Landowner

Although Winchester College can be said to have acquiesced in public use of St Catherine's Hill during its ownership of the land, it made its intentions with regard to public access clear with its Section 31(6) deposit of 1999. Although there is no record of the College challenging public use of any particular route prior to 1999, it is considered that the weakness of the evidence covering this period renders this point irrelevant.

13.10 **Conclusions under Section 31, Highways Act 1980**

As discussed at 13.5.1, Section 31 cannot operate in respect of Sections A-B and H-J on account of there not being a complete twenty year period to consider. In respect of the remaining section B-H, for the reasons set out at 13.7, it is considered that the evidence of public use is insufficient for a deemed dedication to be inferred under Section 31.

13.11 Analysis of the evidence under Common Law

This matter can also be considered under common law (and solely, in the case of A-B and H-J), where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the 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.

13.12 **Conclusions under Common Law**

Unlike under Section 31, the limited period of use of Sections A-B and H-J between 1990 – 2007 would not preclude a claim succeeding at common law, and so it can be considered alongside Section B-H. However, for the same reasons set out at 13.10, the claim over the whole route must fail under common law. When considering the low volume of overall use, and the varying nature of the routes running over the area in question, there is insufficient evidence from which to infer that the landowner was dedicating any one route over St Catherine's Hill to the public.

14 Conclusions

- 14.1 The documentary evidence is insufficient to infer that there has been any predominant route running over St Catherine's Hill, but there evidence of public use of St Catherine's Hill dating back to 1940.
- 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.
- 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.

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/999

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.