

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	6 December 2017
Title:	Application for a Definitive Map Modification Order to record public footpaths at Ashe Hill Park Estate, Parish of Oakley
Reference:	
Report From:	Director of Culture, Communities and Business Services

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1 Executive Summary

- 1.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a number of routes running through the Ashe Hill Park Estate in Oakley as public footpaths. 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 sufficient for it to be inferred that, on the balance of probabilities, the majority of the claimed routes should be recorded on the Definitive Map. In respect of these routes, the application is recommended for acceptance (it is recommended that the other routes are refused).

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

- 3.1 The primary issue to be decided by this Committee is whether there is clear evidence to show that public rights, which are not currently recorded, subsist or are '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, Members should direct that an order is made so that the evidence can be tested further at a public inquiry. Save for the case of one of the claimed routes, officers do not consider that there is such a conflict in this case.
- 3.2 If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
- 3.3 Where a Map Modification Order is made by authority of this Committee, 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 must be referred to the Secretary of State for determination.

- 3.4 Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order as unopposed.

4 Claimant

- 4.1 The claim was submitted in February 2013 by a resident of Oakley, on behalf of an organisation known as the Oakley Footpath Sustainability Group.

5 Landowners

- 5.1 The network of paths to which this application relates run through the Ashe Hill Park Estate. For the most part, each section of path falls within the ownership of the property behind which it runs. As a result, there are in excess of one hundred landowners affected by the application. All have been consulted and many have made representations in response to the application (these are covered in further detail later in this report).

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

- 6.1 The routes that are now claimed were set out when the estate was built in the 1960s. All routes were surfaced at the time the estate was built but as they were never adopted as publicly maintainable highways, many are now in a poor state of repair. Further, due to issues relating to anti-social behaviour, a number of paths have been blocked off in recent years by adjacent landowners, and are now unavailable for use. Fifteen routes have been included in the application, all of which vary between 1.1 and 2.9 metres in width. As many of the routes intersect, for ease of reference, all junctions have been lettered on the Committee Plan, and the routes sub-divided as follows:

- Routes A-B-C and C-D - North of Meon Road
- Routes C-C2-E-G-H-I and E-F - North of Lyde Close
- Route H-J-K-L-O – South of Lyde Close
- Routes Q-R and P-P1-R-R1-U – South of Meon Road
- Route N-O-U-V-C1-D1 – West of Hoopers Way
- Routes S-T-X-Y, W-X and T-V – Between Medina Gardens and Blackwater Close
- Routes Z-A1-B1 and A1-C1 – South of Blackwater Close

7 Background to the Claim

- 7.1 The claimed routes have existed since the Ashe Hill Park Estate was built in the East Oakley area, with the first routes being built in the mid-1960s. The estate is comprised of four roads – Meon Road, Medina Gardens, Blackwater Close and Lyde Close. It was designed using the ‘Radburn’ principle, a planning system which, rather than providing footways next to roads, instead laid out paths running between houses. The system, which originated in North America and was used in a number of locations in the UK during the early 1960s, was successful in

segregating pedestrian and vehicular users, but it is now generally acknowledged to have been the setting for increasing levels of anti-social behaviour and crime in the locations where it was employed.

- 7.2 According to anecdotal evidence, Willett Homes, the developer of the Ashe Hill Park Estate, went into administration shortly after its construction. As a result, no formal agreement was ever reached to publicly adopt the claimed routes (officers have not been able to substantiate these reports). Three short sections on the estate have subsequently been adopted, and are recorded on the List of Streets Maintainable at Public Expense (C-E, H-I and P-P1-R-U).
- 7.3 In 2009, following incidences of anti-social behaviour (including dog-fouling, arson and vandalism) a number of residents on the estate opted to fence or gate their sections of the paths. Some owners have gone further, and have subsequently absorbed sections of the claimed routes into their back gardens as a result. There is evidence to suggest that, some years prior to this, some the paths in the Meon Road area (Routes A-B-C and C-D) were reportedly closed off, and although this prompted complaints to Basingstoke and Deane Borough Council, the closures appear to have remained in place.
- 7.4 The widespread closures of 2009 disrupted public access through the estate, and whilst welcomed by some local people, they also met with opposition by users of the paths. A number of witnesses report that to gain access to local shops, the school and the children's playground, they were subsequently forced to walk on estate roads that did not have footways. In 2012, a parish meeting was held specifically to discuss the issue, and was attended by a representative of Hampshire Constabulary and two officers from the County Council. An account of the meeting, provided by the applicant, is included at Appendix 1. At the meeting, arguments for and against the reopening of the routes were put forward, and those in favour of reopening the routes were advised that they could be claimed as public rights of way, if evidence could be put forward to substantiate that such rights had been acquired through long use.
- 7.5 The application now under consideration was received by the County Council in February 2013, and was supported by 51 user evidence forms. The application was taken up for investigation in October 2016, and approximately 120 letters were sent out to local residents to enable them to comment on the application and provide evidence as to how the routes had been used and managed over the years (some residents of the estate who own property affected by the application have also submitted user evidence in support of the claim). Many people living on the estate have expressed their opposition to the routes being reopened, citing fears of a return of the anti-social behaviour which brought about their closure. Consultation responses both in support of and in opposition to the application are summarised later in this report.

8 Issues to be decided

- 8.1 The issue to be decided by this Committee is whether there is evidence to show that, on the balance of probabilities, public rights subsist, or are reasonably alleged to subsist, on the routes shown on the Committee Plan.
- 8.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that an application to change to the Definitive Map must not be approved (or refused, as the case may be) simply because it would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing

the Definitive Map is made, Members must be satisfied 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 recent years.

- 8.3 User evidence has been examined to ascertain whether the use of the routes indicates that the public have acquired rights as a result of a deemed 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 no longer used nor needed. The County Council is under a statutory duty to record any rights that are found to exist.

9 Documentary Evidence

9.1 Ordnance Survey Maps/Aerial Photography

9.1.1 National Grid Series Map – 1972 (see Appendix 3)

This map gives an insight into the development taking place in the Oakley area during the late 1960s/early 1970s. The Ashe Hill Park Estate had been built by this time, but the area to the west of Kennet Way (which now accommodates the local play area), the area to the north (where Anton Close and Dever Way are now situated), and the southern section of Itchen Close are all undeveloped. All of the claimed routes are shown on the map, most by solid parallel lines varying between 2 - 2.5 metres apart. All routes are shown to be open and unobstructed, save solid lines across the path between B-C, and at Point C itself, indicating barriers or obstructions of some description. Access is possible between C-D, but it is not clear where the path terminates, as it continues into the back gardens of properties on Hamble Close and Kennet Way. Point C is shown to be fenced against the area of open space to the north-east. Due to the lack of development on the adjacent land, the route running around the northern and eastern side of Lyde Close between Points C and J (and between H-I) did not exist as enclosed routes on the ground at this time (they were later created as a by-product of the subsequent development of those areas), although the path running from E to G (terminating at the north of 13 Link Way) is shown by a pecked line, indicating the existence of an unenclosed path.

9.1.2 National Grid Series Map – 1982 (see Appendix 4)

This map, published ten years later, shows development having taken place in those areas that were previously untouched (including the play area, which accommodates a path running westward to meet The Vale). As a result, enclosed paths are now shown to the south of Anton Close and Dever Way (C-G), and to the west of Itchen Close (G-J and H-I). The path between B-C is still shown to be blocked at two locations. No other permanent obstructions are indicated on the map.

9.1.3 Aerial Photography – 1971-2013

A large number of aerial photographs, taken both by the Ordnance Survey and for Google, have been viewed as part of this investigation. Given the varying scales at which they were taken, some of them are more instructive than others, but those that are produced at a sufficiently large scale are helpful in indicating whether certain sections of the claimed routes were open on a particular date.

9.1.3.1 Ordnance Survey - 1971

This photo reflects the position shown in the 1972 map (9.1.1). At this time the estate had existed for less than a decade, and this is reflected by the lack of trees and other vegetation in front and back gardens of the properties. As a result, an unrestricted view of a number of routes is possible. The routes between P1-J and E-G are unobstructed, and a number of walked paths on the undeveloped areas to the east and north of the estate can be seen leading to junctions with these routes from neighbouring estates. A-B-C is cut off from the rest of the path network by a fence or hedge at Point C. The long north-south route running between Blackwater Close and Hoopers Way (N-D1) is largely obscured by shadow, and it is not possible to infer anything regarding the route's availability, although Z-A1-B1-D1 can be seen is unobstructed.

9.1.3.2 Ordnance Survey - 1985

By now the estate had been complete for a number of years, and an increased amount of vegetation is shown in property gardens. The planting of hedges against some of the perimeter fences makes the delineation of some of the routes clearer, but a number of newly planted trees are by now well-established, obscuring some of the routes from an overhead perspective. The routes referenced at 9.1.3.1 can be seen and are unobstructed, but little can be said with certainty with regard to the remaining routes.

9.1.3.3 Google Earth – 1999, 2005 & 2008

The 1999 and 2005 photos were taken in bright conditions, and as a result, a significant portion of the estate is covered by shadow, making interpretation difficult. However, the 2008 photograph, produced with a better resolution and taken on an overcast day, gives a much clearer picture. Vegetation can be seen overhanging a number of the routes from adjacent properties, but those sections of routes which are visible are open.

9.1.4 Summary of Aerial Photography Evidence

Where it provides sufficient detail, the aerial photography evidence supports the accounts of witnesses, in that it shows an obstructed path network from the early 1970s, right up until the reported closures on the estate in 2009.

9.2 **Local Government Records**

9.2.1 County Council Highways Adoption Plans – 1970-1976

These plans, held by the County Record Office, show the routes which were to be publicly adopted by the County Council following the completion of the Ashe Hill Park Estate. The plans reflect the current situation with regard to the publicly maintainable highways in the area – the roadways on the estate are shown as having been adopted but, save for C-E and H-I and P-P1-R-U, none of the paths are set out for adoption.

9.2.2 Minutes of Oakley and Deane Parish Council – 1969-1992

The minute books of Oakley and Deane Parish Council, held by Hampshire Record Office, contain numerous references to the claimed routes. There are recorded instances of the parish either asking the district surveyor to carry out works on (or to facilitate public use of) various paths on the estate, enquiries regarding the possible adoption of the routes, and letters written to adjacent landowners requesting that obstructing vegetation be removed.

“24 July 1969

A report was given on the meeting with the District Surveyor, arising from which, the council decided to formally request the County Council to adopt the footways on the Willett Estate.

12 March 1970

The state of the footpaths on the Willett Estate was discussed and the Clerk was instructed to ask the Rural District Council if any permission for the maintenance of these paths was contained in the planning approval.

19 November 1970

The Clerk was instructed to ask if a guard rail could be placed at the junction of The Drive with the footpath from Blackwater Close [Point B1].

21 January 1971

Councillor Mrs Kirby of the Rural District Council read a letter from Hampshire County Council regarding the footpath in Lyde Close, and after detailed discussions it was agreed to consider this further at the next meeting with a view to arranging a meeting between the parish council and the owners of houses in Lyde Close.

25 March 1971

Councillor Richardson reported his discussions with residents in Lyde Close regarding the footpath. He stated that he had interviewed the owner of the house at each end of the footpath, both of whom had consulted their solicitors and were not prepared to dedicate their piece of land which constituted the footpath. In view of the fact it was essential to have the cooperation of these two owners to enable the scheme to proceed, it was decided that it was not possible to do anything further in this matter at this time.

21 April 1971

It was reported that the District Surveyor would erect a guard rail at the footpath junction of Blackwater Close and The Drive. It was reported that Councillor Richardson had obtained the approval of the owner for the provision of a safety barrier on the footpath junction with Lyde Close and it was decided to ask the District Surveyor to provide this barrier.

21 October 1971

Complaints were made regarding rose trees overhanging the footpaths in the Willett Estate and it was agreed that members would report to the next meeting the addresses of properties where this occurred so that letters could be sent to the owners.

25 March 1972

It was decided that in light of the increase in the number of children now using them, two footpaths be tarmacked on the Willett Estate and the District Surveyor be asked to do this work as soon as possible.

27 January 1983

RESOLVED – that following matters be raised...the use of the footpath between Lyde Close and Link Way by lorries [K-J].

13 September 1984

Footpaths – Kennet Way area – RESOLVED – that the Clerk be asked to write to the owner of 7 Lyde Close pointing out that he is responsible for the cutting back of the trees which are obstructing the footpath at the bottom of his garden [E-G].

11 October 1984

The Chairman explained that following the council's letter requesting the owner of a property to cut back the tree overhanging and causing an obstruction to the footpath at the rear of the property, the person concerned had advised that the path was not a public right of way and therefore he was not required to cut the trees. RESOLVED – that the Clerk be asked to write to the Borough council and the county Rights of Way department to ascertain the status of the series of footpaths in the state roads of Kennet Way.

13 December 1984

It was reported that a reply had been received from the National Association of Local Councils advising that the only way a resident could be required to cut back the tree was for the people who use the path to assert their private right of way which was being obstructed. Beyond this the council had no powers to take any further action. The Chairman agreed to advise the complainant.

9 July 1987

Members received a copy of a report prepared by the Chairman about the possibility of the paths in the Kennet Way area being adopted as public footpaths. RESOLVED – that the Clerk be asked to make an initial approach to the County Council to explore the possibility of the paths in the Kennet Way area being adopted as public footpaths.

14 April 1988

It was noted that the County Council would not be prepared to adopt the network of paths in the Kennet Way area unless the paths were firstly repaired at the expense of the present owners and because procedure to formalise adoption would be extremely complicated because of the number of owners involved. It was therefore agreed to consult the Hampshire Association of Parish Councils to seek further advice on the matter.

13 April 1989

Footpath – Frome Close to Lyde Close [J-H-I] – Mr Briggs reported that a large tree was overhanging this path and the Clerk was asked to send the standard letter to the owner of the adjoining property asking for the tree to be cut.

9 July 1992

Pathway from Lyde Close to Itchen Close [J-H-I] – The Clerk was asked to arrange for one of the litter wardens to clear the accumulation of rubbish along this path.”

9.2.3 Summary of Local Government Records

Whilst the adoption plans indicate that the routes were not adopted at the time of construction, the parish minutes indicate that the paths on the estate have been in regular use since the late 1960s. Notwithstanding the fact that various residents do not appear to have considered the routes to be public (as evidenced by their refusal to clear obstructions), the multiple attempts of the parish council to get the paths adopted (and their efforts to keep the routes clear) indicates that they were being used by the wider community, and this was not limited solely to residents of the estate.

9.3 Correspondence

9.3.1 Letter from residents of Meon Road to Basingstoke and Deane Borough Council – 22 October 1977

In 1977, a number of homeowners living on Meon Road wrote to Basingstoke and Deane Borough Council to complain about public access to the route running behind their properties (C-D). The letter, (a copy of which was forwarded to the County Council by a current occupant of Meon Road), reads as follows:

“We the undersigned residents of Meon Road, East Oakley, wish that the footpath at the rear of our properties be closed as a public right of way.

We all bought our properties when the corner adjacent to No.4 was closed to Anton Close (there was no indication that it would ever be opened) and the footpath was used only by the residents on either side of it. Since the new houses have been built in Anton Close and the corner of the footpath has been open the quality of life here has greatly deteriorated.”

The letter goes on to list a number of factors that have led to this deterioration, including the loss of privacy, dog-fouling, vandalism and anti-social behaviour by passing children. It continues:

“As the path is our property we do not intend to suffer these annoyances for much longer. We wish to close the ends of the path with gates, indicating private property, but leaving the path as access for the residents of the adjoining properties.”

The letter concludes by asking for confirmation that the residents are legally entitled to take this action. It is not clear whether they received any reply to their letter. However, a copy of a letter addressed to Nos 4, 5, 6, 7, 8 and 9 Meon Road from the Company Solicitor of New Ideal Homes (also forwarded by the occupant referred to above) dated 19th January 1978, agreed that *“as the footpath concerned is a private footpath I cannot see any objection to the residents taking such action as is necessary to protect themselves from trespassers.”*

This exchange corroborates the Ordnance Survey evidence of 1982 (see 9.1.2), and indicates that the area to the north of Ashe Hill Park had been developed several years earlier (resulting in the creation of enclosed paths between C and J). It also supports the depiction on the 1982 plan of an obstruction at Point C that prevented access eastwards towards Point E, and anecdotal evidence from local residents that they encountered obstructions at Point C during the early 1980s (see Section 10).

9.3.2 Letter from Basingstoke and Deane Borough Council (Compliance Team) – 23 March 2005

This letter, sent to a then resident of Meon Road (provided by the current owner of the property), refers to the ‘Encroachment/blockage of alleyway’ to the rear of the property. It confirms that:

“...the case was closed on 9th April 2002 with a recommendation that no further action should be taken in this matter. The opinion of the investigating officer was that while there was technically a breach of planning control, that the breach was not of a sufficient magnitude in this instance to be expedient to pursue any further.”

The letter does not offer any insight into when the route was initially closed, but it does confirm that access beyond Point C was still not possible in 2002. It also ties in with the earlier Ordnance Survey evidence (and anecdotal accounts by local users) that access to routes A-B-C and C-D was not possible from an earlier date.

9.3.3 Correspondence from a resident of Oakley to the Parish Council – 10th April 2008

This letter was provided by one of the users of the path network along with a user evidence form. It reads:

“Further to the proposed notice of closure of the alleyway behind the premises of Lyde Close on 26th April, I wish to express my surprise at the lack of communication to the residents from surrounding neighbourhoods that may use this alleyway. An unsigned notice placed suddenly at either end of the alleyway without details of who to contact to object is most annoying, and as I have searched the internet for more information on this closure and found nothing, I am writing to you to register my objection.

The estate was planned and built with alleyways for the public to use. Rightly or wrongly, the responsibility to maintain certain alleyways fell on the residents and is mentioned in their deeds of sale....

....the most important part of this particular alleyway is the section from the entrance of Hoopers Way through to Meon Road. The more senior residents of this area frequently use this part when going to the park or the shops and therefore every effort should be made to keep this part open and keep it maintained....”

9.3.4 Emails to Oakley and Deane Parish Council – April - June 2009

Along with a user evidence form in support of the application, one resident of the Ashe Hill Park Estate, also forwarded an exchange of emails between himself Councillor Cecilia Morrison, the then Borough Councillor for Oakley and North Waltham.

The emails confirm the introduction of obstructions on several routes, and therefore enable some of the closures to be pinpointed more or less to the exact date:

16th April 2009

“Whilst walking my dog today I encountered a fence panel, apparently by someone from 17 Lyde Close which has been installed to fence off the alleyway between Lyde Close and Link Way in Oakley. Can you confirm that this has been done with the permission of the District Council or Highways Authority and if not can you get someone to contact the people involved and ask them to remove it and reopen the alleyway please.

My understanding is that the people of Lyde Close cannot close their footpath because it has existed for more than 20 years.....unless a Local Authority, or Government Department, has agreed to this I believe that the Council should take steps to reopen this Right of Way otherwise this will set a precedent and many other footpaths in Oakley will be closed in future.

19th April 2009

“Today I noticed that another fence has been erected completely closing the footpath between Lyde Close and Link Way. This time by 22 Lyde Close. At least we can still walk to the shops and the park via the Hoopers Way footpath but for how much longer?

Pedestrians will be forced to walk up and down Lyde Close road which will eventually cause an accident, as there is no pavement, and someone will be injured....I hope you are able to persuade them to see sense and reopen this Public right of Way.

27th April 2009

“Walking the dog today I came up against another fence blocking the footpath between Meon Way [sic] and Hoopers Way. Now residents of Hoopers Way and Link Way can no longer use the footpath to reach the shops in Meon Way or go to the Kennet Way park.

Are you having any success in getting this illegal blocking of footpaths stopped?”

Councillor Morrison responded in full on 10th June 2009:

“I have received confirmation from Hampshire County Council Highways that to convert these footways into public adopted and maintained areas individual agreements would have to be obtained for each resident. This would be a lengthy and expensive task notwithstanding the fact that possibly not all residents would wish to agree (as happened in the 1970s when the County Council were willing to adopt the footways).

The only other course of action which could be taken is for the Parish Council to apply to Hampshire County Council Rights of Way who advise that there could be a possibility of establishing a Right of Way as the pathways have been in continuous use for over forty years....

...The Parish Council will be sending this information to all residents in the immediate area who may be affected by the present situation. If the Parish Council feels that there is a sufficient number of residents who feel strongly about the closure of these footways and after full consultation, then application could be made to Hampshire County Council Rights of Way.

If and when this process is completed and the Footways are designated as Rights of Way the Parish Council could then be responsible for upgrading and upkeep which would have some financial implications for the village.”

9.3.5 Article in Southern Daily Echo – 15th August 2009

This article, forwarded by a local resident, is entitled “Dismay after residents act to block off footpath.” It reads:

“A DECISION by people in Oakley to block off a footpath that has been open for more than 40 years has been met with dismay. Residents of Lyde Close took the decision following a spate of vandalism, drug-taking and dog-fouling on the footpath. Nearby residents use the alleyway, which runs behind the back gardens of people in Lyde Close, as a route to local shops and schools. Alex Mills, aged 17, lives in Hoopers Way, which joined the alleyway before it was blocked off. He said: “It makes it so much longer to get to the shops. It used to take a minute, now it takes ten. It has also upset the elderly people here, who now have to walk all the way round. It’s sad that it’s come to this.

People in Lyde Close blocked the alleyway by placing fences at each end as well as several in between. At Oakley and Deane Parish Council on June 9, a resident of Lyde Close defended the decision. The resident, who asked not to be named, said: ‘I’m one of the people who closed it and have lived there for 27 years. On the first day I moved in, I had potatoes thrown in my garden and since then I’ve had people trying to climb over my back fence, people picking fruit from my trees and recently a boy stood in the alley smoking cannabis from a bong. “The list is endless, we’ve asked for help from the police and all they say is ‘we’d like to close all the alleys in the area’.

The alleyway was created in 1966 as part of a network of paths that criss-cross the estate. After consulting solicitors, the Lyde Close residents decided they could legally close the path as they hold ownership of it under their house deeds and it was closed at the beginning of June. Oakley and Deane Parish Council will decide at its meeting today whether to apply for the path to be established as a public right of way, a process which could take up to five years.”

9.3.6 Extract from January 2012 issue of ‘Link’ Magazine

The following extract is taken from a letter, written (and forwarded) by a local resident. IT appeared in the local ‘Link’ magazine in January 2012. It includes a reference to a further closure on the estate:

“I write in disgust at finding yet another alleyway closure in Oakley this weekend, this time blocking public access from the Dever Way entrance through to Itchen Close and onto Avon Park Road...”

9.3.7 Letter to Borough Councillor Diane Taylor – 26 June 2012

This letter, a copy of which was forwarded by the applicant, was written by a local resident at the time that access to the claimed routes was under particular scrutiny, and immediately prior to the parish meeting held in July 2012 (see 9.3.8):

“I have received a copy of your letter....regarding the Ashe Hill Park footpath problem. As I am away on holiday at the time of your meeting I am setting down my thoughts in the matter and trust they will be of value.

1. As Group Architect (1965-70) of the Basingstoke Development Group I am aware that my predecessor Alan McCulloch was instrumental in encouraging Willett Homes (the Developers for Ashe Hill Park estate) to include footways as natural desire lines. The reasoning being that the footways should safely and directly link dwellings to schools, shops etc rather than those conventionally tied to a roadway. The suggestion was accepted by the Developers and included in the design drawings – the same design drawings that received detailed planning approval. The proposal at the time was that ‘The Drive’ was to be a bus route hence the generous lay-bys in the Willett Homes area of the roadway.

2. During construction it must be remembered that it is a condition of the Highway Authority that roads and footways must be constructed to a certain specification level before they can be considered for adoption. It is my understanding that the roads and footways of Ashe Hill Park estate were fully adopted by the Authority before the Developers went into administration. In practice the Highway Authority has maintained the roads in The Drive and the roadways in Kennet Way and related culs-de-sac but, over the last 45 years, the Authority appear to have entirely ignored the existence of the ‘desire line’ footways.

3. The house owners who have blocked off the footways appear to have ignored the requirement of the deeds of their property. This in turn has and will cause problems of access for statutory and service providers. Each may have a statutory right of access to their cables, pipework and terminal points that might be located within the ‘desire line’ footways.

4. Clearly opinion varies on the rights of way for pedestrians. One thing that is certain however is that the desire line footways have been open continuously to the public for in excess of 40 years. If legally challenged opinion may well identify that all the existing footways carry an established right of way for pedestrians. An inspection of the deeds of the affected properties may be important to this issue.

5. The result of blocking-off the rear footways has generated in recent times the further problem of fly-tipping. Waste material that may well be attractive to vermin and resultant disease.”

9.3.8 Extract from September 2012 issue of ‘Link’ Magazine

This account, written by the applicant, recounts the events of a meeting held at the Newfound Sports Pavilion, Oakley, on 11th July 2012. It was reportedly published in the September 2012 edition of ‘Link’, and is included in its entirety at Appendix 1. It provides a concise summary of the history of the estate, and the various views held by residents of the parish, as well as providing a context for the application which is now under consideration.

9.3.9 Letter from Basingstoke and Deane Borough Council (Compliance Team) – 3 September 2012

This letter was forwarded to the County Council by a local resident during the consultation on the application. It appears to be a generic letter, addressed to a number of residents living on the Ashe Hill Park Estate. It explains that:

”...A number of residents are at this time seeking to ensure the pedestrian footpaths located to the side and/or rear of the properties in the immediate locality of Meon Road, Lyde Close, Medina Gardens and Blackwater Close provide free and unobstructed pedestrian passage – as we understand is required by covenants contained within the relevant properties Title Deeds.

The matter of closure and enclosure of stretches of the footpaths in question have also been brought to our attention...you are receiving this letter in order to confirm the footpath to the side and/or rear of your property was observed on 25 June 2012, as having been closed and/or enclosed by way of the erection of wooden fencing panels.

Although the stretch of footpath in question has been closed....this action has not generated a breach of planning control. However, should the stretch of footpath be used for residential purposes (if enclosed rather than closed off) at any time in the future this would generate a breach of planning control...

...Notwithstanding the planning status of the closure of the footpath...in recognition that we have been made aware of the Title Deed covenants which require the maintenance and provision of free pedestrian passage over the footpath(s) we would take this opportunity to invite you to voluntarily remove the fence panels which have resulted in the closure and...return the rear residential curtilage boundary fence line of your property to its original position. We would also advise that should the closure remain moving forward this may render you liable for any future civil actions....”

9.4 Conveyancing Documents

9.4.1 Officers have carried out a number of Land Registry searches on properties located on the Ashe Hill Park Estate. Many of these documents include a copy of the original Transfer between the developer and purchaser in the 1960s. In each case, this document sets out a number of private rights attached to the property, including, in the First Schedule:

“A pedestrian right of way at all times over the footpaths on the estate.”

The Second Schedule sets out the following:

“A pedestrian right of way in favour of the owners and occupiers for the time being of the remainder of the said estate at all times over the footpath coloured blue on the said plan.”

In all cases, the plan accompanying each document shows the area coloured blue as corresponding with the section of path running behind the property, also coinciding with a section of one of the claimed routes.

In the vast majority of cases, the following requirement appears in the Third Schedule:

“To maintain cleanse and keep in good order and condition and free from all obstruction the land shown coloured blue on the said plan, being the footpath subject to rights of way.”

It would appear that the requirement set out in the Third Schedule has, in a number of cases, not been complied with, but this is not something which has a bearing on whether the public have acquired a right of way over any of the routes, and is not a matter which falls within the jurisdiction of the County Council. However, the provision of a private right of way over the paths on the estate for residents of Ashe Hill Park does affect what evidence of use can be taken into account when determining this matter (discussed later in this report at 13.6).

9.5 Summary of Documentary Evidence

The above evidence is useful in identifying approximately how long certain paths have been available on the ground, and when access to others was withdrawn. The parish council minutes offer a clear indication that the routes on the estate were in general public use, and reflect its attempts to have the routes formally adopted. Officers have undertaken a thorough search of County and Rural District Council Highway and planning minutes, but have not been able to find any specific reference to the intended purpose of the claimed routes. The application must therefore be determined based upon the evidence of use put forward by local people.

10 **User Evidence**

- 10.1 The application was supported by evidence of use from fifty-seven local residents, in the shape of user evidence forms (accompanied by maps on which users highlighted the routes they had walked) and signed statements. For the purposes of this investigation, the evidence of seventeen of these witnesses has been discounted. Twelve of these users have been excluded because their use can be categorised as having been in exercise of a private right (this is explained in more detail later in the report). The remaining five users provided insufficient information about their use for it to be considered (eg no dates of use provided or no map showing the routes that were used). The dates of use of the remaining forty people is summarised in the chart at Appendix 2. The table is anonymised and is, by necessity, a generalisation. However, it provides an insight into the length of time the public can be said to have used the paths on the estate. A sample of some of the user evidence put forward is included from 10.7.

- 10.2 The evidence put forward indicates that there has been public use of the claimed routes since they came into existence in the mid 1960s (the earliest date given is 1966), around the time the Ashe Hill Park Estate was constructed. The bulk of use captured in the forms and statements commenced during the mid-1980s, with the majority of use continuing until 2009, when a number of the claimed routes were blocked off (although use of routes that were not blocked is still possible today). Use of the routes varies depending on each user's point of origin, and the purposes for which the claimed routes were used (eg school drop-offs, walking to the local shops/park and dog-walking).
- 10.3 Of the forty users, ten provided evidence of daily use of the paths. Eleven users put forward use of several times per week, and a further nine provided evidence of weekly use. Of the remaining ten users, three put forward use of at least once per month, two use of once a month, and two less than once month, with three users not recording a frequency of use on their forms. Most users state that they used the routes to avoid the estate roads while either dog-walking, visiting the local shops, or taking their children to and from school. All users report having seen other people using the routes.
- 10.4 Save for one user (who reported being told by a local resident that route C-D was not public during the 1970s), no witnesses reported that their use was ever challenged by anybody prior to 2009. Several witnesses recalled a gate or fence being installed on the path to the rear of Meon Road between A-B-C, and although recollections differ regarding the date this obstruction appeared, the general consensus is that this happened at some point during the early/mid-1980s.
- 10.5 Six users recalled seeing signage on the route running to the south of Lyde Close (O-K) immediately prior to the widespread closures in 2009. The notice apparently advised that the route was to be closed imminently. Three further users recalled seeing notices relating to dog fouling (it is possible that these users are recalling the same notice, as anecdotal reports indicate that the notice relating to the closure between O-K referenced this issue as a reason for the closure).
- 10.6 None of the users reported having to pass through gates, or climb over stiles to gain access to the routes prior to 2009. It can therefore be said that, with the exception of routes A-B-C and C-D (which were obstructed much earlier), the fences and/or gates erected in or around April 2009 brought public use of a number of the routes to a halt. No other obstructions are reported on the remainder of the routes, which are all still accessible.
- 10.7 **User A** (completed statement in 2016) has lived in Oakley since 1980, and moved to his present address on Hoopers Way in 1990. From this date, he used the route running from D1 to P1 (via Point U) to reach the park when taking his dogs for a walk. The frequency of his use varied, but increased in the winter months (probably daily) due to the extra shelter the route provided during bad weather. He also occasionally used the route running east from Point O. He often saw other people using the routes, including youngsters coming home from school and dog-walkers. He does not recall any closures or challenges to use prior to 2009.
- 10.8 **User B** (completed statement in 2016) moved to Avon Way in 1972. From that date, she used the claimed routes in the proximity of Lyde Close, Medina Gardens and Blackwater Close for the purposes of walking her dogs, (which she did twice daily) as they were ideal for keeping them off the roads. She used the routes around Lyde Close to take her daughter to school, the play area, and also to visit the local shops, and her husband used them to get the paper every day. The

routes were closed in 2009 with no prior warning – it is believed this was as a direct result of some anti-social behaviour which occurred around that time.

This witness's use was never challenged prior to 2009, but she does recall that the route round the back of Meon Road was blocked off around the early 1980s, first on the corner and then adjacent to Number 4 (Point C) - having used the route to visit a friend who lived in Hamble Close, she was unable to use it after this time. She also recalled that she couldn't get out through Anton Close before the other closures were implemented, although she cannot remember an exact date. All other routes remained available until the closures of 2009.

- 10.9 **User C** (completed statement in 2016) lives in Oak Close, where she moved with her parents as a child. Save for about 18 months when she lived in Basing, she has lived there continuously since 1967. As a result, she began using the claimed routes around the time the Ashe Hill Park Estate was built. When she was at school she made daily use of the routes running through the western half of the estate. She also used them when out with or visiting friends.

This witness's parents moved to Anton Close in 1985, and around that time she started using the route that linked Lyde Close and Anton Close to cut through (E-F), at least 5 times per week. She also occasionally made use of the east-west route that ran towards Itchen Close when taking the dogs for a walk (between O-K). Her use of the routes was never challenged by anyone, and she never encountered any obstructions prior to those that were introduced in 2009. She often saw other local people using the routes, including lots of school children and mothers with pushchairs.

- 10.10 **User D** (completed statement in 2016) moved to Frome Close in 1985, but prior to that her daughter went to school in Oakley, so she was familiar with the area before then. She has always owned dogs and the path network on the estate provided a means of walking them. She would do this twice daily, and the routes she used most frequently to do this were the paths to the north and south of Lyde Close. Other routes on the estate she would walk approximately 3 times per week, depending on dog walking routes. She would often see other dog walkers, mothers with prams and children walking home from school - both residents of the estate and people from further afield.

This witness believes that all of the routes were available when she first moved to the area, and initially she used all of them. She believes that the closures adjacent to properties in Meon Road occurred in around 1999, and the closure at Point F introduced shortly afterwards. She was never challenged by anyone when using the routes, and never encountered any obstructions prior to 1999, when the above routes were shut without warning.

- 10.11 **User E** (completed statement in 2017) moved to Itchen Close in 1983. At that time her eldest daughter attended Oakley School (which lies to the west of The Vale) and her youngest was at pre-school. She walked along the route which ran along the south side of Lyde Close through Kennet Way when taking them to school (I-P1). She walked this return journey twice per day on the morning and afternoon school runs. Her use of the route reduced after 1990 when her children left the school.

In 1983, when her family moved to the area, there was a greengrocer, newsagents and butchers resident in the shops at Meon Road, and for a while a mobile library parked on Kennet Way every week. The witness and/or her husband would often walk the above route to pick up supplies, although the closure of those shops

reduced the need to walk the route as frequently. Their daughter had friends who lived on Dever Way and Blackwater Close, and the paths on the estate were used to collect her, approximately once a week. The family would use the route running between N and D1 most weeks when walking the dogs, although the frequency varied.

10.12 **User F** (completed user evidence form in 2012) lives in Link Way, but is apparent from the details on her form that between 1990 and 2000 she lived on Meon Road (adjacent to Point O). She provided particularly detailed evidence of use of the path network dating back to 1966, as follows:

- Between 1966 and 1974, daily use on all of the routes west of (and including) N-D1,
- between 1974 and 2009, daily use of Route P1-J,
- between 2000 and 2009, daily use of Route J-C2 (as well as H-I and E-F),
- between 1966 and 2000, occasional use of Q-R (as well as the east/west spur connecting to it), and,
- between 1966 and 1990, occasional use of A-B-C and C-D.

This witness stated that she used the routes as a safe route to school and the local shops, a means of visiting friends, and for walking the dog. She also indicated that some of her use was in exercise of a private right, when she ran errands for neighbours or visited friends, and between 1990 and 2000 when she was resident of Meon Road, at which time she maintained a section of footpath “as instructed on house deeds”.

She was never challenged or prevented from using the routes until 2009, but also provided a copy of a letter sent to Oakley Parish Council in April 2008 indicating that a notice appeared on the route south of Lyde Close (O-K) in 2008 (see 9.3.3).

11 The Landowners

11.1 As reported above, a large number of landowners are affected by this application, primarily residents of Meon Road, Lyde Close, Medina Gardens and Blackwater Close. In the case of each of the landowner residing in the above roads, a section of one of the claimed routes passes through land within their ownership.

11.2 All affected landowners were consulted by letter when the application was taken up for investigation. Responses were varied, with many people having strong views on the subject, dependant on their own experiences. As word spread regarding the consultation, other local residents living outside the estate also submitted their thoughts on the application. Of thirty-three consultation responses received, twelve respondents were in favour of reopening the routes and seventeen were against the proposal, with four respondents not expressing a view either way.

11.3 Many of those residents who supported the reopening of the routes cited the safer, more convenient access to local amenities that the routes would afford, and highlighted the fact that pedestrian users have been forced to walk on roads with no footways at some locations (particularly on Kennet Way). Some respondents

who are residents of the Ashe Hill Park Estate also pointed out that access to their rear fences (and access by statutory undertakers to pipes and cables etc) is currently impossible due to the current obstructions.

- 11.4 Those who opposed the reopening of the routes made reference to a number of anti-social behaviour problems, similar to those which precipitated the closures in 2009.

Some of the other pre-2009 issues referenced in consultation responses included:

- wilful damage to property (both to rear fences and properties as a result of the throwing of various objects into gardens from the pathways, and in one case, the setting on fire of one resident's rear fence)
- evidence of illegal/anti-social behaviour, facilitated by the lack of street-lighting on the routes, and their 'rat-run' layout
- dog fouling and littering/fly-tipping

- 11.5 Some respondents who opposed the reopening of the routes highlighted practical concerns, such as the responsibility for maintenance, and fears that their council tax would have to increase if this cost was not to be covered by other means. Others indicated that the routes had been laid on for private and not public use, asserting that the capacity to close the routes was set out in the deeds to their property, and that the 2009 closures had been carried out following consultation with (and approval from) the local constabulary.

- 11.6 Residents of Medina Gardens have claimed that the section of the path running between U-V has been closed at regular intervals, as a rebuttal to any presumption that the public might have acquired rights through uninterrupted use. More detailed responses from these residents is set out between 11.6.1 and 11.6.4.

- 11.6.1 One resident wrote that:

"...since 1966 [the path] has repeatedly been blocked for five to seven days at a time – without complaints – for various maintenance works repeatedly every two to three years for cleaning/repair, various fence/erections/repairs, wood treatments of fence plus yearly for other maintenance such as tree pruning, weed and pest control....immediate neighbours have also regularly closed their sections. We always understood by doing this that no person could in the future claim any 'right of way'.

In a subsequent communication, the same resident also stated that:

"My family and I recall the original owners of 13 Meon Road permanently blocking their section of back path in 1970s. You will need to ask Basingstoke Council what it said or wrote to the original property owners....Council workers appeared mob handed one day with pick axes and crow bars and demolished the obstruction..."

The resident also indicated that her family "verbally explained to any user why the path was blocked and at the same time told them that 'we' legally owned the land and could legally block it. Some people were 'nice' about it and others, sadly, were abusive...". She also stated that "the closures happened outside of any maintenance projects."

11.6.2 Correspondence was also received from another resident of Medina Gardens which also indicated that U-V had been regularly closed. She was resident at the property between 1966 and 1971, and again since 1982. She states that *“on various occasions it has been blocked off eg when water meters were fitted, when new pipe work installed, and when maintenance work was carried out by ourselves and our neighbours. During these periods there was no pedestrian access.”*

11.6.3 Another resident of Medina Gardens, who has lived there since 1986, also wrote to state that:

“..in common with our immediate neighbours [we] actively ensured that no rights of way could be obtained by claims of unrestricted access for 20 plus years by non-residents of the Ashe Hill Park Estate.

This has involved us in regular closure of that part of the path...Hence the closure of the route by ourselves, both for regular routine maintenance and one off closures on varying occasions for e.g. tree felling/pruning and replacement of fences, throughout the period of 1986 – 2009. Referring to the area we own, we have regularly cleaned litter, dog mess and worse, repaired fences which had been vandalised and coped with the stress of a burglary when access was gained into our property from the said pathway.”

11.6.4 Another person living in Medina Gardens (resident since 1991), also speaks of regular closures:

“We were advised on exchange of contracts to ensure that the path was closed for at least one day a year in order to retain full legal title. In conjunction with our neighbours...and aware of our legal rights and responsibilities, we ensured that the path was regularly closed a number of times each year for maintenance, fencing and clearing up mess left, in order to retain absolute title to the land.

A number of anti-social behaviour issues experienced during their time at Medina Gardens are described, along with some detail regarding the usage of U-V:

“I monitored traffic throughout 2002 prior to submitting plans for my studio in 2003. The highest number of passers-by (audible footfall) was 5 a week in the spring and summer, mostly at night and negligible during the day and in other seasons.

Since 2005 I have worked at all hours in my studio in the garden. I can count on one hand the number of times a week I actually heard anyone on the path – and most incidents were at night.”

11.7 Evidence has also been provided by residents of (or close to) Meon Road, which supports evidence discovered during the course of the investigation that access between A-B-C and C-D has not been possible for significant periods of time (as discussed in Section 9).

11.7.1 A consultation response received from a resident of Anton Close, stated that:

“The footpath abutting the southern boundary of my property...was constructed as part of the Anton Close development in 1976. It was subsequently adopted as an integral part of the Anton Close ‘highway maintainable at public expense’. I have lived here since the beginning.

Originally, it connected with the footpath at the rear of properties in Meon Road. Meon Road residents closed the connection by erection of a fence about thirty-five years ago. Since then it has been a disused cul-de-sac."

Correspondence was also forwarded by a resident of Meon Road which indicates that the path between B-C has been overgrown for considerable period of time, and that his wife had *"lived in Oakley for 35 years and to her knowledge this pathway has always been overgrown and not used."*

11.7.2 A letter received from a resident of Lyde Close stated that:

"When I moved to Lyde Close in 1982 there was a significant footfall along the pathways at the rear of Lyde Close, Medina Gardens and Blackwater Close to the shops in Meon Road from people living in Hoopers Way, Link Close and The Drive area.

In the 1990's the main shops – the newsagents and grocery shop - closed. The only business now operating from this area are a hairdressers, beauty salon and a charity shop. The footfall along the pathways rapidly declined to be used only by dog walkers and people walking to and from the Kennet Way Park."

11.8 Responses to Landowner Submissions

11.8.1 Many of the representations received as part of the consultation on this application (both for and against) relate to questions of suitability, desirability and safety. Whilst these concerns are clearly well-founded, they are not issues that the can be taken into account when determining this application (as set out at 8.2).

11.8.2 Some residents have stated that their human rights will be affected if the routes are recorded as public. The Planning Inspectorate has published guidance on the subject of the Human Rights Act 1998 (Rights of Way Advice Note No.19). Whilst the Advice Note refers to the 1998 Act, its content also serves as a useful summation of the framework for determining Section 53 applications. It states that:

"In cases which involve proposed modifications to the definitive map and statement, the criteria are strictly limited to matters of fact and evidence. Section 53 of the 1981 Act imposes a duty on the surveying authority to make changes to the definitive record 'as soon as reasonably practicable' upon discovery of evidence which shows that a path or way is omitted or is incorrectly shown. In all cases the evidence will show that the event has already taken place, for example a footpath or bridleway has already come into existence after twenty years uninterrupted use by the public, or a track should have been recorded as a vehicular right of way based on evidence from the nineteenth century. The legislation confers no discretion on a surveying authority (or the Secretary of State) to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it."

11.8.3 Many consultees raised concerns regarding who would bear the cost and responsibility for bring the routes into a good standard of repair in the event the routes were recorded as public. Whilst this is a question that will be of particular relevance to the County Council in its capacity as highway authority (if and when the routes are recorded as public footpaths), it has no bearing upon the question of whether public rights have been acquired on the claimed routes.

- 11.8.4 The only responses which are strictly relevant to this matter relate to closures (or alleged closures) at Meon Road and Medina Gardens, and references to the volume of public use on the claimed routes. These matters are addressed in Section 13.

12 Consultations with Other Bodies

- 12.1 The following people and organisations have been consulted on this application: The Ramblers, Open Spaces Society, Oakley and Deane Parish Council, Basingstoke and Deane Borough Council, Hampshire Police, County Councillor Anna McNair Scott and consultees within Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager). Responses or acknowledgements that have been received are set out below.

12.2 Oakley and Deane Parish Council

The Parish has no objection in principle but is concerned about the practicality of recording these footpaths, as each is 'owned' by the properties that back onto it, and some we know have been blocked off by home owners over the years.

12.3 District Councillors Diane Taylor, Rob Golding and Stuart Frost

Councillors Taylor, Golding and Frost are aware of the application.

12.4 County Councillor Anna McNair Scott

Councillor McNair Scot is aware of the application.

12.5 Hampshire Highways

Officers within Hampshire Highways are aware of the application, and of the recent history of the routes in question. They have also provided useful information regarding recent discussions regarding attempts to get the routes adopted as publicly maintainable highways.

12.6 Hampshire Police

The local Police Community Support Officer, Andrew Jones, is aware of the application.

13 Analysis of the evidence

- 13.1 There is evidence of public use of the claimed routes since their initial construction in the mid 1960s. With the exception of Routes A-B-C, C-D and U-V, there is no indication that public use of any of the routes was interrupted prior to 2009. The evidence of long use under both 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 at least twenty years before the date on which the right is brought into question;
- use must be *as of right*, that is, without force, without stealth and without permission;
- use must be by ‘the public’; and
- 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

All of the claimed paths are capable of being public rights of way at common law, given that they all follow well-defined, linear routes.

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

The twenty year period is calculated retrospectively from the date when the right of the public to use the way (or ways) is brought into question. In assessing the routes that have been claimed in this instance, all fall into one of three categories - those that were either permanently obstructed in or around 2009, those that were obstructed (or allegedly obstructed) before this date, and those that are still available and in use today. Based on the accounts of local people, and various aerial photography images, most of the routes that are now obstructed were blocked in 2009. Known obstruction points are marked on the Committee Plan.

Consideration of each route under this criterion is set out below. In each case, the number of users who claim to have walked the route and the earliest recorded use is listed. In some cases, use of different sections of the same route varies dependent on the point at which users exited the route.

13.4.1 ***Route A-B-C (13 users, earliest evidence of use – 1966)***

The available evidence indicates that this route was blocked at various points not long after the estate was built. A line indicating an obstruction is apparent between Points B and C on the 1972 OS map, and at some point during the early 1980s a further line can be seen at Point C, as reflected on the OS evidence of 1982. The correspondence from the residents of Meon Road (9.3.1) indicates that the route had previously been blocked at Point C during the 1970s, prior to the construction of Anton Close, and the recollections of ‘User B’ also indicate that it was not possible to use A-B-C as a through route from a relatively early stage after the estate was built. It therefore appears likely that public use of A-B-C ceased within a decade of the path being constructed, and so **no twenty year period of user can be identified.**

13.4.2 ***Route C-D (14 users, earliest evidence of use – 1966)***

Use of this route over the years has apparently been limited by a number of obstructions, the earliest of which appears to have been introduced shortly after the Ashe Hill Park Estate was built. The 1972 OS map shows the route running northwards without obstruction to Point C, but access eastwards is blocked, with access only possible to the west, behind 3 & 4 Meon Road, perhaps indicating that access was only to adjacent properties. The 1982 map shows a new path

connecting with Anton Close between C-E, but the line at the junction of this path and C-D suggests an obstruction of some sort. The correspondence from local residents in 1977 (9.3.1) indicates that access at Point C had been opened up for a brief period, but based on the 1982 OS evidence, the route was apparently blocked again shortly afterwards. This is further corroborated by consultation responses and statements received during the investigation. Given the length of time the route appears to have been obstructed, **no twenty year period can be identified.**

13.4.3 **Route N-O-U-V-C1** (26 users, earliest evidence of use – 1966)

The user evidence indicates that this was the most heavily used of all the claimed routes. As has been discussed at Section 11, several of the adjoining landowners in Medina Gardens state that U-V was subject to regular closures when water meters were fitted, new pipe work installed, and when maintenance to the path and rear fences was carried out by local residents.

The question of interruption was considered in the House of Lords judgement on *R (on the application of Godmanchester Town Council v Secretary of State for the Environment, Food and Rural Affairs)* [2007], the authoritative case dealing with the proviso to Section 31. In his judgement on the matter, Lord Neuberger stated that:

"It is clear that an interruption of the user at some point during the relevant twenty year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user "as of right" under section 31(1) during that period. Traditionally, one day a year is the norm...However, it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption; that was the view taken by the Court of Appeal in Lewis v Thomas [1950] KB 438. Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of twenty years in order to defeat user as of right....."

The circumstances of and the intention with which the barring of the way takes place are also relevant - in *Lewis*, the court found that the locking of the gates was not to prevent public user, but had only been done at night, when there was no evidence that anyone actually used the route and the purpose of the locking was to prevent stock escaping. In *Fernlee Estates Limited v. City and County of Swansea v. National Assembly For Wales* [2001] the court found that a route which had temporarily been blocked during construction works had nevertheless been in public use for a full period of twenty years without interruption, save for instances of such a temporary works related nature as not to be significant.

In the context of this application, it is open to question whether closures of the sort that have been described could be considered a specific challenge to public use, particularly when considering the decisions of the courts in the above cases. When assessing whether the proviso of Section 31 has been satisfied, it is necessary to consider how the matter would have appeared to the user of the path. It is conceivable that the closures that have been described by residents would not necessarily be viewed by a member of the public as a challenge to their right to use the path, particularly if they appeared to be facilitating maintenance works (either by landowners or utility companies) – such a scenario would bear similarities to the *Lewis* and *Fernlee* cases. Closures were not advertised in advance, or supported by signage which explained the reason for the closures (which may have been a more effective means of communicating the landowner's intentions to the user, and which is often the case where public use of a route is with permission only). It has been stated that people encountering the obstructions were verbally informed of

the reasons for closure (see 11.6.1), but this is not reflected in any of the user evidence.

Of more significance is the fact that, to date, no objective evidence has been provided to substantiate claims that this particular route was regularly closed. The assertions of the landowners are at odds with the evidence of users of the route, who have indicated through user forms and statements that their use of the route was not interrupted prior to 2009, and it would appear that any closures that were implemented did not come to the attention of the public (or at least the witnesses who have contributed user evidence). Given the conflict in this evidence, officers consider that there is little option other than to conclude that the 'reasonably alleged' test has been met. It may be that, if an Order to record this route as public is made and subsequently opposed, further evidence relating to the alleged closures may come to light and could therefore be presented at an inquiry. In such an eventuality, the interpretation and application of relevant case law (including *Godmanchester* and *Lewis*) would be a matter for an Inspector.

The 2009 obstructions were permanent in nature and unquestionably came to the attention of the public, and can be said to have called public use into question, giving a relevant period of **1989 - 2009**.

NB - It should be noted that C1-D1 is still available on the ground, and is considered at 13.4.13. See 13.4.9 for further consideration of O-U.

13.4.4 **Route E-F** (14 users, earliest evidence of use – 1969)

Aerial photography shows this route being open as late as 2008, and user evidence indicates that access at Point E was blocked in a way that prevented access from all directions around the same time as other closures in the first half of 2009 - relevant period **1989 - 2009**.

13.4.5 **Route C-C2-E-E2-G-H** (25-28 users, earliest evidence of use – 1969)

As has been established earlier in the report, use of A-B-C and C-D appears to have ceased much earlier than on the other routes on the estate, and the obstruction at Point C would have effectively rendered C-C2 a dead end. However, access from Point E to Anton Close remained unaffected until much later (2009). The route between E2-G-H, which also provided access to Dever Way, seems to have been available until January 2012 (as documented by the letter to the Link magazine - see 9.3.6), when a new obstruction effectively brought use of the full extent of the route to a halt. Therefore, the public's use was called into question on C2-E-E2 in 2009 (relevant period **1989 - 2009**), and on E2-G-H in 2012 (relevant period **1992 – 2012**). It should be noted that the extent of the route used by witnesses varied, depending on the point which they exited onto either Anton Close or Dever Way (hence the variable number of users). The fact that C-C2 is (and has for a number of years been) a dead end does not diminish the fact that the path has been adopted, and so it is considered that the rights set out in this process should also be recorded.

13.4.6 **Route I-H-J-K** (10 users, earliest evidence of use – 1969)

This route is enclosed by fences between Points H and J before running through an open area between J and K (as referenced in the parish minute of 27 January 1983 at 9.2.2). It terminates at the junction with the south-eastern end of Lyde Close, where the ongoing enclosed route between Points K and O is blocked by a gate (see 13.4.7). I-H-J-K is still open and in use by the public today (H-I is

recorded on the List of Streets Maintainable at Public Expense). Accordingly, the public's right to use this route can said to have been called into question by Mr Johnson's application of 2013, giving a relevant period of **1993 - 2013**.

13.4.7 **Route O-L-K** (27 users, earliest evidence of use – 1969)

The physical closure of this route (at Points O and K) can be traced to an approximate date by virtue of the emails to Cllr Morrison between the April and June of 2009. However, it is apparent from the letters to the parish newsletter (9.3.3) that a notice had been erected at each end of the route in 2008 indicating that it would be closed. The minutes of Oakley and Deane Parish Council (9.2.2) recorded adjacent landowners' reluctance to clear overhanging vegetation or to enter into adoption agreements, but there is no evidence to suggest that use of the route was ever interrupted or overtly challenged prior to 2008, giving a relevant period of **1988 - 2008**.

13.4.8 **Route L-M** (17 users, earliest evidence of use – 1969)

This short link between the above route and Hoopers Way was reportedly blocked at Point L, sometime after the closure of O-L-K. Its use as a cut-through was effectively halted by the physical closure of O-L-K in 2009, and so it could be held that public use was called into question at the same time, giving a relevant period of **1989 - 2009**.

13.4.9 **Route P-P1-R-R1-U-O** (19-26 users, earliest evidence of use – 1966)

It is interesting to note that the full extent of this route is already recorded on the List of Streets, having been adopted by the County Council during the 1970s. The route between P1 and U is still available on the ground, but its use as a through route connecting with the rest of the estate was brought to a halt by the closure at Point U in 2009. There is a clear deterioration in the condition of the surface of the path to the east of Point R1, with a build up of moss and side vegetation reflecting the drop off in public use. Conversely, the western half of the route running between P-P1-R-R1 is still in use today. It is therefore considered that the public's right to use R1-U-O was brought into question in 2009 by the erection of fencing at Point U (relevant period **1989 - 2009**), and P1-P-R-R1 by the application of 2013 (relevant period **1993 - 2013**). The level of use varied depending on the point of exit.

13.4.10 **Route Q-R** (7 users, earliest evidence of use – 1966)

This route is still available today, and so public use on it can be said to have been called into question by the 2013 application (relevant period of **1993 - 2013**). An east/west path, now largely overgrown, intersects this route about halfway along its length and emerges next to the row of shops on Meon Road, but the route was not claimed in Mr Johnson's application and no evidence of use has been provided. Therefore, whilst it is probable that the route has received some public use, it has not been considered as part of this investigation.

13.4.11 **Routes S-T-X** (16 users) & **T-V** (14 users) - earliest evidence of use – 1966)

An obstruction introduced at Point T (reportedly around the same time as other closures) effectively brought use of both these routes to and end in 2009. There are no reports (or any evidence) of any closures on these routes prior to this date - relevant period **1989 - 2009**.

13.4.12 **Route W-X-Y** (11-16 users, earliest evidence of use – 1966)

This route is still open, and there is no evidence of an obstruction in the past, giving a relevant period (triggered by the application) of **1993 - 2013**.

13.4.13 **Route Z-A1-B1** (16 users), **A1-C1** (14 users) and **C1-D1** (26 users) - earliest evidence of use – 1966

Both these routes are also open and available for use, and do not appear to have been obstructed in the past (relevant period of **1993 – 2013**).

13.5 Twenty years' use without interruption

13.5.1 With the exception of A-B-C and C-D (which were initially obstructed during the 1970s and again in the early 1980s), none of the available evidence indicates that public use of any of the routes was interrupted within any of the relevant periods.

13.5.2 As detailed earlier in this report, some residents of Medina Gardens have stated that closures were implemented on that part of the route running between U-V. However, no substantive evidence has been provided to corroborate these assertions, which conflict with the evidence of use put forward. On this basis, it is considered that it can be 'reasonably alleged' that this route received twenty years' uninterrupted public use prior to 2009. As has been set out above, in the event that an Order is made and opposed, this question can be tested further at a public inquiry.

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.

Although there are numerous accounts of anti-social behaviour carried out by people using the claimed paths, there is no evidence to suggest that members of the public ever had to resort to force in order to gain access to the routes themselves during the relevant periods.

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.

There is evidence to suggest that public use of all the routes has been open and without secrecy. The parish minutes covering the late 1960s to the early 1990s, and the account of the local resident at 11.7.2, indicate that the reputation of the routes was consistent with their being public highways.

Permission – users 'as of right' will not have used the way with any kind of licence or permission.

Twelve people who provided user evidence, including the applicant, are (or at least during the period of their use, were) residents of Ashe Hill Park Estate. The deeds relating to each property on the estate prescribe a private right for each owner to use all the paths running through it (see 9.4.1). This would mean that use of the claimed routes by these thirteen people has been *by right*, as opposed to *as of right*. Since it is not possible to *acquire* a right by doing something for which you already have a prescribed right, the use of these individuals has been discounted. Save for instances where they were visiting people living on the estate, there is no

evidence to suggest that use by the remaining users was subject to any kind of permission.

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.

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 Some residents have expressed concerns about a 'broad brush' approach to evaluating the user evidence, and the possibility that a high volume of use on one route might be wrongly ascribed to another which in reality may have been used much less frequently. Many users did not break their use down for specific routes, instead providing an overall frequency on their forms and highlighting the routes they used on an accompanying map (although users who were interviewed and who gave statements were questioned about this in more detail).

It is conceded that, given the large number of routes in question, to obtain a definitive picture of the level of public use of each individual path is challenging. However, all user forms were accompanied by a map which gave each witness the opportunity to indicate the routes that they have walked. Unless there is any reason to question whether the use is accurately and honestly recalled, the evidence put forward must be taken at face value. Officers have sought to reflect the volume of use on each route as accurately as possible, as shown by the numbering next to each route on the Committee Plan. It is considered that all use on the claimed routes can be considered to have been representative of 'the public'.

- 13.7.2 The evidence of use put forward indicates that a number of the claimed paths have provided important links for people walking to and from the local school, local shops, and for the purposes of recreational walking (with or without dogs). The utility of some of the routes that provided access through the estate is reflected by the numbers of people who claim to have used them, with the bulk of use occurring on the main routes that connect Lyde Close and The Drive (running north-south between N-O-U-V-C1-D1), and the area to the east of the Ashe Hill Park Estate with Kennet Way (the east/west routes O-L-K, P-R-U and C-E-G-H). When considering the amount of daily use put forward, much of it coming from dog walkers who made a habit of varying their route through the estate, or from people who made the same journey several times per day (eg as part of the school run), on balance it is considered that 'the public' can be considered to have used all the claimed routes. It is also clear from the numerous references to the routes in Oakley Parish Council minutes dating back to 1969, that they were in regular use by the public.

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.

- 13.7.3 Aside from the use discussed at 13.6, no use was in the exercise of a private right. Although a small number of users cited visits to friends (who may or may not live on the estate or on the other side of it), the majority appear to have used them as a

means of crossing the estate to reach local shops, schools, and for the purposes of dog-walking or general recreation.

13.8 Summary of user evidence

Save for A-B-C and C-D (and notwithstanding the discussion at 13.4.3 regarding the alleged closures of U-V), the evidence of use indicates that local people have been walking the claimed routes in every year since 1966, with the bulk of use falling after 1980. Use has not been secretive or as a result of force, and apart from use by some local residents who benefit from a private right, has been 'as of right'. In the case of each route, there is no objective evidence to suggest that public access on foot was ever physically obstructed during the relevant periods.

13.9 Conclusions under Section 31, Highways Act 1980

It is considered that the requirements of Section 31 have been satisfied in this case, and that it can be reasonably alleged that the public have been using all routes except A-B-C and C-D 'as of right' for a full period of twenty years.

13.10 Analysis of the evidence under Common Law

This matter must also be considered under common law, where the onus is on 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. 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. Establishing user is only one part of the equation, and it is also necessary to look at all the evidence, in particular the actions of the landowner. If the landowner does nothing, or at least nothing that is inconsistent with dedication, it could be reasonable to infer that dedication was intended.

Conclusions under Common Law

13.11 Although most of the routes were never adopted as publicly maintainable highways, it could be argued that in setting the routes out using the Radburn system, the developer of Ashe Hill Park Estate was providing routes *in lieu* of footways situated by the side of the road. If users were not expected to walk in the carriageway, these routes would provide the only viable means of walking into (or through) the estate. However, the upshot of setting the estate out in this way (coupled with the reported failure to secure public adoption of the routes at the time it was built) has apparently contributed to the perception of the routes as private alleyways by residents of the estate. The absence of any documentary evidence to verify this makes it necessary to consider the matter based on the evidence of public use in tandem with the actions (or inaction) of the landowners.

- 13.12 A-B-C and C-D aside, there is evidence from which a deemed dedication of public rights can be inferred at common law. Apart from anecdotal accounts received from several residents in respect of O-V, there is no evidence that has been submitted to the County Council to indicate that any landowner took steps to inform the general public that the routes had not been dedicated for use by pedestrians until very recently (2009). All remaining routes have been in continuous use since the late 1960s/early 1970s by a large number of local inhabitants, at a volume and frequency which was sufficient to come to the attention of adjacent landowners – as indicated by the letter to the County Council described at 11.7.2. Although some landowners appear to have indicated to the parish council that they believed the routes were not public when the matter was raised with them, crucially there is no evidence that this view has ever been widely communicated to public users of the paths.

14 Conclusions

- 14.1 The available evidence indicates that the claimed routes all came into existence between the mid-1960s and the early 1970s, and there is evidence of public use of all routes since their initial construction.
- 14.2 Save for routes A-B-C and C-D, the evidence put forward in support of the claimed routes is sufficient for it to be reasonably alleged that all have been used by the public as of right and without interruption for a full period of twenty years.
- 14.3 The available evidence is also sufficient for a common law presumption to be inferred (ie that the landowners intended to dedicate the claimed route as a public right of way).
- 14.4 Save for N-O-U-V-C1-D1 (2.5 metres wide), the width of the claimed routes is approximately 2 metres.
- 14.5 If Members agree with paragraphs 14.2 and 14.3 and consider that, on the balance of probabilities, it can be reasonably alleged that the public have acquired a right of way on the routes identified in this report, then they should direct that a Map Modification Order is made to record the routes as public footpaths.

15 Next Steps

- 15.1 Although not relevant to Members' decision as to whether or not an Order should be made, officers consider it useful to outline the possible next steps following the Committee meeting.
- 15.2 If Members agree that an Order should be made, notice of the making will need to be served on affected landowners, and advertised on site for a period of 42 days. If, during that period, any objections are received, the County Council will not be able to confirm the Order itself, and will have to refer the matter to the Planning Inspectorate for determination. The Inspectorate will then appoint an Inspector to determine the Order, with the likely outcome being the holding of a non-statutory public inquiry, which would enable witnesses who both support and oppose the application to give evidence. It is unlikely that any inquiry would take place before the summer of 2018.
- 15.3 If Members resolve not to make an Order, the applicant will nevertheless have a right of appeal to the Secretary of State, under the provisions of Schedule 15 to the Wildlife and Countryside Act 1981. This may result in the County Council being

directed to make the Order which is sought. Again, if this Order is subsequently opposed, the course of action outlined at 15.2 will result.

16 Recommendation

- 16.1 That a Definitive Map Modification Order be made to record the route shown between C-E-G-H-I as a public footpath with a width varying between 1.8 and 2.7 metres.
- 16.2 That a Definitive Map Modification Order be made to record the route shown between E-F as a public footpath with a width of 2.4 metres.
- 16.3 That a Definitive Map Modification Order be made to record the route shown between H-J-K-L-O as a public footpath with a width varying between 1.1 and 2.2 metres.
- 16.4 That a Definitive Map Modification Order be made to record the route shown between L-M as a public footpath with a width of 2.3 metres.
- 16.5 That a Definitive Map Modification Order be made to record the route shown between P1-R-R1-U as a public footpath with a width varying between 1.4 and 1.9 metres.
- 16.6 That a Definitive Map Modification Order be made to record the route shown between Q-R as a public footpath with a width varying between 1.8 and 2.1 metres.
- 16.7 That a Definitive Map Modification Order be made to record the route shown between N-O-U-V-C1-D1 as a public footpath with a width varying between 2.2 and 2.9 metres.
- 16.8 That a Definitive Map Modification Order be made to record the route shown between A1-C1 as a public footpath with a width of 2.3 metres.
- 16.9 That a Definitive Map Modification Order be made to record the route shown between Z-B1 as a public footpath with a width varying between 2.1 and 2.4 metres.
- 16.10 That a Definitive Map Modification Order be made to record the route shown between T-V as a public footpath with a width varying between 1.7 and 2.1 metres.
- 16.11 That a Definitive Map Modification Order be made to record the route shown between S-T-X-Y as a public footpath with a width varying between 2.1 and 2.4 metres.
- 16.12 That a Definitive Map Modification Order be made to record the route shown between W-X as a public footpath with a width varying between 2.4 and 2.6 metres.
- 16.13 That the application to record A-B-C as a public footpath be refused.
- 16.14 That the application to record C-D as a public footpath 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: 1116

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.