

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Jonathan Woods <i>Countryside Access Group Manager</i>
Date:	17 November 2022
Title:	Application for a Definitive Map Modification Order to record a footpath in Hayling Island Borough of Havant
Reference	DMMO 991

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Purpose of this Report

1. The purpose of this report is to assist the Countryside Access Group Manager in determining whether to accept an application for a Definitive Map Modification Order to record a footpath in Hayling Island.

Recommendation(s)

2. That the application be refused, as it is considered that the evidence submitted in support of the application is insufficient for it to be reasonably alleged that a right of way subsists and should be added to the Definitive Map.

Executive Summary

3. This is an application made by a member of the public ('the applicant') in 2010 under Section 53 of the Wildlife and Countryside Act 1981, to record a footpath in Hayling Island, Havant. The application was supported by user evidence that the applicant believed demonstrated that a Public Right of Way should be recorded on the basis of long-term use of the claimed route.
4. Having considered the evidence submitted with the application, and undertaken additional research of historic documentary evidence, it is considered that there are insufficient grounds to record a footpath along the claimed route.
5. Upon taking up the application for investigation, the applicant has advised that they do not wish to pursue the application any further. The applicant has been advised that as the Surveying Authority, Hampshire County Council is obliged to register duly made Definitive Map Modification Order applications and once registered, to investigate and determine them.

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:
- a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
 - 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 the occurrence of that event.
- (3) The events referred to in sub-section (2) are as follows - (PART)
- (b) the expiration, in relation to any way in the area to which the map relates, 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 in 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 such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;

HIGHWAYS ACT 1980 – Section 31: Dedication of way as highway presumed after public use for 20 years.

(1) 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 to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) 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.

RELEVANT CASE LAW

R (on the application of Roxlena Ltd.) v Cumbria County Council and Peter Lamb (2019)

Part of the judgement in this case concerned user evidence forms. The judgement stated that it was acceptable for the Order Making Authority to take user evidence forms at face value, and there is no onus on the authority to conduct further investigation into the forms (e.g., by conducting witness interviews).

During the 2017 Judicial Review of the above case (Roxlena Ltd, R (On the Application Of) v Cumbria County Council. 2017), comment was made by Mr Justice Kerr regarding the withdrawal of applications (obiter, not necessary to the judgement and not binding). *'The procedural provisions governing applications under section 53(5) of the 1981 Act are silent on any question of withdrawal of an application.... The obligation to investigate the matters stated in it, consult the other local authorities in the area and "decide whether or not to make the order" (paragraph 3(1)(b) of Schedule 14 to the 1981 Act) in my view survives any purported withdrawal.'* (Para 35 and 36, part)

Description of the Claimed Route (please refer to the map attached to this report, Appendix 1)

6. The claimed route is located within a residential area in South Hayling and is situated between the seafront to the south and the local shops to the north.
7. The route runs between Mengham Avenue (point A) and Webb Lane (point B). At the time of the application, the claimed route ran between Number 8 Mengham Avenue to the south and the garden wall of Number 5 Webb Lane to the north. Since the application was submitted, an additional house has been constructed in the former garden of Number 5. This property is now Number 6 Mengham Avenue.
8. The length of the claimed route is approximately 34 metres and appears to have been a narrow passageway between two garden boundaries. There is a tree at the Webb Lane end of the route which would impact the alignment.
9. The land over which the claimed route extends is unregistered with the Land Registry.
10. During the recent sale of Number 8 Mengham Avenue, photographs displayed on Rightmove¹ show the location of the route as having been enclosed and the boundary of Number 8 Mengham Avenue adjoining that of Number 6 Mengham Avenue.

¹ [3 bedroom end of terrace house for sale in Mengham Avenue, Hayling Island, PO11 \(rightmove.co.uk\)](https://www.rightmove.co.uk/property-for-sale/details.html?listingid=123456789)

Issues to be decided

11. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. Case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry. Officers do not consider that there is such a conflict in this case.
12. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, it must be demonstrated that any change to the map is supported by evidence. This might be proved by historic documentary evidence or by evidence of use in the recent past.
13. 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.
14. Where a Map Modification Order is made, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.
15. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order. In the event of an application under Section 53 being refused, the applicant has the right to appeal against the County Council's decision to the Secretary of State, who may direct the County Council to make the order that is sought.

Background to the Application

16. The application was submitted in 2010 by a member of the public. Due to a backlog of applications the matter was not taken up for investigation at the time.
17. In 2009 the route was blocked, and this appears to have triggered the submission of the application to the County Council. In accordance with Section 31 of the Highway Act 1980, this would give a relevant twenty-year period of use of 1989 to 2009.
18. Hampshire County Council hold files relating to potential claim applications. In 2000 a letter was received regarding the use of the claimed route and a recent obstruction to use. A short obstruction of the route is also recorded in the submitted user evidence. Although a date is not specified, estimates range from over 13 years ago (i.e. prior to 1997) to a few years ago (i.e. a few years prior to 2010). Whilst the dates do not concur, each user refers to one obstruction and it is therefore considered likely that this relates to the

obstruction in 2000, where the evidence provided is contemporaneous to the occurrence of the event. This indicates a previous interruption to use and in accordance with Section 31 of the Highway Act 1980 this would give an additional relevant twenty-year period of 1980 to 2000.

19. The application to construct a new house (Now Number 6 Mengham Avenue) was submitted in 2010 (Havant Borough Council 10/53184/002). Attention was drawn to the claim application and the submitted plans were amended. The case officer report states '*The amended plans indicate that a minimum distance of 1.8 metres will be maintained between the proposed close boarded fence on the south boundary and the north elevation of no. 8 Mengham Avenue to allow members of the public to continue to pass between Mengham Avenue and Webb Lane (as Hampshire County Council are currently investigating whether this route is a Right of Way.)*'
20. It is noted that there is also a current planning application which affects the claimed route (Havant Borough Council APP/21/00654).
21. Since this application has been taken up for investigation the applicant has advised that they do not wish to pursue the application any further and suggested that it be closed. This position has been acknowledged and the applicant has been advised that the County Council is obliged to register all applications and once registered to investigate and determine them. Under Section 31 of the Wildlife and Countryside Act 1981, the submitted application constitutes the discovery of evidence regarding potential rights of way and relates to the duty of the Surveying Authority to keep the definitive map and statement under continuous review.

Consultations

22. The following people and organisations have been consulted on this application: Havant Borough Council, The Ramblers and The Open Spaces Society. Additionally, the County Council Member for Hayling Island Division, Councillor Quantrill has been made aware of the application. Where responses were provided, these are set out below, no other comments have been received.

Havant Borough Council

23. No comments were made regarding the use of the claimed route, however information was provided in response to a request for information, including regarding the 2010 planning application adjacent to the claimed route.

Councillor Quantrill

24. 'As a Resident of 60 years I have never used this path and was not aware of its existence.'
25. Councillor Quantrill also contacted Havant Borough Councillors regarding the application. One response was received advising that, as a Cllr since 2010, they were unaware of the footpath.

Comments by the Landowners

26. The claimed route is not registered with the Land Registry, however the landowners either side of the route have been consulted, Number 8 Mengham Avenue and Number 6 Mengham Avenue.
27. A letter has been received from the owners of Number 8 Mengham Avenue stating that they do not agree that this land constitutes a Right of Way. Contact has also been made via a solicitor who has advised that further detailed comments will be submitted should an order be made.
28. No comments have been received from the owners of Number 6 Mengham Avenue.

Documentary Evidence

Documents held in archives, whether Hampshire Record Office, the National Archives, or online archive collections, are marked by an 'A'

(For further details see Appendix 2 - Documentary evidence)

Ordnance Survey Maps

County Series (25 inches to 1 mile) 1867-1932 ^A²

29. Four maps were published by the Ordnance Survey at a scale of 25 inches to 1 mile between 1867 and 1932

County Series Map (25 inches to 1 mile) 1867-1896 (First and Second Edition)

30. Whilst Webb Lane is shown, neither the claimed route nor Mengham Avenue are depicted on the First (1867) or Second (1896) Edition of the County Series maps.

County Series Map (25 inches to 1 mile) 1908 (Third Edition)

31. Mengham Avenue is depicted on the map and the terrace of properties, of which Number 8 forms the northern most property, is also shown for the first time. The route is not shown and the area to the north of Number 8 is shown as being undeveloped. It can therefore be inferred that there was no feature on the ground corresponding to the route during this period that was significant enough to be included on the map. The boundary of Number 8 is shown extending in line with the northern side elevation of this property. At this time, the closest property to the north of the claimed route is Number 4 Mengham Avenue.

County Series Map (25 inches to 1 mile) 1932 (Fourth Edition)

32. The claimed route is not shown on this map and the area to the north of Number 8 is shown as being undeveloped. It can therefore be inferred that there was no feature on the ground corresponding to this route during this period that was significant enough to be included on the map. At this time, the closest property to the north of the claimed route is Number 3 Webb Lane.

² Available from the National Library for Scotland. Copies also held by Hampshire Record Office.

County Series Map (25 inches to 1 mile) 1940 A³

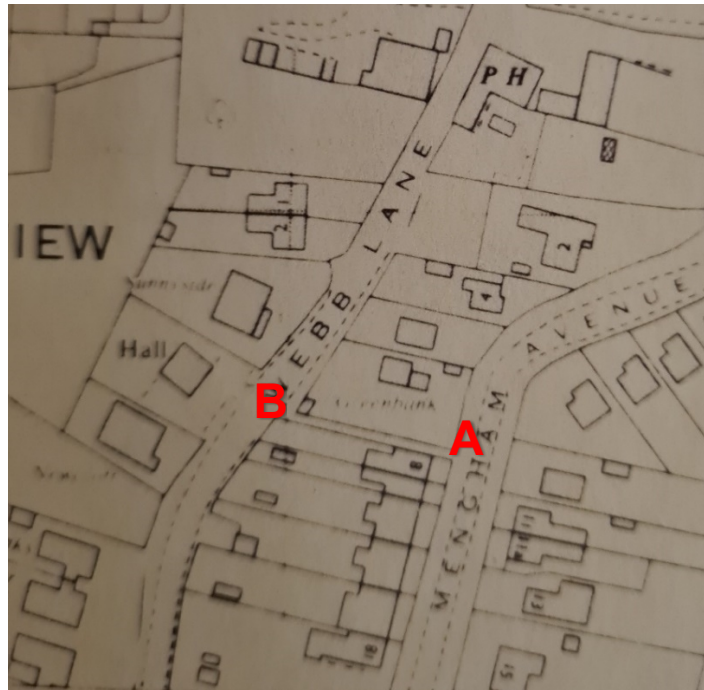
A further revision of the County Series Map for this area was produced in 1940

33. The claimed route is not shown on this map and the area to the north of Number 8 is shown as being undeveloped. It can therefore be inferred that there was no feature on the ground corresponding to this route during this period that was considered significant enough to be included on the map. At this time the closest property to the north of the claimed route is Number 5 Webb Lane (the garden area of this property was subsequently extended to the south).

National Grid Series (1:10,560) 1962 A⁴

34. The claimed route is not shown on this map and the area to the north of Number 8 is shown as an undeveloped strip of land. It can therefore be inferred that at this time there was no feature on the ground corresponding to this route that was considered significant enough to be included on the map.

National Grid Series (1:2,500) 1968 A⁵



The claimed route is shown on this map as a narrow path, open at either end. The boundary of Number 8 is shown extending in line with the northern side elevation of this property. The land to the north of the route is shown as part of the garden of Number 5 Webb Lane 'Greenbank'.

³ Available from the National Library for Scotland

⁴ Available from the National Library of Scotland

⁵ Part of a collection of maps held by Hampshire County Council

National Grid Series (1:10,560) 1971 A⁶

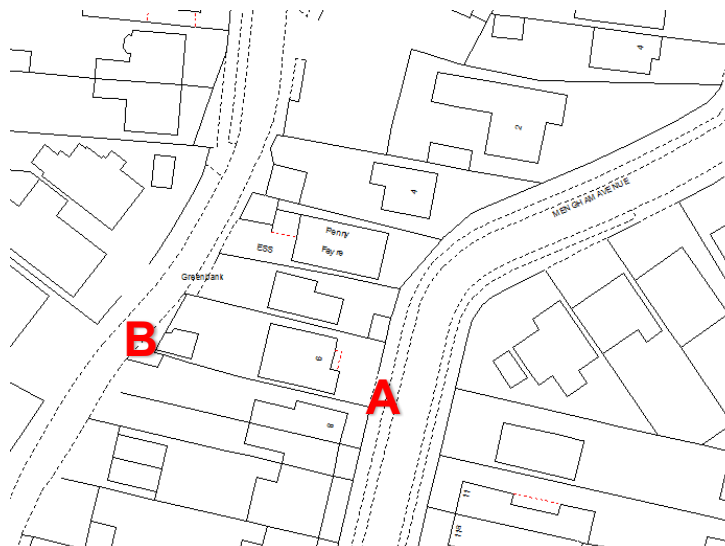


35. The claimed route is shown on this map as a narrow route, open at either end. It is noted that due to the scale of this map the route is shown as wider than appears to have been the case.

Ordnance Survey Explorer Map (1:25,000) 1997, 2007 A⁷

36. The claimed route is shown on both of these maps as a narrow route, open at either end.

Contemporary Ordnance Survey maps – OS VectorMap



⁶ Available from the National library of Scotland. Reproduced with the permission of the National Library of Scotland

⁷ From a collection of maps held by Hampshire County Council

37. On the contemporary Ordnance Survey map, the claimed route is not shown. The boundary of Number 8 Mengham Avenue is shown further to the north and adjoins the boundary of Number 6 Mengham Avenue. This is consistent with the claimed route having been enclosed and being no longer discernible on the ground.

Other Sources viewed

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

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

Parish Map (c.1953)

39. 'Parish Maps' were prepared by Parish, Town and Borough Councils for County Councils when the first Definitive Map was being prepared; the map was produced to inform the County Council of the rights of way in each area in order for the Draft Definitive Map to be produced. Two maps exist for Hayling Island. The claimed routes have not been annotated on either of them. This indicates that the Borough Council did not consider the claimed route to be a public right of way at that time.

First, Second and Third Definitive Map and Statement

40. The route is not shown on the first Definitive Map (1955) nor the second or third versions.

Objections Book

41. The book of objections contains a record of all objections received when the draft definitive map was open to public scrutiny. It also contains records of objections and amendments made when the Definitive Map was open to periodic review. There is no mention of the omission of the claimed route from the Definitive Map.

Parish File and pre-application documents

42. The County Council maintains a file relating to countryside matters (including countryside management and rights of way) for each of the parishes/districts in the county. These files date back to the 1940s-50s and contain, amongst other things, correspondence, maps, and work orders. No documents relevant to this claim have been identified within the file for Havant Borough.

43. The County Council also retain information submitted regarding potential claims. As noted above, this includes a letter submitted in 2000 regarding the closure of the route. This also includes letters from 2009 regarding the closure of the route and copies of a petition sent to Havant Borough Council. The petition details 14 people who confirm their knowledge of the route, in one case dating back to 1938, and in some cases includes a reason for using the route, e.g. to access the shops. The petition does not provide further details of the use of the route, such as dates or frequency of use.

Havant Rural District Council Highway Handover Map (1929) (A)⁸

44. Handover Maps were prepared by the Surveyor of each district within Hampshire when responsibility for the maintenance of rural, unclassified roads was transferred to the County Council (as prescribed in the Local Government Act of 1929). The claimed route is not shown on the Highway Handover Map.

List of Streets

45. The route is shown as an unadopted footpath. The footpath was changed from adopted to unadopted in 2009 at the request of the Highway Status Team (it was first recorded as maintainable in 1984). At the time, the conclusion was reached that it had previously been classified as adopted in error, as the route is not shown on the Havant Borough Council Highway boundary plans or on the Mengham Avenue adoption plans.

Aerial Photographs

46. A number of aerial photographs have been taken of the area in question during the 20th and early 21st Century.

1946 A⁹



47. The 1946 photograph shows Webb Lane and Mengham Avenue. The terrace of properties, of which Number 8 Mengham Avenue forms part can be seen, as well as Number 5 Webb Lane and the garden of this property, to the north of the claimed route. Whilst difficult to discern at this scale, there appears to be a route between the two properties, along the line of the claimed route.

⁸ Hampshire Record Office Reference number – H/SY3/6/10

⁹ Historic England Aerial photograph Ref: RAF_3G_TUD_UK_162_VP4_5290
date flown 20 April 1946

1984 (1:10,000)¹⁰

48. The 1984 photograph is a black and white image showing Webb Lane and Mengham Avenue. The boundary of Number 5 Webb Lane is visible, however at this scale it is difficult to discern details regarding the location of the route.

1991 (1:10,000)¹¹

49. The 1991 photograph is a colour image showing Webb Lane and Mengham Avenue. The boundary of Number 5 Webb Lane is visible, however at this scale it is difficult to discern details regarding the location of the route.

1999 (Google Earth)



50. The 1999 image shows the location of the claimed route which appears to be visible between the gardens of Number 5 Webb Lane and Number 8 Mengham Avenue, terminating under the tree at Webb Lane.

¹⁰ Hampshire Record Office Run 42 Number 1184157 1:10,000. Date 28 July 1982

¹¹ Hampshire Record Office Run 42 Number 3391011 1:10,000. Date 04 June 1991

2000¹²



51. The 2000 image shows the site of the claimed route. The garden of Number 8 appears overgrown and it is difficult to discern details of the route.

2001 Google Earth



52. The 2001 image shows the location of the claimed route which appears to be visible between the boundary of Number 5 Webb Lane and the boundary of Number 8 Mengham Avenue.

2005 Google Earth



53. The 2005 image shows the line of the claimed route. The boundary wall of number 5 Webb Lane can be seen, however the claimed route is less discernible from the garden area of Number 8 Mengham Avenue.

2007 Google Earth



54. The 2007 image shows the claimed route which appears to be visible between the boundary of Number 5 Webb Lane and the garden area of Number 8 Mengham Avenue. There appears to be vegetation along part of the route.

Sales Particulars¹³

55. Number 8 Mengham Close was sold in 2009, prior to the submission of this application. The sales particulars include a number of photographs of the exterior of the property.

Front elevation of Number 8



56. The location of the claimed route is shown in this photograph, between the low wall of Number 5 Webb Lane and what appears to be a fence to the rear of Number 8 Mengham Avenue. The land forming the claimed route appears overgrown at this time.

Rear elevation of Number 8 Mengham Avenue



57. The location of the claimed route is shown in this photograph between the low boundary wall of Number 5 Webb Lane and what appears to be a low post and wire fence. The route appears overgrown at this time.

¹³ Rightmove sold price <https://www.rightmove.co.uk/house-prices.html>

Side elevation of Number 8 Mengham Avenue



58. The photograph shows part of the rear garden of Number 5 Webb Lane and the low side boundary wall of this property. Beyond this, the side wall of Number 8 Mengham Avenue can be seen, with an adjoining close boarded fence panel.
59. The property has recently been up for sale and the external photographs show that the area of the claimed route has now been enclosed, with the boundary of Number 8 adjoining that of Number 6 Mengham Avenue.

Analysis of Documentary Evidence

60. The location of the claimed route appears to be visible on the 1946 aerial photograph and has been identified on a number of subsequent aerial photographs, providing evidence of the physical existence of the route. It is noted that at times the area of the claimed route appears overgrown.
61. The claimed route has also been identified on a series of Ordnance Survey Maps from the late 1960s up until the early 2010s which also demonstrates the physical existence of the route on the ground. Whilst over a significant period of time the appearance of a route across a series of maps could be considered to be an indication of the reputation of its status, in this case, the maps are relatively recent in date and all from one source, where a certain amount of repetition is to be anticipated. It is noted for example, that the route appears on the Ordnance Survey map of 2014, after it was closed in 2009.
62. Whilst the documentary evidence identified provides evidence of the physical existence of the route in the latter half of the 20th Century and early 21st Century, it does not provide evidence of the status of the route. The application must therefore be determined upon evidence of user. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

User Evidence

63. The application was supported by the evidence of eleven people, who completed user evidence forms (one form was submitted on behalf of two people). The dates of use are summarised on the chart at Appendix 3. The table is, by necessity, a generalisation, but it provides an insight into the evidence which has been put forward in support of the application.

64. All eleven users completed user evidence forms, however only ten users indicated a date range (or approximate date range) for their use of the route. Where a date given is not specific e.g., 1980s or Mid 2000s, this has been taken to be 1985 or 2005.
65. Not all users provided details of the frequency of their use of the route and some users gave broad responses. One user provided the response 'often daily' and another 'several times per week'. For the purposes of calculating frequency and average use, both responses have been estimated as four times per week. Seven users who provided dates of use of the route also provided a frequency, or approximate frequency of use.
66. The submitted evidence details public use of the claimed route from 1960 up until 2009. It is noted that two of the users provide evidence of use of the route from childhood. The majority of the submitted evidence relates to the use of the route on foot. Four users also provided evidence of use of the route on bicycle, however only two of these users provided dates of use or details of frequency.
67. All eleven users indicated the use of the same route between Mengham Avenue and Webb Lane. Ten users saw others using the route, the majority of which was on foot. Four users stated that they saw others on bicycle, two users saw others using a vehicle and one user saw others on horseback. Ten users saw other locals using the route, eight saw strangers and one states that they saw the landowner.
68. As noted above, there are two possible twenty-year claim periods. The first is between 1989-2009 as a result of the closure of the route in 2009, prior to the submission of this application. The second is between 1980-2000, prior to the blocking of the route by a previous landowner in 2000. The user evidence chart at Appendix 3 indicates the use across both twenty-year periods and they are detailed below.

Use 1989-2009 on foot

69. Nine users provided evidence of use of the route on foot between 1989 and 2009. Six of the nine users provided details of their frequency of use. Two users used the route for the whole period and six further users used the route for more than half of this period. Three users providing evidence were using the route in 2009.
70. Five of the six users providing a frequency of use, used the route at least weekly for some or all of this period. The evidence of the use of the route on foot varies across the twenty-year period, but equates to approximately six to thirteen times per week and one to two users per day. It is noted that users providing evidence also saw other users using the route and that not all users provided details of their frequency of use.
71. Given the identified blockage of the route in 2000, a claim under this twenty-year period is considered to fail to meet the tests of Section 31 of the Highways Act 1980, requiring twenty years use without interruption. It is therefore necessary to consider the relevant twenty-year period of use between 1980 and 2000.

Use 1980-2000 on foot

72. Nine users provided evidence of use of the route on foot between 1980 and 2000 and one user provided evidence of use in 2000 only. Five users used the

claimed route for the whole twenty-year period and three used the route for more than half of this period. Seven of the ten users provided details of the frequency of their use.

73. Five of the seven users providing a frequency of use used the route at least weekly for some or all of this period. The evidence of the use of the route on foot varies across the twenty-year period but equates to approximately six to ten times per week and an average of one to two users per day. It is noted that users providing evidence also saw other users using the route and that not all users provided details of their frequency of use.

Use on foot prior to 1980

74. Six users also provided evidence of use of the route prior to 1980, the earliest evidence of use was from 1960. One user used the route from 1960 to 1980 and four of the users used the route for more than half of this period. Five users provided information regarding the frequency or approximate frequency with which they used the route. Three used the route more than once a week, two of whom began using the route during childhood.
75. The evidence of the use of the route on foot varies across this period but equates to approximately nine to fifteen times per week and an average of one to two users per day.

Use of the route on bicycle

76. Whilst four users provided evidence of use of the route on bicycle, limited evidence has been provided in terms of dates of use or frequency of use, with two of the four users having provided this information. One user provided evidence of use of the route on bicycle between 1989 and 2009 with a frequency of approximately twice per week.
77. In the period 1980 to 2000, one user provided evidence of use on bicycle in 1980 only, with a daily frequency.

Use of the route and additional information provided by users

78. All eleven users providing evidence of use indicated that they used the route to access Mengham Village shops, services or amenities, including bus services. Two users also referenced using the route as a short cut to the beach.
79. Ten users were accessing the route from addresses within nearby streets. One user provided evidence of use in the past, but it is not clear regarding their residence at the time.
80. Only one user indicated a name for the route, that of 'Passage Way'. No users reported having to pass through gates or climb over stiles to access the route and none of the users completing user evidence forms reported having seen any signs along the route.
81. The letter sent to Hampshire County Council regarding the blockage of the route in 2000 refers to barriers having been erected with signs marked 'Greenbank Private'. The author notes that the path was outside of the boundary of the adjacent property 'Greenbank' (Number 5 Mengham Avenue).
82. All of the users providing evidence stated that the path had been obstructed. None of the users stated that they were related to, employed by, or a tenant of the owner or occupier. None of the users stated that they had been told that the path was not public, none sought permission, and none were using the path by

way of a private right. One user stated that their relative had been stopped/turned back in 2009.

83. The submitted user evidence includes other information regarding the route including the origin of the route, which is discussed below, (Actions of the landowners). One user states that the dimensions of the claimed route may have previously been wider. A user also refers to a family member and friend having cleared a previous blockage of the route.

Summary of user evidence

84. The submitted evidence spans the period 1960-2009, with the average use across this period equating to approximately six to fifteen times per week and an average of one to two users per day. The relevant twenty-year period is 1980-2000 as a result of an earlier break in use caused by the blockage of the route.
85. Analysis of the evidence submitted by the witnesses who used the route demonstrates that the route has been used for a continuous period of more than twenty years, between 1980 and 2000.
86. Seven of the users using the route between 1980 and 2000 provide details of frequency of use. The average use equates to approximately six to ten times per week and an average of one to two users per day.
87. Limited evidence of the use of the route on bicycle has also been provided, however the evidence reviewed does not demonstrate that the route has been used on bicycle for a continuous period of more than twenty years.

Actions of the landowners

88. The land over which the claimed route crosses is unregistered with the Land Registry, and no evidence has been submitted regarding the actions of the owner of the route. The route is however bounded by residential properties, Number 8 Mengham Avenue to the south and Number 6 Mengham Avenue to the north, (formally the garden of Number 5 Webb Lane).
89. The route was closed in 2009 by the owners of Number 8 Mengham Avenue and one user reports a family member being stopped/turned back from using the route in 2009. During an initial enquiry, prior to taking up this application, it was noted that prior to closing the route advice was sought regarding the status of the route from the Highway Authority. As shown in recent photographs, the route now forms part of the garden of Number 8 Mengham Avenue.
90. In 2010, during the consideration of the planning application for Number 6 Mengham Avenue, the submitted plans were amended to provide access for the route between Number 8 and Number 6 Mengham Avenue.
91. From the user evidence and other information submitted to the Council it is noted that a previous owner of Number 8 Mengham Avenue also sought to take steps to block/close the route in 2000 and to indicate that the route was not public.
92. Two potential explanations for the origin of the route have also been identified through the application and user evidence submitted. The application states that the Owner of 'Greenbanks' (Number 5 Webb Lane) opened the footpath over

50 years ago to provide a shortcut. One user providing evidence states that the previous owner of 'Greenbanks' sought to determine ownership of the land to the south of their property without success, seeking to determine how much they could develop into a garden. The user notes that they built a breeze block wall leaving free access from Mengham Avenue to Webb Lane.

Analysis of the Evidence under Section 31, Highways Act 1980

93. For Section 31 of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:
- the physical nature of the path must be such as is capable of being a right of way at common law
 - the use must be 'brought into question', i.e., challenged or disputed in some way
 - use must have taken place without interruption over a period of twenty years before the date on which the right is brought into question
 - use must be *as of right*, i.e., without force, without stealth and without permission
 - use must be by the public at large
 - there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

Physical nature of the route

94. A public highway must follow a defined route. The claimed route was enclosed on both sides and linked two public roads. It follows a clearly defined route and is therefore capable of being a right of way at common law.

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

95. The route was closed in 2009 by the owners of Number 8 Mengham Avenue which called in to question the public's use of the route. This event predates the County Council's acceptance of a 'duly made' application in June 2010. Although it was later cleared, an earlier event in 2000, blocking the route and erecting signage, also called in to question the public's right to use the route.

Twenty years' use without interruption

Pedestrian use

96. As a result of the earlier challenge to the use of the route, the relevant twenty-year period is 1980-2000. Nine users provided evidence of use of the route on foot between 1980 and 2000 and one user in 2000 only. The evidence of the use of the route on foot varies across the twenty-year period but equates to approximately six to ten times per week and an average of one to two users per day. The user evidence chart detailing the submitted evidence demonstrates that the claimed route was in continuous use throughout this period.

Use on bicycle.

97. Limited evidence has been submitted regarding the use of the route on bicycle with only one user providing details of use within the relevant twenty-year period. The user evidence does not demonstrate that the route has been in continuous use throughout this period.

'Without force, stealth or permission'

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

The Planning Inspectorate's *Definitive Map Order Consistency Guidelines* describe the use of force as including "the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate."

98. It is noted that the user evidence indicates that a blockage of garden waste in 2000 was removed by neighbours who wished to use the route, rather than the adjacent landowner. The access to and use of the route prior to this blockage (during the relevant twenty-year period) does not appear to have been through the use of force.

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.

99. The accounts of users of the path indicate that access to the land was open and without secrecy.

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

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

Use by the Public

Use must be by the public, and that should be reflected in its volume and the breadth of the type of users.

The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.

Pedestrian use

101. Nine users provided evidence of use of the route during the relevant period and one provided evidence of use in 2000 only. Of these, five had used the claimed route for the whole of the twenty-year period. Seven of the ten users provided details of the frequency of their use. This equates to approximately six to ten times per week and an average of one to two users per day. It is noted that all ten users also saw other users using the route.
102. This is a suburban area where there is a significant population and therefore potential users of the route. It is accepted however that given the nature of the route, a short-cut linking between two roads, users are most likely to have come from the immediate locality and this is borne out in the evidence provided.
103. The applicant was contacted when the application was taken up for investigation and a request was made for any further information to be submitted that they wished to be taken in to account. No further evidence has been submitted and as noted above, the applicant does not wish to proceed further with the application.
104. It is accepted that the modest number of users put forward is perhaps reflective of the type of route and that consistent use has been identified over a significant period of time. However, on the basis of the evidence submitted,

the use is not considered to have been of sufficient volume or frequency for it to have come to the attention of the landowner that a right over the route was being asserted. In addition, given the limited evidence provided, in the context of a suburban area and the potential number of users, the volume and breadth of users of the route is not considered to be representative of the public.

Bicycle use

105. Given the limited evidence of use on bicycle, it is not considered sufficient to demonstrate use by the public or to have been of such a volume that it would have come to the attention of the landowner, that a right of way for cyclists was being asserted.

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.

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

Conclusions under Section 31, Highways Act (1980)

107. Analysing the evidence reviewed above, the conclusion reached is that the provisions of s31 of the Highways Act (1980) have not been satisfied, as the evidence submitted of the use of the route is not considered to have been of sufficient volume or frequency to have come to the attention of the landowner or to have been representative of 'the public'.

Analysis of the evidence under Common Law

108. This matter can also be considered at common law. For a claim to succeed at common law, the onus is on the applicant to show that the owners were aware of, and acquiesced in, the use of a route by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied from a sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back. The more notorious the use, the easier it will be to infer dedication.

Conclusions under Common Law

109. Unlike in Section 31, a wider period of user evidence can be considered, in this case from the earliest evidence of use in 1960 to 2000, when the route was blocked. Ten users provided evidence of use between 1960 and 2000 although not all users provided information regarding their frequency of use. The evidence of use varies across the period and the use of the route equates to an average of six to fifteen times per week and one to two times per day. Limited evidence relating to the use of the route by bicycle has also been provided.

110. Whilst it is accepted that consistent use of the route has been identified over a significant period of time, in the context of this suburban area and on the basis of the evidence submitted, the use is not considered to have been of sufficient volume or frequency for it to have come to the attention of the landowner that a right over the route was being asserted.

Conclusions

111. As set out earlier in the report, for an Order to be made to change the Definitive Map, it must be on the basis of evidence which shows that the existence of a public right of way is 'reasonably alleged'.

112. The documentary evidence in the form of maps, aerial photographs and other documents is insufficient to infer that the route had been dedicated to the public, although there is evidence of public use of the route dating back to 1960.

113. The user evidence submitted is considered to be of insufficient volume and frequency for a reasonable landowner to have inferred that a public right over the route was being asserted, and of an insufficient breadth or volume to be representative of the public.

114. There is therefore insufficient evidence to demonstrate that the provisions of s31 of the Highways Act (1980) have been met regarding the claimed route, or for a deemed dedication at common law to be inferred. It is therefore recommended that the application be refused.

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

Hampshire maintains strong and sustainable economic growth and prosperity:	yes/no
People in Hampshire live safe, healthy and independent lives:	yes/no
People in Hampshire enjoy a rich and diverse environment:	yes/no
People in Hampshire enjoy being part of strong, inclusive communities:	yes/no
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

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

Document

Location

Claim Reference: Case File (CR 991)

Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

EQUALITIES IMPACT ASSESSMENT:

1. Equality Duty

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

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act with regard to the protected characteristics as set out in section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within section 149(7) of the Act (see above) and persons who do not share it.

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

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

2. Equalities Impact Assessment:

Hampshire 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. It is not considered that there are any aspects of the County Council's duty under the Equality Act which will impact upon the determination of this Definitive Map Modification Order application.