

# HAMPSHIRE COUNTY COUNCIL

## Decision Report

<b>Decision Maker:</b>	Jonathan Woods Countryside Strategic Manager
<b>Date:</b>	02 February 2023
<b>Title:</b>	Application for a Definitive Map Modification Order to record Footpath 21 - between Church Road and Farringdon Way - as a public bridleway Parish of Tadley

**Contact name:** Harry Goodchild, Map Review Manager

**Tel:** 03707 779 7652      **Email:** harry.goodchild@hants.gov.uk

### Purpose of this Report

1. The purpose of this report is to assist the Countryside Strategic Manager in determining whether to accept an application for a Definitive Map Modification Order to record part of Tadley Footpath 21, which runs between Church Road and Farringdon Way, as a public bridleway.

### Recommendation(s)

2. It is considered that the evidence submitted in support of the application is insufficient for it to be inferred that the existing footpath should be upgraded to bridleway status. It is therefore recommended that the application be refused.

### Executive Summary

3. This is an application made by a Tadley Town Council ('the applicant') in 2015 under Section 53 of the Wildlife and Countryside Act 1981, to record a public bridleway over part of Tadley Footpath 21 that runs between Church Road and Farringdon Way. The application is supported by user evidence that the applicant believes demonstrates that a public right of way should be recorded based on 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 the application route as a bridleway.

### 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 those events [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 -

- (a) the coming into operation of any enactment or instrument, or any other event, whereby—
  - (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
  - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
  - (iii) a new right of way has been created 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
- (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;
  - (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; or
  - (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 as highway presumed after public use for 20 years.  
(PART)

- (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.
- (1A) Subsection (1)—
  - (a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but
  - (b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.
- (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 a dedication under S.31 of the 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.

CASE LAW

***Whitworth v Secretary of State for Environment, Food and Rural Affairs (2010)***

*“It is true that regular use by both horse-riders and cyclists over that period would be consistent with an assumed dedication as a restricted byway at the beginning of the period (had that concept then existed). But it is no less consistent with an assumed dedication as a bridleway, of which cyclists have been able to take advantage under the 1968 Act. Since section 30 involves a statutory interference with private property rights, it is appropriate in my view, other things being equal, to infer the form of dedication by the owner which is least burdensome to him. Carnwath LJ*

Commenting on a consideration of evidence relating to use by two cyclists, Carnwath LJ stated that *“..it was on any view insufficient to support a finding of use as enjoyment as of right “by the public”.”*

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

5. The claimed route covers the westernmost section of Tadley Footpath 21, a distance of approximately 150 metres, commencing at a junction with Church Road (see Fig.1) and proceeding north-eastwards along a gravel track, which also serves as a vehicular access to several properties. The track continues on a narrower, tarmac path to a junction with Farringdon Way, where several small concrete bollards have been installed to prevent vehicular access onto the footpath (see Fig.3).
6. The land over which the claimed route runs is unregistered. The definitive statement entry for Tadley Footpath 21 states that the route was '*shown on Tadley Inclosure Award as Public Footway No. 663*', which possibly explains the absence of a registered owner.



Fig 1 – Junction with Church Road (Point A)



Fig 2 – Looking back at Point A from north-east



Fig 3 – Junction with Farringdon Way (Point B)

## Issues to be decided

7. The primary issue to be decided is whether there is evidence to show that public rights subsist, or can be 'reasonably alleged' to subsist along the claimed route. At least one of these tests must be satisfied for an Order to be made. In the case of an application that concerns a route not already recorded on the definitive map, it is simply necessary to demonstrate that the 'reasonably alleged' test has been met (in accordance with Section 53(3)(c)(i)). 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. A higher threshold must be met for an Order to be made in instances where the application concerns a route that already appears on the definitive map.

8. Case law has decided that the burden of proof associated with the confirmation of Definitive 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. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order if it is satisfied that the way subsists *on the balance of probabilities*.
9. Any changes to the definitive map must reflect public rights that already exist. It follows that a change must not be made simply because it would be desirable, or instrumental in achieving another objective. Therefore, before an Order 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.
10. If an application is approved and an Order is to be made, then the alignment of the route, and the status and width of the way and any lawful limitations to use must also be determined. Authority for the inclusion of those particulars in the Order to change the definitive map and statement should also be given.
11. Where a Definitive 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 for determination.
12. In the event that an application is refused, the applicant has the right to appeal the refusal to the Secretary of State under Schedule 14 to the 1981 Act, and they may direct the County Council to make the Order that is sought if they agree that the evidential threshold has been met. The Schedule 14 process allows for the introduction of additional evidence at appeal stage, and this could result in the County Council being directed to make an Order based upon evidence that was not before it at determination stage. The stance taken by the County Council in the event a decision not to make an Order is appealed will therefore depend upon the particulars of each case.
13. In the present case, if it is held that there is sufficient evidence to warrant a modification of the Definitive Map to record higher rights, it will be necessary to determine the status of the way to be recorded. The Planning Inspectorate's *Definitive Map Orders: Consistency Guidelines* has the following to say regarding the acquisition of public rights arising from use by pedal cycles:

*Section 31, HA80, as amended...provides that use of a way by non-mechanically propelled vehicles (such as a pedal cycle) can give rise to a restricted byway. In Whitworth it was suggested that subsequent use by cyclists of an accepted, but unrecorded, bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the CA68, could not give rise to anything other than a bridleway. Whilst Carnwath LJ accepted that regular use by horse riders and cyclists might be consistent with dedication as a restricted byway, it was also consistent with dedication as a bridleway. In such an instance of statutory interference with private property rights, he determined, it was reasonable to infer the dedication least burdensome to the owner.*

## **Consultations**

14. Basingstoke and Deane Borough Council and the local member (Councillor Warwick Lovegrove) were made aware of the application at the time it was submitted. No further consultation has been considered necessary in view of the straightforward nature of the case.

## **Comments by the Landowners**

15. The claimed route is not registered with the Land Registry. However, several landowners whose property abuts the route contacted the County Council when the application was submitted, objecting to the application on account of its use as a private vehicular access, safety concerns linked to limited sight lines, and raising concerns about future maintenance. None of these issues are relevant to the determination of the application.

## **User Evidence**

16. The reference in the definitive statement entry to the route being set out as a public footway in the Tadley Inclosure Award (1850) indicates that the history of the route was thoroughly researched at the time the first definitive map was prepared in the early 1950s. Officers have found no documentary evidence which indicates that an error was made in the recording of the claimed route as a public footpath, or that there has been any question of higher rights raised by anyone in the years since it was first recorded. The application must therefore turn upon the evidence of use submitted in support of the application.
17. The application was supported by the evidence of two people who completed user evidence forms. Their evidence charts public use of the claimed route from 1990 up until 2015. Both users claim to have used the route on foot and on a bicycle.
18. One user stated that they first used the route in 1990, and continued to use the route until the submission of the application. They provided no frequency of use, instead stating that they had used the route 'all year round'. They do not report ever having been challenged, or encountering any obstructions, and state that they occasionally saw other people using the route on a bicycle.
19. The other user did not provide any dates for their usage, instead stating that, at the time they completed their user evidence form, they had used the route for 'over 20 years'. At the time of the application, this would translate to the commencement of their use being (at the latest) some point during the mid-1990s. They gave a frequency of use of 3-7 times per year but did not differentiate their use on foot/bicycle. They claim to have seen other people using the route on foot, on a bicycle and on horseback. They do not report having ever been challenged or prevented from using the route.
20. The applicant requested an update on the progress of the application in 2019, at which point they were advised that the County Council was not yet in position to progress it. At that time officers indicated to the applicant that the volume of user evidence submitted in support of the application was very light, and it was likely that additional evidence would be required in order to substantiate a claim for higher rights. However, no further evidence has been forthcoming.

## **Summary of user evidence**

21. The evidence of qualifying use (ie use on a bicycle) put forward is particularly light. Only two forms were submitted in support of the application, and neither user differentiated their pedestrian use from their use on a bicycle. In any event, the

frequency provided by the user who submitted those details equates to approximately once every two months.

### **Actions of the landowners**

22. No evidence has been put forward to suggest that use by cyclists has ever been challenged by a landowner, or by the owner of any of the properties which abut Footpath 21. Although early correspondence from local residents expressed concerns about the designation of the route as a bridleway on safety grounds, they do not indicate that they have ever directly challenged cyclists who were using the route.

### **Analysis of the Evidence under Section 31, Highways Act 1980**

23. 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

#### 24. Physical nature of the route

A public highway must follow a defined route. As the claimed route is already recorded as public footpath linking two public roads, it does follow a clearly defined route and is therefore capable of being a right of way at common law.

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

No event has been identified prior to the submission of the application for a Definitive Map Modification Order that can be said to have brought the public's right to use the route as a bridleway into question. It is therefore considered that the bringing into question of this right was the 2015 application itself.

#### 26. Twenty years' use without interruption

The earliest stated use of the route was in 1990. Because both users claim to have used the route on foot, it is not clear whether their earliest use of the route was on foot or on a bicycle, so it cannot be said with certainty whether this requirement has been satisfied. However, in light of other aspects of Section 31 not being satisfied, this issue is not considered to be pivotal

#### 27. '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."

There is no evidence that use of the path has been as a result of force, which is in keeping with its existing status as a public footpath.

*Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look.*

The accounts of users of the path indicate that use was open and without secrecy.

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

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

## 28. 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 volume of use on a bicycle is particularly light, and there is no direct evidence of any use on horseback. There does not appear to have been use of a volume one might expect if the route was recorded as a bridleway.

29. *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.*

The quantity of evidence of cycling use put forward is not considered to be representative of 'the public'. Given the setting of the path, on the edge of a large town such as Tadley, a far greater volume of evidence of use on a bicycle would be necessary for it to be brought home to the landowner that a right higher than that on foot was being asserted. The use put forward by the two witnesses itself is also particularly lightweight, with one user claiming use of only 3-7 times per year (and it not being clear whether any of this use was on foot). The volume of use from the other witness appears to have been more substantial, but the vagueness of the description of this makes it impossible to draw any meaningful conclusions. Again, this use appears to have been diluted by use on foot. It is doubtful whether this use could be sufficient to bring home to a landowner that a higher right was being asserted.

30. *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.*

Neither of the users claimed any connection to the landowner, that they sought permission to use the route on a bicycle or that their use was in the exercise of a private right. The use put forward therefore appears to have been 'as of right'.

## **Conclusions under Section 31, Highways Act (1980)**

31. It is considered that the requirements of Section 31 of the Highways Act 1980 have not been satisfied in this instance. Use of a kind that would be required to upgrade

the footpath to bridleway status (ie use on horseback or bicycle) appears to have been trivial, and not of a level that would be required for a deemed dedication of bridleway rights to be inferred, taking into account the setting of the path on the edge of a large urban area.

### **Analysis of the evidence under Common Law**

32. 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**

33. As the land is unregistered, it is questionable whether there is anyone with the capacity to dedicate higher rights over the route, and unlike Section 31, this would be a potential barrier to inferring dedication had occurred. However, for the same reasons as under Section 31, the volume of qualifying use put forward in support of the application is insufficient to raise a presumption that a landowner intended to dedicate higher rights on Footpath 21, and so this issue is not material to determination.

### **Conclusions**

34. For a modification to be made to upgrade the status of a route already recorded on the Definitive Map, it must be shown that those higher rights subsist on the balance of probabilities.

35. There is no documentary evidence to cast doubt on the current depiction of the route on the Definitive Map. The surveying process that recorded the route as a footpath in the 1950s appears to have taken account of historic documentary evidence, as can be seen by the reference in the Definitive Statement to the Tadley Inclosure Award.

36. The evidence of qualifying use (use on horseback or a bicycle) submitted in support of the application is very light, and not of a volume that would be required to draw an inference that higher rights subsisted than those already recorded.

37. For the reasons set out above and earlier in this report, it is considered that the application should be refused.



## REQUIRED CORPORATE AND LEGAL INFORMATION:

### Links to the Strategic Plan

This proposal does not link to the Strategic Plan 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: DMMO 1164 (Tadley)

#### Location

Countryside Access Team  
Universal Services  
Three Minsters House  
76 High Street  
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.

### **CLIMATE CHANGE IMPACT ASSESSMENT:**

Hampshire County Council declared a climate change emergency on 17 June 2019 and a Climate Change Strategy and Action Plan has since been adopted. The County Council utilises two decision-making tools to assess the carbon emissions and resilience impacts of its projects and decisions. These tools provide a clear, robust, and transparent way of assessing how projects, policies and initiatives contribute towards the County Council's climate change targets of being carbon neutral and resilient to the impacts of a 2°C temperature rise by 2050. This process ensures that climate change considerations are built into everything the Authority does.

The legislative framework for Definitive Map Modification Orders does not enable the decision maker to take into account any environmental concerns relating to an application and a climate change impact assessment has therefore not been carried out in relation to this application. The Countryside Access Team strives to reduce their environmental impact wherever possible.