

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Jonathan Woods – Countryside Strategic Manager
Date:	2 May 2024
Title:	Application for Definitive Map Modification Orders to record a restricted byway from T58 Unclassified Road to T58 North Down Road, in the parish of Hurstbourne Tarrant.
Reference:	DMMO 1270

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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, a “DMMO”, recording a restricted byway in the parish of Hurstbourne Tarrant.

Recommendation

2. That there is sufficient evidence for a DMMO to be made and that the claimed route should be added to the Definitive Map and Statement, the “DMS”, as a public bridleway with a width of 3.5meters. A draft order plan is provided in Appendix A.

Executive Summary

3. This is an application made under Section 53 of the Wildlife and Countryside Act 1981. The application was made in 2020 by a resident of Andover, the “Applicant”, to record a restricted byway from T58 Unclassified Road to T58 North Down Road, in the parish of Hurstbourne Tarrant.
4. The application is supported by user evidence which the Applicant believes sufficiently demonstrates that a public right of way should be recorded. Having considered the supporting evidence, and taken additional research into account, officers consider that there is sufficient evidence for a DMMO to be made, and that the claimed route should be added to DMS as a public bridleway.

Legal framework for the decision

Wildlife and Countryside Act 1981

5. Section 53: Duty to keep definitive map and statement under continuous review.
 - (2) As regards every definitive map and statement, the surveying authority shall:
 - b) ... keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.
- (3) The events referred to in sub-section (2) are as follows: -
 - c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
 - i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies.
 - 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.

Highways Act 1980

6. Section 31: Dedication of way as highway presumed after public use of 20 years
 - (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, 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.

Presumed dedication at Common Law

7. 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 circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

Issues to be decided

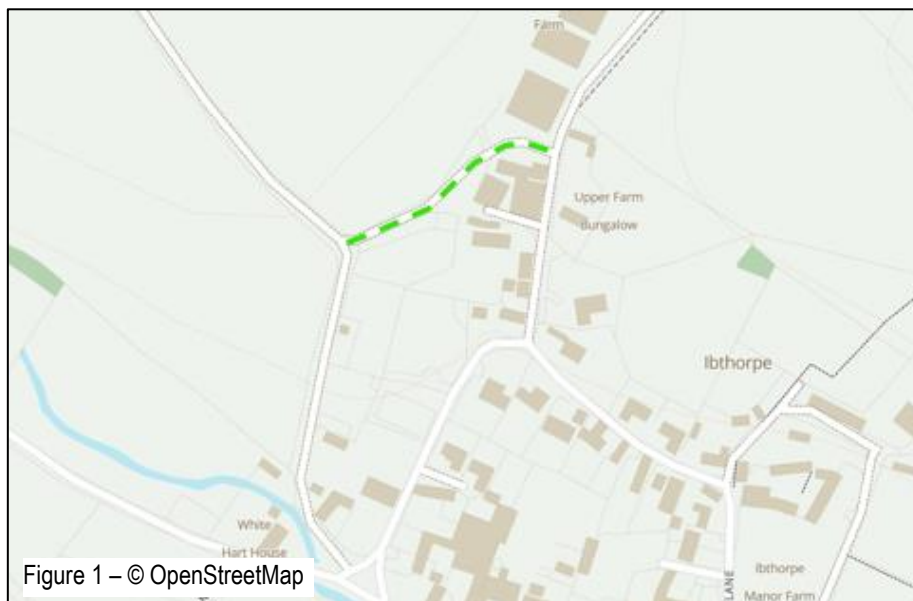
8. The primary issue to be decided is whether there is evidence to show that public rights subsist, or can be 'reasonably alleged' to subsist, along the application route. At least one of these tests must be satisfied for an Order to be made. In the case of an application that concerns a route not already 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.
9. 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'.
10. Any changes to the definitive map as a result of a DMMO 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.
11. Historical documentary evidence has been examined to see whether it indicates the existence of public rights as a result of a deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be assessed holistically, it being unlikely that a single document or map will provide sufficient evidence to justify a change to the definitive map. The County Council is under a duty to record any rights that are found to exist, even if they are not claimed by the applicant.
12. 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.
13. 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.

14. 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.

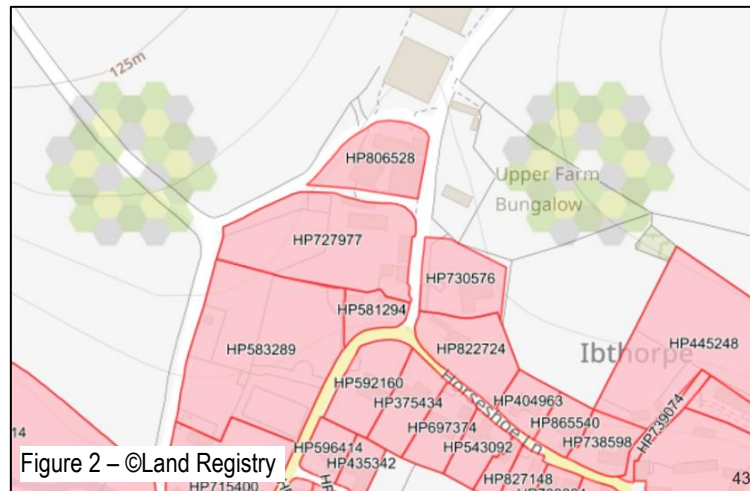
Description of the route

15. The claimed route is located in the village of Ibthorpe in the parish of Hurstbourne Tarrant. Commencing at T58 Unclassified Road the route travels eastwards to where it terminates at T58 North Down Road as shown by a green dashed line in Figure 1 below.



Land Ownership

16. Officers have completed a Land Registry search regarding the land over which the claimed route travels.



17. At the time of search the land adjacent to the claimed route is covered by parcels numbered HP727977 and HP806528.
18. The land over which the claimed route travels and the area north of the claimed route is unregistered. One of the landowners mentioned in the registers of title in relation to the above-mentioned parcels, “Landowner 1”, has stated that they have full title to the land over which the claimed route travels and that the land has been in their family since the 1960.

Representations from the Landowners

19. The following landowner representations have been received:

Landowner 1

20. Landowner 1 has raised the following points:
- Numerous walkers have used the claimed route and they had not been sufficiently firm in denying their use of the track.
 - Horse riders that used the route regularly had requested and had been granted permission, the route should therefore not be recorded as a bridleway.
 - Use of the claimed route does not support restricted byway designation.

Landowner 2

21. Landowner 2 moved to Ibthorpe 17 years ago, they have raised the following points:
- Landowner 1 allowed the local riding school to use the claimed route years ago (before my time).
 - Landowner 1 kindly let local villagers walk the claimed route.

- iii) Landowner 1 told me that we could not walk the claimed route as it is not a public right of way and have seen others being told the same.
- iv) Landowner 2 also explained that the claimed route was not a right of way.

Landowner 3

22. Landowner 3 moved to Ibthorpe 20years ago, they have raised the following points:
- i) Landowner 1 permitted people to use the claimed route.
 - ii) Landowner 3 was not opposed to people using the claimed route but insisted that this was with permission of Landowner 1.
 - iii) Various cyclists and motorcycles had used the route without permission.
 - iv) Landowner 3 thought that without installing a gate there was little that could be done to prevent people using the route.

Consultations with other bodies

23. In addition to the landowners, the following people and organisations have been consulted in relation to this application:

The Ramblers, Open Spaces Society, Byways and Bridleways Trust, British Horse Society, Trail Riders Fellowship, Cycling UK, British Driving Society, Auto-Cycle Union, Land Access and Recreation Association, Test Valley Borough Council, Hurstbourne Tarrant Parish Council, HCC Local Member – Cllr Kirsty North, and Countryside Access Team.

The following responses were received:

Andover Ramblers

24. Andover Ramblers have stated that they *“have no objection to the DMMO 1270 proposal and would support it as being a useful addition to the PROW network”*.

Hurstbourne Tarrant Parish Council

25. Hurstbourne Tarrant Parish Council have stated that *“The Parish Council met on Monday and are keen that the Parish Council is the voice to ask residents to comment. One councillor updated that there were now 4 such applications within the Parish which would no doubt invite comment in due course. He stated that as a young person he walked the path and was aware that there is lots of other evidence of usage over many years. One member of the public in attendance stated he’d already written a submission about 4 or 5 years ago about it, concerning his own personal use of it going back to the 1990s”*.

Public responses

26. A resident of Hurstbourne Tarrant has emailed stating that the claimed route *“has certainly been used for many years for access, so I would happily add further support to recording as a byway”*.

Documentary Evidence

27. The documentary evidence that has been considered as part of this investigation is listed below, a guide to documentary evidence is provided as Appendix B:

Ibthorpe Village Map Corpus Christi Survey (1823)¹

28. Although not the largest of the Oxford colleges, Corpus Christi was the holder of a major estate which included lands in Hampshire. The estate survey of Ibthorpe village, dated 1823, does not show the claimed route.

Tithe Map (1838)²

29. The Tithe Map of 1838 shows the first part of the claimed route which is coloured sepia and numbered 598. The northeastern part of the claimed route is uncoloured and forms part of plot numbered 141.

Ordnance Survey 25" England and Wales Map (1910)³

30. The OS 25inch to the Mile England and Wales map of 1910 shows the claimed route delineated with dashed lines, the route is shown in similar fashion to other tracks and ways. However, the claimed route forms part of plot numbered 273 which the corresponding Book of Reference records as being "*houses, gardens, &c*", and so indicates that the route was considered to form part of the surrounding property rather than a distinct 'through route'.

First Definitive Map – Andover Rural District (1957)⁴

31. The claimed route is not recorded as a public right of way or adopted highway on the first edition of the Definitive Map.

Aerial Photography (2000 - 2020)

32. The claimed route is visible as a well-defined track on the aerial photography dated 2000 with a width of 3.5meters. On the aerial photography dated 2013, the claimed route is also visible, but vegetation is obscuring the track. On the aerial photography dated 2020, the claimed route is also visible, but vegetation is obscuring some of the track. The aerial photography dated 2000 shows that the claimed route was 3.5m wide in 2000 which is a similar width to that shown on current Ordnance Survey mapping.

¹ Hurstbourne Tarrant Historical Society (hbhistoricalsociety.org.uk)

² Hurstbourne Tarrant Historical Society (hbhistoricalsociety.org.uk)

³ National Library Scotland (nls.uk)

⁴ Hampshire Record Office H/CL1/2/2 (hants.gov.uk)

Photos of signage on farm building (2024)

33. Landowner 2 has sent in photographs of signage on a farm building. The signage states:

“You are entering a farm yard, machinery and workmen operating - please be alert, take care and drive slowly”

“Please keep to marked footpath”

“Keep dogs on a lead”

Landowner 1 has stated that the signage has been in place for approximately 10years. Landowner 1 stated that the sign regarding driving slowly was meant for people driving motorised vehicles for example deliveries and mechanics. Landowner 1 stated that the none of the signage relates to the claimed route and was not meant to indicate that the public were not allowed to use it.

Analysis of the Documentary Evidence

34. Officers, having examined the documentary evidence, do not consider that there has been an express dedication of a public right of way. Officers also do not consider that the documentary evidence, when considered independently, shows that a right of way has come into existence through long use under common law. There also is no documentary evidence that indicates that the landowner did not intend to dedicate a public right of way.

User Evidence

35. The application is supported by 13 user evidence forms. The evidence is summarised on the chart provided in Appendix C. 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.

36. All 13 users have reported to have used the route on foot, 3 on a bicycle, and 4 on horseback. No user has reported to have used the route in a motor vehicle. Officers consider that the use is consistent with that of a bridleway.

Analysis of the user evidence under Section 31 of the Highways Act 1980

37. 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 routes

38. The claimed route links to two adopted unclassified roads which appear to hold carriageway status. The claimed route is also an established track. The route is therefore capable of existing as a public right of way at common law.

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

39. The period of 20years is calculated retrospectively from the date on which the public's right to use the routes was first brought into question. Officers consider that the date that the public's right was brought into question was 2020, when the Applicant submitted the application to modify the Definitive Map.

Twenty years use without interruption

40. To establish that a way has become a right of way it is necessary to evidence uninterrupted use over the period of 20years previous to the rights being brought into question. Use of the route does not appear to have been obstructed during the 20year period from 2000 to 2020 with at least 12 users using the route in each and every year.

As of right - without force, stealth, or permission

41. The uninterrupted use over the 20year period must also be 'as of right' – without force, stealth, or permission. None of the users have stated that they have sought permission to use the route, were exercising a private right, or were related, employed by, or a tenant of the landowner. The user evidence therefore indicates use as of right.

Use by the public

42. The use must be of a volume 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 user evidence is supplied by a few residents of Ibthorpe and others living further afield, the use is therefore representative of the public.

Analysis of the user evidence under Common Law

43. This matter can also be considered under common law where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied from a

sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use.

44. 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 use 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. Unlike under Section 31, the total period spanned by the user evidence can be considered.
45. Officers consider that the submitted user evidence confirms a level of use that should have come to the attention of the landowner, in this case the landowner has been aware that the claimed route was being used by the public. This view is further supported by Hurstbourne Tarrant Parish Council's consultation response which confirms that a parish councillor has stated that the claimed route has been used extensively over many years.

Actions of the landowner

46. Landowner 2 has stated that they have been told by Landowner 3 that they were not allowed to use the claimed route and have seen them telling other people the same. Landowner 3 has stated that horse riders have been given permission to use the claimed route.
47. However, no users have reported to have used the route with the permission of the landowner. Officers therefore consider that the landowner has not sufficiently made the public aware that the claimed route should only be used by horse riders with permission.

Conclusions regarding the User Evidence

48. In the case of *R v SSW ex parte Emery* [1996,1998] the Court of Appeal held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry*".
49. Officers therefore consider that although there is some conflicting evidence, when taking all the evidence together, it provides a reasonable allegation of dedication under statutory prescription and presumed dedication under common

law. Officers consider that the bridleway should be recorded as 3.5m wide in line with the aerial photography and mapping during the period of claimed use.

Conclusion

50. That there is sufficient evidence for a DMMO to be made and that the claimed route should be added to the DMS as a public bridleway with a width of 3.5meters.