

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Countryside Access Group Manager
Date:	24 October 2019
Title:	Application for a Definitive Map Modification Order to upgrade Tangley Footpath 12 to a Byway Open To All Traffic Parish of Tangley

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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 to upgrade Footpath 12 in the parish of Tangley to the status of Byway Open to All Traffic (hereafter 'BOAT').

Recommendation(s)

2. That the application be refused.

Executive Summary

3. This is an application made by a member of the public in 2018 to upgrade Tangley Footpath 12 to a Byway Open to All Traffic. The application is supported by historic documentary evidence that the applicant believes demonstrates that higher public rights should be recorded along the 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 BOAT along the route.

Legal framework for the decision

WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

- b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

- (3) The events referred to in sub-section (2) are as follows: -
- c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows...
 - (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

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 66: Restriction on creation of new public rights of way

(1) No public right of way for mechanically propelled vehicles is created after commencement unless it is—

(a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or

(b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.

(2) For the purposes of the creation after commencement of any other public right of way, use (whenever occurring) of a way by mechanically propelled vehicles is to be disregarded.

Section 67: Ending of certain existing unrecorded public rights of way

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

(2) Subsection (1) does not apply to an existing public right of way if—

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

(3) Subsection (1) does not apply to an existing public right of way over a way if—

(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles—

(i) was reasonably necessary to enable that person to obtain access to the land, or

(ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

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

5. The claimed route commences at a junction with the U56 (Church Lane and Clay Copse Lane, Tangley; point A on the attached plan), before continuing northwards along an enclosed track for approximately 440 metres. The claimed route then bears east for 230 metres to Whistler's Farm. Beyond the farm, the route is unmetalled; it bears north for 320 metres, and east for 230 metres to a junction with C33 (Andover Road; point B on the attached plan).
6. The claimed route is shown on the County Council's list of streets maintainable at public expense (a requirement under s36(6) Highways Act 1980). From the western end of the route as far as Whistler's Farm, the route is classified as a U-road; from Whistler's Farm to the eastern end of the route, the road is classified as a T-road.

The County Council's Highways Department uses the term 'U-road' to denote an unclassified road, maintainable at the public expense and metalled. A 'T-road' is an unclassified road, maintainable at the public expense and unmetalled. The above classifications relate to internal inspection and maintenance regimes and are not necessarily representative of public status.

The route was added to the County Council's list of streets in 1982 following an enquiry about maintenance responsibility from the former owner of Whistler's Farm. After review of the Tangley tithe map and award, Greenwood's map of Hampshire, and the Ordnance Survey map of 1808, the County Surveyor determined that the route should be added to the list of streets. As the list of streets is merely a record of highways maintainable at public expense, presence of the route on the list does not reflect the status of rights the public have over it, merely that maintenance of the route is the responsibility of the highway authority.

Issues to be decided

7. The primary issue to be decided is whether there is clear evidence to show that public vehicular rights 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.
8. 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.
9. Section 66 of the Wildlife and Countryside Act describes a BOAT as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which

footpaths and bridleways are so used”. This distinction differentiates between a BOAT and a road. If the claim is to be recommended for acceptance, it will need to be demonstrated (on the balance of probabilities) that public vehicular rights subsist over Footpath 12.

Background to the Application

10. The application was submitted in 2018 by a member of the public. Due to a backlog of applications the matter was not taken up for investigation at the time. In 2019, the applicant appealed to the Planning Inspectorate, as the matter had not been determined. The Planning Inspectorate instructed the County Council to determine the application within nine months of the decision date of 28 June 2019. Following this decision, the application was taken up for investigation.
11. The applicant submitted the following evidence in support of the application:
 - a. Bartholomew’s Half-Inch Map, sheet 29, 1902
 - b. The Inland Revenue Valuation plan
 - c. INSPIRE land index polygon map, 2018
 - d. Correspondence bundle (1982 – 2002)
12. The solicitor acting for the affected landowners submitted a number of documents as evidence that the claimed route has never been considered a public vehicular highway:
 - a. Greenwood’s Map of Hampshire
 - b. The Tangley Tithe Map and Apportionment
 - c. The Ordnance Survey Book of Reference
 - d. The Andover Rural District Council Highway Handover Map
 - e. The Ordnance Survey County Series Maps
 - f. Tangley Estate Plan
 - g. Andover Highways Book
 - h. Sworn statement from a local resident
 - i. The Tangley parish map
 - j. Ministry of Agriculture, Fisheries and Food - Farm Survey
 - k. Ordnance Survey letter, April 2005
13. All evidence is discussed below, in addition to other sources which have been reviewed.

Consultations

14. The following people and organisations have been consulted on this application: the Open Spaces Society, the Ramblers, the Auto Cycle Union, the Byways and Bridleways Trust, the British Horse Society, the carriage

divers' representative, the CTC, Test Valley Borough Council, Tangley and Vernham's Dean Parish Councils, the Trail Riders' Fellowship, the Hampshire County Council Countryside Service Area Access Manager.

Additionally, the local elected member of the County Council, Cllr North, has been notified. Where responses were received, these are set out below.

15. The Ramblers

As this is a claim based on historic evidence we will not be commenting.

16. Carriage Drivers' Representative

A new shared route that would be open to horse drawn vehicles would be welcome.

Comments by the Landowners

17. The affected landowners have been consulted on this application. Where responses were received, these are set out below:

18. Solicitor acting for the owners of Whistler's Farm and Ambley Manor

The solicitor has provided a comprehensive submission relating to the status of the claimed route. This response included thorough research into the historic documentary evidence, which is reviewed below. Additionally, the following points were made in relation to this application:

- The evidence cited by Mr Mason for putting the route on to the List of Streets in 1982 was insufficient to prove public vehicular status
- The documentary evidence against public vehicular status is substantial
- There is no public vehicular user evidence
- In the necessary balancing exercise, the evidence must surely be predominantly against public vehicular status
- The route was only put on the List of Streets because of great political pressure brought by the then owner, his County Councillor and his MP, and also the litigation which he was bringing against the County Council for breach of duty. As a result of that pressure, a sum of money was paid to him by the County Council and also the route was put on the List of Street so that he could get it maintained by the County.

Documentary Evidence

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

19. Ordnance Survey Old Series Map (c.1817) (A)

The claimed route is clearly shown on the plan as an enclosed route. The current Whistler's Farm, named East End Farm on this map, is shown, which

suggests that the claimed route may have been for private use. The routes shown in the immediate vicinity of the claimed route generally reflect the present-day highway network, but it is interesting to note the depiction of a route running westward from Whistler's Farm to meet Rushmore Down Lane (T56); this route is not shown on any other map.

The clear depiction of the route on this map demonstrates the presence of the route on the ground at the time the area was surveyed. Surveyors marked what was physically present on the ground, rather than only showing routes along which the public had access, therefore this map adds limited support to the application to upgrade Footpath 12 to the status of BOAT.



Figure 1 - Ordnance Survey Old Series. Source - <http://www.geog.port.ac.uk/webmap/hantsmap/hantsmap/ordnce6/oss09f.htm>

20. Plan of a Freehold Estate in the Parishes of Hurstborne Tarrant and Tangley, belonging to Charlotte Poore (1819) (A)

The plan shows outlines of land parcels owned by Charlotte Poore, including land to the north of Whistler's Farm. The majority of the claimed route is shown on the plan and annotated 'Lane', and part of the route has been omitted because it was beyond the area of interest. Elsewhere on the map, other routes are either unmarked, or marked with the destination, eg 'To Tangley'; one route is marked 'Road to Hurstbourne Tarrant'. A route adjacent to a distinctively shaped parcel of land is marked 'lane', yet is not currently part of the publicly maintainable highway or rights of way network. Notably, there is a route shown on the map reflecting the route shown on the Ordnance Survey Old Series map – commencing to the south of Whistler's Farm and continuing in a southerly direction towards the C168.

As a landowner, Charlotte Poore may have had a private right to use the claimed route to access her property. This document demonstrates that the

claimed route was present on the ground in 1819 but does not reflect whether there were public rights of access over it.

21. Greenwood's Map of Hampshire (1826) (A)

The map shows the claimed route as a 'cross road'; the map only shows two types of road – cross roads and turnpike roads. The map was produced for use by the travelling public and therefore tended to show routes which members of the public could use. However, the map is not a legal document and presence of the route on the map does not necessarily reflect that there were public rights along the route at that time. The route from the current Whistler's Farm, southwards to the C168 is also shown on the map; this is a route which no longer exists. The route shown on the Ordnance Survey Old Series, which continued westwards from the corner of the claimed route, is not shown on this map; this may be because it no longer existed at the time the area was surveyed.



Figure 2 - Greenwood's Map of Hampshire. Source - <http://www.geog.port.ac.uk/webmap/hantsmap/hantsmap/grnwood2/grnwood2.htm>

22. Tangley Tithe Map and Award (1838) (A)

Tithe maps and awards were created following the Tithe Commutation Act (1836), which sought to update the historic arrangement of landowners making payments in kind to the church, instead requiring them to pay a monetary payment. The maps and awards were created to calculate the value of the land in order to ascertain how much money the landowner should contribute to the church.

The claimed route is present on the Tangley Tithe map as a clear route, numbered 35 and 42, however, these two parcel numbers do not appear in the accompanying apportionment document. Although there is a figure at the end of the apportionment showing the total area in the parish for

'waste/roads', it is not clear whether these two parcels of land were included in that category and, if they were, the award is not specific enough to infer that any route shown on the map was public or private.



Figure 3 - Tangley Tithe Map. Image source - Hampshire Record Office, ref. 21M65/F7/230/2. Not to be reproduced without permission.

23. Book containing schedules and plans, by parish, of roads in Andover Highway District (undated, but likely mid- to late- 19th century) (A)

The book sets out the roads maintained by Andover Rural District Council; eight miles of roads in Tangley parish were maintained by the Rural District Council at this time and a map of these roads is provided. The claimed route has been omitted from the map, indicating that the Rural District Council did not consider the route to be publicly maintainable. This is indicative that the route was not considered to be a public vehicular right of way at the time the book was compiled. The routes in Tangley which were considered to be publicly maintainable at the time largely reflect the current highway network, except for part of a Roman road, which is not shown on the map and is currently classified as a T-road; Clay Copse Lane and Cow Down Lane are also omitted from the map. With the exception of these routes, the network of publicly maintained highways in Tangley has not changed since the map was created, and all routes which were being publicly maintained in the 19th century are still being maintained today. This is strong evidence that the claimed route was not considered to be a publicly maintainable highway by the highway authority at the time the map was produced.

24. Tangley Estate plan (1876)

The landowner's solicitor provided a copy of a plan produced for the sale of the Tangley Estate. The solicitor suggests that the plan demonstrates that the claimed route was private, as it is white rather than sepia like the other roads shown. As this plan was produced for the sale of an estate, rather than to reflect public rights of way, inferences about rights of way or status of routes cannot be made. It may be that the colouring is suggestive of the status of the route. However, as the map does not contain a legend, it is not possible to interpret the significance of the colouring of the roads. It may be that the route is uncoloured because it is a short route between two other roads on the plan, or because it is outside of the area of interest for the plan (Whistler's Farm is not included in this sale and the route is situated at the edge of the plan area).

25. Ordnance Survey Maps - County Series (25 inches to 1 mile) – 1870 – 1931

(A)

Four maps were published by the Ordnance Survey at a scale of 25 inches to 1 mile between 1870 and 1931. On each edition of the map, the claimed route is shown by solid parallel lines, indicating that the route was enclosed by hedges or fences. At its widest point, the route is approximately 11 metres wide, and at its narrowest point, the width is approximately 3.5 metres. There are no solid lines across either end of the route, which would have indicated the existence of a gate or barrier; however, there is a pecked line across the western end of the route at the junction with the U56.

The Ordnance Survey surveyors marked what they observed on the ground; therefore although a route may be shown as a road, this means that there was a route on the ground at the time the area was surveyed, it does not necessarily mean that there was a public right of way along the route (for example, the individuals using the route may have been doing so in exercise of a private right). The route to the south of Whistler's Farm which is parallel to the C33 is shown on each edition of the County Series map, although, unlike its depiction on Greenwood's Map of Hampshire and the Ordnance Survey Old Series, the route terminates before meeting the road, suggesting that this route may have been used for field access.

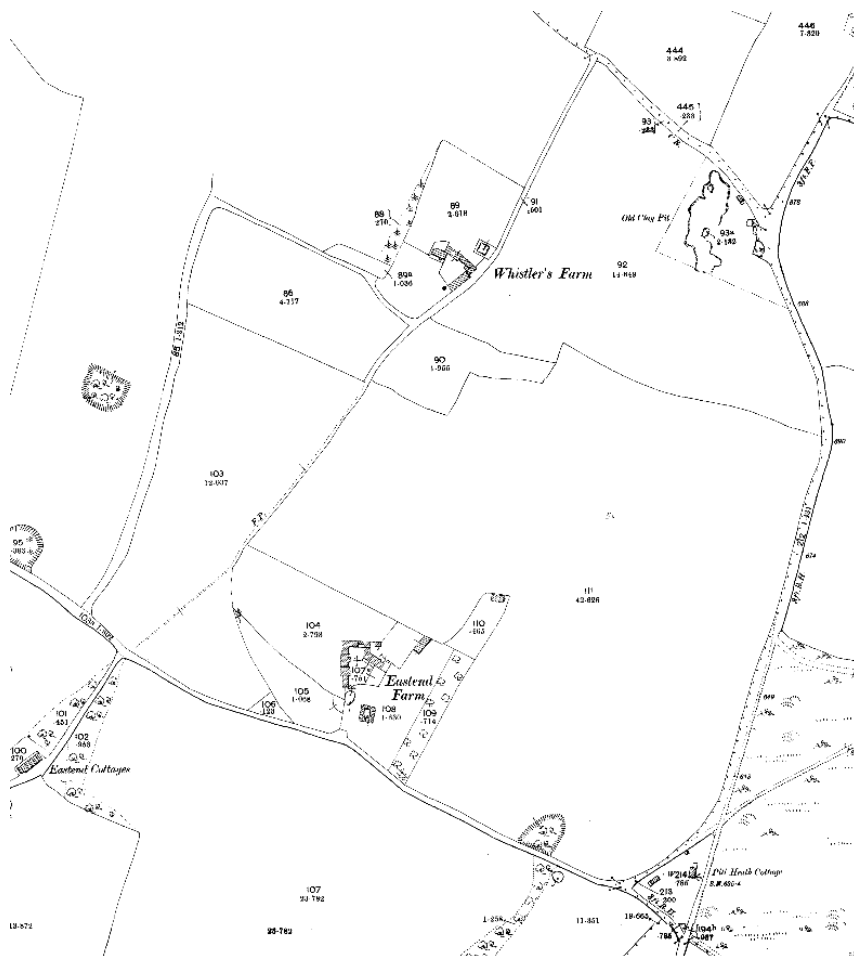


Figure 4- Ordnance Survey County Series, Second Edition. Image source - Hampshire County Council GIS

26. Ordnance Survey Book of Reference (1874) (A)

The Book of Reference was created to accompany the Ordnance Survey County Series First Edition. The book shows descriptions of land which correspond with the land parcel numbers on the map. The parcel numbers associated with the claimed route are described as 'road'. This indicates the character of the route as it appeared to the surveyor at the time but is not necessarily reflective of status.

27. Sales particulars of The Upton Estate and Bourne Farm (1898) (A)

The plan shows the claimed route clearly as a sepia coloured line. However, this map was produced for the purpose of sales and marketing of the surrounding land, rather than to reflect public status of a particular route. Therefore, the presence of the route alone cannot be interpreted as the existence of a public right of way, although the map is clearly strong evidence that the route existed at the time the map was produced. Similarly to previous maps, there is a small spur of a route to the south of Whistlers Farm, terminating in the field; the route is shown in the same way as the claimed route.

28. Bartholomew's Half-Inch Maps of England and Wales (1902) (A)

These maps were published for use by the public, particularly tourists and cyclists, therefore the maps tend to show routes over which the public had access. The application route is shown as a white road, which the legend denotes as an inferior road, not recommended for bicycles. Whilst the route is clearly shown, the map carries a disclaimer that, "The representation of a road or footpath is no evidence of the existence of a right of way." In *Commission for New Towns and Another v J.J. Gallagher Ltd* (2002), the judge stated that interpretations from Bartholomew maps should not be cast aside as a result of the disclaimer that the map was not evidence of the existence of a right of way, but conceded that "the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps".

This map is very similar to the depiction of the route on Greenwood's map of Hampshire; the claimed route is clearly shown on a map which was produced for use by the travelling public. However, although the map is clear evidence of the existence of the route, inferences about whether the route was a public vehicular highway cannot be drawn, as this map, by its own admission, is not proof of the status of a route.



Figure 5 - Bartholomew's Map of England. Source - National Library for Scotland. Reproduced with permission.

29. Inland Revenue Valuation Plan (1910) (A)

The Finance Act of 1910 required all properties in England and Wales to be valued so that a tax could be charged on the increase in property value at any subsequent sale or inheritance. A tax deduction could be made if there was a public right of way within the property boundary. These records consist of maps, which show the property boundaries, and field books, which set out the tax owed and any deductions made for rights of way.

The Finance Act map for Tangley uses the second edition Ordnance Survey county series map as a base map, therefore the line of the claimed route is shown as a road. The surrounding parcels of land have been outlined in different colours to denote ownership, but roads, including the claimed route, are omitted from the valuation. Roads were often excluded from valuation as

they were usually owned by the local authority. Although the claimed route is uncoloured, this map is not conclusive evidence of a route being a public right of way; the maps were not created for the purposes of reflecting road status and public rights and there is no positive confirmation that public vehicular rights exist.

30. Sales particulars of The Upton Estate and Bourne Farm (1917) (A)

The sales particulars consist of a map and a sales brochure. On the map, the claimed route is shown as a road, which is described as an 'occupation road' in one of the sales descriptions. These documents were created for the purpose of sales and marketing and therefore would not necessarily reflect whether a route was part of the publicly maintainable highway. Presence of the claimed route on the plan reflects that the route physically existed on the ground at the time that the area was surveyed; describing the claimed route as an 'occupation road' suggests that the route was for private use only.

31. Andover Rural District Council Highway Handover Map (1929) (A)

Highway handover maps were prepared when responsibility for highways transferred from rural district councils to county councils under the Local Government Act (1929). The maps indicated which highways were maintainable by the council, and also indicated routes which were not considered to be public routes that were not the responsibility of the highway authority. This map is similar in purpose and depiction to the 18th Century Andover Highway book (see item 18). The claimed route has not been annotated on the Handover Map, demonstrating that the Rural District Council did not regard the route as publicly maintainable.



Figure 6 - Andover Rural District Council Highway Handover Map. Source: Hampshire Record Office, ref. H/SY3/6/3. Not to be reproduced without permission.

32. Ministry of Agriculture, Fisheries and Food, Farm Survey (1941)

The landowners' solicitor provided a copy of a farm survey conducted by the Ministry of Agriculture, Fisheries and Food in 1941. The survey consists of a form, which is a single side of paper and appears to be for general data gathering purposes, and a plan, which uses the Ordnance Survey County Series third edition as the base map. On the plan, land appears to have been outlined and shaded to denote ownership, and the majority of the route has been included in the shading for Whistler's Farm. The survey form asks, on a scale of 'good, fair, bad', about the 'situation [of the farm] in regard to road' and 'condition of farm roads'. The surveyors indicated that Whistler's Farm was in a 'bad' situation regarding roads, and that the condition of farm roads was fair. This separation acknowledges a distinction between public highways and farm roads, but it is unclear what information the surveyors had at their disposal when the survey was made, nor what the purpose of the survey was. There are no questions on the form which relate to public rights of way. Without more information, further inferences about this document cannot be made.

33. Highways Maintenance Map, Andover Division (1946) (A)

Highway maintenance maps were produced following the responsibility for highways being transferred to county councils; the maps show the highways maintained by the County Council at the time. The map uses the same Ordnance Survey base map as the 1929 Highway Handover map (see above). As on the handover map, the claimed route has not been annotated, showing that the County Council were not maintaining it, and did not consider the route to be its responsibility.



Figure 7 - Highway Maintenance Map, Andover. Source: Hampshire Record Office, ref. H/SY3/3/24/2. Not to be reproduced without permission

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

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

Parish maps were prepared by parish 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 parish in order for the Draft Definitive Map to be produced.

On the Tangleby parish map, the claimed route is shown annotated in blue ink, which the legend sets out as 'public footpaths'; there are separate classifications for 'public highways', 'roads used as public paths', 'public bridleways' and 'public highways repairable racione tenurae'. The easternmost part of the route is only annotated in pencil, as this part of the route is within Vernham's Dean parish. There is a pencil line and a question mark querying whether there is an additional footpath in Vernham's Dean parish.

On the Vernham's Dean parish map, there is no indication of the claimed route. This omission by the parish council may have been done inadvertently, as the route runs along the parish boundary and is barely discernible on the map.

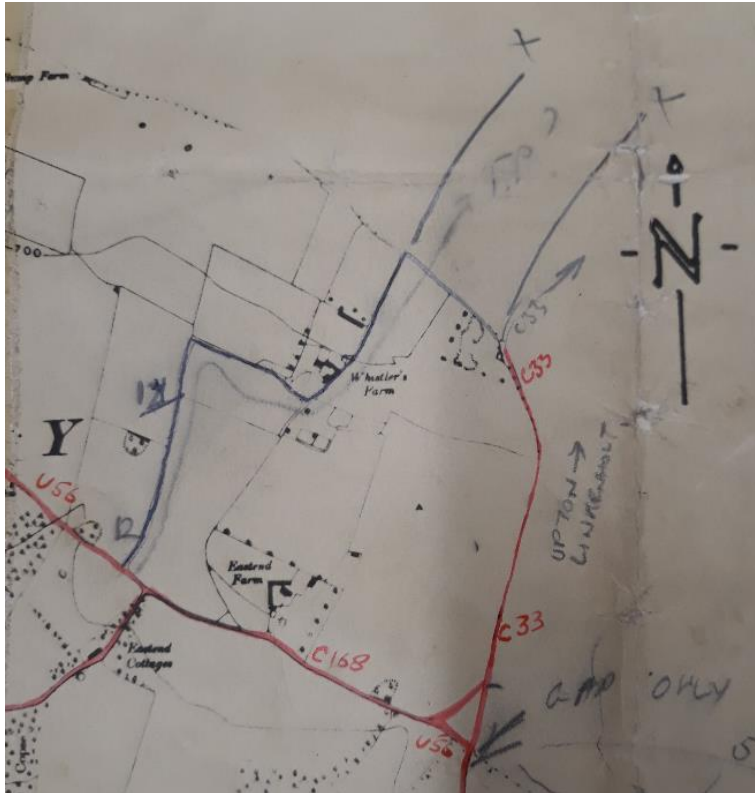


Figure 8 – Tangley Parish map. Source - Hampshire Countryside Service records.

Objections Book

The book of objections contains a record of all objections received when the draft definitive map was available for public scrutiny. It also contains records of objections and amendments made when the Definitive Map was open to periodic review. Three objections were made relating to the proposed rights of way in Tangley parish, but none of these were about the claimed route. The fact that some objections were received demonstrates that the draft map was under active public scrutiny.

Definitive Maps (A)

On both the first (1954), second (1958) and third (c1958-1964) Definitive Maps, the claimed route is shown as a footpath.

In summary, all documents relating to the National Parks and Access to the Countryside Act (1949) are consistent with the claimed route having been correctly recorded as a footpath at the time the map was produced: the route was claimed as a footpath by the parish council, the footpath status or route were not challenged when the draft Definitive Map was open to public scrutiny, and the depiction of the route on all editions of the Definitive Map is consistent over time, with an identically aligned route being shown as a footpath. This indicates that at the time, the parish council did not consider the route to be a right of way with a status higher than footpath, nor did they consider the route

to be a full public vehicular highway (which may have caused them to omit the route from the draft map entirely).

35. County Council Correspondence (1982 – 2002)

The applicant provided copies of three letters sent by the County Council in relation to the status of the claimed route. In a letter dated March 1982, the Assistant County Secretary wrote to the owner of Whistler's Farm House following an enquiry about who was responsible for clearing snow from the claimed route. The Assistant County Secretary viewed an Ordnance Survey drawing of 1808, Greenwoods map of 1829 and the tithe map, and took the view that the route was a public highway; he concluded that the route would be recorded as an unmetalled road, and the maintenance responsibility would fall to the County Council.

The second letter is dated December 1982 and, as above, it is from the County Secretary to the owner of Whistler's Farm House. This letter is similar to the first in that it sets out that the route is considered by the County Council to be a public highway. The letter speculates that the footpath classification along the route may 'disappear' or be upgraded to a Byway Open to All Traffic following a review of the Definitive Map in light of the route being considered a highway.

The third letter, dated September 2002, is from the County Council's Head of Legal Practice, to the Member of Parliament for Andover. The letter appears to be in relation to a liability claim made against the County Council along part of the claimed route; the County Council had asserted that not all of the route was part of the highway, but in this letter the position was reviewed: "It has been established that the section of highway was wrongly defined, as it was an ancient highway pre-dating 1835". The letter concludes that the route will be maintained as an unclassified road, to a safe and serviceable condition.

36. Letter from Department of the Environment, Transport and the Regions (1998)

The landowners' solicitor provided a copy of a letter about unclassified roads. The letter sets out that inclusion on the County Council's list of streets is not proof of the existence of public vehicular rights: "In relation to an application under the Wildlife and Countryside Act 1981 to add a route to a definitive map of rights of way, the inclusion of a highway described as [an unclassified county road] on the Highways Act list of highways maintained at public expense may provide evidence of vehicular rights. However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights."

37. Ordnance Survey Letter (2005)

The landowner's solicitor provided a copy of an Ordnance Survey letter setting out their policy on levelling. The solicitor suggests that the absence of levelling markers along the claimed route on the third edition of the Ordnance Survey

county series demonstrates that the route was private, as the letter states that levelling was undertaken along “any passable routes which did not rely on public rights of way”. However, further on, the letter also states, “Most of the levelling was done along road and tracks (public and private).” Whilst there are no levelling marks on Ordnance Survey maps along the claimed route, there are a large number of other roads in the area which do not have levelling marks; this may be because only more popular roads were surveyed.

38. Land Registry Official Copy of Register title - HP687856 (2017)

The title for Whistler’s Farm sets out that the proprietors have “a right of way on foot and by motorised transport” over the claimed route from Whistler’s Farm to the western point of the route at the junction with the U56. It is asserted by the objector that such a provision suggests that the route is not a public right of way for vehicles, as it would have been unnecessary were the route a public carriageway.

39. Sworn statement of local user (2018)

The landowner’s solicitor submitted a sworn statement of an individual who lived near the claimed route between 1947 and 1962. The individual describes the claimed route as an ‘access lane’ used for access to the farm only; he writes that he “spent a lot of time on the farm especially during school holidays either with farm work or shooting vermin and I don’t recall ever meeting any member of the public on the farm either walking, cycling, riding or driving. I cannot conceive that it was ever considered as a through route as it was virtually impassable beyond Whistler’s Farm and it was so much easier and quicker to use the roads to get from Tanglely to Upton.”

Whilst this statement provides an interesting insight into a local resident’s recollection of the route, it does not account for any public rights which may have existed prior to 1947. It does however support the parish council’s perception of the route, as submitted in its parish survey in the early 1950s.

40. INSPIRE Land Registry index polygon map, (2018) / Land Registry MapSearch, (2019)

The applicant provided an extract from the INSPIRE Land Registry, which they claim shows that the land is unregistered and therefore supports the notion that the claimed route is an ancient vehicular highway. However, there are a number of reasons why land may not be registered with the Land Registry, as the legal requirement to register land was only established under the Land Registration Act (2002). The Act required any unregistered land to be registered at any future change of ownership, therefore a property which has not changed hands since 2002 and was unregistered at the time of the Act may still show as unregistered land. Furthermore, the applicant appears to have overlooked the registration of a small parcel of land over the affected route; this is easy to miss due to the angle of the map and is more clearly seen on the Land Registry’s ‘MapSearch’ feature of their website.

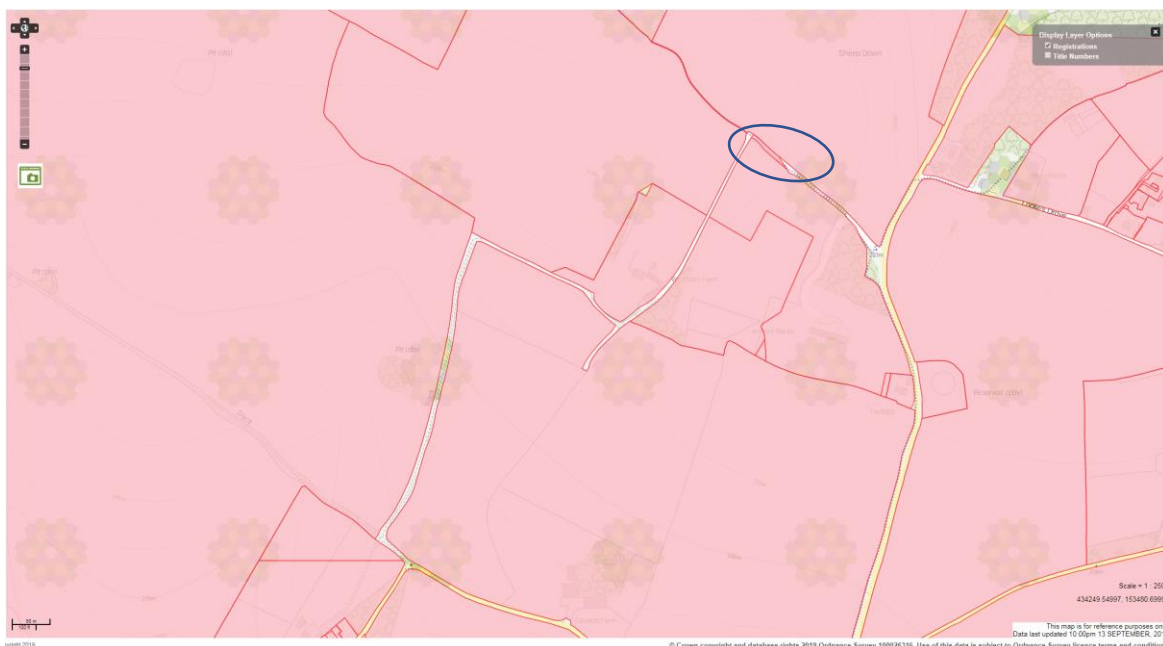


Figure 9 - Land Registry MapSearch. Source: Land Registry website

Other sources viewed

41. Parish File

The County Council maintains a file relating to countryside matters (including countryside management and rights of way) for each of the parishes in the county. These files date back to around the 1940s-50s and contain, amongst other things, correspondence, maps, and work orders. There are a number of documents in the file which relate to the claimed route. A summary of the most relevant documents is below.

- Correspondence from the Parish Council demonstrates that they took an active interest in the development of the First Definitive Map. The route was intentionally claimed as a footpath along the current alignment, which was not challenged when the draft Definitive Map was open to public scrutiny.
- In 1963, the former owner of Whistler's Farm contacted the County Council to ask for the 'road running past his farmhouse' to be resurfaced. The route was checked and it was concluded that it was not part of the publicly maintainable highway and it was a footpath only.
- In 1976, the County Council contacted the owner of the poultry farm which used to be situated adjacent to the northern part of the route. The contact was made following complaints about misleading signage; signs stating, 'No entry, footpath only' were displayed and the County Council asked for these to be amended to 'No entry for vehicles, public footpath only'.
- In the 1980s, the Parish Council had a Rights of Way Officer who was very active in his role, writing regularly to the County Council with updates

about the Rights of Way in the parish. These letters show that the route was generally in good order and, when the track became waterlogged, the landowner put down stone to improve the surface.

- In 2015, the County Council responded to an enquiry from a solicitor about the legal status of the route. The enquiry was made following the construction of a dwelling at the eastern end of the route; the County Council was not consulted during the planning application and the application was granted despite the vehicular entrance to the property being situated on the footpath.

Analysis

42. The applicant presented the case for the existence of vehicular rights along the route on the basis of the depiction of the route on Bartholomew's map, and the fact that the route appears unshaded on the Inland Revenue valuation plan and Land Registry plans; he supplied a bundle of correspondence from the County Council relating to the route being added to the list of streets.

Whilst this evidence alone appears to show that the route should be shown on the Definitive Map as a route of a higher status than a footpath, other documents reviewed rebut this assertion.

43. The solicitor acting for the landowners submitted a range of evidence to illustrate that the route has never held public vehicular rights. He stated that the evidence reviewed when the route was added to the Definitive Map was insufficient to prove public vehicular status, that there is no evidence of public vehicular use of the claimed route, that the balance of proof was 'predominantly against' public vehicular status, and that the route was added to the List of Streets as the results of 'great political pressure' brought by the former owner of Whistler's Farm.

The evidence viewed in this case, corroborates the argument made by the solicitor.

44. The claimed route is clearly shown on a number of maps dating back to the early 19th century, including the Ordnance Survey Old Series, Greenwood's map of Hampshire, three successive editions of the Ordnance Survey County Series and Bartholomew's Map of England and Wales. The route is also shown on estate plans from the 19th and 20th century. However, whilst the route has been shown on these maps, they are not evidence of a public right of way, as surveyors marked physical features on the ground, rather than any rights which may have existed along them.

45. The route was intentionally claimed as a footpath by the parish council during the drafting of the first Definitive Map; the route has subsequently been shown on all editions of the Definitive Map as a footpath. The book of objections and additional correspondence from the parish file demonstrate that the draft Definitive Map was under close public scrutiny and therefore, any higher rights that were considered to exist at the time would most likely have been asserted prior to the draft Definitive Map being approved.

46. The route is clearly shown on two sales plans from 1898 and 1917. This is clear evidence that the route existed when the plans were produced but these documents do not provide any insight into what public rights may have subsisted on the route. A document accompanying one of the plans refers to the claimed route as an 'occupation road', which suggests that it was a private means of access.
47. Both the Andover Highways book, and the Rural District Council highways handover map demonstrate that Andover Rural District Council did not consider the route to be publicly maintainable throughout the late 19th and early 20th century. Following responsibility for highways maintenance transferring from the Rural District Council to the County Council, the highway maintenance map for the Andover area illustrates that Hampshire County Council did not consider the route to be publicly maintainable in 1946.
48. There are two pieces of evidence which are usually strong evidence of the existence of an historic right of way. The first is the tithe map, upon which the claimed route is clearly shown, and the second is the Finance Act valuation map, upon which the route has been omitted from the valuation. However, in this case, these documents alone are insufficient to be evidence of vehicular rights, as the claimed route has been omitted from the plans, rather than providing a positive confirmation of vehicular rights. The tithe map and Finance Act valuation record would be stronger evidence if they corroborated a more watertight document setting out public vehicular rights (such as explicit reference to the claimed route being a highway), or if the documents themselves provided such confirmation. This is because the purpose of these plans is not to reflect highway status.
49. The claimed route is recorded on the list of highways maintained by the County Council, but this does not reflect that vehicular rights exist along the route.
50. Taking all the documentary evidence into account, it is considered that there is conclusive evidence that the route has existed since at least 1817, however, there is insufficient evidence that Footpath 12 in Tangley should be upgraded to a Byway Open to All Traffic. Consequently, officers do not consider it necessary to establish whether any of the exemptions set out in the Natural Environment and Rural Communities Act (2006) apply in this case.

Conclusions

51. As set out earlier in the report, for a change to the Definitive Map to be made, it must be on the basis of evidence that demonstrates 'on the balance of probabilities' that the map should be modified.
52. Although the documentary evidence indicates that a route corresponding with the claimed route has been shown on maps of the area since the 19th Century, there is insufficient evidence to demonstrate that there were ever any public vehicular rights over the route. For this reason, it is recommended that the application should 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

Claim Reference: Case File (CR 1206)

Location

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:

See guidance at <http://intranet.hants.gov.uk/equality/equality-assessments.htm>

Insert in full your **Equality Statement** which will either state:

- (a) *why you consider that the project/proposal will have a low or no impact on groups with protected characteristics or*
- (b) *will give details of the identified impacts and potential mitigating actions*