

# HAMPSHIRE COUNTY COUNCIL

## Decision Report

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	18 March 2020
<b>Title:</b>	Application for a Definitive Map Modification Order to record a bridleway at Irongate, Ossemsley Parish of New Milton
<b>Report From:</b>	Director of Culture, Communities and Business Services

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### Purpose of this Report

1. The purpose of this report is to present Members with evidence relating to a claim for a public bridleway at Irongate, Ossemsley, in the parish of New Milton, so that they may determine whether or not to authorise a Definitive Map Modification Order for the application route, either under the provisions of section 31 of the Highways Act 1981, or through a dedication at common law.

### Recommendation

2. It is recommended that this application be refused.

### Executive Summary

3. The matter before Members consists of an application, made by a local resident in New Milton, and supported by a number of user evidence forms.
4. Having considered the evidence in tandem with current guidance and relevant case law, it is considered that there is not sufficient evidence of public use on horseback on the claimed route, on the balance of probabilities, to authorise the making of a Definitive Map Modification Order for this route, and two other routes forming extensions to public highways giving access to the claimed route. The application should be refused.

### 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 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...

PRESUMED DEDICATION AT COMMON LAW:

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of, and acquiesced in, public use.

HIGHWAYS ACT 1980 s.31:

Dedication of way as highway presumed after public use of 20 years.

- (1) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- (2) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

**Applicant**

5. The application was made by **User 5** of New Milton, on 2 November 2005, and consists of a short section of path, starting just south of the edge of the open part of the New Forest, at the northern boundary of the property known as Irongate. From this point, it runs south, as shown on the Committee Plan attached to this report, between points A and B, and as described below. What is shown by the applicant on the consultation plan for this application (see **Appendix 1**) does not directly connect two public highways. The northern end is what is known as 'a place of public resort', that is effectively a cul-de-sac at

a location such as a beach, a viewpoint, or public land. In order to allow wider access to the claimed route, the evidence has been examined for the level of use of a route running from point A to point C on the Committee Plan, providing access to the B3058, Holmsley Road. Another route has been taken into consideration, running in a south-easterly direction from the claimed route, to the Road B3058, Bashley Common Road. Therefore, the remainder of Green Lane (B-D-E on the Committee Plan) and Ossemsley South Drive (E-F) have been assessed for public use, as the most likely means of accessing the claimed route by those members of the public living to the south of it. A revised Committee Plan, showing the actual numbers for each section of the route C-A-B-D-E-F is also attached to this report (**Appendix 4**).

## **Landowners**

6. The current landowners of the claimed route A to B are **Mr. Wilson** and **Mrs. Crow** of London and Ossemsley, and are represented by **Moore Blatch LLP** of Chandlers Ford. The freeholders of the route from D to E (Green Lane), **Mr. A. Knight** (for the period 1985-2005), and **BCS Dorset Limited** have also been consulted as current landowners, as have the **Forestry Commission**, for the section A-C.

## **Description of the Claimed Route, and two extension routes (please refer to the map attached to this report)**

7. The application route is shown, by means of a red pecked line between points A and B, on the Committee Plan attached to this report. This is the actual route claimed, as shown in the plan accompanying the application. On the original, User 5 shows a section of the path from the property Irongate, running south to the location of a gate, in green and describes it as '*actual section of track where there is dispute (green)*'. A further section going south along the track has been shaded with pink highlighter, and then covered with a white masking fluid, and then a pecked line in blue biro has been added. A gate is also shown to the west of the property 'Irongate', with a horizontal blue biro line, also marked 'gate', a little distance south of where this track meets the track from the Holmsley Road, close to point A on the Committee Plan. The length of this section of path is 353 metres.
8. While it is acceptable for the northern end of this claimed route to terminate at the New Forest (the 'Forest', a place of public resort), it is not possible to record on the Definitive Map and Statement a route that terminates at a point three-quarters of the way down a section of track. The second termination point needs to be a place providing public access, such as a public highway. The nearest is at the junction of the track giving access to Irongate with Holmsley Road (the B3058), at point C on the Plan. Another termination point is at the junction of Ossemsley Drive South, New Lane (the road U124) and Bashley Common Road (the road B3058). This junction is shown on the amended Committee Plan, marked 'F'. The evidence of the majority of users is that they predominantly used the section A-B-D, with about half going on to use Green

Lane, down to its junction with Ossemsley South Drive and North Drive, at point E on the Committee Plan – a total length of 1,045 metres. Seven users provide evidence of continuing to the public highway at point F, the whole route measuring 1,835 metres.

9. The width of the route varies between 3 and 5 metres.

### **Background to the Application**

10. This application was received on 29<sup>th</sup> November 2005, accompanied by the required notices, plan, eleven completed user evidence forms, and photographs of a notice that was said to have been put up on the claimed route. To date, 28 forms have been received, with 4 witnesses submitting further forms in 2013 and 2014 (User 1, User 8, User 11, and User 23). One form of only one page and an unsigned map, that cannot contribute to the evidence being considered, because it is incomplete and not confirmed by a signature. Another, completed by User 12, details use on horseback between the years 2010 and 2013, years which do not fall within the relevant period under consideration (see paragraph 28). Three users demonstrated use on foot only in their forms. Where a witness has submitted two forms, only the use demonstrated up to 2005 has been considered. Officers are conscious that the application was made in 2005 and has only been fully investigated in 2019, and apologise for this delay.
11. Before considering the available relevant evidence in detail, there are some aspects of this application that should be clarified. For a claimed route to be eligible for inclusion on the Definitive Map and Statement as a public right of way, there should be a place for public access at both ends, normally another public highway. There are, however, circumstances when this does not apply, and the route that is the subject of this application is said by witnesses to have been used to gain access directly to the New Forest, without having to use the busy local roads. As can be seen on the Committee Plan, the termination point of the route shown with a red pecked line at point A, the route drawn on the application plan by the applicant, was the point of entry to the Forest cited in many of the user evidence forms. There is no public right of way or general purpose highway at this point. However, the Forest itself can be described as a 'place of public resort', a term which includes features such as beaches, a viewpoint, or woodland to which the public has access. Case law has confirmed this. In the case of *Roberts v Webster and others*<sup>1</sup>, Widgery J. said *'the authorities clearly show that there is no rule of law which compels a conclusion that a country cul-de-sac can never be a highway. The principle stated in the authorities is not a rule of law but one of common sense based on the fact that the public do not claim to use a path as of right unless there is some point in their doing so, and to walk down a country cul-de-sac for the privilege of walking back again is a pointless activity. However, if there is some kind of attraction at the far end which might cause the public to wish to use the*

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<sup>1</sup> *Roberts v. Webster and others*, 8 December 1967

*road, it is clear that that may be sufficient to justify the conclusion that a public highway was created'. It is entirely reasonable that local horse riders should wish to ride freely in the New Forest, and to seek to reach an entry point avoiding the busy roads in the area.*

12. Allowing that point A is the entrance to a place of public resort that would justify the claimed route being added to the Definitive Map and Statement, if the evidence substantiates this, the next question to be answered is where is the public highway that provides public access to the claimed route. Taking the route shown on the actual application, it runs south from point A, to a point level with the northern boundary of the Poultry Houses (see Appendix 1). As drawn, the claimed route is an isolated section of track. The nearest exits onto public highways are at point C, onto Holmsley Road (the B3058), which is a matter of 492 metres. A second exit onto the B3058 (here called Bashley Common Road) is found at point F, 1,453 metres from point A. If the evidence for the route A-C, or the route B-D-E-F, along with the actual claimed route A-B, demonstrates sufficient use by the public for that use to come to the attention of the landowner(s), and the affected landowner(s) have done nothing to demonstrate that they do not intend to dedicate public rights, then the application should be approved.
13. As noted in paragraph 10, there are 20 complete evidence forms recording the use of witnesses relevant to the 20-year period under consideration. Each form has been examined for qualifying use, and to see what parts of the routes now identified, to provide a route that can be recorded on the Definitive Map, have actually been used on horseback
14. The issue of qualifying use is particularly important in this application, since some of the users have indicated on their forms that they did have, or thought they may have had, private rights along parts of the route, particularly along Green Lane. Use of a private right is not qualifying use. For the avoidance of doubt, a private right is one that exists between two specific points, for example points x and y, and must be used within the parameters set out for that right. The user may be specified, such as on foot, with a bicycle, with a vehicle. User other than that specified is not with a private right. The private right will exist between two freeholds, and can be used only by the freeholder of the deed in which the right is recorded in the way specified in that deed. If a user who already has a right to go along a path recorded in their deeds, uses any part of a claimed path, or a connecting path, this will not count towards the acquisition of a public right. Some users have rented land from a landowner who has a private right along some or all of the route being considered. Therefore, those people renting fields for their horses cannot be said to be using the private right extended to the freeholder they are renting from. The use of the route in a way not specified in the private right, such as someone riding a horse over a private right of way on foot, would be qualifying use for a public right of way.
15. The private right of way recorded in the deeds of four of the witnesses dates from 1938 and is for all purposes, or for use with or without vehicles and animals.

### Issues to be decided

16. The issue to be decided is whether there is evidence to show, on the balance of probabilities, that the public has acquired public bridleway rights over the two routes from point A on the Committee Plan, and described above at paragraph 12.
17. 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.
18. Any changes to the Definitive Map must reflect public rights that already exist, through periods of unchallenged use. It follows that decisions as to whether to amend the Definitive Map must not be taken for reasons of desirability or suitability. Therefore, before an Order changing the Definitive Map is made, the County Council must be satisfied that the requested modification is supported by the evidence.

### Documentary Evidence

19. The early small-scale maps of this area do not show any route that would approximate to A-F.
20. The claimed route A-B, and its extensions A-C and B-F are shown on the Milton Tithe Map (1840) and Apportionment (1843). The route A-B-D is shown between solid lines (indicating a feature such as a hedge) and runs along a very similar route as on the current OS mapping. A double pecked line, braced into the fields on the west, runs alongside this, on a slightly straighter route. The track that corresponds to the claimed route is plot '1499' and is designated as 'Droeway'. The Droeway has a solid line across it at its northern end, indicating a gate, and then a narrower track between solid boundaries feeds into an open area, where the route A-C is shown between pecked lines. This lies within plot '1646', recorded as '*Part of the New Forest*'. The Droeway continues as a track between pecked lines on the same route as today, and continues south-east to pass through 'Ossemsley Gate' and then towards the junction with what is now Bashley Common Road. Shortly after passing Ossemsley Gate, the plot number '1353' appears, and this is designated as 'waste', with an area of 29 perches, whereas the area of the Droeway is 1 acre, 1 rood and 4 perches, suggesting it is the name for the track from Irongate to Ossemsley Gate, now north of Arreton Farm. The name 'Droeway' is suggestive of a route along which animals were driven to and from the Forest. It was in the ownership of Colonel Roberts and tenant by Isaac Hurst in 1843.
21. The route A-F is shown on the Handover Map of 1929, which records the routes considered to be publicly maintainable when the Rural District Councils handed over maintenance responsibility to the County Surveyor. No part of the claimed route is shown as publicly maintainable, though it should be remembered that the compilation of this series of maps was not open to public consultation and

it is not known what documents relating to inclosure and the tithe were consulted, if any.

22. The Ordnance Survey County Series map at the scale of 1:2,500 for this area of New Milton, dated 1871 (first edition) shows the route A-B-D running south from a little north of the building now known as Irongate, and it carries the plot number '91'. The book of reference shows this as an '*occupational road*', and thus not publicly maintainable. The plot has solid boundaries, indicating a boundary more than one foot high, and there are two parallel pecked lines denoting a track between these two boundaries. The width of this wider route is 16 metres, with the section within the pecked lines being 3 metres wide. This double pecked line turns to the south east at point D and follows the line of the current Green Lane. This is also about 3 metres wide, and runs on very much the same line as the route D-E-F. Most of this linear route is part of Ossemsley Brake, an area of mainly woodland, carrying the plot number '210', which is given in the book of reference as '*wood, pasture, etc.*'. Where it meets the present day Bashley Common Road towards point F, it is marked as having plot number '231', which is recorded as a '*public road*'. Plot 231 is the section of the route from point F, going north-west to a turning south and down to Arreton Farm.
23. The depiction of this area on the second edition of the County Series (1895) is very similar to that in the first edition, and both maps show a solid line across the route at point D, in connection with the notation for a bench mark. The third edition, of 1909 shows the same solid line, but there is no bench mark indication, giving weight to the suggestion that there was a gate across the route here. There is also a similar bench mark and line at point A on the 1871 and 1895 maps though, on the latter, the depiction of the line has the appearance of being part of the boundary of the adjoining plot of land, rather than a straight line. The line looks straight and deliberate on the 1909 map, whereas the pecked line path appears to run straight into the forest on the 1930s fourth edition. The OS 1:10,000 map, spanning the years 1905 to 1945, also shows a solid line across the path at points A and D, with the continuation from D to Bashley Common Road shown in a similar way to the previous maps.
24. A National Grid map at the scale of 1:10,000, dated 1972, shows the claimed route with a line across it at point A. By this time, three large poultry houses have been built to the west of this part, near point D, being large structures parallel to each other. The path from point D south-eastwards starts with double pecked lines, but then continues where a number of houses have been built between solid boundaries. The path then continues in a similar way to the current mapping, joining Bashley Common Road at point F.
25. The existing aerial photography of this route adds little information because there is consistent tree cover on both sides of the route A-F, obscuring any detail.
26. The applicant supplied a photograph of a notice that appeared in September 2005. This sign was also photographed by a now retired member of staff, on

1 December 2005, and these photographs appear in **Appendix 2**. The first photograph shows the general location with the gate tied with rope, and copies of the notice on the posts at each end of that gate. The second is a close up to show the wording. He took a number of photographs, some from junction of Holmsley Road with North Drive, and some from the junction of Ossemsley South Drive with Bashley Common Road (point F).

27. The sign that features in Appendix 2 reads '*Private Property. This path is not a statutory right of way. Permission to ride or walk through the property is solely at the discretion of the owner. Please stay on the path whilst crossing the property. Note that the path may be closed at any time without notice. Please do not cross the property at any time between the 24<sup>th</sup> & 26<sup>th</sup> December. Thank you for your co-operation*'. The placing of these notices by the current owners when they acquired the property Irongate is a bringing into question of the public's right to use the section of path under their control. This particular sign should be considered in the context of other signs that this member of staff photographed. One at the end of Ossemsley South Drive shows the name of the route with the words '*Private Drive*' in brackets underneath. A further sign under the name of the route reads '*Private Estate Residents maintain these drives. Access only at under 12 mph max please. Speed Ramps.*'. At the northern end of North Drive, a sign indicates '*North Drive*' with the word '*(Private)*' underneath. One photograph shows another sign further down the drive, but it is impossible to discern what it shows. A sign further down the drive to Irongate says that access is to '*Private Properties Only*'. For any sign disclaiming public rights to be effective, it must unequivocally state what rights are being denied. Signs saying 'Private Property' have been held to be inadequate. The specific rights must be stated with wording such as 'No public right of way', and the contrast is shown with these photographs. Users of the entrance at Irongate have been left in no doubt that the current owner considers the land to be not only private property, but that there is no statutory right of way there, that is no public footpath or bridleway.
28. The current owners of Irongate brought the public's use of the section of track from A-B into question by posting this notice in or around September 2005. The application for a Map Modification Order was made shortly after, in November 2005. This gives a 'relevant period', during which the public must demonstrate qualifying use of 1985-2005. This investigation must consider past use with an end-date of the bringing into question. The difficulty for the current owners is that this is a period when they may have had no connection with the property or the land surrounding it, no control over the previous owner's actions, or necessarily any knowledge of what those actions were in relation to the management of the track in relation to public access.

### **User Evidence**

29. The applicant supplied 27 user evidence forms in total to support this claim. The information contained in the forms was extracted to produce a 'User Evidence Chart' (**Appendix 3**), from a list of the users who provided information about actual dates of use on horseback (19) in alphabetical order. It shows the



period of use by means of horizontal bars, with the 'relevant period' shown by a blue tint on the chart. This denotes the period in which 20 years of unchallenged use must be demonstrated. Of the 27 forms, one user gave no dates for any type of use, and 3 witnesses gave dates for use on foot only, which user does not contribute to the acquisition of public bridleway rights. The graph at Appendix 3 shows 19 users on horseback, and the earliest use of any part of the route was in 1950, with 5 users providing information about use after 2005. Of the users providing evidence, 8 say they were using the route in 1965, though the bulk of the use occurred from the late 1970s. Ten witnesses had used the path on horseback for 20 years between 1985 and 2005. The modified Committee Plan at **Appendix 4** shows the 2 additional paths that are being considered in this report. This plan contains information on the number of users for the individual sections of the two paths. It is not necessary that every user has twenty years of use, but there should be consistent use by the public in all years, with no interruptions to use. There appears, from the witness evidence, to have been no interruption to use before 2005. There are 6 references to tree trunks and a cable across the route in the forms, in response to the question regarding obstructions. The majority of users on horseback said in 2005 that the path had never been obstructed. However, all the users who say that the path was obstructed by these logs had completed forms dated 2012 or 2013, indicating that this obstruction post-dates the relevant period.

30. Having set out the presentation of the recorded user in visual form, the actual content of the forms needs to be considered. While the user evidence charts are, of necessity, a generalisation, they can give a feel for the extent of the use claimed. Detail is provided in the written accounts submitted. Twenty-two of the twenty-seven users completed their forms in 2005 (**User 16** submitted his in 2014, though it is dated 2012 and **User 12** in 2013), with four other users completing an additional form in 2013 (**User 1**, **User 8**, **User 11**, and **User 23**). Four users put in dates of use for foot use only (**User 2**, **User 5**, **User 12** and **User 16**), and such use only, without any horseback use indicated, does not contribute to qualifying bridleway use. One person, **User 17**, indicated use on foot and on horseback, but gave both no dates or frequency of use, only a last date of use on 20<sup>th</sup> October 2005, so does not appear on the user evidence chart. **User 2** gave dates only for use on foot, but has indicated on her form that she did ride her horse. She did confirm in a telephone call that she had ridden for over 60 years, keeps her horse in a rented field at New Lane, Bashley, and rides in summer 3 times a week, also using an access at Milton Grange. However, without actual dates for this, it is not possible to include her in the chart. The frequency of all the reported use varies from once a fortnight, to weekly to twice weekly, to four times a week.
31. All witnesses reported seeing others whilst using the claimed route, with all identifying users on horseback. **User 10** and **User 9** identified '*locals and landowners on horseback*'. This indicates that there was identifiable use on the claimed path, and therefore any Order made as a result of this investigation should be for public bridleway rights.

32. No witnesses reported seeing stiles and, while all users reported the presence of gates, they were invariably described as '*unlocked*'. All 20 recorded horse riders indicated, whether their use is qualifying or not, that they passed through an unlocked gate, or gates. The plan accompanying the application (see paragraph 7) shows two gates, drawn in by the applicant, one slightly to the west of Irongate house itself, on the track, and the second some metres south of the southern boundary of the property. Current OS mapping does show a line across the track at this location. Looked at in conjunction with the question about obstructions on the route, where opinion is divided, it seems more probable than not that these two gates were not locked before 2005. There are four references to obstructions across the route, and they are found on the forms completed by users in 2013. In 2005 when **User 1** completed his first form, he noted that the path had never been obstructed, whereas on his form of 2013 he referred to '*big tree stumps scattered along the path*', but said they were no longer there. It is a similar case with the evidence of **User 8**, whose 2005 form indicated no obstructions on the route, but said in 2013 that there were tree stumps between the '*gates and electric cable*'. This obstruction was still in place at the time of the completion of the form, and User 8 added that '*it is possible to walk or ride around tree stumps but a pony and trap would not*'. She indicated on her 2013 plan that the obstruction were between the two gates that the applicant had shown on the plan accompanying the application. **User 11** indicated no obstructions were in place in 2005, but spoke in 2013 of '*large tree stumps between the two gates. Until recently there was a power cable across the track*'. She added that the obstruction was still in place in 2013, but that it was possible to '*ride around the tree stumps but vehicle & pony & trap access would be restricted*'. She placed the two tree stumps in a similar position to that indicated by User 8, south of Irongate, and north of the second gate. The 2005 form completed by **User 23** indicated no obstructions on the route, while by 2013 when she completed a second form the route was obstructed by '*tree stumps/logs in the track. Passable on horseback/walking*'. User 23 has marked her two crosses in a slightly more northerly position than User 8 and User 11. The other users say, in 2005, that the path had never been obstructed.
33. None of the witnesses for this application report being stopped while using the claimed route, and no-one had any connection with the landowner. **User 20** and **User 24** do report that they were told by the owner [the freeholder in the period up to 2005] that the path was not public, but they report that they '*told them we have right of way from our property*'. The Land Registry document for User 20 and User 24 does not specify a private right along Green Lane and, unless they can provide another document illustrating a private right there, their use of the route on horseback is qualifying.
34. Most of the users said they were not using a private right on any part of the claimed route or the connections to public highways (A-C and B-F). However, eight witnesses did answer this question. **User 1** acknowledges that he uses a private right to reach Green Lane and to access his field, which lies on a spur track to the west of Portnalls Farm and south-west of Irongate. In these circumstances, when User 1 rides from point E, the junction with New Lane,

Green Lane, North Drive and Ossemsley South Drive, and then north west to point D and beyond, that use is eligible for the acquisition of a public right. However, when he rides from point D along to the entry point to the Forest at point A, that use does not qualify, as it is with a private right. The form he completed in 2005 shows only a used route that does not go south to point F. Mr. Adams' use of a private right from A-B (to get to one termination point of a route that can be recorded on the Definitive Map) only affects that section of the route, and his use of D-E to reach his property without a private right can contribute to qualifying use over that section. **User 6** states that she used private rights to get rear access to her property, but her deeds do not show any private right specified. **User 7** says she used private rights to reach the land where her horses were kept. She lives to the south west of A-B, and her deeds do not demonstrate a private right over the claimed route. Therefore, the use she has recorded is qualifying towards a public right. **User 8** had visited a previous owner at Irongate as a small child and teenager. She shows her use of her horse from her property in Green Lane on both of her forms. Her horse was kept in User 1's field and his private right cannot be transferred to her, as discussed in paragraph 14 above. However, her own deeds grant on 19 October 1937 her '*a right for all purposes... over Green Lane and over the road or way leading therefrom to the main road from Lyndhurst to Brockenhurst*'. All the use shown on her forms, from her own house to the Forest is therefore not qualifying. The deeds of **User 20** and **User 24** do not set out a right to pass and repass along the access drive to their property in Green Lane, as described in the previous paragraph. **User 18** said she had visited previous owners and **User 19** also visited owners, and make work-related visits, so this use is not likely to contribute towards public bridleway rights. However, there is nothing to suggest their use on horseback of the route A-B-D-E-F was in the exercise of a private right. **User 21** admits that he has a private right to travel from his property and field to the Forest, so his use of that private right cannot be counted, **User 22** is in a similar position to User 21, living close to him on the same lane. It is always difficult in such investigations to quantify the exact nature of the private use disclosed on a form of this nature, and this would normally be best addressed in cross-examination at a public inquiry, since users often do not elaborate on this despite being asked to give details. Copies of Land Registry details for the properties of witnesses have been examined. There are four users (User 1, User 8, User 21, and User 22) who were exercising private rights over some or all of the claimed path.

35. Users are invited to put forward any other information which would assist in determining the application. Several users (User 3, User 13, User 17, User 18, and User 21) commented that they used the claimed route A-B to gain safe access to the Forest, by avoiding the busy roads, the closest ones being Holmsley Road and Bashley Common Road, both the B3058. **User 5** comments that the route is used '*by local horseriders to access the NForest. It avoids Bashley Common Road which has a continuous flow of traffic including a large number of heavy lorries and there is no pavement only narrow grass verge*'. These comments are echoed by **User 6** on her form. **User 10** writes that he has met '*innumerable [sic] local riders on this path over the years using it to reach the forest from their own fields*'. Any user by horse riders reaching

the Forest from their own land and using a private right, is not qualifying use. The Land Registry documents examined in relation to the completed user evidence forms indicate the granting of private rights for all purposes in an area where there is a limited number of public footpaths and bridleways. **User 11** took the view that, keeping her horse on Green Lane because she lived some distance away, *'landowners or people who rent land in Ossemsley have the right to use the track'*. In this, she was mistaken, because any private right granted to the owner of the land where the horse was kept, or of the field she rented, cannot be transferred to the renter. **User 13** commented that the gate at Irongate *'has never been locked'* for the 28 years that she lived in Ossemsley Drive. **User 16**, though not a horse rider, stated that there was *'regular vehicle access'* and that his *'clients had access, as did riders and ramblers'*.

### The Landowners

36. The owners of Irongate, Mr. Wilson and Mrs. Crow, are represented in this matter by Moore Blatch LLP, who has responded to the County Council's consultation letter. They set out, in a letter dated 29 November 2019 that their clients are investigating the content of this consultation letter and taking advice on it. They are trying to locate contact details for the former owners, who were responsible for the management of the claimed route prior to the bringing of the public's right into question in 2005.
37. The owners of the extension south of the claimed route to point F and the path to Holmsley Road (A-C) have also been consulted.
38. At the time of writing this report, the only landowner that has responded to the County Council's letter of consultation has been the representative of the owners of Irongate. During an interview and site visit with Mrs. Crow on 3 February 2020, she provided the following information:
  - She and her husband put up the current signs disclaiming any public right of way over the section A-B to replace existing paper/laminated signs and confirmed that a notice was in place prior to their purchase and was replaced by them with a sturdier sign (the previous sign was laminated paper / card) after they exchanged contracts for the purchase of the property.
  - Mr. Wilson and Mrs. Crow were told that the sign they replaced was put up by the previous owner (potentially replacing a previous sign). The previous owner had owned the property for 7 years.
  - Mrs. Crow says that she knew that *'the people using it were neighbours'*, and is of the opinion that the use on horseback of the claimed route was predominantly private use.
  - The claimed route is still being used by those people with private rights.
39. During a site visit on 3 February 2020, which involved walking the claimed route, the most northerly of the two gates at point A was shown to have a drawing pin, attached to a small piece of paper in plastic (for weather-proofing) on the northern side of the gate. Photographic evidence was secured of this. The presence of a remnant of what appears to be a previous notice gives weight to the suggestion made by the present owners of Irongate that there

were signs in place prior to 2005, though the remnant cannot provide evidence of the wording on that notice.

### **Analysis of the evidence**

40. For section 31(1) 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.

#### 41. Physical nature of the route

Taking the first requirement of section 31(1), all parts of the paths that are the subject of this report are of a physical nature that they are capable of being public rights of way at law.

#### 42. The bringing into question of the public's right to use the paths

The bringing into question for this application is the putting up of the sign indicating to the public using the claimed route that the path was not '*statutory*' and that it was due to be temporarily closed over Christmas 2005, in order to provide an interruption for use, which would defeat any claim. The wording used is described in paragraph 27 above. The response to the appearance of that notice was this application. The notice was first seen in September 2005 according to witnesses, and the application was made two months later in November. The resulting 'relevant period' is 1985 to 2005, during which unchallenged and uninterrupted use must be demonstrated to meet the legal test. This relevant period is shown graphically in relation to the user in the chart at Appendix 3 by the use of a blue tint.

43. Officers understand that the new owners of Irongate erected the notice that shows that there was no intention to dedicate public rights of way over the claimed route, when they exchanged contracts on the property in 2005. Of the 23 witnesses completing forms, 16 gave evidence that they saw the signs that brought the public's right to ride on the claimed route into question in September 2005. Two users had apparently attached a photograph of the notice, and a photograph of the wording was found in the file. The retired

officer's 2005 photographs also show this sign. The effectiveness of this notice is that it is worded so as not to limit the types of public rights that it seeks to protect the freeholder against. Unlike some of the notices described in paragraph 27 above, referring to 'Private Property' or indicating the estate to be private, this notice addresses the public and is specific. The claimed path is said to be 'Private Property', but the notice explicitly states that it is not a 'statutory right of way', that is, it is not legally a right of way. It is not recorded on the Definitive Map and Statement of Public Rights of Way for Hampshire, and has not been through any legal process. This investigation is the legal process to determine whether there is a public right of way on the claimed route. The notice then renders any use by the public void, because it will be with permission – '*Permission to ride or walk through the property is solely at the discretion of the owner*', and that permission will be withdrawn at specified date. The dates on which such permission will be withdrawn are set out, namely between Christmas Eve and Boxing Day, when the public is asked to '*not cross the property at any time*'. This is a classic time of year to cause an annual interruption to public use on paths, and so engineer the failure of any claim for such rights. However, the effect of the notice cannot be retrospective, and the period during which management practices over this land with regard to public access must be examined is the 20 years prior to 2005, when the notice was put up. There is evidence has been put forward by Mrs. Crow, backed by physical evidence, that there had been signs of some kind in place on one of the gates prior to her occupation of Irongate in October 2005. Twenty-one witnesses said that they were not stopped or turned back up to the time they signed their forms. Of those users who rode the route, the majority filled in their forms in October and November of 2005, and most said they saw this particular sign in September of that year. None refer to notices being seen prior to September 2005. Since many witnesses had evidently photographed or copied down the words, the notice put up by the present owners of Irongate made an impression on them. The use that the public is expected to be making of any route while the right is being acquired must be capable of coming to the attention of any reasonable landowner, which it did to the new owners in 2005. At the same time, that use must be unremarkable in its nature, and have the appearance of people exercising a right that they feel they already have. Case law<sup>2</sup> does not demand that people are consciously thinking that they are exercising a right. This type of unremarkable use is use that is not noted down; it is people using the countryside for the purposes for which they wish to be there. To walk, to relax, to chat with friends and exercise their dogs or horses. This is the reason for the standard of proof to be 'on balance' rather than 'beyond all reasonable doubt'.

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<sup>2</sup> The Planning Inspectorate, Advice Note 6 – 'The House of Lords held that evidence as to the status or reputation of a way is admissible, but evidence as to the state of mind of the users is not part of the test of user as of right. If it emerges that users did not consider that they were exercising public rights that does not mean that the evidence of use is to be discounted. On the contrary, user "as of right" does not require that the public believe they are using a way as of right.

1. R-v-Oxfordshire County Council and Another ex parte Sunningwell Parish Council [1999] 3 WLR 160'

44. Twenty years' use without interruption

Turning to the evidence submitted to this investigation, questions are asked on the user form to identify any obstructions or actions that might interrupt use of paths. Witnesses are asked for details of gates and obstructions, or whether they were stopped from using the claimed path. All the witnesses mention the presence of gates on the claimed route, but these gates are characterised by all of them as open. None of the witnesses say that they were ever stopped from using the paths, though User 20 and User 24 were told that the path was not public, to which they replied by stating they had a private right up the track. No-one reports being stopped, and the obstructions that occur in four forms are mentioned only in those completed in 2013. Critically, the forms completed by the same witnesses in 2005, when the relevant period ends, say there were no obstructions. Therefore, it seems more likely than not that there was a period of uninterrupted use during that relevant period of 1985 to 2005, and this test is met.

45. 'Without force, stealth or permission'

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

To qualify for inclusion on the Definitive Map and Statement, the users must demonstrate that their use of the paths must be 'as of right', that is without force, stealth or permission. Taking the issue of force first, the witness did not encounter any stiles on the claimed route that would need to be jumped over on horseback, and the gates referred to in all the forms completed by horse riders are, without exception, described as open. Therefore, there would have been no need to use force, and this test is met.

46. The use of signs placed by the freeholder of the land to indicate to the public that there is no intention to dedicate any public rights of way can make any such use 'contentious', and thus not qualifying to be as of right. There were signs placed on the claimed route in 2005, when the ownership of Irongate changed, declaring that the route was not a public right of way, that it was subject to permission and that this permission could be withdrawn, and would be withdrawn, over the Christmas period in 2005. This action, in itself, brought the public's right to ride there into question, triggering a relevant period of 1985 to 2005, as discussed above at paragraph 28. There is some evidence of other signage prior to 2005, but not of its wording. It is therefore possible that the use on horseback of the claimed route was in contention during the relevant period. This investigation must also consider extensions of the route A-B to provide one termination of the claimed public bridleway to reach a place of public access, in this case the road B3058, meaning that there are other signs to consider. Appendix 2, discussed in paragraphs 26 and 27, includes photographs with words such as '*Private Drive*', '*Private Estate*' and '*Private Properties Only*', and such phrases are not considered to be sufficiently exact in relation to the rights that are being denied to render any use of the paths contentious. Without actual evidence of the wording of the signs along the claimed route to assess their effectiveness in denying public rights of way in the 20-year period prior to 2005, this test is met, on the balance of probabilities.

47. *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.*

Any qualifying user must be ‘without stealth’. It should be open and capable of coming to the attention of a reasonable landowner. There are 20 witnesses who have completed user evidence forms that they have ridden over the claimed route from A-B. Twelve of those users have used the path for over 20 years on horseback, and one user comments that he had seen innumerable riders reaching the Forest along it, and User 17 says the path had been used by riders for the previous 20 years. When the new owners of Irongate and its surrounding land arrived, they immediately noticed the traffic along Green Lane past their property and took action to show a clear intention that they did not intend that public rights should be dedicated over it. This suggests that the use was not stealthy in nature, and therefore this test is met.

48. *Permission – users ‘as of right’ will not have used the way with any kind of licence or permission.*

Finally, all qualifying user must be without permission. None of the horse riders giving evidence in relation to this claim said that they had sought permission to use it. As there is no evidence of how this route was managed in relation to public access prior to 2005, this test is met. Any use of the route since the notice described in paragraph 42, and over the period that it has been maintained would not meet this test. Those users who have a private right for some, or all, of the routes being considered, have had that private use disqualified from consideration in this investigation.

49. Use by the public

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

*The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of sufficient users, and that 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.*

In the consideration of any claim involving multiple routes with possible usage it may be complex to assign that use to individual routes, given that user is always in the past and users may not have been giving their full attention to exactly what they were doing when walking the routes, or have full recall of any particular use. However, the requirement for each user to show on a map the routes he or she has used reduces the possibility that an ostensible ‘high volume’ of use on one route might be wrongly ascribed to another which, in reality, may have been used much less frequently. In this case, use of the route A-C and the route B-D-E-F must be considered in order to arrive at any public right of way reaching a public highway, to be eligible for inclusion on the Definitive Map. The information on the forms must be taken at face value, unless there is any reason to question whether the use is accurately and honestly recalled. Officers have sought to reflect the volume of use on each



route as accurately as possible, as shown by the numbering next to each route on the amended Committee Plan (**Appendix 4**). These numbers have been obtained by scrutinising the routes drawn on these maps. It is also considered that all user on the parts that must be considered in this application can be said to have been representative of 'the public', since none of those giving evidence said that they were member of the family of, an employee of, or a tenant of, the landowner. The issue of private rights has been addressed in paragraph 34 above. The map at Appendix 4 shows that all four parts of the complete route running between points C and F have been used. The heaviest use on horseback was that section A-B-D, running south from Irongate to the poultry houses at Portnalls Farm, where all 20 witnesses rode, with numbers of users of the whole of the section D-E decreasing to 11, as some riders turned off to Portnalls Farm or to their own land. While the 20 users filling in forms inevitably represent some fraction of the total user on this part of the route, it is difficult to estimate what that fraction might be. User 10 spoke of innumerable horse riders from the local area reaching the Forest using the route, and User 5, User 17 and User 16 refer to riders reaching the Forest by this means. User 23 comments that the new owners put up the sign indicating no statutory right of way when they arrived in 2005, so the level of user illustrated by the evidence given to the investigation was enough to bring that use to the owners' attention. It is clear from the maps provided with the forms that nine users did not use the whole of the section D-E and so did not reach a place of public access. While this use of part of the route D-E can count towards public bridleway rights, the number carrying on beyond point E to a place of public access is actually eleven.

50. Given that some of the users have terminated their riding either at Portnalls Farm, or at one of the properties towards the southern end of section D-E, it is not unreasonable that the diminished use might not come to the attention of any landowner at the southern end of Green Lane. The number of riders continuing south east towards Bashley Common Road, on the section E-F, has further decreased, with 8 riders using the whole section to the junction with the B3058. Given that this is an area where many people keep and exercise horses, and the B3058 gives access in at least two places to a large area containing routes that lead out onto the Forest, 8 riders are unlikely to represent a volume of use that is capable of coming to the attention of any landowner affected by that use. The land to the north of the claimed route may be open forest, but to the south is a relatively densely populated area, including Christchurch, New Milton, Milford on Sea and Lymington. Five witnesses, both walkers and riders, came to the claimed route from some distance away.
51. It is necessary to return to the subject of private rights at this stage of the investigation. Four users have a private right to ride along part, or all of, Green Lane, so their use must be deducted from the total shown in Appendix 4, as this use is not qualifying. The effect of this is illustrated in **Appendix 5**. As has been shown, User 10 talked of innumerable local horse riders reaching the Forest using the claimed route. According to User 10, these users were coming from their own land, and he thought it likely they were using a private right, which would not be qualifying use. As has been demonstrated, of those horse

riders giving evidence, four were using private rights. When looking at rights of way claims, particularly for footpath rights, any admitted private right use is likely to be much less than the public use (for occasional visits to friends, delivering items, for example) and it is customary to note the private use but not try to quantify it. Because of the circumstances in this application, the private right usage has had to be quantified, and it has removed a proportion of the use on the section A-B-D, where the number of users has been reduced from 20 to 16. User 1's exercise of a private right down to point D on Green Lane cannot be counted towards public bridleway rights. The number of users of the route D-E riding without private rights is reduced from 11 to 8 (removing the use by User 8, User 11 and User 21), and for E-F, there are 7 users. As the tendency of horse riders using only part of a route is to reach their land, and some of those who do are doing so with a private right on D-E, this has the effect of diminishing the public user of that route. In the setting of this claimed route, the diminution in numbers of riders towards the B3058 results in the documented usage being less likely to come to the attention of an absentee landowner, and therefore, this test is not met.

52. *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.*

There is no evidence in this application that the users are of any one particular class of individual, given that all replied in the negative about connections with the landowner.

53. The volume of user by the public for each individual section of the claimed route and its extensions to places of public access varies, as is shown by the plans at Appendix 4 and Appendix 5. The path from C to A has received negligible use as set forth in the available evidence. The section from A-B-D was the most heavily used by horse riders, with 20 users, though 4 must be discounted because of private rights, bringing the final total to 16 users. In Order to reach a place of public access, the B3058 being the nearest and most convenient (and ironically what most witnesses were clear they were trying to avoid as it is seen as unsafe for horses), section D-E and E-F must be considered. The use on horseback declines from point D, with 16 users, but not all are using the whole of the section. Nine riders were using part of the route to get to their own property. Once the private use is deducted there are 11 riders using the whole section, but only six riders using it without a private right to reach a destination along that section. From E to F, there are 7 users continuing down to Bashley Common Road. This number of users is unlikely to come to the attention of any landowner, especially a landowner residing some distance away, as is the case here. It does not reflect the numbers of people keeping horses in this area, and wanting to reach the Forest by the more rural setting of the claimed route A-B, rather than busy roads. Therefore, it is unlikely that, on balance, the volume achieved reflects the potential public users of the area, when this particular volume of use is considered in the context of this part of the required test.

54 . Insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

*There must be insufficient evidence that the landowner took steps to stop public use of the claimed routes, such as challenging users, preventing access by physical means or the use of correctly worded signage, or the making of a CA16 deposit.*

The actions of landowners in such applications as these are crucial to their determination. Under section 31 of the Highways Act 1980, the public must demonstrate twenty years of unchallenged use on linear routes, and that use must be as of right and uninterrupted. This legislation fixed the period after which, without action from the freeholder of the land, a 'deemed dedication' will be held to have taken place, and the public rights so acquired can be recorded on the Definitive Map and Statement of public rights of way. In effect, it is for the freeholder to manage her or his land for public access, and to make it clear when he or she does not intend to dedicate such rights, clearly and unequivocally to the users. The critical questions are what is a 'reasonable' land owner to take from what the public is doing on the land? What rights are the public asserting by their use?

55. The evidence currently before this investigation does indicate that the use on horseback of the claimed route and its extensions to the access to the road B3058 has come to the attention of the landowner of the actual claimed route, that is between points A and B. This use resulted in the placing of signs in 2005 which brought home to equestrian users that the route they were riding was not a public right of way, and not intended to be one, and led to this application. There is some evidence that there were previous signs at this location of a similar nature to the 2005 signs, but the wording is unknown. As is not uncommon in the matter of claims for public rights of way, when land changes owner, public use that was tolerated by the vendor of the land becomes evident to the new freeholder, who wishes to stop the public entering on their newly-purchased land. This is entirely reasonable, but the circumstances are not favourable, particularly if the previous landowner has never done anything to manage public access over the land, has moved a distance away or wants no further involvement with it. This is not a clear-cut matter in this investigation. The current owner of Irongate states that the previous owner had similar signs in place, and that these were a renewal of other similar signs, but there is no direct evidence from that landowner. It may be that the present landowners will be able to find more evidence of management for public access of the route prior to 2005. There is no Highways Act 1980 section 31(6) deposit (or its later equivalent, a CA16 declaration) over the land encompassing Irongate and its surrounding fields. Such declarations serve to show that the freeholder does not wish to dedicate any further public rights than already exist over that land, and may be more effective than maintaining fencing, locked gates and notices. The signs put up by the present landowners are effective, direct and address the problem of public access, but were put up at end of the relevant period for this application, which is 1985-2005. In this particular investigation, no direct evidence has been put forward from landowners relating to the period 1985-2005. A challenge to what appears to have been public use of the claimed route took place in late 2005, and the

challenge mounted then was the bringing into question of the public's right to use the way. The evidence, as it stands, is insufficient to demonstrate a lack of intention to dedicate on the part of the landowner between 1985-2005. It is difficult to say whether or not the test is met without direct evidence from the relevant period but, on balance and considering what evidence there is, officers are led to say that the legal test of insufficient evidence is met.

### **Summary of the available evidence**

56. Taking all the available evidence to this investigation at the time of writing, it is considered that the requirements of section 31 have not been satisfied in this case, on the balance of probabilities, for the claimed path and the necessary extensions to reach a place of public access for those members of the public wishing to reach the open Forest avoiding busy roads. The nature of the setting of the route actually claimed is in an area largely devoid of public rights of way. The fact that it reaches a place of public resort at its northern end, but not at its southern end (even with an extension), and that there has been use with private rights, has rendered the final figures for horse riders on the longer of the two routes A-B-D-E-F not of a volume capable coming to the attention of a landowner as being public use during the years 1985-2005. The section that is actually the subject of this application is not able to stand alone in terms of the Definitive Map. The use shown in the user evidence chart at Appendix 3 indicates the route has been in use for many years, with a reasonable number of users from 1950 onwards, but the witnesses have not demonstrated the volume of public horse use that might be expected in an area of open access countryside and forest on the fringe of wider settlement.

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

57. **Route A-B-D** (20 users, earliest evidence of use – 1950)

This is the actual subject of this application to modify the Definitive Map and Statement, and the most heavily used part of the longer route that connects to a place of public access, the B3058, Bashley Common Road. Users say that the claimed route was not obstructed before 2005, though there have been obstructions since. Four users have been shown to have a private right for all purposes along this section of the wider route, so this use is not qualifying, and the actual number of public users on horseback is 16. The claimed path does not qualify to be a public bridleway on its own, and examination of the evidence for linking routes indicates that the level of use on each of them is not sufficient to come to the attention of a landowner. The relevant period is **1985 to 2005** and, while there has been no clear evidence put forward to suggest how the land was managed, there is some evidence of previous signage prior to the 2005 challenge. While there may not be any evidence that the claimed route A-B may have been the subject of any action by the landowner to show no intention to dedicate, and public bridleway rights may have been acquired over that section only, it is not able to be recorded on the Definitive Map as a public bridleway as it stands. The law requires that a right of way has fixed start and end points and follows a defined route. Case law has held that a path terminating at a feature such as the sea shore could be a public right of way, but, it is necessary that there be a point that allows the public access to what

may otherwise be a cul-de-sac. As has been pointed out by the Area Countryside Manager in paragraph 60, in response to consultation, the question here is how would the public gain access to the section A-B? This is the reason that the other three sections must also be considered, as below. As a stand-alone route, A-B may theoretically have met the legal tests for recording on the Definitive Map, but without the means necessary to allow the public to reach it, given that there are no public rights of way from the B3058 to the start point at B, there would be no purpose in recording it there.

**Route C-A** (3 users, 1 whole and 2 part, earliest evidence of use – 1996)

This route is also open and available for use, and does not appear to have been obstructed in the past, but the level of recorded use is so low that it would not be likely to come to the attention of the landowner, and the legal test is not met.

**Route D-E** (20 users, 11 whole and 9 part, earliest evidence of use – 1950)

The route is open and available for use. This section, along Green Lane, is a necessary component of a public bridleway that could be recorded on the Definitive Map. Although there are 11 horse riders who have shown that they have ridden on this section on the plans attached to their user forms without exercising a private right, 6 have only used a part of it without a private right, with three users having exercised private rights over part of the section. The use illustrated on five of these user forms is to Portnalls Farm only, some way short of the junction of Green Lane with Ossemsley Drive South. Given that this part of the route has been owned by a non-resident landowner for many years, it is unlikely that this number of users constitute a volume capable of coming to that landowner's attention. Therefore, this legal test is not met.

**Route E-F** (8 users, 7 whole and 1 part, earliest evidence of use – 1950)

The route is open and available for use. It runs from the junction with Green Lane, where it meets North Drive, and is known as Ossemsley Drive South. During the 20-year period up to the bringing into question of the public's right to use the claimed route in 2005, this route was also owned by an absentee freeholder and, on balance, it is not likely that the volume of 8 horse riders who have provided evidence to this investigation is likely to come to the attention of such a landowner. In relation to this section of the longer route, the legal test regarding volume of use is also not met.

## **Common Law**

58. As there is little information on how this route was actually managed for public use during the period 1985-2005, it is difficult to consider this matter under common law.

## **Consultations with other bodies**

59. The following persons and bodies have been consulted about the application: New Forest District Council, New Milton Town Council, the local Member, the Open Spaces Society, The Ramblers, the British Horse Society, Cycling UK,

Hampshire Highways and the Area Countryside Access Manager (South). At the time of writing, the following responses have been received.

60. The County Council's **Area Countryside Access Manager South** has responded to say that, on checking the GIS mapping, it is '*difficult to ascertain whether there is any public access from the south end of this route*'. None of the routes in the area where the claimed route lies are recorded on the List of publicly maintainable streets [known as CHALIST]. The Manager appreciates that the northern end of the route goes onto the open forest, but then comments that '*however without any public access to the south I'm unsure what use this route may have received in isolation*', thereby identifying precisely the reason why sections C-A, D-E and E-F have had to be considered.
61. The Assistant Parish Clerk to **New Milton Town Council** responded that she had raised this matter at a meeting of the Council's Planning Committee on 5 December 2019, and the matter was detailed in the minutes of that meeting. The Clerk says that '*to date no comments have been forthcoming and I am not expecting this to change*'.

### **Comments by the Landowners**

62. The affected landowners have been consulted on this application. Their legal representative has been in contact and expects to put forward a representation, but at the date of writing this has not been received. However, any material that is received between the submission of this report and the Committee meeting will be forwarded to Members for consideration and to aid the determination. Some information has been put forward by the current owner of Irongate and this is discussed at paragraph 38. Contact has also been made by a representative of the Forestry Commission, who may also wish to put forward evidence or comments. Any material that is put forward after the date of publication will be provided in advance of the Committee meeting, if possible, to allow Members to take all relevant evidence into consideration in making their determination of this application. An Assistant Land Agent for the Forestry Commission has contacted officers in relation to the route A-C. She points out that the Forest is land that is open to the public, and that there is no need to '*upgrade the route*'. She also says that the Commission has not actively stopped riders using it. It should be noted that, as crown land, the Forestry Commission is not bound by the provisions of the Highways Act 1980, under section 31 of which this claim will be determined, unless an agreement has been made under section 327 of the Highways Act 1980 that it will be so bound.

### **Conclusions**

63. The intention of this report is to provide the Regulatory Committee with information and advice on this application. Officers again apologise for the length of the delay in investigating it.
64. The evidence available to the investigation indicates that the claimed route and other routes examined to ascertain whether there is a route to the Forest that

connects to a place of public access at the road B3058, have been in use by the public during the relevant period 1985 to 2005. The issue before Members is whether the volume of public use is sufficient to come to the attention of the landowner, and what the landowner has done during that 20-year period once aware that a public right, here on horseback, was being asserted.

65. None of the users who have ridden the route on horseback from the Forest to Bashley Common Road (A-B-D-E-F on Appendix 1), or any part of it, report being challenged or stopped during the period 1985-2005. While the horse riders used the route without stealth or force, four did ride parts of the route in the exercise of private rights, and that use does not contribute to the acquisition of public bridleway rights over this route. Only with a change of ownership of the land over which the route actually claimed (A-B) runs was there any direct challenge to the use of the path by the public for horse riding, and to access the Forest, that came to the attention of users, sufficient to mount a claim to have the route recorded on the Definitive Map. This is not an uncommon occurrence in rights of way claims.
66. As the Area Countryside Access Manager correctly identified, the question is whether there can have been sufficient access from the south to the route A-B claimed as a public bridleway, to allow the public use occurring there to be recorded on the Definitive Map. As has been set out in the analysis, taking each section of the route from the Forest to the B3058, for the necessary legal tests to be met, and for the Definitive Map to be amended to show a public bridleway, the issue is the volume. The use captured on user evidence forms can only ever be a fraction of what has taken place on a route, particularly one in a rural setting or open countryside. It is not possible to know just how many riders have used this route over the 20-year period under consideration, though witnesses say, or imply, that many local riders rode there. From the evidence put before officers, and when any use with private rights is discounted, the total of 16 riders for A-B, the claimed path, reducing to 11 riders over the whole of the section B-D-E and then to 7 over the whole of the final section E-F is a low volume for the setting of this route in an area with few public rights of way bordered by extensive settlement to the south. The route A-C has received negligible public use. The only resident landowner over the 20-year period, when unchallenged public use must be demonstrated, was for the section A-B, and no substantive evidence is available to show how that section was managed with regard to public access. Taking what evidence there is, officers are of the opinion that the volume of use on the linking extensions is not sufficient to allow for a deemed dedication of a route suitable for inclusion on the Definitive Map.
67. If Members agree with these conclusions and consider that, on the balance of probabilities, it cannot be reasonably alleged that the public have acquired a right of way on horseback on the routes as set out in the previous paragraphs, then they should direct that the application be refused.

**REQUIRED CORPORATE AND LEGAL INFORMATION:**

**Links to the Strategic Plan**

<b>Hampshire maintains strong and sustainable economic growth and prosperity:</b>	
<b>People in Hampshire live safe, healthy and independent lives:</b>	
<b>People in Hampshire enjoy a rich and diverse environment:</b>	
<b>People in Hampshire enjoy being part of strong, inclusive communities:</b>	
<b>OR</b>	
<b>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.</b>	

<b>Section 100 D - Local Government Act 1972 - background documents</b>	
<b>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.)</b>	
<u>Document</u>	<u>Location</u>
Claim Reference – case file CR/887	Countryside Access Team Castle Avenue Winchester SO23 8UL



**IMPACT ASSESSMENTS:**

**1 Equalities Impact Assessment: N/A**

**2. Impact on Crime and Disorder: N/A**

**3. Climate Change:**

How does what is being proposed impact on our carbon footprint / energy consumption? N/A

How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts? N/A

**This report does not require impact assessment but, nevertheless, requires a decision because the County Council, in its capacity as the ‘surveying authority’, has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.**