

## HAMPSHIRE COUNTY COUNCIL

### Decision Report

<b>Decision Maker:</b>	Jonathan Woods <i>Countryside Service Strategic Manager</i>
<b>Date:</b>	14 January 2021
<b>Title:</b>	Proposal to extinguish parts of Bishopstoke Footpaths 781 and 736, and to make a Definitive Map Modification Order to record an alternative route between Footpaths 736 and 506 Parish of Bishopstoke

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#### **Purpose of this Report**

1. The purpose of this report is to assist the Countryside Service Strategic Manager in determining whether to accept the proposal to extinguish parts of Footpaths 781 and 736, and to make a Definitive Map Modification Order (DMMO) to record an alternative route which will link Footpath 736 with Footpath 506. This proposed course of action will resolve a long-standing anomaly on the Definitive Map.

#### **Recommendation(s)**

2. That authority is given for the making of a Definitive Map Modification Order to record three new public footpaths with a width of 1.5 metres as shown between Points A and B and between Points D and E, in addition to a short spur route at point C (please refer to the attached plan).
3. That authority is given for the extinguishment of the northern three sections of Footpath 781 (points F, G and H).
4. That authority is given for the extinguishment of a section of approximately 40 metres of Footpath 736 near Oak Coppice Close (between points A and D).

#### **Executive Summary**

5. For around 40 years, there has been an anomaly on the Definitive Map of Rights of Way, whereby the three northern sections of Footpath 781 have been built over. This resulted from the failure of the local planning authority to divert or extinguish the path at the time of the development. Currently, the route is obstructed by nine properties. It is believed that this development took place in the late 1970s or early 1980s.
6. There is a further anomaly on Footpath 736, where the line of the path is obstructed by mature trees and vegetation (between points D and A on the attached plan); the public have been using an adjacent metalled (publicly maintainable) path instead.

7. As part of a review (carried out in 2020) of the rights of way network in this area of Bishopstoke, Highway Adoption plans were checked and a number of footpaths were subsequently added to the Definitive Map. However, whilst Eastleigh Borough Council indicated that there had been an adoption plan for the DMMO routes proposed here, the plan could not be located. The routes are nonetheless on the list of Highways Maintainable at Public Expense.
8. The proposal is therefore to make a DMMO to record three routes between A-B, D-E and at point C. These paths are metalled and are in regular use by the public because they are the alternative routes following the development in this area.
9. There is no applicant in this case. The matter has been initiated by the Map Review team.

### **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...
    - (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;

#### 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 – Section 118: Stopping up of footpaths, bridleways and restricted byways

- (1) Where it appears to a council as respects a footpath...in their area that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order...extinguish the public right of way over the path or way.

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

10. Footpath 781 is in four sections. Section F commences at a junction with Footpaths 736 and 782 at the edge of Stoke Park Woods. It continues in a southerly direction through several properties and terminates on The Ridings. Section G commences on Oak Coppice Close and continues in a southerly direction through 1 Oak Coppice Close, terminating on Olympic Way. Section

H commences on Alan Drayton Way; there is a pedestrian traffic island but no onward route for pedestrians: the line of the footpath is obstructed by a metal barrier and tall garden fence. The line of the path continues through a private garden and between two houses, terminating on Beaver Drive. The southernmost section of Footpath 781 is unobstructed and is therefore not part of this proposal.

11. Route A-B commences at a junction with Footpath 736. The metalled path continues in a south-westerly direction to Alan Drayton Way, where there is a pedestrian crossing.
12. Route D-E commences at a junction with Footpath 736 and continues in a south-westerly direction to meet Route A-B. Beyond point E, the path continues as a metalled cycle way (which is not on the Definitive Map and does not form part of this proposal).
13. At point C, there is need for a short spur from Footpath 506 to Alan Drayton Way, where there is a pedestrian crossing to link to point B.
14. The section of Footpath 736 between points D and A is obstructed by mature trees and vegetation and is impassable; it is therefore proposed that this section should be extinguished in favour of the alternative route proposed above.

#### **Issues to be decided**

15. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. Case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry. Officers do not consider that there is such a conflict in this case.
16. 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.
17. If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
18. Where a Map Modification Order is made, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to

the Secretary of State. Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.

## **Background**

19. In 2020, it was observed that parts of Footpaths 736 and 781 were obstructed, and that the alternative pedestrian link was not listed on the Definitive Map. This appeared to be caused by development and has been a long-standing anomaly on the Definitive Map, which this department was aware of. The decision was made to resolve these anomalies before they caused a problem (for example, if a property on one of the obstructed routes was to be sold and the anomaly discovered during conveyancing, causing a subsequent delay to the house sale).
20. The obstruction appears to have happened during the 1970s or 1980s when this area was developed for housing and a new main road was built.
21. Highway adoption plans in this area were reviewed and where pedestrian paths had been annotated as having been adopted by the County Council, the routes were added to the Map. In total, 16 footpaths were identified and recorded in this way.

## **Consultations**

22. The following people and organisations have been consulted on this application: Bishopstoke Parish Council, Eastleigh Borough Council, the Ramblers and the Open Spaces Society. Additionally, the member of the County Council for Bishopstoke and Fair Oak, Councillor Mike Thornton, has been made aware of the application. Where responses were provided, these are set out below.
23. The Ramblers  
The Ramblers initially responded to the consultation to provide a background to the issue (that the obstruction was caused by development in the 1970s and 1980s) and to indicate that they would object to the extinguishment of Footpath 781 if no alternative provision was made. Following this, a discussion was held with a representative of the Ramblers and the routes set down in the highway adoption plans (which were already being identified prior to the discussion) were added.  
In November 2020, The Ramblers confirmed that they were satisfied with the proposals:  
*Whilst we cannot undo the mistakes that were made when all the roads and dwellings were built on the line of Footpath No 781 Bishopstoke what you have done gives the best outcome that could now be achieved.*
24. The Countryside Service Access Southern Area Manager and the Senior Ranger  
The Area Manager and Senior Ranger responded to the consultation with their support for the proposals.
25. Eastleigh Borough Council  
A representative of the Borough Council stated that they had “no objections” to the proposals.

## Comments by the Landowners

26. The land affected by the proposals covers a number of different land parcels and all owners have been identified and written to. These comprise eight houses, Eastleigh Borough Council and two companies. Where responses were received, these are detailed below:

27. Mill Lodge Properties Ltd.

Mill Lodge Properties outlined their objection to the proposal, on the grounds that it impacts their land “when in fact the Forestry Commission should be clearing the original footpath and the alternative that you show in red has not been used for the required minimum of 20 years.”. Following receipt of this letter, a response was sent to clarify the proposals, which will extinguish obstructed and unusable footpath rights along the company’s land parcel. No further response was received.

28. Eastleigh Borough Council

A representative of the Borough Council stated that they had “no objections” to the proposals.

## Documentary Evidence

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

*Reference letters have been provided on the images; please refer to the attached plan.*

29. Ordnance Survey Maps - County Series (25 inches to 1 mile) – c.1869 -1941 (A)<sup>1</sup>

Four maps were published by the Ordnance Survey at a scale of 25 inches to 1 mile between c.1869 and 1941.

The maps show the changes in the area: on the first, second and third editions, the area is largely undeveloped with very few houses. By the fourth edition, the development of what is now Fair Oak Road was underway. On each edition, there is a route marked ‘FP’ leading from Middle Street (now Fair Oak Road) to Stoke Park Woods; this route appears to match the alignment of the four sections of Footpath 781. There is also a route marked ‘FP’ which is consistent with the alignment of Footpath 736.

As both routes have been depicted on these maps and as they are currently part of the rights of way network, it is possible that they were public footpaths at the time the maps were produced. There is no indication of the presence of any routes in the area where the proposed DMMO routes are located.

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<sup>1</sup> Available on the National Library for Scotland website. Not to be reproduced without permission:  
<https://maps.nls.uk/view/105986560>  
<https://maps.nls.uk/view/105986557>  
<https://maps.nls.uk/view/105986554>

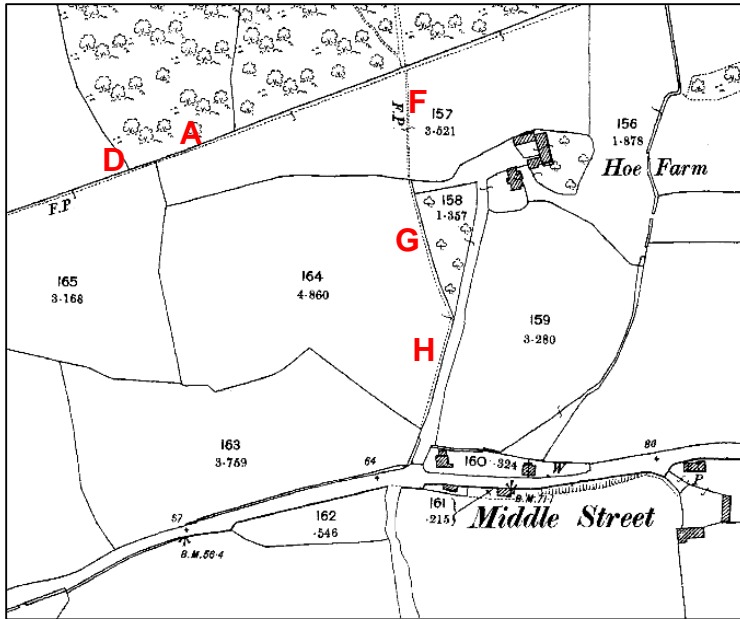


Figure 1 - Ordnance Survey County Series, Second Edition (1896)

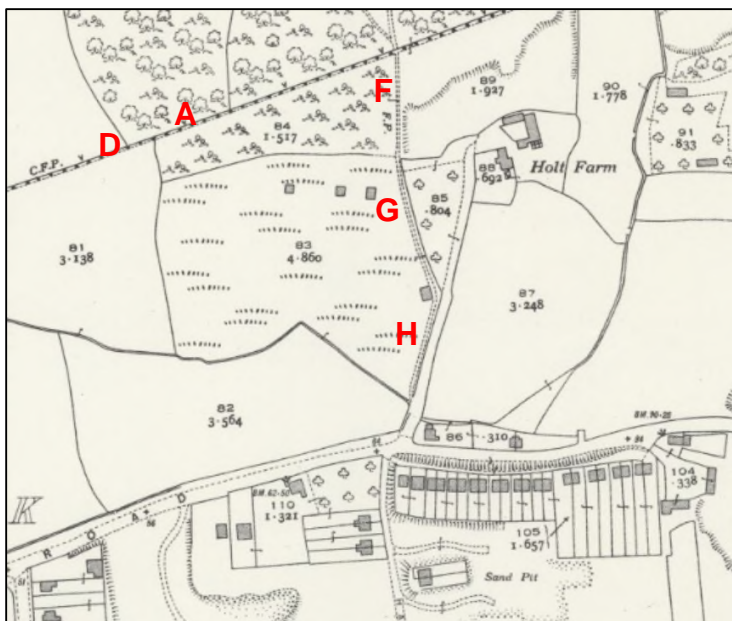


Figure 2 - Ordnance Survey County Series, Fourth Edition (1941)

### 30. List of Highways Maintainable at the Public Expense (2021)

Under the provisions of Section 36(6) of the Highways Act (1980), the County Council has a duty to keep a list of all highways maintainable at the public expense; this is also referred to as 'the list of streets'. The list has been digitised into the 'Chalist' layer within GIS and a screenshot is shown below.

This data shows that the obstructed sections of Footpath 781 and 736 are not considered to be highways maintainable at the public expense, whereas the majority of the routes to the north of Alan Drayton Way are (a small section at point B has been omitted). They are depicted with an orange pecked line, which denotes an adopted footpath; note that this term does not confer any legal footpath status and is for descriptive purposes only.

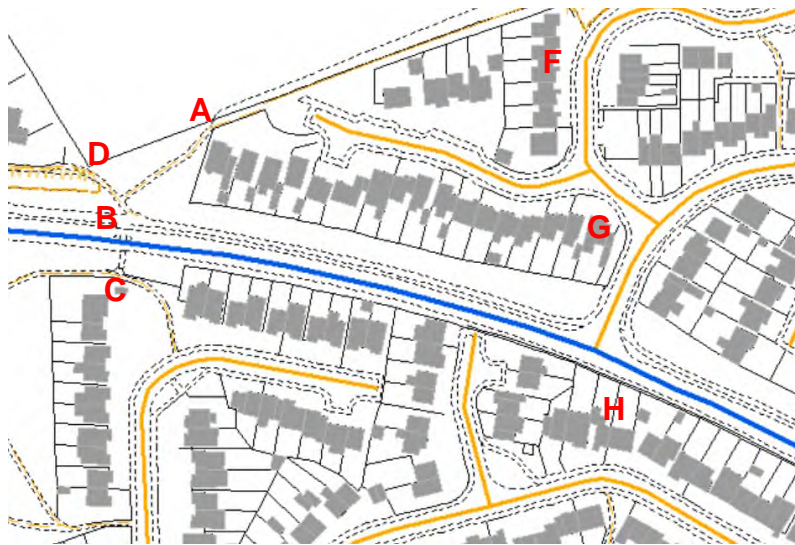


Figure 3 - Extract from 'Chalists', the digitised version of the List of Streets

### Analysis of Documentary Evidence

31. The documentary evidence shows that pedestrian routes have existed along the alignment of Footpaths 781 and 736 since around 1869 when they were first depicted on the Ordnance Survey county series map. As Ordnance Survey surveyors marked what was visible on the ground, rather than reflecting any rights which existed, it is not possible to be certain that the paths were public footpaths at this time. There is no historic evidence of any paths in the area where the proposed DMMO routes are located. This is consistent with them being a modern feature following development in the latter half of the 21<sup>st</sup> century.
32. The majority of the proposed footpaths to the north of Alan Drayton Way located between Oak Coppice Close and Mitre Way are considered to be highways maintainable at the public expense. By contrast, the obstructed sections of Footpaths 781 and 736 are not listed as publicly maintainable highways.

### Analysis of the evidence under Common Law

33. This matter can be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied from a sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as

putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back.

### **Conclusions under Common Law**

34. The proposed DMMO routes appear to be well used by the public and were in use when a site visit was conducted. Additionally, the paths are metalled and provide valuable connections to other footpaths and pedestrian routes, including providing a north to south link in the rights of way network, and linking to an existing pedestrian crossing over Alan Drayton Way.
35. The majority of the proposed routes are already recorded by Hampshire Highways as publicly maintainable highways.
36. There is evidence to suggest that there has been a positive intention to dedicate the paths as public rights of way, as the routes are metalled and, according to the County Council's records, have mostly been adopted as publicly maintainable highways. The short section of the route not shown on Chalist as a publicly maintainable highway (between B and C on the attached plan) can still be interpreted as having been intentionally dedicated for public use, as the path is metalled and a pedestrian crossing has been provided.
37. The public appear to have accepted the dedications insofar as they have enjoyed use of the paths without secrecy, force or permission.

### **Conclusions**

38. There is no evidence of any attempt to divert or extinguish the relevant parts of Footpaths 736 or 781.
39. Given that there has been no complaint regarding the obstruction of the paths by the housing development, and that alternative routes have been provided, it is reasonable to argue that these parts of Footpaths 736 and 781 are not needed for public use. Given the provision of the other routes that have subsequently been constructed and adopted, it would appear that the test for extinguishment of these paths under Section 118 Highways Act 1980 has been met.
40. A public right of way for pedestrians is reasonably alleged to exist on the alternative routes as a result of deemed dedication at common law, based on the actions of the landowners and use by the public since around 1980.



**REQUIRED CORPORATE AND LEGAL INFORMATION:**

**Links to the Strategic Plan**

<b>Hampshire maintains strong and sustainable economic growth and prosperity:</b>	yes/no
<b>People in Hampshire live safe, healthy and independent lives:</b>	yes/no
<b>People in Hampshire enjoy a rich and diverse environment:</b>	yes/no
<b>People in Hampshire enjoy being part of strong, inclusive communities:</b>	yes/no
<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>	

**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: 1339

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:

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