

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	26 October 2011
Title:	Application for a definitive map modification Order to record a public footpath between Gorsedown Close and Hogmoor Road in Whitehill Parish.
Reference:	3254
Report From:	Director of Culture, Communities and Business Services

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1. Executive Summary:

- 1.1. The purpose of this paper is to set out the facts of the case to enable this Committee to determine whether the public has acquired a right of way over the route being claimed. If it is considered that the public has acquired a right of way then the status, route and width of the path must also be determined. Members' authority is required for the making of a map modification order to record those rights on the definitive map.
- 1.2. It is considered that the evidence submitted in support of this application is insufficient to support the acquisition of a public right of way. It should be noted that a different application, for the same route, was previously considered and rejected by the County Council in 1989. There is little additional evidence, therefore the application is recommended for refusal.

2. Legal framework for the decision:

2.1. WILDLIFE AND COUNTRYSIDE ACT 1981:

s.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 the occurrence of that event.

(3) The events referred to in sub-section (2) are as follows: -

b) the expiration... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

a) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies.

2.2. 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 referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by notice...or otherwise.

2.3. 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.

3. Claimant:

3.1. Mrs O Todd-Russett
5 Gorsedown Close
Whitehill
Hampshire
GU35 9QH

4. Landowner:

4.1. There is no registered owner of the land in question.

5. Description of the route: (please see maps attached to this report)

5.1. The claimed path consists of a strip of land, approximately 4 metres wide and 75 metres long, between the property boundaries of 61 and 63 Hogmoor Road. It is currently not useable as a public path, being obstructed with garden waste, tree branches and a fence.

6. Background to the claim:

- 6.1. The application was made in 2005, but was not taken up for investigation until 2011 due to a large backlog of claims. From correspondence with local residents it was discovered that an application for the same path was made back in March 1989 and considered by the Rights of Way Sub-Committee on 23 November 1989. The report recommended that the claim be turned down on the grounds that there was insufficient evidence of use to support the acquisition of a public right of way, and members resolved to refuse the application. A copy of the report is attached as **Appendix 1**.
- 6.2. The claimed path was blocked in the summer of 1989, before the decision of the Rights of Way Sub-Committee, and has remained obstructed to the present day. Therefore there can have been no further actual use of the route since the last decision was made. Additional user evidence was submitted by the current applicant in 1995, but at that time the Senior Map Review Officer took the view that “...*they do not provide enough evidence to justify reopening the claim.*” This report seeks to include all the evidence submitted in support of the claim since the last Committee decision and provide a final view on the existence of a public right of way.

7. Issues to be decided:

- 7.1. The issue to be decided by this Committee is whether there is evidence to show, on a balance of probability, that a public right of way subsists, or is reasonably alleged to subsist, over the route shown by a green line on the map attached to this report.
- 7.2. 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, Members must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).
- 7.3. With regard to any application for a definitive map modification order, historic and documentary evidence will be examined to see whether the past history and use of the paths points to them having footpath, bridleway or vehicular rights as a result of dedication in the distant past. Any such rights are not lost merely through disuse. Unless stopped up by due process of law any rights previously dedicated will still exist, even if they are now neither used nor needed (subject to any statutory extinguishment under Natural Environment & Rural Communities Act 2006). This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the definitive map and statement. The County Council is under a duty to record such rights as are found to exist.
- 7.4. Evidence forms and statements taken from those who have used the path, or have knowledge of it in living memory, can show that rights have been acquired as a result of a recent dedication at common law, or

a deemed dedication under s.31 Highways Act 1980. It may not be necessary to examine this type of evidence if the historic and documentary evidence shows that rights were dedicated in the past and still subsist, although the user evidence may add credibility to the earlier evidence of dedication. This type of evidence is also useful in determining the width of the path.

- 7.5 The burden of proof in these matters is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive 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, Members should make an Order so that the evidence can be tested at a public inquiry. However, this is not a step which should be taken simply to avoid making a difficult decision. Officers do not consider that there is any such conflict here.
- 7.6 The originals of many of the documents referred to in this report are only available in public record offices, but copies, transcripts or photographs of most documents are available for inspection in the offices of the Countryside Access Team, as are witness evidence forms and statements. Members are urged to inspect these, or the originals, when considering this report.

8. Documentary Evidence:

8.1. 1908 Ordnance Survey 25 inch map

This map shows Hogmoor Road and Golf Lane, although at this date it is known as Sandy Lane. There is no path, or track, of any description in the locality of the claimed route.

8.2. 1935 Ordnance Survey 25 inch map

This is the first map to show the claimed route. It consists of a track which leads from Hogmoor Road to an outbuilding situated where the end of Gorsedown Close is now located. It is not a through route and the track is gated where it joins Hogmoor Road.

8.3. 1973 Ordnance Survey 1/2,500 scale map

This map too shows the claimed route, this time as a through track connecting Hogmoor Road with Golf Lane. There are houses on both sides at its eastern end and the route is gated where it joins Golf Lane.

8.4. 1978 Ordnance Survey 1/2,500 scale map

The claimed route appears on this map as a track running between houses fronting Hogmoor Road and terminating at open space behind those houses. This is just before Gorsedown Close was built, and it is not obvious what purpose the path serves.

8.5. 1980 Highway Adoption Plan

This plan shows those roads and footways that were to be adopted by the Highway Authority as publicly maintainable highways. It includes Gorsedown Close and associated footways, but does not include the claimed path.

9. Witness Evidence:

- 9.1. The 2005 application is supported by user forms completed by 11 local residents. However, of these eleven people only four have actually used the path, the remaining seven just observed that the route would provide a useful path, but was obstructed by fences and vegetation. The evidence from the four users is detailed below. For a visual representation of the user evidence please see the bar chart at the back of this report.
- 9.2. **Mrs I Lee** of Gorsedown Close used the path on foot to go to school and church from 1947, but she can't remember when she last used the path. She recalls that there was a gate across the route which had to be kept shut to keep cows in. Mrs Lee does not say how often she used the path or how many years her use spanned.
- 9.3. **Mrs S Parker** of Fernlea used the path, 360 times a year, on foot and bicycle between 1984 and 1989 to take children to school, visiting relatives, going to shops and mailbox. She says: *"The residents of Fernlea and Gorsedown Close had access through to Hogmoor Road via said path."* The path was obstructed in the summer of 1989 by *"trees cut down and thrown in footpath – fences erected at both entrances."*
- 9.4. **Mr D Ross** of Gorsedown Close also used the path between 1984 and 1989, twice a week, as it was convenient for going to local shop and letter box. He recalls that *"In the summer of 1989 obstructions were placed at either end of the path"* and that it is now obstructed mainly by tree branches. Mr Ross relates that *"When I moved into Gorsedown Close in January 1984 the path was in regular use by people on foot or bicycle and people with prams/push chairs. It remained unobstructed until the summer of 1989."*
- 9.5. **Mrs O Todd-Russett** of Gorsedown Close used the path every day from 1979 to 1989. She recounts what happened in 1989 when the path was obstructed by fences and lopped trees.
- 9.6. Several residents have submitted Land Registry documents for their properties which record the existence of a right of way for all purposes over the claimed route. This refers to a private right of way specific to the owners and occupiers of that property and has no bearing on the existence of a public right of way. However, any use by those with private rights cannot count towards the acquisition of a public right of way.
- 9.7. In 1994 Mrs Todd-Russett submitted 23 user evidence forms, but did not make a formal application for a map modification order. Of those 23, two are included in the 2005 submission, one was the original 1989 applicant, two did not provide dates for the period of their use, and three had not actually used the path. This leaves a further 15 users to be taken into account, and they are listed below in alphabetical order.
- 9.8. **Ms G Bridgman** of Gorsedown Close used the path on foot from 1979 to 1988 as a short cut to Hogmoor Road.
- 9.9. **Mr & Mrs Cooper** of Broomfield Road used the path on foot about 20 times a year, from 1979 onwards, to deliver parish papers for the

church. Mr Cooper observed that: *“Locals have used the path for a number of years.”*

- 9.10. **Mr & Mrs Gowers** of Gorsedown Close used the path weekly between 1986 and 1989. Mrs Gowers says: *“It was a well-used footpath when we moved here, and an essential cut-through for those with no transport. No.20 Gorsedown Close have upkeep of part of the path in their deeds.”*
- 9.11. **Miss A Lee** of Gorsedown Close used the path from 1972 to 1988 with her grandmother for family outings.
- 9.12. **Mrs R MacDonald** of Gorsedown Close used the path every day between 1982 and 1989.
- 9.13. **Mrs Robinson and Mr Robinson**, originally of Gorsedown Close, used the path daily from 1979 to 1988 to access local shops and army common land. Mrs Robinson adds: *“When moving into the close, solicitor informed me that Rowag Construction would, at a later date, tarmacadam track.”*
- 9.14. **Mrs L Stead** of Golf Lane used the path twice a week between 1975 and 1976 for a short walk to Hogmoor Road and back.
- 9.15. **Ms V Taylor** of Hogmoor Road used the path daily from 1977 to visit neighbours. She observes that: *“Until fenced off it was regularly used by local people.”*
- 9.16. **Mr & Mrs Tiley** of Gorsedown Close used the path 144 times a year between 1986 and 1989 for pleasure and shopping. They observe that: *“The track has been used by the public since 1932’ish. Mothers and toddlers denied access in 1989 and all denied access in 1990-91. It is not right that the occupier of 61 Hogmoor Road should be permitted to close the track as he has.”*
- 9.17. **Mr & Mrs Watts** of Golf Lane used the path occasionally from 1976 to 1988 for visiting friends in Hogmoor Road

10. The Landowner:

- 10.1. There is no known owner of the land in question. The adjoining landowners comments appear under ‘Consultations’ below.

11. Consultations with Other Bodies:

11.1. Whitehill Parish Council:

The Committee Administrator has replied to say that:

“At the Town Council meeting on 26th September, the Council voted...that the second application be refused.”

11.2. East Hampshire District Council:

No comment

11.3. Councillor Carew – local member:

No comment

11.4. The Ramblers:

The Footpath Secretary for East Hampshire has replied to say:

“Sadly I have to agree with your conclusion that there appears to be insufficient evidence of use of this path by the public to acquire this path as a public footpath.”

11.5. Mr F Ball – adjoining landowner:

“I have lived at this address for 47 years, the land in question was used as a private driveway to a rear garage owned by Mr J Leslie. In 1970 Mr Leslie sold his rear garden to Mr J Lee who in turn later sold the land to Mr Gawor, owner of Rowag Construction Company who was the builder of the properties at the rear of my garden in Gorsedown Close. Mr Gawor closed off that strip of land and held it as a ransom strip for the possibility of future development. The land has not been used as a footpath by others since it ceased to be the drive to the garage owned by Mr Leslie.”

11.6. Mr M Scott – adjoining landowner:

Mr Scott has lived at his current address since 1984.

“..the circumstances detailed in the decision of the HCC Rights of Way Sub-Committee decision of 23 November 1989 have not changed since they said the land had seen ‘challenges to use...by gate or fence...intermittently from 1968, culminating in closure by fencing in the mid1980s.’ In the time I have lived here there has always been a fence/barrier at the Hogmoor Road end while the Gorsedown end is also blocked. There have always been overgrown nettles and brambles which have never shown any sign of being beaten down by someone using the land as a footpath. I have accessed the land to fence and do maintenance to my property, but it is certainly not used as a public footpath.”

12. Summary of Evidence:

- 12.1. From the mapping evidence it can be said that the claimed route started life, at some point between 1908 and 1935, as a track running from Hogmoor Road to an outbuilding where the end of Gorsedown Close is now situated. It is unlikely that this would have been used by the public as it was a cul-de-sac that did not connect with Golf Lane. After 1935, but before 1973, the track was extended to connect with Golf Lane, but given the limited number of properties in this locality, at that time, it is unlikely that the path would have been used by the public to any great extent.
- 12.2. The 1978 Ordnance Survey map shows the situation just before Gorsedown Close was constructed. The western half of the through route between Hogmoor Road and Golf Lane no longer exists because houses fronting Golf Lane have been built over the path. This leaves the claimed route as a cul-de-sac leading to undeveloped land sandwiched between properties fronting the two roads. Again, it is difficult to see what purpose the claimed route served and therefore it is unlikely to have been used to any great extent at this date.

- 12.3. Once the houses in Gorsedown Close were completed and occupied, in 1979, the claimed route served as a useful short-cut for those living in the cul-de-sac. The path was used, by local residents until 1989 when the path was obstructed by the actions of a resident, or residents, in Hogmoor Road. Although the blocking of the path brought into question the public's right to use the path, it did not signify an intention not to dedicate because the obstruction was caused by someone other than the landowner, and was not acting at the request of the landowner.
- 12.4. Given the length of time that the path has been unavailable to the public it is very difficult, 22 years after its closure, to provide a full and accurate representation of the user evidence in the years before 1989. For that reason considerable weight must be given to the conclusions of the investigating officer who reported to the Rights of Way Sub-Committee on 23 November 1989, following receipt of the original application in March 1989.
- 12.5. One of the conclusions drawn from that earlier report was that there was very little user evidence before the construction of Gorsedown Close. The bar chart with this report shows that use, prior to 1979, was very limited with occasional use as a through route. This must have come to an end before 1978 as the OS map of that date shows houses built across its western end at Golf Lane. So there are, in effect, two different routes; the pre-1978 through route to Golf Lane and the post-1979 route between Gorsedown Close and Hogmoor Road.
- 12.6. The amount of use by the public of the pre-1978 route is insufficient for the acquisition of a public right of way, either through 20-years use or through a common law dedication. Use of the shorter, post-1979 route is significant, but only lasts for about 10 years before the route is obstructed. This means that there is insufficient period of use for the acquisition of a public right of way based on the provisions of s.31 Highways Act, that is 20 years use. This still leaves the possibility of a common law dedication having occurred.
- 12.7. Of those that used the claimed route between 1979 and 1989 approximately half, that is 13 out of 27, lived in Gorsedown Close. This presents a difficulty in assessing how much use was by the public and how much use was by those who had a private right of access. It would appear that some properties in that road, possibly all of them, have a private right of access contained within their deeds. This would stem from the original owner of the land, upon which the houses are built, having a private right of access over the track. The land, and the rights attached to it, being transferred from the original owner to the new residents. It is not known how widespread the private rights are, but any use by those with private rights would not count towards the acquisition of a public right of way.
- 12.8. The test for the existence of a right of way under common law is more difficult to satisfy than that for 20 years use. The onus is on the applicant to demonstrate that the landowner intended to dedicate a public right of way. This is different from a s.31 dedication where it is only necessary to show that the path was used by the public, and the landowner did not take any steps to prevent the public acquiring a right of way. A common

law dedication need not be an express declaration by the landowner, but can be inferred from the available user and/or documentary evidence.

- 12.9. In this case it is considered that there is insufficient evidence from which a common law dedication can safely be inferred. The path was not specifically constructed to link Gorsedown Close to Hogmoor Road; it was a relic from a previous age before the housing estate was built, which the local residents took advantage of. The volume of use and the period that the path was in use are not sufficiently large or long-lasting for a semi-urban area such that it can safely be assumed that the owner knew about, and acquiesced in, that use.
- 12.10. Although the application that is the subject of this report is recommended for refusal, there are two other courses of action open to the applicant if it is resolved that the public has not acquired a right of way. Firstly, to take legal advice on the existence of private rights and how those rights could be asserted or, secondly, to find the owner of the track and persuade that person(s) to dedicate a public right of way.

13. Conclusions:

- 13.1. A through route existed between Hogmoor Road and Golf Lane after 1935 and before 1978, but there is insufficient evidence of public use during this period for the acquisition of a right of way.
- 13.2. From 1979 onwards there was a through path from Hogmoor Road to Gorsedown Close with evidence of use from 24 residents of whom about half lived in Gorsedown Close.
- 13.3. The public's right to use the path was brought into question by the blocking of the route in the summer of 1989.
- 13.4. The path was used for a period of 10 years (1979-1989) which is insufficient for the acquisition of a public right of way through the provisions of s.31 Highways Act 1980.
- 13.5. The amount of use made of the path by the public and the length of that use is insufficient for it to be inferred that the landowner intended to dedicate a public right of way.
- 13.6. The conclusions of the report to the Rights of Way Sub-Committee on 23 November 1989 are still relevant to this application, although there was evidently more use than was considered back in 1989.
- 13.7. There is evidence that at least some of the properties in Gorsedown Close have a private right of way over the route being claimed.
- 13.8. It is open to those that have private rights to take action to secure those rights through independent action, or to persuade the absent landowner to dedicate a public right of way.

14. Recommendation:

- 14.1. That the application for a definitive map modification order to record a public footpath from Gorsedown Close to Hogmoor Road be refused.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	N/A
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	N/A
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	N/A
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because the County Council, in its capacity as ‘Surveying Authority’, has a legal duty to amend the definitive map on the discovery of evidence that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist.	

Other Significant Links

Links to previous Member decisions:		
<u>Title</u>	<u>Reference</u>	<u>Date</u>
Rights of Way Sub-Committee	Item 5a	23.11.1989

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.)

<u>Document</u>	<u>Location</u>
Claim reference: 826 Whitehill – Claim for footpath from Gorsedown Close to Hogmoor Road	Room 200 Mottisfont Court High Street Winchester SO23 8ZF