

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	21 March 2012
Title:	Application for the addition to the Definitive Map of a footpath from Mohawk Cottages, Sandy Lane to Lyons Copse (Junction with Footpath 1), in the parish of Shedfield
Reference:	3771
Report From:	Director of Culture, Communities and Business Services

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1. Executive Summary

- 1.1. This is an application made under section 53(3) of the Wildlife and Countryside Act 1981, to record a footpath over land in the parish of Shedfield. The claim is based on evidence from 6 local residents. These residents have put forward evidence of use on foot by members of the public, while the landowner is aware of the use that has taken place. Clauses in the agreements with tenants are demonstrative of an intention not to dedicate public rights of way, though there is no evidence of how that lack of intention has been demonstrated to the public by the tenants until all public access was stopped in 2008. The claim is recommended for acceptance because there is a reasonable allegation that the public has acquired a right on foot.

2. Legal framework for the decision

- 2.1. WILDLIFE AND COUNTRYSIDE ACT 1981: (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: -

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. 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. The application was made in November 2008, by **Dr. R. Daniel** and **Dr. S. Daniel**, of Sandy Lane, Shedfield.

4. Landowners

4.1. The landowner is **The Phillimore Estate**, managed by **Mr. M. Phillimore** and **Ian Judd and Partners** of Bishop's Waltham.

5. Description of the Routes (please refer to the map attached to this report)

5.1. The path that is the subject of this application is shown on the attached plan in red, and runs between points A, B, C and D. It is not recorded on the Definitive Map. It leaves Shedfield Footpath 1 (which connects to Sandy Lane, the U147) just to the south west of Lyons Cottage. The claimed path runs on a track made by tractor tyres along the headland of the field fenced with rabbit-proof wire, in a north westerly direction, for about 41 metres, until it reaches point B. At point B it turns ninety degrees, and continues on a track wide enough to accommodate a car between two fields along to the 'Family Trees' Nursery. At point C, there is a junction with a hardened track that runs along the west side of the Guides' land, from Sandy Lane. This section is about 312 metres long. From C, the path runs along another tractor track along the headland of a field north of the Girl Guides' land, marked as 'Workings' on the map. The ground drops away to the south of the path into the old workings. There is rabbit proof fencing on the southern boundary of the path. It reaches Sandy Lane at Mohawk Cottages, at point D, where there is a wide splay. There are two metal field gates at the entrance to the field. The length of the section C to D is about 141 metres, and of the whole route about 767 metres.

- 5.2. Because there was a wholesale re-fencing of the land which includes the claimed path in 2007 and/or 2008, this description of the current state of the land may not reflect what was on the ground before that date.

6. Background to the claim

- 6.1. The land over which the claimed path runs is part of the Phillimore Estate, which has owned the Shedfield House Estate since the 1860s. The Phillimore family is mentioned in a local history¹ as letting out land, 'usually in one acre plots' by the 20th century. The area is one from which market gardeners were supplying the Portsmouth, Southampton and, later, London markets from 1850 to the early 1930s with strawberries and cherries.
- 6.2. A part of the claimed path is shown on maps dating from the 1840s. There is no evidence to indicate a public status for the part of the route shown on any of these maps. It appears to have been used for private access to the fields. On the Ordnance Survey maps, the area is one of 'allotment gardens'. This area appears not to have been the subject of an inclosure award, so it cannot be assumed that these allotments were public in nature.
- 6.3. Much of the land over which the claimed route runs is, and has been, let out to tenants who use the land to graze cattle, produce vegetables, or grow trees. A part of the Estate is now used as a golf course, and it is possible that there may be another golf course over land to the north of the claimed route in the future.
- 6.4. The first user is recorded in 1981 and the recorded use ends in 2008, when the witnesses completed the user evidence forms.
- 6.5. This application was prompted by the arrival of new tenants, who securely gated and fenced the land with rabbit-proof fencing to protect the tree crops grown in the nursery. This had the effect of preventing all public access.

7. Issues to be decided

- 7.1. The issue to be decided by this Committee is whether there is evidence to show that the claimed route ought to be shown on the Definitive Map as a highway: this is as a footpath, bridleway, restricted byway or byway open to all traffic.
- 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

¹ p. 50, *Some of the History of Shedfield Parish* – Grace Emery, Paul Cave Publications, 1991, in Hampshire Record Office

distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).

- 7.3. Historic and documentary evidence has been examined to see whether the past history and use of the path points to it having public 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. This evidence must be looked at as a whole, it being unlikely that a single document or map will prove sufficiently cogent evidence to justify a change to the Definitive Map. This type of evidence may disclose rights other than those claimed by the applicant. For example, they may show that a lane is an old road for vehicles, not merely a footpath or bridleway. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 7.4. 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 the users on the one hand and the 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 such a conflict in the evidence in this case.
- 7.5. The originals of many of the documents referred to in this report are only available in public record offices, but copies, transcripts or tracings of most documents are available for inspection in the offices of the Rights of Way Section. Members are urged to inspect these, or the originals, when considering this report.

8. Documentary Evidence

- 8.1. The early commercial one inch maps do not show the claimed route, and the first time any part of it is shown on a larger scale map is in 1840.

- 8.2 Tithe Map for Droxford, 1840, Hampshire Record Office (HRO) 21M65/F7/63/2

This map was produced in 1840, and shows a route corresponding to part of that claimed, diverging from Sandy Lane. This route ends in a field, and there appears to have been a gate on it where it leaves Sandy Lane. It is recorded in the Tithe appointment as '*Lane*', and its state of cultivation is recorded as '*road*', in the ownership and occupation of James Boucher Esq. This depiction of a route corresponding to the claimed path suggests private ownership in 1840, providing direct access to fields. None of the rest of the claimed path is shown.

- 8.3 Sales Particulars for the Shidfield Estate, to be sold at auction in 1866, HRO 115M88/E2/3

There are differences between this 1866 map and the Tithe, though the later map is clearly based on the earlier. The first part of the claimed route is shown in a similar manner to the earlier map, with a solid line

across it where it leaves Sandy Lane at point D. It still terminates at the corner of a field but another section corresponding to the claimed path down to point C is also shown. This map contains no direct information as to the status of the track or whether it is public or private.

8.4 Ordnance Survey County Series 1:2,500 first edition, 1871

The claimed route diverges from Sandy Lane at the same place that it currently does (Mohawk Cottages had not been built at this date), and the path is relatively wide between solid boundaries. It is braced into the next field. The path then turns in a southwesterly direction, where it has solid boundaries. The path is shown with the same tint to that found on Sandy Lane. The map shows only part of the claimed route. There is nothing to say that this yellow tint has any significance relating to whether the routes shown carrying it are public or private, or what their status is.

8.5 Ordnance Survey County Series 1:2,500 map, second edition, c. 1895

This map shows a configuration is suggestive of the route having provided a field access.

8.6 Ordnance Survey County Series 1:2,500 map, third edition, c.1909

This map shows Mohawk Cottages, and the claimed route, with a line across it suggestive of a gate. The configuration of paths shown on this map is very similar to that found on the Tithe map. Only part of the claimed path is shown. The depiction of the track is, again, suggestive of providing private access, but the map does not give information about status or whether public or private.

8.7 Plan of outlying portions of the Shedfield House Estate, for sale in September 1941 (HRO 115M88/E1/27)

The plan shows Ash House Farm, to the north of Sandy Lane, and only the very first part is shown diverging from Sandy Lane.

8.8 National Grid Map, printed 1965, revised 1964

This mapping shows the claimed route as a distinct track running parallel to the boundary of the field now occupied by the Girl Guides, here shown partly as a sand pit. The route is marked 'Track', and is shown by means of parallel pecked lines. This path runs on a very similar course as the path shown on the plan attached to this report. The path coming up from Sandy Lane alongside the boundary of the sand pit field is also shown by means of parallel pecked lines. No other part of claimed path is included on this map.

9. **Witness Evidence**

- 9.1. Ten user evidence forms were received with the application in 2008. No others have been received since this date. Three user forms were excluded from the investigation; one had been completed by a tenant who drives to his holding along part of the claimed route, and had not actually used it on foot; a second form was completed by a person who had not walked the footpath but supported those who did walk it in a '*responsible and careful manner*'; a third was completed by a tenant of the Phillimore Trust and she had asked for permission to use the path

years before. One other form was completed by a person who had used the claimed path, but he withdrew his evidence after the investigation started.

- 9.2. The remaining evidence has been put into the form of a chart, at Appendix 1. Such a chart is, of necessity, a generalisation, but may give a feel for the extent of the use claimed. The least frequent user says that they walked the path once a week, two used it twice a week, another '*a few days a week*', while three indicate that they used it daily.
- 9.3. The earliest recorded use of the claimed path (as shown on the user forms) was in 1981, and two more users began walking the way in 1984. A further user began using the path in 1993, and two further witnesses used it from 2001 to 2008, when public access was denied. The evidence of Miss Coombes has had to be excluded because she is a tenant of the Phillimore Estate, and her use of the path must be considered as not as of right.
- 9.4. None of the users report the presence of stiles or gates.
- 9.5. Witnesses were asked about notices or signs on the land, and none of them reports seeing any.
- 9.6. All of the users refer to obstructions, and these are in connection with fencing that was put up by the current tenants of the land. Users say that this fencing appeared when the new tenants took over, probably in 2007 or 2008. Prior to this time, none of the witnesses report any obstructions on the path.
- 9.7. Only one of the users, **Mrs. Clark**, does not report having been stopped while using the path. She comments that '*everyone went there and took it as normal*', and says that '*the tenant farmer at Mohawk Cottages said nothing to us*'. All the others say that they were stopped. **Dr. Richard Daniel** states that he had been stopped '*in the past few months [before October 2008] by the new tenants*'. His wife reports that she was stopped by the '*leaseholder in an abusive manner*' after the new tenants took over. **Mrs. Moore** was told in August 2008 by the occupier '*in a threatening manner*' that she should not go on the land. **Mr. and Mrs. Prevost** were advised, just before fencing and gates were put in place in 2008, that the path was '*unsuitable for walking with a dog*', but neither of them turned back. There are no other reports of being stopped prior to the arrival of the current tenants. Users said that they had talked to previous tenants, and **Mrs. Clark** reported that '*the tenant farmer at Mohawk Cottages said nothing to us*', and **Dr. Sandy Daniel** found that Mr. House the tenant of Family Trees was happy to have people walking past.
- 9.8. All of the users saw others, mostly locals, while using the claimed path, the majority of these on foot, but also with horses and bicycles. **Dr. Richard Daniel** also saw the landowner Mr. Mark Phillimore on the path. He saw locals on foot most frequently, but riders at any time of the year. The applicant **Dr. Sandy Daniel** had ridden the route herself on horseback and bicycle, but not since 2004. She saw locals on foot, horseback and with cycles. This type of usage is also reported by the other witnesses, and **Mr. and Mrs. Prevost** report seeing people who

were unknown to them. It was their impression that people were using the claimed path to keep off a dangerous road.

- 9.9. On the question of permission, none of the witnesses say that there was any indication that use of the path was permissive in nature. **Mrs. Clark** said she did not ask anyone for permission to use the track, and **Dr. Richard Daniel** said that he asked permission from the former tenants, but not from the landowner himself (who he had seen while using the path) because he thought he would be told if they did not want walkers there. His wife has asked permission from the market gardeners working on the land, but says it did not cross her mind to seek permission from the estate itself. **Mrs. Moore** reported a conversation with the person living in Mohawk Cottage, who made it clear that there was no objection to walking on the claimed route. She described this conversation as '*not in the nature of [him] giving me permission*'. **Mr.** and **Mrs. Prevost** did not know who the landowner was, and '*did not think to ask for permission*'. **Dr. Richard Daniel** was under the impression that he was exercising a private right when he used the claimed route to visit Miss Coombes, but as her cottage can be accessed from Sandy Lane via a public footpath, it is unlikely that any private right has been granted to Miss Coombes over the claimed route to enable visitors to reach it.
- 9.10. What can be understood from this evidence is that local people have been using the claimed path from the early 1980s. Public access to the claimed route ceased in 2008.

10. The Landowner and Tenants

- 10.1. The land over which the route being claimed runs is owned by Phillimore Estates Limited, and the manager is Mr. Mark Phillimore. The estate also has an agent, Mr. Tim Gardner of Ian Judd and Partners.
- 10.2. Mr. Phillimore, and the two current tenants, have been interviewed, but have not signed or returned their statements, and therefore this report does not contain any material provided by the landowner or those directly managing the land.
- 10.3. **Mr. Gardner**, Mr. Phillimore's representative, has sent some material relating to a planning application made in June 2005 for a 9-hole extension to the golf course, which would have affected the claimed route. The application was approved. He draws particular attention to the consultations with neighbours, and the comments they made in reply. He provides copies of letters from eight people living in the neighbourhood, three of whom have filled in user evidence forms, and three of whom are tenants or former tenants of the Phillimore Estate. Mr. Gardner says '*One would have thought that there would have been at least some mention at that stage of a regularly used pathway if there actually was one? Not one of the letters...made any mention whatsoever of the said pathway which only three years later some of them had been claiming was used on a daily basis... "for more than 20 years"...*' Mr. Gardner contends that the whole application '*therefore must be called into question as to its veracity and substantive nature. Whilst all of the letters mention how busy Sandy Lane had become as a*

single track road and was frequently used by walkers, cyclists and horse riders there was no mention whatsoever of any of those actually using an alternative route that was in some of those applicants minds well established as being something that they used regularly and for years’.

- 10.4. Mr. Gardner has also provided a copy of the tenancy agreement (Appendix 5) held by the current tenants of the bulk of the land over which the claimed path runs. This contains a clause dealing with ‘Adverse rights’, which instructs tenants ‘to take all reasonable steps to prevent any right over the Holding being acquired and to prevent trespass on the Holding’.
- 10.5. A tenant of the Phillimore Estate, Mr. Philip House, initially completed a user evidence form in 2008, in which he recorded that he has used part of the claimed path from 1989 to 2011 (and still continues) with a vehicle to gain access to his rented holding. He does not claim to have used the application path on foot. The form was accompanied by a letter from Mr. House to the applicant stating ‘As you know, I entirely sympathise with you...several people used to come regularly, often with a dog, and walk down beside the willow windbreak on the south side of my nursery and on round the field and I have often talked to them.’ In this letter it was Mr. House’s view that the present manager’s father ‘would never have stopped these walkers. When the golf course extension was in prospect he was most anxious that a way round the area should be kept for walkers and riders and told me he had said to the golf manager “You must not be selfish”.’ When interviewed in 2011, Mr. House said he had been a tenant of the Phillimore Estate for 22 years. He had put hard core down on the communal road to the holdings [running alongside the western boundary of the Girl Guides’ land] which continues to the Scout Association land. At the Scout’s land he said there is a gate across the road, and that several people still come down this route with their dogs. They can pass the gate because they know the number of the lock. He re-iterated that the former owner of the estate, Richard Phillimore, ‘said he felt that a way should be left for walkers, a strip when the golf course was to be put in. I have never been told by the Estate to turn people away.’ He also stated that his tenancy agreement of 1989 did not have a clause relating to use of the land by people and any rights that might be acquired by the public. Mr. House said that there had been ‘a regular traffic of people walking along the claimed path’, and that he had only seen people there on foot. His view was that people were using the path to get away from the road, and that no-one had ever asked his permission to walk along it.

11. Consultations with Other Bodies

- 11.1. The following persons and bodies have been consulted about the application: Winchester City Council, Shedfield Parish Council, the local Member Councillor Felicity Hindson, the Open Spaces Society, The Ramblers, The British Horse Society, The Byways and Bridleways Trust, the Area Countryside Access Manager, Highways Management and Minerals and Waste. At the time of writing, the following responses have been received:

- 11.2. The representative of the **Ramblers** has walked along Sandy Lane between Shedfield Footpath 5 and Shedfield Footpath 1, and comments that '*a surprising amount of traffic was encountered on the road*'. He thinks that '*the addition of the footpath would be welcome, as it would also make a good link to and from Shedfield footpath 5*'. He mentions that '*as evidence of use, a Mrs. Peggy Clark [living on Sandy Lane]...had used the proposed path over a number of years, over 20 years. I believe she may have been one of the original 10 users of the path. She is now 90*'.
- 11.3. The local Member, **Councillor Felicity Hindson**, is aware of the application.
- 11.4. No other comments have been received.

12. Analysis of the Evidence

- 12.1 Parts of the claimed route have appeared on historic maps since 1840. While these maps indicate that about one half of the claimed path has been in existence since at least 1840, they seem to indicate that it was more likely than not to have been a private access to fields on then Shedfield House estate. The historic and documentary evidence does not prove, on the balance of probabilities, that any part of the path was a public right of way, and thus the application must turn on evidence of use in recent years.
- 12.2 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
- 12.3 Dealing with the above criteria as listed, the path is of such a character that it is capable of being a right of way at common law.
- 12.4 The bringing into question of the public's right to use the claimed path was the erection of rabbit-proof fencing and gates by the present tenants of the land on which it runs. The user evidence suggests that this happened in 2008, giving a relevant period of 1988 to 2008. There is nothing in the user evidence that indicates that the path was blocked in any way until the fencing and gates were put in place.

- 12.5 There is no suggestion of any interruption in the use, and the user evidence chart shows use in every year of the twenty-year period.
- 12.6 To qualify, user must be without force, stealth or permission. None of the witnesses reports having to go through a gate or do anything that would be described as using force to gain entrance to the claimed path before the current fencing and gates were put up, so use appears to have been without force. All witness saw others while using the path, either on foot, on horseback or with bicycles. Therefore, it would appear that the path was being used in an open way. Where permission is concerned, one user was excluded at the outset because she is a tenant of the estate. Two users, including the applicant, asked permission of the tenants, but both say that they did not think they needed to ask the landowner. A recent decision resulting from a public inquiry dealt with the matter of permission sought from the wrong person. On page 7 of her decision letter the Inspector says *'It was suggested that the fact that some people sought permission, or thought that they had permission, meant that their use should be given less weight. However, in R v Oxfordshire County Council and others ex parte Sunningwell Parish Council (1999) ("Sunningwell") it was said that use as of right meant that "they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right...the...theory of prescription...depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the...user is plainly irrelevant."* The point was *"...how the matter would have appeared to the owner of the land".*' The Inspector further considered that *'if users thought they had permission their use would be open and would suggest to a reasonable landowner that they believed they were exercising a right'*, and refer to another case *R v City of Sunderland ex parte Beresford (2003) '...It is clear that merely standing by, with knowledge of the use, and doing nothing about it, i.e., toleration or acquiescence, is consistent with the use being "as of right"...It would be for the landowner himself to challenge the use, even if some users thought that they had permission from another source.'*
- 12.7 Use by the public must be of a volume sufficient to come to the attention of the landowner. While the number of users who have completed forms witnessing their use in this application is small, it seems from discussions with the agent for the estate that there was awareness of public use by the landowner. One of the tenants who has occupied a holding on the estate for twenty-two years speaks of a regular traffic of walkers. 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. The use of the witness who is a tenant of the landowner has been excluded. The use of the rest of the witnesses was as of right in its nature. Most of the users live along Sandy Lane, or its continuation Clewers Hill in Waltham Chase. While it can be said that evidence taken from users living at a number of different addresses might be felt to carry more weight than evidence from the same number of users living at one address, there is nothing

to suggest that evidence should be taken from only one user at an address. Even though a number of witnesses come from the same address, officers feel that the quantity of user evidence is, on balance, enough so as to be capable of giving rise to a presumed dedication at common law.

- 12.8 All but one of the witnesses reports having been stopped, and this was in connection with new tenants taking over the management of the land at the Mohawk Cottage end of the route, and putting up rabbit-proof fencing and gates in 2008. Prior to this, there is no indication that the landowner, or anyone representing him, ever challenged any of the walkers. It seems that five of the users acknowledged or talked to the previous tenants on the land, but none of this contact resulted in any of them being told that they could not walk there. This only happened when the present tenants moved on to the land, and all public access to the claimed path stopped.
- 12.9 Dedication of a public right of way will not be presumed if there is sufficient evidence that the landowner did not intend to dedicate the path as a public right of way. Therefore, the evidence put forward by the landowner must now be examined.
- 12.10 The current landowner Mr. Mark Phillimore (managing the estate on behalf of his family) has not put forward any signed statement to this investigation. The only information submitted to this investigation regarding the management of this land with relation to the acquisition of public rights on foot has been a letter and a signed statement from Mr. House, one of the estate tenants, and material from Mr. Gardner, the estate's representative, in connection with a planning application.
- 12.11 The material from Mr. House confirms that there has been '*regular traffic*' of people on the claimed route, on foot, and that he was under the impression that the previous owner of the estate wanted the public to have access along the path even when the golf course was extended. He had spoken to people using the way, and had never challenged them, and they had not sought permission from him. He had no instructions to stop them.
- 12.12 Mr. Gardner points out in the material associated with the planning application to extend the golf course in 2005 that neighbours who subsequently completed user evidence forms, and others, were consulted and replied to Winchester City Council. Their letters mention the volume of traffic in Sandy Lane, and object to the extension on the ground that it would promote more traffic. Mr. Gardner draws attention to the fact that none of the letters mentions the claimed route, which those who have completed user forms say had been used as an alternative to Sandy Lane for over 20 years. He feels that the lack of reference to the claimed route undermines the veracity of their case. It could be argued that the case that Sandy Lane was, and is, dangerous would be supported by reference to the fact that people had taken to walking off the road on the claimed route. The users in their forms and statements mention the dangers of Sandy Lane as a reason for using the claimed route. It could also be argued that those objecting might have felt that they were undermining their case that more traffic would increase danger in the lane if they made it clear that they were no

longer actually walking along it and had found a safer route running roughly parallel to it. Members must form their own views of the relative strengths of these arguments and the overall point made by Mr. Gardner.

- 12.13 The tenancy agreement supplied by Mr. Gardner is the one held by the current tenants, and this spells out that tenants are not to allow public rights to be acquired over estate land, and to prevent trespass. Mr. House, another tenant, says that his 1989 tenancy agreement does not contain such a clause, but has supplied no evidence to show that this is so. There is nothing in the evidence put forward by the users to indicate that any tenants before A.E. Roberts, now occupying the land, did anything to stop them walking the route. The intention not to dedicate any further public rights of way is contained within the tenancy document, but is not effective unless it is communicated clearly to the public. It seems this did not happen until Roberts took over the land in 2008, and this action brought the public's right to use the way into question. The effect was to put an end to any public access to the path.
- 12.14 There is no evidence such as notices indicating revocable permission had been granted over the path, or of any annual closures, or any declaration made under Section 31(6) of the 1980 Highways Act.
- 12.15 This application would seem to give rise to a reasonable allegation that the public have acquired footpath rights, on the balance of probabilities, over the path under section 53(3)(c)(i) of the Wildlife and Countryside Act (see the box at the start of this report). The number of users whose evidence has been captured is small. The applicant says that many former users no longer live in the area, and attempts to collect more evidence have not succeeded. The users all say that they saw other people when they were using it. It is for Members to take a view whether the evidence gathered from these users is sufficient to substantiate their claim.
- 12.16 This matter may also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way. 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.
- 12.17 The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends of 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, or turning people back.
- 12.18 There is evidence of user on which Members could find that a dedication has taken place under common law in the period from 1985

to 2008. The manager of the estate was seen on the path by at least one of the users, and he was not turned back or challenged. That user himself commented that he expected to be told if walkers were not wanted there. Nothing was done by either tenants or the landowner prior to the fencing off of the route in 2008 to show that the public were to be excluded, and friendly relations seemed to have been characteristic of the relationship between the walkers and the tenants. This could be seen to be acquiescence by the landowner in that use.

13. Comments by the Applicant and Landowner

13.1 No specific comments relating to the substance of this report have been received from either party.

14. Conclusions

14.1 Members will see that the use that has been captured for this application is limited. The applicant is of the view that users living north of the path, at Waltham Chase, have moved away or died, and so the opportunity to record the use has been lost. One of the tenants remarks that he regularly saw people using the path. A witness recalls seeing Mr. Mark Phillimore on the path while he was using it, and it does seem that the estate was aware of public use. The test is that use by the public must be of a volume that is capable of coming to the notice of the landowner, and it seems, in these circumstances, to have been met.

14.2 Until the present tenants arrived on the land, it also appears that no actions were carried out by the Phillimore Estate or its tenants to communicate to the public that there was no intention to dedicate the path as a public right of way.

14.3 Therefore, it is open to Members to find, in the absence of clear evidence that the landowner that did not intend to dedicate the way as a public footpath in the relevant period, that this path can be reasonably alleged to subsist.

15. Width of the path

15.1 The path has not been walked since 2008, and the track on the ground has been made by tractor or car wheels. The width of this footpath was estimated by the users to be the width of a tractor or between 6 and 10 feet wide. It is suggested that 2.5 metres would accommodate a tractor or car.

16. Recommendation

16.1 There is evidence under section 31 of the Highways Act 1980 that a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist on the route A to D.

16.2 Members may also consider that a common law dedication has taken place under common law, during the period 1985 to 2008.

16.3 Officers consider the width of the path to be 2.5 metres.

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

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
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 determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

<u>Document</u>	<u>Location</u>
Claim Reference 1018	Rights of Way Office, Mottisfont Court, High Street, Winchester, SO23 8ZF.

IMPACT ASSESSMENTS:

1. Equalities Impact Assessment:

1.1.

2. Impact on Crime and Disorder:

2.1.

3. Climate Change:

- a) How does what is being proposed impact on our carbon footprint / energy consumption?

- b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

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.