

## Appendix 4

### 1. Background

- 1.1 An adjoining landowner, Mr. Christopher Armstrong, has put forward arguments in response to a consultation on the draft Committee report, and these were received too late to be included with the report that was originally to be presented to this Committee on 13<sup>th</sup> March 2013. In any event, this item was postponed, at the Chairman's request, to the next meeting on 24<sup>th</sup> April. This has presented an opportunity for officers to provide a considered response to Mr. Armstrong's material (provided to Members). Part of this material concerns itself with a difference between Chilworth Footpath 3 and the historic route, which has been surveyed by Mr. Gary Vaughan on behalf of Mr. Armstrong.
- 1.2 The original investigator for this application, Mr. Piper (now retired), was of the opinion that there was a discrepancy between the currently recorded route of Chilworth Footpath 3 and the historic route of the old road, near point D on Map 1, attached to the report.
- 1.3 Mr. Piper concluded that the difference had resulted from changes made to the historic route in the 1950s and 1960s: briefly, initial damage had occurred through use by army vehicles during the war (see paragraph 8.30 of the report); the erection of a gate by Mr. Young, across the route, to prevent further access by gypsies onto the land (see paragraph 8.34); changes made by the Forestry Commission, involving timber extraction and planting and the placing of gates and stiles at points E and F (see paragraph 8.36). Material from Chilworth Parish Council minutes of 25<sup>th</sup> October 1961 record that changes were made by agents for Messrs Seward, and that they erected a fence and bank alongside the public footpath, this being the bund shown on Mr. Vaughan's survey.
- 1.4 Mr. Piper was of the opinion that the landowners of the footpath and other interested parties holding the adjoining land were in agreement that the difference between the two routes was minimal and should not be an issue. This is reflected in his final report, in particular in paragraph 10.10. The report presented to the Committee is Mr. Piper's original, with some minor additions.
- 1.5 Now that Mr. Armstrong has raised the matter of the discrepancy through the letter with supporting documents written by his barrister Mr. Webster, plus the material submitted by Mr. Vaughan, Members will wish to have the views of officers. It was felt that this could most conveniently be done in a separate appendix addressing only the matters submitted by Mr. Armstrong.
- 1.6 The original historic route is shown on the 1856-1867 Ordnance Survey County Series mapping at the scale of 1:2,500, discussed in the report at paragraph 8.12. Close to point D, on Map 1, the original route runs slightly to the west of the route of Chilworth Footpath 3. **Appendix 5** shows a current Ordnance Survey map overlaying the County Series first edition 1:2,500 map of 1865-1867, showing the relationship between the historic line, and the route of Chilworth Footpath 3 on the current mapping, within a red circle. Officers have measured the difference at its widest point, on this mapping, as 12 metres between the centre points of the two routes. Mr. Vaughan identifies the widest gap between the two routes as 14 metres, though this

measurement derives from the second edition of the County Series, dated 1895. His analysis does not include an examination of the 1865-1867 Ordnance Survey 25 inch map and its accompanying book of reference (see paragraphs 81.2 and 8.13 of the report). The entry in the book of reference for the historic route (plot 142a) is 'public road', an indication of its reputation at the time of the survey, supported by the tithe maps and apportionment for Millbrook, where the continuation of this route is recorded in the section listing public roads and highways as a public road from Maybush to Chilworth.

- 1.7 Mr. Webster argues in his submission that '*whatever historic track existed in the period 1895-1940 was largely obstructed or even destroyed by the raising of an earth bund in around 1960*'. He then goes on to suggest that it is '*questionable whether any upgrade in the rights enjoyed over the modern route could be sustainable in law in so far as it purports to be underscored by the historic mapping evidence*'. Even if the historic route was obscured by these developments, there is no evidence that the public rights over that section of the route were ever legally stopped up or extinguished, or that this deviation in the historic route renders the evidence for higher public rights over the whole of it inadmissible or unsustainable. Small changes are not uncommon on old routes over time, resulting from slight deviations by the public when the route has been obstructed (for instance, by fallen trees) or has become founderous. Mr. Piper was of the opinion that the historic route and the route of the public footpath largely co-incide.
- 1.8 If there is a discrepancy between the two routes that is sufficiently large as to not be *de minimis* (defined as meaning '*the law cares not for small things*'), the situation is that there are two routes, in close proximity. There will be higher rights than currently recorded (or recorded at all) over the historic route, resulting from a common law dedication of a public carriageway in the historic past. Close by, to the east, will be a route carrying public footpath rights, resulting from a dedication of public rights from the mid-twentieth century and put on the Definitive Map in 1953 as Chilworth Footpath 3, under the National Parks and Access to the Countryside Act of 1949.
- 1.9 Officers have recently visited the site, and found it difficult to identify the precise position of the historic route on the ground, to the west of Chilworth Footpath 3, because of the nature of the ground and the vegetation. Mr. Vaughan's plan shows the close relationship between the bund and the historic route of 1895, except between the points D and E, the site of the discrepancy.
- 1.10 Mr. Webster refers to use of force by cyclists using Footpath 3, which would render their use not as of right, and thus unable to contribute to the acquisition of higher rights over Lordswood Lane. Mr. Piper included details of the cyclists who completed user evidence forms so that the full evidence available could be put before Members. Mr. Piper has discussed the user material as part of his analysis of the historic documentary evidence, in section 10 of the report, particularly the heavy use of the route by cyclists before a gate was erected in 1995. He commented that the volume of use attested to by Mr. Armstrong in correspondence at that time between the 1970s and 1995, would of itself be sufficient to lead to a presumed dedication of higher rights. However, any change to a higher status for this route relies on a common law dedication of full highway rights over the route at some time before 1865, the date of the Ordnance Survey Book of Reference to the first edition of the County Series map,

which identifies the route (and its continuation in the adjoining parish of Nursling) as a 'public road'. Before the passing of the Natural Environment and Rural Communities Act (NERC) 2006, a public road that had not been stopped up could have been recorded on the Definitive Map as a byway open to all traffic. Because the route was recorded on 2<sup>nd</sup> May 2006 on the Definitive Map as a bridleway and footpath, it has been modified by NERC as described in section 14 of the report, to the effect that any motorised vehicular rights will have been lost, leaving the route to be recorded on the Definitive Map as a restricted byway.

- 1.11 Mr. Webster also draws Members' attention to the issue of sustainability. This is not something that can be considered at this stage of Definitive Map Modification process, and is therefore not something that should be a part of Members' decision-making. Members of the Committee act in a quasi-judicial capacity, and are required to determine whether the legal tests for making an order to modify the Definitive Map in respect of the status of Lordswood Lane have been met. This should be done with reference to the evidence Mr. Piper has discovered, and should not take into account anything other than the evidence relating to status when coming to a decision.
- 1.12 If the status of the route is changed by a confirmed Map Modification Order, the second stage of the process can then be considered. Should this situation arise, the Countryside Service will ensure that it works closely with the owners of the land and local residents to manage the usage of the route, and work to address any safety concerns. There are practical steps that can be taken to prevent unlawful access should this prove necessary.