

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	20 November 2013
Title:	Application to record Fareham Footpath 3a as a restricted byway
Reference:	5360
Report From:	Director of Culture, Communities and Business Services

Contact name: Sylvia Seeliger

Tel: 01962 846349

Email: sylvia.seeliger@hants.gov.uk

1. Executive Summary

1.1. This is an application made under section 53(3) of the Wildlife and Countryside Act 1981, to record public restricted byway rights over Fareham Footpath 3a. 232 members of the public have put forward evidence of use with bicycles, and the landowners are aware of the use that has taken place. Public access with bicycles continues. However, evidence shows that, before 1986, the condition of the footpath makes it unlikely that rights will have been acquired and, after 1986, there is evidence of actions by landowners to indicate that they did not intend to dedicate higher rights than footpath. The claim is therefore recommended for refusal.

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;

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- 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 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]
 - ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
 - iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

2.2 HIGHWAYS ACT 1980 s.31:

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

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

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 The application was made in October 2010, by **Mr. M. Cummins**, of Mariners Way, Warsash.

4. Landowners

- 4.1 There are a number of freeholders, and their ownership was confirmed in a consultation of May 2012:
 - **Mr. A. Smith** of Tidemark (possessory title)
 - **Mr. and Mrs. Betts**, of Longreach.
 - **Mr. and Mrs. Taylor**, of Tir-An-Og.

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- **Mr. and Mrs. Cauldwell**, of Brooklands House.
- **Sir John and Lady Carol Baddeley**, of Brooklands Farm.
- **Mr. Tracy**, of Brooklands Quay.
- **John Willment Marine Limited**, of Universal Marina.
- **Mr. and Mrs. Cooper**, of 'Duneagle'.
- **Mrs. Stoke**, of Ashwick House.
- **Mr. and Mrs. Cameron**, of Otterholme.
- **Mrs. Twigger**, of The Walled Garden.
- **Hampshire County Council**, of The Castle, Winchester.
- **Mr. and Mrs. Beardsall**, of Bywater House.
- **Dr. Kelly**, of Fairlight.
- **The Crown Estate**, of New Burlington Place, London.
- **Fareham Borough Council**, of the Civic Offices, Fareham.

Two plans are attached to this report, one showing the route that is the subject of the report (Plan 1), and one showing the landholdings described above (Plan 2).

- 4.2 A large part of the path is unregistered, where no land owner has been identified. Landowners, who do not own sections of the path itself, but whose land abuts it, have also been consulted. Those whose titles abut the path may, under common law, claim ownership of the subsoil up to the middle of the highway.

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

- 5.1 The path that is the subject of this application is shown on Plan 1, in red, and runs between points A, B, C and D. It has been recorded on the Definitive Map as a footpath since 1952. It leaves Swanwick Shore Road (the U481) at a bend, and runs east of south parallel to the bank of the River Hamble. It continues to run parallel and close to the shore until it reaches Brooklands Farm (halfway towards Universal Marina), where it runs a little further in-shore and in a south-westerly direction. The claimed path then passes through Universal Marina, where it turns twice through 90 degrees and then runs southwestwards towards the shore. It then turns south close to the bank of the river to point B, where there is a junction with Fareham Footpath 4, which runs to the east, and Crableck Lane. From point B, the path continues south, hugging the shore, and overlooking deposits of mud on the river bed. It passes two junctions with Fareham Footpath 3b at Downkiln Copse. It continues to run south, along the shore, by Bunny Meadows to point C, where there is a junction with Fareham Footpath 5, connecting to Brook Avenue. From point C, the path runs south eastwards and then follows the curve of the

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shore to point D, where it passes through a car park to meet Passage Lane (also the U481). The length of the whole route is about 3,507 metres.

- 5.2 The width of the path varies along its length. From point A to the Universal Marina, the path is mapped at between 3.5 and 4 metres wide and has a gravelled surface that allows for the passage of motorised vehicles. At point A there is a metal disc, white with a red border, that shows a bicycle drawn in black with a red line through it. There is also a green sign indicating that the drive is private, and that the route is a public footpath only, with a similar 'no cycling' symbol. A photograph of this is attached in **Appendix 6**. The path is of a similar width and surface as it passes close to the shore-line and curves to the south west. Most of the length of the path at the northern end is fenced on the eastern side. The path then passes a property where there is a low fence on the east side where it is narrower, at 2.9 metres, and then passes over a footbridge, after which the path is less than 2 metres wide. Before the path reaches Universal Marina, there is a kissing gate across the way, with similar 'No Cycling' signs as described above. The kissing gate is a wooden structure extending beyond the width of the path. At the Marina, the path has no boundaries, and has a tarmac surface. Within the boatyard itself, a 'No Cycling' sign is affixed to a railing. Once past the Marina, the path continues at a consistent width of about 1.75 metres, and is slightly raised above the level of the surrounding land. As it goes south, it is unfenced, and narrows to 1.5 metres, with at least one place where it is subject to damage by inundation. It then widens again, and at one point there is a wooden bridge curving upwards over an inlet, to allow a rowing boat to pass underneath. This is known locally as the 'Chinese Bridge', and is marked 'F.B' alongside Fareham Footpath 3b, on the accompanying plan. The path continues southwards with a similar width and surface, passing the 'Pink Ferry', marked by a bright pink hut. It runs past a Nature Reserve on the east, where another 'No Cycling' sign is displayed and along the edge of a car park, between fences, with a tarmac surface, street lights and a width of 1.9 metres, and emerges on the U481, Passage Lane.

6. Issues to be decided

- 6.1 The issue to be decided by this Committee is whether there is evidence to show that the claimed route, shown on the Definitive Map as a public footpath, ought to be shown on the Definitive Map as a highway of a higher status, as a bridleway or restricted byway. Which of these two types of right of way will be discussed later in the report.
- 6.2 Advice was issued to highway authorities in a letter from Defra when this application was submitted, indicating that where the balance of user on a path is predominantly cycling, the resulting status should be as a restricted byway, and where the predominant use is horse riding, the status should be bridleway. This accounts for this application being for a restricted byway. This advice was rescinded in late 2012, and was replaced by guidance that the resulting status should be the least burdensome to the landowner. For this case, that status would be bridleway.

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- 6.3 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).
- 6.4 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.
- 6.5 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 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. Some of the evidence presented to this investigation has been disputed by both sides and differing views of it have been put forward. Having considered the evidence, officers consider that the facts of the case allow for a definite recommendation to be made to the Committee.
- 6.6 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 Countryside Access Team. Members are invited to inspect these, or the originals, when considering this report.

7. Background to the claim

- 7.1 The route that is the subject of this application is part of the Solent Way, and has been affected by extensive works, primarily aimed at its preservation and, latterly, improvement. It provides the only direct, continuous, linear access for the public to the shoreline along the eastern bank of the tidal Hamble River between Swanwick Shore and Warsash.
- 7.2 Over the years, the whole area which forms the hinterland of the path has been developed for housing, where there are a large number of people who might have an interest in walking along the shore path. There were breaches in the path before 1986, and some were very large. The building of what is

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known as the Chinese Bridge (known by this name because of its shape) in 1986 made it possible to walk continuously to Warsash from Swanwick. This path also draws users from a much wider area. Improvements made in 2001 to the northern part of the path, which was then subject to frequent inundation by the tide, have made the path easier to use and attracted more users.

- 7.3 There is no doubt that cyclists have, and do, use this path. Issues that will be addressed in this report are for how long, in what numbers and how the path has been managed. The latter relates to whether higher public rights than footpath have been acquired.
- 7.4 This path is unusual, in that there are 16 separate freeholders, and a number of owners who do not own the path but whose properties abut it. It is usual for a claimed route to have one, or perhaps two, freeholders, leading to a single policy of management and view of what status a route should have, and easier analysis of demonstrations of an intention not to dedicate. This route is over 3km long. This length means that the separate landowners may have carried out actions without reference to, or knowledge of, other landowners.
- 7.5 The first use with bicycles is recorded in 1931 and such use continues to date. A large number (232) of user evidence forms were completed by witnesses between 2009 and 2011, and these form the basis of a section of the report. Information has been provided by 14 landowners, or adjoining landowners, allowing for analysis of how the route has been managed.
- 7.6 This application was prompted by the prominent placing of 'No Cycling' signs along the path. There were apparently challenges to cyclists, and short-lived 'police' signs indicating that cycling on the footpath might be a criminal offence. In law, cycling on the footpath is not a criminal offence, but a trespass against the landowner.

8. Documentary and User Evidence

- 8.1 There is a large quantity of documentary evidence, both historical and recent, to be considered in this investigation. **Appendix 1** is an evaluation of historical documents, providing a context against which the historic evidence should be considered. The documentary evidence is considered in chronological order.
- 8.2 The key points to be drawn from the documentary evidence are:
 - There is evidence that part of this footpath has existed along the shore of the river Hamble since the 19th century. This mapped physical existence along the bank does not mean that the path has always run on exactly the same line, since the river is tidal and the shoreline has changed over time.
 - Large scale mapping from the 19th and 20th centuries shows the path, and its status on the Ordnance Survey County Series map is that of footpath.
 - The area is tidal, and therefore the footpath has been affected by multiple breaches during the 20th century.
 - Between 1939 and 1986, there is evidence that pedestrians could not use the whole path because of these breaches, and there were various

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attempts to both preserve the path, and to make it more available to walkers.

- In 1986, when a bridge was put in place to close the last breach, the footpath was complete and fully open for the first time since 1939.
- Hampshire County Council, a freeholder of path of the footpath, put up a locked iron gate in 1986, before the completion of the bridge, to stop all types of traffic other than pedestrians from being able to use the route.
- A metal 'Footpath Only' sign had been set up, it is thought by Fareham Borough Council, at the northern end of the footpath. Photographic and written evidence suggests it was there from at least 1978, and it was not taken down until 2001.

8.3 User evidence and statements made by landowners and others must be considered, and all this material has been placed in **Appendices 3, 4 and 5**, attached to this report. Members are invited to read this material, which sets out the evidence gathered by the investigation and informs the analysis section of the report.

8.4 The key points to be drawn from the user evidence are:

- The earliest use of the footpath with bicycles was in 1931, with very slowly increasing use until 1970. Once the path was complete in 1986, there was a marked increase in cycling, and after improvements the evidence records that cycling increased even further, with 196 people recording that they cycled on the path.
- Most users cycle the route between 1 and 10 times a year, with a small number using it daily, several times a week and weekly.
- Users before 1986 were affected by breaches in the path, and were not able to cycle the whole length of the path. Users report cycling on sections of it, and either turning back or going inland to use other routes.
- Witnesses report the presence of a kissing gate, a curved bridge and gates, most of which are reported to be unlocked.
- The majority of users said they had seen signs, carrying 16 different types of wording. By far the bulk of users saw 'No Cycling' signs, or 'Footpath Only'. Most of these were seen in the autumn of 2009, at about the time the application was made.
- Nearly all users report seeing other cyclists while using the route on bicycles themselves.
- Twenty-one users report being stopped by landowners, council employees, other members of the public and others
- Fifteen users were apparently using the path on cycles in the exercise of a private right, mainly to get to work at the boatyard(s) or to reach their boats in the boatyard(s), though no witnesses reported that they had asked for permission to cycle the path.

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8.5 The key points to be drawn from the landowner evidence are:

- Two freeholders, who live at the northern end of the footpath, have challenged cyclists, in one instance after a collision with a cyclist was narrowly avoided.
- Staff at Universal Marina have challenged cyclists and horseriders, and have turned them away from the yard, put up a kissing gate across the footpath north of the boatyard, and maintained signage that the route was for 'Walkers Only'.
- Another freeholder has challenged cyclists, verbally and with 'No Cycling' signs, both of his own devising, and put up at his request by the County Council as highway authority.
- In 1986, the County Council, the highway authority and a freeholder of part of the path, put up a single-bar locked gate with the express intention of preventing all other users than pedestrians gaining access to the path.
- An officer of the County Council maintained 'No Cycling' signs on the path from 2007 onwards, at the request of landowners.
- No landowners had given permission for cyclists to ride over the sections of footpath they own.

9. Consultations with Other Bodies

- 9.1 The following persons and bodies have been consulted about the application: at the time of writing, the following responses have been received:
- 9.2 An officer in Property Services, **Hampshire County Council**, comments that he does not have *'reliable information about the use of the footpath although I appreciate that there is currently a reasonably significant use of it being made by cyclists'*.
- 9.3 The local Member, **Councillor Seán Woodward**, supports the route being used by walkers and cyclists, but *'not for motorised vehicles'*. Should Members of the Regulatory Committee agree with the recommendation of this report and refuse the application, Cllr Woodward, would wish to see action taken to establish the most appropriate means for cycling to be permitted along this route.
- 9.4 The local Member, **Councillor Keith Evans**, has been informed of the investigation, and results, and would support action to enable cycling use of the route.
- 9.5 The Rural and Coastal Portfolio Manager of **The Crown Estate** states that The Crown does states that *'subject to the rules of accretion and diluvion, The Crown Estate does not claim any legal interest in the footpath'*.
- 9.6 The local representative of **The Cyclists' Touring Club** says that the *'path has been regularly used by many cyclists over the years and for most of that time walkers and cyclists have coexisted happily. The level of usage by cyclists over the years is evident from the more than 220 forms completed by local cyclists. Not only is this an attractive route for cyclists but avoids the*

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necessity to use busy roads. The need for safe off-carriageway routes for cyclists is clearly documented in the County's Countryside Access Plan. As a result, I and the local CTC representative ...fully support the efforts by local cyclists to have this route reclassified as a Restricted Byway'.

9.7 The following comments have been received from **Fareham Borough Council**:

- I. *'In principle, Fareham Borough Council, as landowner of part of Fareham Footpath 3a (east bank of the Hamble river; adjacent to the Passage Lane car park on the Eastern edge), would agree that support should be given to the proposal to allow cyclists to use this path for access to wider cycle routes in this ward and beyond. Discussion with a number of departments suggests that an initiative which seeks to promote reduced car usage and provide greater access by residents, to planned foot or cycle options should be encouraged.*
- II. *'Initial research would suggest that this initiative doesn't appear to cause an issue with traffic management in the vicinity of Passage Lane and it would also support the Council's wider Cycling Policy. However, in order to ensure the safety of cyclists and pedestrians, the Council would not support the access of any motorised vehicle (such as motorcycles) to this route and would seek reassurance from Hampshire as to this restriction being actively enforced.*
- III. *'However if this proposal is pursued by Hampshire County Council, then Fareham Borough Council would highlight that the segment of the footpath (between the toilet block and the actual 'Passage Lane' road) is very narrow and potentially difficult for cycling along in its current condition, especially if pedestrians are also walking simultaneously. Therefore we would request that consideration (and a necessary resource) needs to be given to creating an access point in the car park, near to the toilets, and remedial works to widen the footpath in this location, by removing some hedging or vegetation in order to make it more suitable for dual use.*
- IV. *'Clearly before formal agreement can be given, consultation with local Ward Councillors, users and residents would need to be conducted to gain full support.'*

9.8 No other comments have been received.

10. Analysis of the evidence in relation to the relevant law

10.1 The documentary evidence, discussed in **Appendix 2** to this report, shows that the route has physically existed since the late 19th century, but on its own does not show that a higher right than footpath has been acquired. The user evidence does contain information about the usage that Footpath 3a has received in past years, and this shows that the footpath has been subject to use by all types of public traffic. However, it is not possible to say with any certainty, from this material, what that use has been for any particular type of traffic other than pedestrian, in terms of its extent, its nature and duration. The witness evidence will be considered both under section 31 of the

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Highways Act 1980, and common law, in order to see whether higher public rights than footpath have been acquired, on balance. Material has been presented, in section 3 of **Appendix 2** of the report, which has a bearing on the way that this route has been managed in relation to the acquisition of higher public rights, and this will be explored in the following paragraphs. The actions of landowners have a bearing on whether there can have been a deemed dedication of higher rights, and these actions are more appropriately considered in relation to the legal tests set out below.

10.2 Section 31(1) of the Highways Act 1980

For section 31(1) of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must all 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
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

10.3 Physical nature of the path

The path is of such a character that it is capable of being a right of way at common law, and therefore this test is satisfied.

10.4 The bringing into question of the public’s right to use the path

In 1986, evidence shows that a locked single-bar gate was placed across the route at its southern end. This event constitutes a bringing into question within the meaning of section 31(1), because the gate was designed to challenge all public use of Footpath 3a other than by foot. Evidence also shows that, in the autumn of 2009, ‘No Cycling’ signs were posted on the path. This action constitutes a bringing into question because these signs were a direct challenge to those cyclists who were using the footpath, which carries the right to pass and re-pass on foot only. There are no other events which constitute a bringing into question for the purposes of the Highways Act. This provides two possible periods which may bring section 31(1) into operation.

10.5 Twenty years’ use without interruption

There must have been 20 years of uninterrupted use before the dates on which the public’s use is brought into question for a deemed dedication of higher rights to arise. In this case, given that the use was brought in question in 1986 and then again in 2009, the two relevant periods are 1966-1986 and 1989-2009.

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- Prior to 1966, the beginning of the first relevant period, there were breaches in the footpath, documented in 1939, and between 1942 and 1956, and use of the path on foot was so difficult at times that the public were forced to deviate inland. The first Definitive Statement documents this by recording an alternative route to be used when the footpath flooded.
- In 1986, a bridge was installed to close the last breach in the footpath, making it a complete route from Swanwick Shore Road to Passage Lane, Warsash. In the period 1966 to 1986, the numerous breaches in the path rendered the footpath difficult to use on foot, and witnesses interviewed who had cycled admitted that they could not always use the whole route, and had to deviate inland. This raises the question whether all those who say they cycled the whole footpath in this period could actually have done so at all times of the year. On balance, officers feel that the test of uninterrupted cycle use during this period is not met.
- From 1989 to 2009 Footpath 3a was complete, and improvements made in 2001 to raise a low-lying section above ordinary tides. The path was, during this time, fit for use with bicycles in its entirety, and the consequent rise in use by cyclists is reflected in the user evidence chart at **Appendix 3**. During this 20-year period, the legal test is considered to have been met.

10.6 'Without force, stealth or permission'

To qualify, use must be without force, stealth or permission.

1. Force - to be as of right, use must not be as a result of the use of force, which may be categorised as the result of climbing over structures, or cutting fences. Contentious use, where the landowner(s) have made it clear that they do not wish the public to use the path, may also be considered to be force. This can be done by the placing of structures or notices, or anything else that signifies to the public that their use is contentious. The user evidence suggests that such structures and notices were seen by cyclists, and therefore, some of the use with cycles must be seen as being either using force, or as being contentious.
2. Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look. Almost all of the users report seeing others while cycling on the path, both on foot and with bikes, locals and strangers. Some users saw vehicles on the path, and few had seen horses. This indicates open use of the path.
3. Permission – users as of right should not be using the way with any kind of licence or permission. None of the users reports having asked permission from anyone to use the path with a bicycle. Fifteen said they used the footpath with cycles in the exercise of a private right. It could be argued that those who were using the path on a bicycle to get to work or to their boats at the Marina were doing so either with permission, or in the exercise of a private right. Such use is not of a nature that can contribute to the acquisition of a public right, and must be disregarded.

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This test is therefore not met, because some use was arguably with force, and some with permission.

10.7 Use by the public

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

1. The use must be of a volume sufficient to come to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area, and the type of use being claimed. The user evidence chart shows that use with bicycles commenced in 1931, but there were very few cyclists before 1960. Use increased gradually until the late 1980s (when the path was completed), and has continued to increase from 1995, with 196 users having completed forms in 2010. The survey conducted by Southampton Solent University indicates that cyclists formed 7% of the users contacted by the researchers on 3 days in the summer and two days in the winter of 2006. In relation to the two relevant periods, it seems, on balance, that there were sufficient users in each period as set out in the user evidence.
2. 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 a public right is to be recorded over it. It has already been noted that eight witnesses cycled on the footpath to get to work or visit boats moored on the river, and their use for these purposes should be disregarded for the purpose of the acquisition of a public right to cycle. The location of Fareham Footpath 3a is such that people will have come from the wider area around to ride their cycles on it. Apart from those users mentioned earlier, all the other witnesses say that they did not have any connection with the landowner(s), so their use qualifies. 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. Officers feel that there are enough users to indicate that cycling use on the footpath has been by the public in both twenty-year periods, and therefore this test has been met.

- 10.8 In the first period, 1966 to 1986 officers are satisfied that the legal tests of section 31 are not met because of the lack of uninterrupted use. On the balance of probabilities, use by the public is sufficient to raise a rebuttable presumption that the way has been dedicated, in the second relevant period 1989 to 2009. The evidence shows that most users who saw deterrent signs saw them between 2009 and 2011. These were the signs that brought the public's right into question. Only about 5 per cent of users were cycling with a private right or permission. However, dedication of a higher status on this public right of way will not be presumed if there is sufficient evidence that the landowner(s) did not intend to dedicate the path as a public route for cycling. The following section deals with this question.

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10.9 Actions by landowners

There are a number of freeholders, and owners whose land abuts this footpath, and it is unlikely that the path has been managed for public access in a unified way. Landowners can signal their lack of intention to dedicate a right by means of placing structures such as fences or gates across a path, putting up signs denying a public right of way, challenging users and completing a disclaimer of public rights under section 31(6) of the Highways Act 1980. There are no section 31(6) disclaimers recorded for any part of this path. The evidence for demonstrations of a lack of intention to dedicate higher rights in relation to the two relevant periods is discussed below:

- The first documented structure across the path was put up in early 1986, at Bunny Meadows. This was a single-bar gate, put up by an officer of Hampshire County Council, with the intention of preventing access by vehicles and horses to the footpath. The gate had been accidentally left open, and the lock was been removed, this had been replaced and the gate locked in August 1987. It is not known how long the locked gate was in place, but its remains can still be seen on site. The presence of this locked gate as an intention not to dedicate higher rights confirms that there can be no deemed dedication in the first relevant period, 1966-1986, though it is not possible to say whether it affected the second, 1989-2009.
- Users have acknowledged the presence of a kissing gate to the north of Universal Marina. This was put up in 2008, and the owner of the Marina confirms that it was primarily aimed at horse riders, but also at cyclists. This qualifies as an intention not to dedicate higher rights, and affects the second relevant period of 1989-2009.
- There is photographic evidence that a 'Footpath Only' sign has been in place at the northern end of the footpath since at least 1978. It is thought that this was put up by Fareham Borough Council, who own part of the footpath. The wording in the conservation booklet where this sign is shown, compiled in 1998 by the Borough Council, suggests that it was put up by the Council. This sign was remained in place until 2001. The notice is specific about the public right that has been recorded on the route on the Definitive Map since 1952. It indicates to the public that use should be on foot only, and indicative of a lack of intention to dedicate higher rights. As such, it falls within both the first and second relevant periods.
- Universal Marina put up a sign from 1987 reading 'Private Property – walkers only'. The wording of this is also specific to the status of the route. While this signage has proved difficult to maintain, because it is regularly removed, it does constitute a lack of intention to dedicate higher rights because the Marina did not want either horses or cyclists in the boatyard, and affects the second relevant period, 1989-2009.
- Mrs. Giles, an officer of the County Council responsible for the maintenance and protection of this path, reports requests from landowners to maintain the round 'No Cycling' signs in 2007. She also arranged to have 'No Cycling' signs put up by the Hamble Ferry hut and at the junction with Footpath 4 in 2009, on the instruction of the Head of

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Countryside Access for the County Council. This wording denies any higher recorded rights than footpath, and demonstrates an intention by the landowners not to dedicate higher rights. It affects the second relevant period.

- Mr. Tracy, who lives close to the footpath, put up his own 'No Cycling' signs and arranged for the County Council to put up further such signs, in 2009. These signs appear to have been the catalyst for the making of this application. It is clear from correspondence with the County Council in 2001 that he does not intend that cyclists should acquire any higher rights over his land, and the correspondence, together with the signs, qualify as an intention not to dedicate and affect the second relevant period. Mr. Tracy was communicating this intention to the public by asking Hampshire County Council to put 'No Cycling' signs.
- Mr. Smith, Mr. and Mrs. Betts and Mr. Tracy, all landowners living close to the footpath, report having challenged cyclists on the footpath since 2001. These actions indicate no intention to dedicate higher rights, and affect the second relevant period.
- Staff at Universal Marina have challenged cyclists and turned them away from the yard, again indicating no intention to dedicate higher rights. These challenges have taken place from 1987 and affect the second relevant period.

10.10 The relevant periods

- On the balance of probabilities, where cyclists have used a footpath without challenge over a relevant period of twenty years, this use could give rise to a finding that public restricted byway rights subsist over Fareham Footpath 3a. These rights should be recorded on the Definitive Map under section 53(3)(c)(ii) of the Wildlife and Countryside Act (see the box at the start of this report). This can only be the case where there is no evidence that the landowner, or landowners, have made it clear that they do not intend to dedicate such rights.
- For the relevant period 1989 to 2009, there is enough evidence to raise a presumption that, on balance, restricted byway rights have been acquired under section 31 of the Highways Act over Fareham Footpath 3a. However, this presumption is rebutted because there is evidence that landowners have not intended to dedicate such rights, and therefore the legal tests of section 31 have not been met.
- For the relevant period 1966 to 1986, the evidence relating to breaches and flooding of the path prior to the completion of the path, and the 'dilution' of cycle use caused by having to turn back or go inland, suggests that there could not have been a full 20 years of uninterrupted cycling use over the whole path. The legal tests of section 31 have not been met during this period either.

10.11 Common Law

10.11.1 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

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acquiesced in, the use of the path by the public on cycles. 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.

- 10.11.2 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 of the kind being claimed, or turning people back.
- 10.11.3 There is not sufficient evidence on which Members could find that a dedication for the whole route has taken place under common law in the period from 1931 to 2009. There is evidence that the footpath was not in a fit state to be cycled along in its entirety until 1986, of actions taken by some of the landowners to make it clear to the public that they did not wish to dedicate higher rights than footpath at times during this period.

11. Comments by the Applicant and Landowners

- 11.1 The following comments have been received from landowners and adjoining landowners to the substance of this report.
- 11.2.1 The **Director of Victoria Rampart Limited** has commented that the Warsash to Hamble Ferry operator has not been consulted, and discusses the effects of a restriction on cycle use on the footpath on the ferry's business. Mr. Kimish would like to amend his own landowner evidence statement to say *'we give permission for anyone to cycle on the path adjoining our land. We would like our employees to travel between our boat yards (Hamble River Boat Yard at Swanwick and Stone Pier Yard in Warsash) on the River Hamble path by bicycle'*. He comments that he has seen no evidence of any reported accident or incident leading to a restriction on cycling, and that leisure cyclists have not been fairly represented. He has contacted the British Cycling Federation to *'allow them to give a response and thus have fair representation on this matter'*.
- 11.2.2 For the avoidance of doubt, officers have contacted the current owner of the Hamble to Warsash ferry in the initial consultation, but received no reply. There has been an attempt to contact the former owner and operator of the ferry, Mr. Sedgwick, but with no success.
- 11.3 **Mr. and Mrs. Betts** have responded to say that Mr. Betts feels inclined to make a deputation to the Committee *'to reinforce our strong feeling that it would be an horrific mistake should this route be opened for use by groups of cyclists who would cause an unpleasant and dangerous situation trying to cut through the pedestrians who visit in large numbers especially at the weekend. Ramblers of all ages and especially families with young children can at the moment allow the children to run free knowing that little harm can come to*

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them.’ Mr. and Mrs. Betts also refer to a reference in this report that the County Council ‘is mindful of cycling’ and ask ‘should they not also be mindful of the large number of current users of this path who just wish to have a quiet walk along a beautiful footpath’.

- 11.4 A member of the **Estates Department of Hampshire County Council** has responded that ‘As landowner, the County Council would, in principle, support the use of footpath 3A for cycling. In this respect, we would welcome the opportunity of working with others in order to establish the most appropriate way of achieving this.’
- 11.5.1 **Mr. W. Tracy** begins his response by stating that ‘it is necessary for the **use** to have been over and along the **whole length** of the Footpath, and that it **actually** took place.’ ‘The Draft Report concludes that it has, but only on the basis that it has been nothing more than theoretically **possible** for it to have done so, and on the wholly unsubstantiated say-so of the applicant, and those supporting the application, to the effect that it has been’. Mr. Tracy says that the section on key points drawn from landowner evidence has ‘**ignored completely...statements made by myself and others to the contrary, and overwhelming evidence that has been put forward in support thereof, and statements made by a least one independent party to similar effect.** Further, ‘there is no mention whatsoever of the 14 photographs...that feature in Appendix 6. The photographs show the early 2001 condition of the Footpath, which effectively made it impassable to cyclists (and most walkers). This condition did not materialise overnight.’ Mr. Tracy puts forward examples from the body of the evidence to underline these points.
- 11.5.2 Mr. Tracy maintains that ‘no account of **user** evidence to the effect that cycling over and along the **whole length** of the Footpath did not take place until the northern section was repaired and reinstated in 2001, it is not altogether surprising that reference to this within statements made by the landowners, and particularly the hard evidence provided in Appendix 6 (in the form of photographs) has been excluded from...”The key points to be drawn from landowner evidence”. He contends that ‘it is only by **omitting user** submissions such as those referred to above, **and** the consequent failure to consider them in a rightful and proper manner, **and** by ignoring the obstruction imposed by the Chinese Bridge...that it makes it possible for the Draft Report to conclude (on the basis of next to nothing, therefore) that **significant use of the Footpath, on bicycles, and over and along its whole length was actually enjoyed by the public at large throughout the period from 1989 to 2009 – whereas the truth of the matter is that, again leaving aside the obstruction posed by the Chinese Bridge at this juncture, it was only so for a period of eight years from 2001 (when the northern section was repaired and reinstated)**’.
- 11.5.3 Mr. Tracy points out that there is no consideration in the Draft Report of the legal implications of the design and construction of the Chinese Bridge, which in his view ‘are such as to prevent cycling over and along the whole length of the Footpath.’ He also points to a possible correlation the Bridge and unauthorised encroachments onto sections of the path north and south of the breach that it would bridge. It is his view that ‘because of the design and

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*construction of the Chinese Bridge, the **whole of the Footpath is not capable of being used** for the purpose claimed...[and]...uninterrupted cycling use **over and along the whole of the Footpath** cannot have taken place for any period, let alone 20 years, at any time since it has been in existence (i.e. since 1986)'.*

- 11.5.4 Mr. Tracy considers that the justification for the inclusion of almost all of the section of the report relating to consultations with other bodies 'is questionable', or 'substantially inadmissible', because it is a 'narrative of aspirations, and contains not a shred of the kind of meaningful evidence on which the Report, and its final decision/recommendation, is required by law to be based'. He contends that 'it is difficult to discount the possibility that the intention behind the inclusion of almost all that is said is to prompt the Members of the Regulatory Committee as to what Councillors Woodward and Evans, and Fareham Borough Council, would like to see come to pass, and to sway Members in the making of their final decisions accordingly'. Mr. Tracy cautions Members to what may prove to be a 'backlash from the vast majority of users (i.e. the walkers – who, of course, have not even been informed of this matter as yet, let alone been consulted) in the event that they are marginalised as a result of their Footpath amenity effectively being turned over to cyclists'.
- 11.5.5 Finally, Mr. Tracy draws attention to paragraph 14.1 – he questions its inclusion. 'The content is clearly for raising and discussing at another time and in another place'. He goes on 'Quite appallingly in my view, 14.2 is all three of hypothetical, suggestive and presumptuous – and is **wholly out of place within this report**'. All that it goes to show is that there are some from within one or other, or both, of the executive and the elective members of Hampshire County Council who are (as has long been suspected) hellbent on appropriating, or misappropriating (they will probably care not which), this Footpath in order to turn it over to cycling – to the overwhelming detriment of not only the private landowners, but also to the walkers who have always constituted by far and away the majority user group, and who, as pointed out...above and previously, Hampshire County Council has hitherto ignored completely'.

12. Conclusions

- 12.1 While there is a large body of user evidence included with this application, there is evidence that there has not been a substantial period when use of the path from Swanwick Shore Road to Passage Lane in Warsash has been possible with bicycles. Use has been interrupted by over-topping of the footpath, major and multiple breaches and erosion. It was not possible to cycle along with whole footpath without turning back, or going inland, until 1986, when the final breach was closed. The legal test that there must have been a full twenty years of uninterrupted use before 1986 cannot be satisfied. A locked barrier was erected with the intention of preventing all but pedestrian use in early 1986. This is a clear intention not to dedicate higher rights than footpath.

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- 12.2 After the completion of the path by the erection of the Chinese Bridge in late 1986, a full twenty years of uninterrupted use on bicycles has been possible, and there is evidence of this. The putting up of 'No Cycling' notices in 2009 prompted this application. There is evidence that between 1986 and 2009 landowners have put up barriers, challenged users and attempted to maintain signs indicating that there should be no cycling on the footpath. With such evidence demonstrating a contrary intention, the legal tests for a deemed dedication of rights for cyclists on Fareham Footpath 3a have not been met.
- 12.3 Deemed dedication under both statute and common law for both relevant periods has not been demonstrated, for the whole of the route claimed. The Committee is required to determine this claim, which is in respect of the whole of Fareham Footpath 3a.

13. Recommendation

- 13.1 There is no evidence under section 31 of the Highways Act 1980 that a right of way which is shown on the Definitive Map and Statement as a highway of a particular description ought to be shown as a highway of a different description.
- 13.2 There is no evidence upon which Members can find that a common law dedication has taken place during the period 1931 to 2009.
- 13.3 Officers recommend that this application be refused.

14. For Members' Information

- 14.1 This paragraph has no relevance for the decision that Members are required to make about this application.
- 14.2 Should Members follow the recommendation, to refuse the application, Members might reasonably question what the County Council proposes to do in light of the demand for cycling on Fareham Footpath 3a. Officers would then explore the possible legal mechanisms for opening the route for cyclists.

CORPORATE 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.)

Document

Location

Claim Reference 1094

Room 0.01,
Castle Avenue,
Winchester,
SO23 8UL.

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.