

**HAMPSHIRE COUNTY COUNCIL**

**Decision Report**

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	27 May 2014
<b>Title:</b>	Application to record a public footpath at Ditcham Woods, in the Parish of Buriton
<b>Reference:</b>	5834
<b>Report From:</b>	Director of Culture, Communities and Business Services

**Contact name:** Harry Goodchild

**Tel:** 01962 846044

**Email:** harry.goodchild@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 a public footpath in Ditcham Woods in the Parish of Buriton. The claim is supported by evidence of use by 9 walkers, covering the period between 1949 and 2006.
- 1.2 It is considered that the evidence submitted in support of this application is insufficient to support the acquisition of a public right of way, and the application is therefore recommended for refusal.

**2 Legal framework for the decision**

WILDLIFE AND COUNTRYSIDE ACT 1981: section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

b) .... keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

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

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 –

- 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.

HIGHWAYS ACT 1980 section 31: Dedication of way a highway presumed after public use of 20 years.

- a) 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.
- b) 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.

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 2006 by **Reverend Philip Mason**.

**4 Landowners**

- 4.1 **Mr Keith Barnett** acquired the freehold in 1989 and retained sporting rights (which were reserved to him and his successors in title) when he sold the land in 1994. It is not known who owned the land immediately prior to Mr Barnett.
- 4.2 Between 1994 and 1998 the land was owned by **Lateq (UK) Ltd**.
- 4.3 Between 1998 and 2013 the land was owned by **Mr Andrew MacDonald** and **Mrs Irene MacDonald**.
- 4.4 Since 2013, the land has been owned by **Mr Richard Woolnough** and **Mrs Tracy Woolnough**.

- 4.5 Since the 1920s, the **Forestry Commission** has retained a leasehold interest in the land through which the claimed route runs.

**5 Description of the Route (please refer to the maps attached to this report)**

- 5.1 The claimed path is situated in an area of chalk downland, near to Queen Elizabeth Country Park, and is approximately six metres wide, with a predominantly earth surface. It commences at a junction with Sunwood Lane, an unclassified road (U216) which also carries a section of the South Downs Way (Point A on the Committee Plan). It then runs roughly parallel to Buriton Bridleway 21 (which itself forms part of the Staunton Way) in a generally southerly direction through woodland to a point where it converges with Bridleway 21 in the Oakham plantation (Point B). For a number of years a wooden vehicle barrier was situated at the northern end of the route with a gap at either side which enabled pedestrian access. This gate was replaced with a more substantial metal barrier shortly after the application to record the route as a public footpath was submitted, although the gaps at the side were retained. There are no structures at the junction with Bridleway 21 at the southern end of the route.

**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 ought to be shown on the Definitive Map as a highway.
- 6.2 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 the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).
- 6.3 Historic and documentary evidence has been examined to see whether the past history and use of the paths point to them 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 provide sufficiently cogent evidence to justify a change to the Definitive Map. 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.
- 6.4 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 users on the one hand and landowners on the other, members should make an Order so that the evidence can be tested at a public inquiry. However, this is not a step which should be taken simply to avoid making a difficult decision. Officers do not consider that there is such a conflict in this case.

- 6.5 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 invited to inspect these, or the originals, when considering this report.

## **7 Background to the claim**

- 7.1 The land over which the claimed route runs has changed hands several times since the 1980s. In 1989, Keith Barnett acquired the freehold of the land and when he sold it in 1994, he retained sporting rights to manage game. Despite the changing ownership over the past two decades, Mr Barnett has lived nearby and retained an interest in the land throughout this time.
- 7.2 The Forestry Commission have retained a leasehold interest in the land since the 1920s, and have managed it by planting new trees and removing timber. The claimed route is frequently used by the Forestry Commission as a means of accessing the land for this purpose.
- 7.3 In April 2006, whilst using the route on horseback, Mr Barnett encountered the applicant Reverend Mason, who was walking the route with Christine Bellman, who has also provided user evidence. According to Reverend Mason, Mr Barnett asked them why they were not following “the proper footpath”, to which he replied that he had walked the route for over thirty years and had never been challenged and as a result probably had “a prescriptive right of way”. Mr Barnett reiterated his challenge and stated that they should not use the path again. Reverend Mason submitted his application to have the route recorded as a public footpath later that month.
- 7.4 In September 2009 the then landowners, Mr and Mrs MacDonald, submitted statutory declarations in which they acknowledged the existence of one right of way running through their land holding (Bridleway 21), but denied the existence of any others. Mr Barnett submitted a similar such declaration. As public use of the route was called into question by Reverend Mason’s application, these declarations were submitted too late to have any bearing on the investigation into whether public rights have been acquired prior to 2006. They will however protect the landowner from any claims asserting public rights after September 2009.

## **8 Documentary Evidence**

### **8.1 Early maps and plans**

The early commercial one inch maps do not show the route, and the first time it is shown on a larger scale map is in 1868.

#### **8.1.1 Buriton Tithe Map and Award, 1840**

The claimed route does not appear on the tithe map, save for the southern-most section near the junction with the route now recorded as Buriton Bridleway 21. The parcel of land through which the claimed route runs is named as “Ditcham Hanger”, and is referred to in the Tithe Award as being a “wood”. The claimed route’s absence from the map and award suggests that

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at this time it either did not exist as a feature on the ground, or was considered to be exempt from titheable land.

### 8.1.2 Ordnance Survey County Series 1:2,500 First Edition, c.1868

The claimed route is shown by parallel, pecked lines, and follows the same line as that which is displayed on current OS mapping. There is nothing on the map to indicate that the route was gated at either end. In this edition of the map, parcel numbers indicate land use - the section of the South Downs Way to the north-east of the claimed route, shown by solid parallel lines, has a parcel number which is described in the accompanying Book of Reference as "public road". There is no parcel number which relates to the claimed route, and a bracing symbol visible at its southern end shows that it was considered part of the surrounding land (recorded in the Book of Reference as a "wood") and suggests that at the time, its reputation was not that of a public highway.

### 8.1.3 Ordnance Survey County Series 1:2,500 Second Edition, c.1895

The second edition map shows the path in a similar location and on a similar course as the earlier edition. Again, there is nothing on this map to suggest that the route has been gated at either end.

### 8.1.4 Ordnance Survey County Series 1:2,500 Third Edition, c.1908

This map shows the route on the same line as the previous two editions, still without gates at either end, but also without annotation.

### 8.1.5 Petersfield Rural District - Highway Handover Map 1929

This map was compiled when the maintenance liability for public highways was transferred from the districts to the County Council in 1929, and shows those highways thought by the County Surveyor to be publicly maintainable. The claimed path is not annotated in any way which suggests that it was maintainable at public expense.

### 8.1.6 Ordnance Survey County Series 1:2,500 Fourth Edition, c.1930

As with previous editions of the County Series, the claimed route is shown by parallel pecked lines, as is Bridleway 21 to the west.

## 8.2 Buriton Parish Council Minutes

The Buriton Parish Council minutes from the early part of the 20<sup>th</sup> century are particularly detailed with respect to public rights of way. There is no mention of the claimed route, but references to routes in the immediate vicinity demonstrate the close scrutiny afforded to rights of way matters at the time. The fact that the claimed route was not mentioned in these minutes suggests that it was not considered to be public at the time.

### 8.2.1 Parish Minutes – 28<sup>th</sup> September 1929

The chairman reported that:

*"...the Forestry Commission had obstructed several rights of way over land in their occupation and as this action had naturally caused considerable feeling*

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*in the village he had called a committee of members together and considered the matter fully.”*

A list of routes considered by this committee to be public is listed, and it includes “Milky Way towards Sunwood Farm” (situated immediately to the north of the claimed route and now part of the South Downs Way) and the route from Dean Barn to Coulters Dean (referred to as “Dean Barn Lane”). Both these routes are listed as being “foot and bridle paths”. Also listed, as a footpath only, is “part of path from Coulter’s Dean Farm to Ditcham Park”. Although it is impossible to be certain, this description would appear to match the route that is now recorded as Bridleway 21. The minutes continue:

*“It was unanimously resolved that a map be prepared by the clerk showing these rights of way and that it be forwarded to the Rural District Council together with a letter requesting them as the highway authority to take up the matter with the Forestry Commission and press for the preservation of these paths, also for the erection of suitable gates and stiles where necessary and the removal of obstructions already fixed.”*

### 8.2.2 Parish Minutes – 25<sup>th</sup> April 1930

By this time, having received no response from the Rural District Council (RDC), the clerk was instructed to:

*“...write again to the Rural District Council urging that steps be now taken with regard to the obstruction of the rights of way over the Forestry Commission’s land, and to point out that the path to Ditcham is a bridle path.”*

This is further corroboration that the route referred to in the minutes of 29<sup>th</sup> September 1929 was probably Bridleway 21.

### 8.2.3 Parish Minutes – 24<sup>th</sup> October 1930

It was reported that the RDC had forwarded a copy of a communication received from the Forestry Commission relating to the rights of way over their property. A list of routes which they acknowledge as public includes the route running from Coulter’s Dean through Ditcham Wood to Ditcham Park, but does not include the claimed route.

### 8.2.4 Parish Minutes – 28<sup>th</sup> August 1933

Following the passing of the Rights of Way Act 1932, it was resolved that all known public rights of way should be marked on a 6 inch Ordnance Survey map, and placed on deposit for public inspection.

### 8.2.5 Parish Minutes – 3<sup>rd</sup> September 1934

The clerk reported that the plan referred to in the minutes of 28<sup>th</sup> August 1933 was ready and had been deposited at the local school for public inspection. It was further resolved to *“write to the Rural District Council to request that stiles erected by the Forestry Commission on the bridle road to Ditcham be replaced by gates.”*

### 8.2.6 Parish Minutes – 23<sup>rd</sup> October 1934

The minutes detail a response from the RDC regarding the route from Coulter's Dean Farm to Ditcham and Compton, in which the RDC state that it was agreed as footpath only with the Forestry Commission in 1931. The Parish Clerk maintained that the RDC had made a mistake and the Parish Council had "*definitely claimed the route as a bridle road*". The clerk had subsequently written to the previous and current landowners of the relevant area, and both had replied to say that they also had always considered it to be a bridle path. The clerk then forwarded these responses to the RDC, requesting that they take the matter up with the Forestry Commission.

The minutes then turn to the actions taken following the introduction of the Rights of Way Act:

*"The clerk reported that the map and schedule of Public Rights of Way had been duly deposited for public inspection. Notices calling attention thereto and inviting observations or objections were sent to all owners and occupiers of land and posted up in many prominent places throughout the parish. No observations or objections had been received."*

The minutes record that the map was forwarded to the RDC so the routes could be copied onto the map held by them. The schedule is listed in its entirety in the minute book, with the entry for 'Route 21' reading:

*"Route 21 – Bridle Road – Coulter's Dean Farm, Ditcham, to Ditcham House, Harris Pond and finally to Compton*

No route listed in the schedule matches the description of the claimed route. The absence of any reference to it in any of the aforementioned correspondence, despite its close proximity to Bridleway and the scrutiny afforded to public rights of way in general at the time, suggests that at the time it was not considered public.

### 8.2.7 Parish Minutes – 13<sup>th</sup> March 1950

In the wake of the National Parks and Access to the Countryside Act 1949, all Parish Councils made submissions to the County Council in its capacity as highway authority, in which they detailed all routes that they considered to be public. These submissions were reflected on the First Definitive Map of Public Rights of Way, published in 1953. The minutes of this meeting record that the County Surveyor had written to say that the map and schedule submitted by the Parish Council in 1934 (as detailed at 8.3.6) was so thorough no further submissions were necessary. There is no evidence to suggest that the claimed route had been added to the map or schedule during the intervening years.

### 8.3 Photographs

Reverend Mason submitted numerous photographs of the claimed route with his application in 2006. Some of these photographs, dated April 2006, show the wooden vehicle barrier at the northern end of the route. A gap at the side of this barrier which indicates that pedestrian access was not prevented, is clearly visible. Shortly after the application was made, this barrier was replaced by a more substantial metal gate with a sign attached reading "*Sporting Rights Reserved – No Access*", as shown on further photographs

provided by Reverend Mason in September 2006. Both sets of photographs are useful in ascertaining the physical feature that existed shortly before and after the claim was made, but they do not give any insight into how long a structure had been in place there.

## **9 User Evidence**

- 9.1 The application is supported by nine user evidence forms, five of which were submitted with the application, completed by friends or family of the applicant, and all of whom live outside the immediate locality of the route. Reverend Mason has also made a more detailed statement about his use of the path. The user evidence is examined below, and is visually represented in the form of a chart at Appendix 1. The frequency of use varies - some witnesses report having used the route as often as four times a week, whereas one witness claimed to have used the path just twice in total.
- 9.2 The earliest reported use of the path was in 1949, but the evidence of use between this date and the mid-1970s is that of a sole witness, whose use was limited to several times per year. Only in 1976 is additional use by three other people reported. By the mid-1990s there were five users, with the remainder of the users commencing their use from 2000 onwards.
- 9.3 None of the users report seeing any signs of any description along the route, with one reporting that they passed through gates.
- 9.4 Two witnesses report being challenged - both were together when the challenge was issued (see 7.3).
- 9.5 All reported use was on foot – none of the witnesses has stated that they rode either a bicycle or a horse along the route, but the majority claim to have seen others doing so (although it is not clear if these users were also members of the public).
- 9.6 **Reverend Philip Mason** of North Lodge, made a statement regarding his use in March 2014. He walked the claimed route from 1976 until the date of challenge in 2006, at a reported rate of four times per week, and has used it since then. During those years, he walked the claimed route with his wife, family and friends and also states that he has used it in the company of church and social groups. Prior to Mr Barnett assuming ownership of the land, Reverend Mason and his wife purchased a licence from the Forestry Commission to enable them to collect firewood from the Oakham area of Ditcham Woods (the dates this licence was held are not known). Reverend Mason states that at no time did he ever see any notices or signs along the route, and that he was of the opinion that Ditcham Wood was owned by the Forestry Commission, due to the Forestry vehicles and workers he saw in the area – he was never made aware that Ditcham Wood was privately owned. In 2006 access to the claimed route was from the South Downs Way via two large gaps either side of a single barred gate.
- 9.7 **Mrs Enerstine Mason** of North Lodge also used the claimed route for recreational purposes from 1976, at a rate of four times per week. Her use continued until 1998, when it ceased due to health reasons. She reported having seen strangers on foot, horseback and bicycle along the route. Mrs Mason states that she and Mr Mason purchased a licence from the Forestry

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Commission which enabled them to collect wood in the Oakham area of Ditcham Woods, but no dates are given.

- 9.8 **Mr George Mason** of Bedhampton, Havant, reported using the route whenever he visited his brother, Reverend Mason, at a rate of approximately four times per year between 1976 and 2006. He also saw strangers on foot, horseback and on bicycle.
- 9.9 **Miss Christine Bellman** of Widley, Waterlooville, states that she used the route at a rate of twelve times per year between 1993 and 2006. She attests to having seen strangers on foot and horseback, and was walking the route with Reverend Mason when Mr Barnett challenged them in April 2006.
- 9.10 **Mrs Margaret Penney** of Bell Hill, Petersfield, started using the route for recreational purposes between 1949 and 1999. As a member of the Hampshire and Isle of Wight Naturalist Trust she states that her visits to Coulter's Dean Reserve were frequent, although she only reports using the claimed route several times per year.
- 9.11 **Miss Lisa Wood** of Auckland Road East, Southsea, reports using the route for recreation and exercise between 2000 and 2006, at a rate of 12 times per year. She saw strangers on foot and on a bicycle.
- 9.12 **Mr Tony Ashenden** of Chichester Road, Portsmouth, used the route between 2004 and 2006, but gives no details regarding the frequency of his use.
- 9.13 **Mrs Pamela Ashenden**, also of Chichester Road, Portsmouth, also gives a period of use between 2004 and 2006. A frequency of two times per year is given.
- 9.14 **Miss Hannah Newbury** of Somerset Road, Southsea, used the route just twice between 23<sup>rd</sup> June 2005 and 22<sup>nd</sup> July 2005, in the company of the applicant as part of a nature walk to raise money for charity.

## 10 The Landowner

- 10.1 Between 1989 and 1994, the land was owned by Mr Keith Barnett, and thereafter he retained a sporting licence which he still holds. Mr Barnett has provided some details of the management of the land. At the time of writing no response has been received from any of the subsequent freeholders.
- 10.2 Mr Barnett states that he does not regard the route as public, that the land is private and used 'inter alia' for shooting, and that the public are advised that there is no right of way over the land.
- 10.3 Mr Barnett has regularly walked and ridden over the land where the claimed path is located over a period of 34 years. During this time he states that he has, from time to time, but not frequently, seen members of the public, both locals and strangers, using the claimed path. Mr Barnett states that on such occasions he has always asked walkers to return to the bridleway. In 2006 he encountered Reverend Mason on the land and "*some 45 metres from the bridleway*". He pointed out that Mr Mason needed to return to the bridleway, whereupon Mr Mason claimed it was a public right of way and that he was being harassed.
- 10.4 Mr Barnett has also stated that "*anyone connected with the shooting on the land is aware that the land is private and that guns are used on it, and that the*

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*public are not allowed on it and to send them back to the bridleway if found trespassing.*” Mr Barnett also states that he gives “*permission as necessary for persons to go on to the land for the management of game and the exercise of sporting rights,*” and that no one has been given permission to access the land for any other reason.

- 10.5 According to Mr Barnett, “*there were barrier gates but the whole width was not gated and it was possible to gain access on foot to the side of these barriers. With the passage of time it cannot be said with certainty when barriers were in place but they would have been locked unless people were working within the woodland (the claimed route is a timber extraction track so work would take place from time to time).*” Mr Barnett confirmed that the Forestry Commission maintain the path to facilitate the extraction of timber.
- 10.6 Mr Barnett states that notices were erected along the path stating “*No Access, Sporting Rights Reserved*” and “*Private Access*”. After the incident in 2006 when Reverend Mason was challenged, all the signs were regularly defaced or destroyed, and so were replaced on trees at a height to make them less vulnerable to criminal damage. Mr Barnett has been unable to provide any evidence of these notices, and has said that he cannot recollect when these signs were first erected.

## 11 Consultations with Other Bodies

- 11.1 The following persons and bodies have been consulted about the claim: East Hampshire District Council, Buriton Parish Council, Byways and Bridleways Trust, British Horse Society, Ramblers’ Association, Auto-Cycle Union, Open Spaces Society, Cyclists Touring Club, the Area Countryside Access Manager and HCC Highways. All landowners whose land abuts the land through which the route runs have been also been consulted.
- 11.2 The Hampshire and Isle of Wight Wildlife Trust, who own land immediately to the west of the claimed route, were unable to offer any evidence to support or rebut the application, but stated that they had not been aware of any use by the general public and that they understood that the route was primarily used by the Forestry Commission.
- 11.3 Buriton Parish Council has not offered any evidence of use, but has stated:  
*Some parishioners can recall that they used to be able to use this route some years ago at a time when the land may have been owned by a different landowner – and they have memories of walking along it. Some parishioners feel that it may be helpful if the path was to be recorded as a formal Right of Way because a nearby bridleway (which runs alongside the Coulters Dean Nature Reserve) is suffering from use by bicycles and horse-riders.*
- 11.4 County Councillor Ken Moon – Local Member  
Councillor Moon is aware of the application.
- 11.5 At the time of writing, no other responses have been received.

## 12 Analysis of the evidence

- 12.1 None of the documentary evidence indicates that, on the balance of probabilities, the route has ever been regarded as a public right of way. The

1929 Handover Map shows that the route was not considered to be publicly maintainable by the County Surveyor and, perhaps most significantly, the route receives no mention in parish minutes which cover rights of way in the locality in specific detail. In the absence of any supporting documentary evidence that the route should be recorded as a public right of way, the application must turn on evidence of use in recent years.

12.2 For Section 31 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
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

12.3 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, in that it is linear in nature, with a clear and defined route, and allows users to pass and repass.

12.4 The bringing into question of the public's right to use the path

Although all users of the path have stated that they saw no notices, the landowner has stated that notices were erected along the route. However, as the landowner cannot recall when these notices might have been installed, this cannot be relied upon to establish when use was called into question. In the absence of any other information, the public's right to use the route could be said to have been brought into question by Reverend Mason's application of 28<sup>th</sup> April 2006, giving a relevant period of 1986 to 2006.

12.5 Twenty years' use without interruption

Based on the user evidence submitted, there appears to have been use of the path in every year between the earliest use in 1949, and 2006, when all of the user evidence forms were completed. The evidence in the forms indicates that there were no permanent obstructions on the route that could be interpreted as bringing the public's right to use the path into question. This is consistent with accounts of the vehicle barrier enabling pedestrian access provided by both Mr Barnett and Reverend Mason, and shown on the photographs described at 8.3.

12.6 'Without force, stealth or permission'

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

1. *Force – to be as of right, use must not be as the result of the use of force.*

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None of the witnesses reports having to climb, or jump, over anything to gain access to the path, and the landowner has openly admitted the existence of the gap at the side of the vehicle barrier which has facilitated pedestrian access.

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.*

All the witnesses appear to have seen others while using the path, although only Hannah Newbury states that she saw local people using the route, and her use was limited to walking the route twice in 2005 with the applicant. All of the other witnesses report seeing strangers when walking the route – for such a small pool of users to have all attested to this on a route in such a remote location could give the impression that it was well used by the public, which would beg the question why such use did not come to the landowner's attention sooner than 2006. It is also unclear in what capacity these 'strangers' were using the route (it is possible that they may have been affiliated with the landowner or the Forestry Commission).

3. *Permission – users as of right should not be using the way with any kind of licence or permission.*

No witnesses appear to have sought permission to use the path, and so it would appear that the bulk of use would qualify as use 'as of right'. The fact that Reverend and Mrs Mason held a licence enabling them to collect firewood in Ditcham Wood for at least part of the relevant period raises the question as to whether their use of the claimed route was in fact 'as of right'. Mr Barnett has indicated that on occasions he has given certain people permission to access the land in association with game management, but that no one has been given permission to walk the route other than in connection with sporting rights.

### 12.7 Use by the public

Use must be 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 that is capable of coming 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.*

Here the number of users in each year needs to be considered. The user evidence chart shows that use commenced in 1949, but there was only one user between then and the mid-1970s, with their use was limited to several times per year. From 1976, the number of users increased to four, in the 1990s it increased to five users, and use by a sixth person commenced in 2000. The three remaining users commenced use in or after 2004, but their reported use is negligible, with the stated use amounting no more than twice a year over a two year period. Of the initial six users, only Reverend Mason and his wife used the route more than once a month, and although anecdotal accounts have been provided of use by church and social groups, no evidence of this has been submitted, and so cannot be included (similarly, the account from Buriton Parish Council must be considered 'hearsay' evidence, and so also cannot be included). Even when considering the remote setting of

the route, the user evidence does not appear to be of a volume and frequency that would meet the above test for the relevant period of 1986 to 2006.

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 it is to be recorded as public.*

As has been established at 12.6, no one has reported seeking permission to use the path or stated that they had any connection to the landowner, but again, the question of whether Reverend and Mrs Mason's use was actually 'as of right' must be considered.

#### 12.8 Summary of User Evidence

The evidence provided indicates that members of the public have been using the claimed route since 1949 without force, stealth or permission, but not, it could be argued, at a frequency or volume that was likely to have come to the attention of the landowner. It is perhaps unsurprising that it was Reverend Mason's use of the route which came to the attention of Mr Barnett as he is the only user who has given details of frequent use throughout the entire qualifying period, although it is probable that part of his evidence should be given less weight on account of the licence he held to collect firewood on the land.

#### 12.9 Actions by the landowners

Mr Barnett, who held the freehold to the land from 1989 to 1994 and thereafter retained sporting rights and therefore an interest in the land, has provided a statement relating to the management of the route. None of the other landowners have provided any information.

12.10 Mr Barnett confirmed that there have never been any gates across the claimed path other than the vehicle barrier at the northern end, which he advised is, and always has been, kept locked. He cannot recall when the wooden barrier was first installed but Reverend Mason has confirmed in his evidence that it was in place when he first visited the area in 1976 (this is borne out by the user evidence – in all but one witness stated that they had *not* passed through gates when using the route, implying that the gap to the side of the wooden barrier has always been present).

12.11 The evidence relating to signage is less clear. Mr Barnett has stated that signs were erected along the route, although he cannot recall exactly when this was, but his reference to the signs being 'defaced or destroyed' *after* the applicant was challenged in April 2006 implies that they were already 'in situ' at that time. However, none of the users report having seen any signs along the route, and the photographs provided at various points throughout 2006 by Reverend Mason show no evidence of any signage other than the sign affixed to the vehicle barrier (reading "No Access, Sporting Rights Reserved"), which was only erected after Reverend Mason's application was submitted that year. There is no evidence to suggest that the southern entrance to the claimed route has ever been signed, and a site visit undertaken in March this year revealed that this was still the case. On balance, given that the landowner cannot remember when any signage might have been installed, and none of the users have acknowledged the presence of any signage at all, it is impossible to be sure whether any existed before 2006. This also makes

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Mr Barnett's claim that signs were defaced or destroyed difficult to substantiate.

12.12 Mr Barnett has confirmed that he has regularly walked and ridden over the land, and on the infrequent occasions that he has encountered members of the public on the claimed route he has asked them to return to the bridleway. He also states that anyone using the land in connection with the sporting rights is made aware that the land is private and that they should send people back to the bridleway if found trespassing. This assertion is credible when considering both Mr Barnett and Reverend Mason's account of the challenge issued by Mr Barnett on 9<sup>th</sup> April 2006, and it is reasonable to assume that if Mr Barnett had encountered Reverend Mason walking the route any earlier than 2006, a similar challenge would have been issued. Although none of the other witnesses reported being challenged, it is also reasonable to assume that challenges have, or would have been issued to other members of the public if and when they were encountered on the route.

12.13 Maintenance of the route has been carried out by the Forestry Commission to enable timber extraction, so there should be no inference that the track was maintained specifically to render the route more commodious for pedestrians.

### 12.14 Common Law

In addition to the provisions of the Highways Act 1980, this matter can 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. This may be demonstrated 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 the landowners in that use. This differs from a Section 31 dedication, where it is only necessary to show that a path was used by the public, and the landowner did not take any steps to prevent this use.

12.15 The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back.

12.16 It is considered that the requirements for a dedication at common law are not satisfied in this instance. Use of the route was never prevented by any physical obstruction, and there is a lack of clarity regarding notices that may or may not have been erected along the route, but the volume of use is not of a level whereby it could be safely assumed that the owner knew about, and acquiesced in, use by the public, and it appears that any use has been challenged when detected.

## 13 **Comments by the Applicant and Landowner**

13.1 Mr Barnett has confirmed that he has no further comments he wishes to add to those he has already made.

13.2 The applicant has submitted a lengthy response to the report, in which he raises a number of issues, some of which have either already been addressed

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in the report or have no relevance to the evidential tests that must be considered. His comments are summarised below.

- 13.3 Reverend Mason has objected to the omission from the report of evidence from one local user of the path, Mr Paul Baseley. Mr Baseley wrote a letter supporting the application in 2013.
- 13.4 The applicant refers to the route's inclusion on OS mapping, and has provided copies of various OS maps, including an extract from the OS 1<sup>st</sup> Edition (Old Series) dated 1810, as well as an extract from the Phillips Street Atlas dated 2006. Reverend Mason states that each map indicates that the route was on the ground at the time.
- 13.5 In addition to providing some background history regarding the historic ownership and management of Ditcham Wood, Reverend Mason makes a number of assertions regarding the probable historic use by local residents, and has also submitted a local press cutting from 1971 detailing the discovery of wreckage from a plane crash, by a couple who were out walking near Ditcham Park, as evidence that the route was being used by the public. Reverend Mason disputes the reference to the locality as 'remote', citing a nearby school and wedding venue, and the fact that routes in the locality are used variously by the military and schoolchildren. He also points out that this area of the National Park is included in many guide books and that the nearby South Downs Way is used by thousands of people.
- 13.6 Reverend Mason has also pointed out that the land in question is not fenced, as well as the fact that a bench was installed just off the South Downs Way, allegedly with the landowner's acquiescence. The applicant believes these facts demonstrate inaction by the landowner.
- 13.7 Reverend Mason points out a number of perceived deficiencies in Mr Barnett's evidence, in particular the fact that Mr Barnett could not recall when the vehicle barrier was installed or when the signs were erected along the route. Reverend Mason states that Mr Barnett's account that signs were 'regularly defaced or destroyed' should have been an indication of the volume of use by members of the public.

## 14 Response to Comments by the Applicant

- 14.1 Other than an allusion to having used the route 'many times over the years', Mr Baseley did not include any specific details of his use, and so he was invited to complete a user evidence form. However, this was not returned to the County Council and so Mr Baseley's use of the route could not be included.
- 14.2 The claimed route is not shown on the OS Old Series map of 1810, although it does appear on the other extracts provided by Reverend Mason. The extracts are provided to show that the route was a feature on the ground, but that is all they do show – they cannot be relied upon to infer the route's status, be it public or private. The only historic mapping which provides any insight into status is the OS 1<sup>st</sup> Edition County Series and its accompanying Book of Reference, and as detailed at 8.1.2, the claimed route was not considered to be public by surveyors at that time.

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- 14.3 The background evidence of land ownership and management provided by Reverend Mason has no connection to the claimed route, and so is of no evidential value. Similarly, the press article detailing the 1971 plane crash is of no assistance in determining the route's status, particularly as it is not even clear where the wreckage was discovered, or even it was actually in Ditcham Woods at all. Anecdotal references to use of the route by other members of the public who have not provided evidence and speculation as to the likely historic use of the route cannot be considered.
- 14.4 A landowner is under no obligation to fence his land, and the question of whether or not land has been fenced in this instance has no relevance to the question of how the claimed route itself has been managed (evidence relating to structures on the route itself has been discussed at length earlier in the report). The bench referred to by Reverend Mason is some 200 yards from the northern end of the route, and its installation along the South Downs Way cannot be relied upon to indicate the volume of use on this route. Officers consider that the limited evidence of use that has been forwarded by the applicant is not sufficient to justify the route's addition to the Definitive Map.
- 14.5 It is acknowledged that the actions of the landowner have not been as robust in disclaiming public use as is often the case; in particular the lack of detail regarding signage makes it difficult to substantiate Mr Barnett's claims that signage was in place prior to 2006. However, it could be inferred that any actions taken by Mr Barnett have been commensurate with the level of public use of which he was aware.

## 15 Conclusions

- 15.1 The public's right to use the path was brought into question by Reverend Mason's application of 2006.
- 15.2 The historic documentary evidence viewed is insufficient to infer that the claimed route is a public right of way.
- 15.3 There is evidence of public use of the path between 1949 and 2006.
- 15.4 The amount of use by the public during the *relevant period* of 1986 – 2006 is insufficient for the claimed route to be recorded as a public right of way under Section 31 of the Highways Act 1980.
- 15.5 The amount of use by the public is insufficient for a common law presumption to be inferred (ie that the landowner intended to dedicate the claimed route as a public right of way).

## 16 Recommendation

- 16.1 That the application for a Definitive Map Modification Order to record a public footpath at Ditcham Woods, Buriton, be refused.

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

<b>Hampshire safer and more secure for all:</b>	Yes/no
Corporate Improvement plan link number (if appropriate):	
<b>Maximising well-being:</b>	Yes/no
Corporate Improvement plan link number (if appropriate):	
<b>Enhancing our quality of place:</b>	Yes/no
Corporate Improvement plan link number (if appropriate):	
<b>OR</b>	
<b>This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.</b>	

**Section 100 D - Local Government Act 1972 - background documents**

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

Document

Claim Reference: 969

Location

Countryside Access Team  
 Castle Avenue  
 Winchester  
 SO23 8UL

**IMPACT ASSESSMENTS:**

- 1. Equalities Impact Assessment:**
  
- 2. Impact on Crime and Disorder:**
  
- 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.**