

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	22 October 2014
Title:	Application for a Definitive Map Modification Order to record a public footpath between Latimer Street and Market Place, Romsey
Reference:	6170
Report From:	Director of Culture, Communities and Business Services

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1 Executive Summary

- 1.1 This is an application, made under Section 53(3) of the Wildlife and Countryside Act 1981, to record a public footpath in the parish of Romsey. The claim is supported by evidence submitted by 53 walkers, covering use since the 1930s.
- 1.2 It is considered that the evidence submitted in support of this application is sufficient to support the acquisition of a public right of way, and it is therefore recommended that a Definitive Map Modification Order is made to add the claimed path to the Definitive Map.

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 Summary of Legal Tests

- 3.1 Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. The primary issue to be decided by this Committee is whether there is clear evidence to show that public rights subsist or are reasonably alleged to subsist.
- 3.2 If a right of way is considered to subsist or to be reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
- 3.3 Where a Map Modification Order is made by authority of this Committee, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.

- 3.4 Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.

4 Claimant

- 4.1 The applicant is **Miss Phoebe Merrick**, a resident of Romsey.

5 Landowners

- 5.1 Club Hotels Limited
Dundridge Lane
Dundridge
Southampton
SO32 1GD

Orchard Homes & Developments Ltd
Orchard House
51-67 Commercial Road
Southampton
SO15 1GG

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

- 6.1 The route runs from a junction with Latimer Street (Point A) and proceeds in a westerly direction until it reaches the back of the White Horse Hotel, whereupon it turns southwards through a partly covered alleyway running alongside the hotel before emerging onto Market Place (Point B). The width of the route varies between 1.8 metres and 5 metres between clearly defined boundaries, save for an area behind the hotel where there is an open, paved area which was formerly the hotel's coaching yard, and is now primarily used for outdoor seating for patrons of the hotel.

7 Background to the Claim

- 7.1 It is likely that the claimed route originally provided access for horse-drawn vehicles to the yard and stables at the rear of the White Horse Hotel. It is shown on the Tithe Map and Award of 1845, although given that the origins of the hotel date from the 16th century, it is probable that it had existed for some time prior to this date. When the stables made way for a garage in the early 20th century, and when in subsequent years a car park serving the hotel was created, the route provided similar access for motor cars. During the last decade, changes in ownership have separated the car park from the hotel, and parts of the car park have subsequently been redeveloped (most noticeably the Holt Court development, which houses 12 flats immediately adjacent to the claimed route).
- 7.2 In 2005 the applicant became aware of the Holt Court development proposals, and upon learning that the claimed route was not already recorded as a public right of way, and fearing that it might be lost as a result of the development, she made an application to Hampshire County Council to record it as a public footpath. Some of the user evidence provided suggests that shortly after the application was submitted, signs were erected along the route reading 'no public right of way', but it seems that these were soon removed and were not subsequently replaced.

- 7.3 The evidence supporting the claim is a mixture of historic, documentary evidence and more recent user evidence. The application was accompanied by copies of numerous photographs of the route taken throughout the 20th century, an extract from the 1845 Romsey Tithe Map, and an extract from sales particulars for the White Horse Hotel when it was put up for sale in 1848. It is also supported by 53 user evidence forms, detailing use dating back to the 1930s.

8 Issues to be Decided

- 8.1 The issue to be decided by this committee is whether there is evidence to show, on the balance of probabilities, that a public right of way subsists, or is reasonably alleged to subsist, on route A-B.
- 8.2 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).
- 8.3 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.
- 8.4 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.

9 Documentary Evidence

Information on the background and evidential weight which should be attached to particular historical sources is included at Appendix 1, which should be read in conjunction with this section.

9.1 Early maps

- 9.1.1 Due to the scale at which they were drawn, the earliest of the commercial maps suffer from a relative lack of detail, and so they are of no assistance in determining when the claimed path came into existence, let alone what its status might have been.

9.1.2 1845 Tithe Map and Award

The claimed route is shown on the map by parallel solid lines on the east-west section, and is included in parcel number 1386, which is recorded as being the 'Offices and Yard' of The White Horse Inn. Abutting the track to the north and south are parcels 1145 and 1146, and these are referred to in turn as The White

Horse Inn's 'Garden' and 'House, Garden, Yard and Buildings'. The route is open at each end, which suggests it was not gated, but there is no reference in the Award to the track being a 'road' of any description.

9.2 Ordnance Survey large-scale maps

9.2.1 1865 Ordnance Survey Map – County Series Survey (1:500 scale)

The claimed route is clearly defined on this map, with the east-west section of the route shown within solid parallel lines, and the western section of the route clearly opening out onto The Hundred under the archway next to the White Horse Hotel. This archway is shown on all subsequent mapping. There is no line or bar across the eastern end of the route to suggest that the route might have been gated or obstructed in any way.

9.2.2 1871 Ordnance Survey Map (25 inches to 1 mile) – 1st edition

A pecked line across the eastern end of the route at the junction with Latimer Street mirrors the way that other public roads are depicted.

9.2.3 1871 Ordnance Survey Book of Reference

The first edition County Series is the only Ordnance Survey map that has an accompanying reference book that describes the use for every parcel of land. The parcel containing the western section of the claimed route has the parcel number 615a, which the Book of Reference describes as 'Houses, gardens etc'. The east-west section of the route has no parcel number. It can be inferred that at this time no part of the claimed route was considered to be a public road.

9.2.4 1895 Ordnance Survey Map (25 inches to 1 mile) - 2nd edition

There is no change to the depiction of the route when compared with the 1st edition map but the White Horse Hotel's covered archway at the junction with Market Place is easier to identify. A line across the eastern end of the route at its junction with Latimer Street is visible on the map, which might suggest a gate or barrier of some description.

9.2.5 1908 Ordnance Survey Map (25 inches to 1 mile) – 3rd edition

There is no material change to the way the route is depicted when compared with the earlier maps of 1871 and 1895. The yard behind the hotel is labelled.

9.2.6 1943 Ordnance Survey Map (25 inches to 1 mile) – 4th edition

There is no change to the depiction of the route when compared with the earlier OS maps. Again, the yard behind the hotel is clearly identifiable.

9.2.7 1965 Ordnance Survey Map (1:2500) – National Grid Plan

The east-west section of the route is not enclosed on the northern side (as on previous maps), reflecting the newly created car park, but there are no gates or barriers shown at the entrance onto Latimer Street, and this junction is shown in an identical way to other public roads.

9.2.8 1988 Ordnance Survey Map (1:1250) – National Grid Plan

This map shows the route in a similar way to the 1965 map, although this time the junction with Latimer Street appears to be enclosed.

9.3 **Sale Documents**

Several sale documents viewed in the Hampshire Record Office, the earliest of which is dated 1794, detail the conveyance of the White Horse Hotel and other properties abutting the route. All documents make reference to the claimed route – it is variously described under ‘ways’, ‘paths’, ‘passages’ and ‘easements’ – and its inclusion in each conveyance suggests that the route was considered private, not public. Additional evidence is considered in more detail below.

9.3.1 **1848 Extract from Sales Particulars – White Horse Hotel**

This document relates to the sale by auction of four lots, including the White Horse Hotel, the tap, brewery, yard, stabling, coach-houses, garden, two cottages in ‘Latimore Street’, and *“a road running from Latimore Street into the yard of the hotel”*. An accompanying plan shows the claimed route in its entirety, unobstructed and labelled as *‘The Road’*. The claimed route is described, with each lot including in its conveyance *“the portion of the road abutting thereon, but subject to a right of way over the same to be reserved to the vendors...and the purchaser will have granted to him by the vendors a right of way over the residue of the road towards Latimore Street.* Again, the route’s inclusion in these sale particulars implies private ownership.

9.3.2 **1919 Draft Conveyance between Richard Bowen and Percy Woods – White Horse Hotel**

This draft document details what is to be conveyed as part of the sale of the White Horse Hotel by Mr Richard Bowen to Mr Percy Woods. The claimed route is referred to in a similar fashion to the 1848 sales particulars: *“...part of which said premises are used as a road leading from the yard of the White Horse from aforesaid to Latimer Street...”*

9.4 **Local Government Records**

9.4.1 **1929 Handover Map**

This map was prepared by Romsey Rural District Council to show those routes that they considered publicly maintainable highways at the time responsibility was transferred to the County Council. This map purports to show footpaths, as well as carriageways, but the claimed route is not featured.

9.4.2 **1931 Building Control Plans**

These two drainage plans were submitted to Romsey Borough Council, and detailed proposed alterations to drainage and sewers serving both the White Horse Hotel and several houses situated at the claimed route’s junction with Latimer Street. The plans show the hotel’s covered junction with Market Place, which is labelled ‘Entrance to Yard’. They also show the east-west section of the route, which is labelled ‘Private Road’ and contains an arrow pointing ‘To Latimer Street’. The claimed route’s junction with Latimer Street is shown as being gated. Whilst this document was not open to public scrutiny, it indicates that the route was not considered to be public at the time the plans were drawn up.

9.4.3 **1946 Highways Map**

This map was prepared by the county highways surveyor to show those routes that were considered to be publicly maintainable. The claimed route is not coloured or marked in a way that would have indicated that the surveyor considered them to be his responsibility.

9.5 Photographic Evidence

Whilst the available photographic evidence is of little assistance in determining the status of the route, it is useful in establishing how it was regarded and used.

9.5.1 The applicant has provided copies of numerous photographs dating from the mid-19th century, which are predominantly taken from in front of the White Horse Hotel. Some of these photos also show the entrance from Market Place to the yard at the rear of the pub, and they also show how its predominant use has changed over time. The entrance served as a coaching access for horse and carriage, but after the advent of the motor car, the wording above the entrance changed to 'Garage'. One photo from the 1960s shows that this wording was further revised to read 'Hotel Entrance – Parking For 60 Cars', before disappearing completely in the 1970s (a new sign above the entrance now reads 'The Coachway'). One photo, taken c.1907 from the yard and facing south, shows the route running through to Market Place without obstruction.

9.5.2 1966 Photographic Slide

This slide, held by Hampshire Record Office, was taken from the roof of Romsey Abbey looking eastwards towards Latimer Street, and shows the White Horse Hotel car park immediately to the north of the claimed route. A car can be seen accessing the car park via the claimed route's junction with Latimer Street.

9.5.3 1976 Photograph of Latimer Street

This photograph, provided by Barbara Burbidge, was taken roughly level with 10 Latimer Street, facing north. The entrance to the claimed route appears in the foreground. A large mesh gate is open against the wall of 12 Latimer Street, on which is also hung a sign with an arrow pointing to the 'White Horse Hotel Car Park' (the gateposts either side of the entrance to the route are still in place, although the gate has long since been removed).

9.5.4 Aerial Photography

Two extracts taken from aerial photography layers available on the County Council's Geographic Information System (taken in 2000 & 2005) both clearly show the claimed route and the White Horse Hotel car park. A barrier is visible on both photographs at the point where access to the car park from Latimer Street narrows, but this appears to be for vehicles only, as there is a wide gap on the northern side which would allow pedestrians to navigate around it. The junction with Latimer Street is unobstructed.

10 User Evidence

10.1 There is evidence of use by walkers in recent years indicating that the route has been used by the public since the 1930s, although it is probable that the route was being used by the public prior to this date - one witness described being introduced to the path by her mother, who was born in Romsey in 1911.

The evidence is comprised of 53 user forms and statements, some of which are summarised below. 7 forms that were submitted were incomplete, and so have been omitted from the investigation. The use of the remaining 46 witnesses is shown in the chart at Appendix 2 (12 of these began using the path after the application was submitted, and so their use has also been discounted).

10.2 Mr Mark Bramley (completed statement in 2014)

Mr Bramley is currently the general manager of the Red Lion Hotel in Salisbury, and has lived at 14 Latimer Street, Romsey, since the mid 1980s. He has used the route daily since then, primarily for walking his dog. From his back garden, which is yards from the claimed route, he can hear people walking past at a rate of about 2-3 per minute. His use of the route has never been challenged, and he does not recall seeing any signage indicating that access was prohibited or permissive.

Mr Bramley does however recall that the hotel used to implement annual closures whilst it was under Forte's ownership (see Section 11), and he used to make a habit of visiting the hotel to witness the closures being recorded in a ledger kept in the hotel. According to Mr Bramley, the closure was something of a tradition, and the hotel used the ceremony attached to it as a means of attracting patrons. When the hotel was sold to Macdonald Hotels, Mr Bramley states that he went into the hotel to remind the new owners that if they did not maintain the tradition then there was a risk that the public could acquire rights over the route. In spite of Mr Bramley's warning, the closures were allowed to lapse, and when the hotel was sold again several years later, the inaction on the owner's part continued. Mr Bramley stated that the closure during this year's Beggar's Fair was the only time in recent years when the route has been obstructed, and even on this occasion the closure was not in force for a full day.

10.3 Mrs Barbara Burbridge (completed statement in 2014)

Mrs Burbridge first came to Romsey in 1970 when she began teaching in the area. She first discovered the claimed path as a safe off-road route when out with a class of schoolchildren and continued to use it to avoid crowds on The Hundred. Although her use has been irregular, it has been continuous since 1970, and she has often seen other people using the route, both on foot and on bicycle. She understood that the original purpose of the route was as a coaching access for the hotel, but always considered that the route was public. Mrs Burbridge has never known the route to be gated in any way as would prevent access on foot before 2005, when work on the Holt Court development began. Although the route had gates at each end, as far as she can recall these were always left open when in place. The route has always been surfaced, predominantly with tarmac, although she believes the section under the archway might have been cobbled at one stage. Her use of the route has never been challenged, and she never saw any signs except for a brief spell when owners became aware of the right of way assertions made by her and others in 2005.

10.4 Mr Roger Bunney (completed form in 2014)

Mr Bunney has walked the route since the 1950s, at a frequency of roughly 2-3 times per week. Save for a brief period between 1971 and 1972, when he lived in Southampton, his use has been continuous. He never saw any signage indicating use was permissive, and states that the only time he was aware that use was interrupted was during the Beggar's Fair in July 2014.

10.5 Mr Charles Burnett (completed form in 2005)

Mr Burnett used the route on foot approximately 20-30 times a year between 1947 and 2005 as it was a "safe and quick path between Market Place and Latimer Street". He also reports having seen other local people using the route as well.

10.6 Mr Paul Gale (completed statement in 2014)

Mr Gale has lived in Romsey all of his life. His parents, who also grew up in Romsey, used the route fairly frequently and first took him on it when he was

about 7 years old. He always regarded the route as a convenient shortcut, and many people he knew also used it. Mr Gale used the route about once a month between 1952 and 2005. However between 1963 and the mid 1970s, when he was a youth leader, he would use the route as a short cut to reach his home after weekly meetings. He was aware that the route was within private ownership when he was using it, but always considered that the public had a right to use it. The gates that were introduced at the junction with Market Place were always open and offered no obstacle to pedestrian use. He also recalls a barrier appearing at the Latimer Street end of the route at some point in the 1980s or 1990s, but this was solely to block vehicular access, and could be easily walked around. Mr Gale was never told he shouldn't be using the route, and he never saw any signs challenging his use.

10.7 Mrs Pat Genge (completed statement in 2014)

Mrs Genge came to live in North Baddesley in 1953, and moved to Romsey in 1969, from which time she walked the route on a weekly basis without interruption until 2005. She has observed frequent use of the path by other pedestrians, and has also seen it used by cyclists. She also recalls the vehicular barrier at the Latimer Street end, but has never known the route to be gated in such a way as would prevent pedestrian access. Her use of the route has never been challenged, and she has never heard that anyone else has been challenged.

10.8 Mrs Eileen Love (completed statement in 2014)

Mrs Love's parents moved to Awbridge in 1925, where Mrs Love was born. She moved to North Baddesley in 1956. Her first recollections of the path date from when she was at school, when her parents introduced her to the route. She often used the route to run errands for her father after the school bus dropped her off in Market Place. During the years she was at school, Mrs Love would use the route several times per week as a short cut during her lunch break. When she was a little older she worked at Bradbeers in the town centre and then at the Telephone Exchange on Alma Road – she used the route extensively during this period. Mrs Love always felt the route was public. More often than not she saw other people on the route, and this continues today as although many of the shops on Latimer Street have disappeared, it still offers a handy short cut for those wishing to get to Waitrose. She frequently saw other people using the route on a bicycle, and used to ride along it fairly frequently herself, although her main use was on foot. She has no recollection of any gates at either end of the route or any signs, and her use of the route has never been challenged. To the best of her recollection, the route has always been tarmac'ed and has been of a consistent width. Mrs Love does not give an exact date for the commencement of her use, stating instead that it began in the 1930s – this is consistent with her statement that she began using the route when she was still at school.

10.9 Miss Phoebe Merrick (completed statement in 2014)

Miss Merrick moved to Romsey in 1967, and immediately began using the route as a cut-through. Between 1970 and 2005 she estimates that she walked the route at least once a month. She never saw the route gated in such a way that would have prevented pedestrian use. She recalls a barrier next to Mascot's bakery (which has long since closed) to prevent vehicular access, but she said that one could easily walk around this. Her use of the route was never challenged and she only ever heard anecdotal evidence that someone was challenged, although this was about fifty years ago. A 'no public right of way' sign was erected along the

route shortly after she made her application in 2005, but this was removed and never subsequently replaced.

10.10 Mr Michael Perfect (completed form in 2014)

Mr Perfect lives on Latimer Street, and has walked the route daily since 1963 as a short cut to and from Market Place. He does not recall seeing any signage and his use of the route has never been challenged. He recalls that the hotel used to close the gates at the Latimer Street end of the route for one day each year when the hotel was under the ownership of Trusthouse Forte, but could not recall exact dates. Other than these closures the route has been unobstructed.

10.11 Mr Ian Richards (completed form in 2014)

Mr Richards has used the route on a weekly basis since the 1970s and continues to use it today. He has never seen any signage along the route challenging his use. He recalls the vehicle barrier near Latimer Street, and also that the route was briefly obstructed when rebuilding work on the White Horse Hotel took place, although he does not give dates or a duration for this work.

10.12 Mrs D Sillence (completed form in 2005)

Mrs Sillence used the route as a short cut about 15-20 times per year between 1952 and 2005, although between 1955 and 1960 she worked at the White Horse Hotel so some of her use during this time could be considered private. She does not recall seeing any signs of any description along the route.

11 The Landowner

11.1 For the majority of the 20th century, the White Horse Hotel was owned by Trusthouse Forte, a subsidiary of the Forte group of hotels. Forte was the subject of a takeover by Granada in 1996, and in 2000, by virtue of a merger and demerger, the hotel portfolio passed to Compass Group. No conveyancing details have been seen, but further investigation has revealed that in 2001 Compass sold its entire hotel portfolio to Macdonald Hotels. It is therefore reasonable to infer that the ownership of the White Horse Hotel passed to Macdonald Hotels at this time.

11.2 The hotel remained in Macdonald's ownership for the next 4 years until 2005, when it was sold to a private developer. The transition of ownership after this date is unclear, but a Land Registry search revealed that by 2007, the ownership of the hotel grounds had been split so that different parts of the claimed route fell within different ownership. The Land Registry details indicate that the hotel (including the section of the route immediately adjacent to it) was taken over by Club Hotels Ltd in 2007. The ownership of the remaining section between Holt Court and Latimer Street was transferred to Orchard Homes in 2007 – no response has been received from them during this investigation, although their ownership commenced after the public's right to use the route was called into question.

11.3 Based on the above, the two landowners of the hotel immediately prior to 2005 were Trusthouse Forte (latterly Granada/Compass), and Macdonald Hotels. Attempts to establish contact with Forte have met with no response, whilst a letter from Compass Group stated that they had no information in their records as they ceased to have an interest in the property many years ago.

11.4 On behalf of Club Hotels Ltd, Paul Bingham, the General Manager of the hotel, completed a form detailing the management of the route during their ownership (he gives a start date of 2006). In his evidence, Mr Bingham states that although he has seen members of the public using the route, he does not consider it to be

public, and further asserts that recording the route as public would be detrimental to the business. He refers to annual closures of the path during the Beggar's Fair event and regular weddings taking place at the hotel as a demonstration that the landowner had no intention of dedicating public rights over the route, and also states that the route was closed for periods between 2006 and 2008 when building work was taking place at the hotel.

12 Consultations with Other Bodies

12.1 Ramblers' Association

The area representative has said:

"The route may well have an historic use, I know it was used within the last 20 years. On a personal level I can state I used the claimed route from the 1980s until the bakery at the rear of No 22 The Hundred closed.

My group will be pleased to support this claim."

12.2 Cyclists' Touring Club

The area representative has said:

"We are unable to contribute much to the debate but a couple of Romsey CTC members have confirmed that they do use this route and it seems to be in general use by the public. One member also said that she had used it a couple of times on her trike but I am not aware of any other use by cycles."

12.3 British Horse Society

The area representative has not provided any information on this particular path.

12.4 Test Valley Borough Council

No comment has been received.

12.5 Councillor Mark Cooper – Local Member

Councillor Cooper is aware of the application.

12.6 Romsey Town Council

Councillor Mike Wenman has stated that he fully supports the application and that *"I have lived in Romsey since 1970 and have regularly used this pathway for access to the town centre."*

Councillor Ian Richards, Romsey Town Mayor and a Test Valley Borough Councillor for Abbey Ward, stated:

"The route has been used as a permissive footpath for most of my years in Romsey, having arrived here in 1969. However the route has had occasional interruptions, ie when the refurbishment of the White Horse took place, and for a few years it was closed to unauthorised vehicle entrance by the installation of a card operated barrier for entrance to the White Horse car park. This area has now been developed into flats and the barrier removed.

I write this without reference to dates but would consider that the route has effectively been closed on more than one occasion to demonstrate the permissive nature of the route."

Cllr Richards also completed a user evidence form (see 10.11).

12.7 Comments on Consultation Responses

According to the current owner of the hotel, the route was closed whilst the hotel was refurbished between 2006 and 2008, but this was after the application was submitted and therefore outside the scope of this investigation. Many witnesses acknowledged the presence of a vehicle barrier towards the Latimer Street end, but that this was designed to restrict vehicular access, and no-one has said that the barrier prevented them from continuing along the route. The question of closures demonstrating permissive access will be explored later in this report.

13 **Analysis of the evidence**

13.1 It is considered that the documentary evidence available does not show, on the balance of probabilities, that the claimed route has ever been recorded as public. It is evident that the entrance at Latimer Street was previously gated in some way, but it is not clear how often or for how long this gate was closed, or when it was removed entirely. As it is considered that the documentary evidence does not show that public rights subsist, or are reasonably alleged to subsist, the application must be considered on the evidence of long use under Section 31 of the Highways Act 1980, or under common law.

13.2 **Analysis of the evidence under Section 31, Highways Act 1980**

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 (in this case, 1985 – 2005)
- use must be *as of right*, i.e. without force, without stealth and without permission
- use must be by the public at large
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

13.3 Physical nature of the path

The path is capable of being a right of way at common law. It is linear in nature, with a clear and defined route, and allows users to pass and re-pass. Whether or not with public use in mind, the surface of the route has been of a standard suitable for pedestrian use throughout the 'relevant period' of 1985 to 2005.

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

There is no substantive evidence of the public's right to use the route being questioned prior to Phoebe Merrick's application of 2005, and so this must be used as a basis for the 'relevant period', being the twenty years between 1985 and 2005. The 'no public right of way sign' referred to by some users was erected after Miss Merrick's application was submitted, and so cannot be considered as

evidence of a lack of intention to dedicate during the relevant period. The same applies to the refurbishment work carried out between 2006 and 2008.

The Beggar's Fair has been held in Romsey on an annual basis since 1993, and the current manager of the hotel has stated that the route has been closed on these occasions (and also on special occasions when weddings have been held at the hotel) whilst it has been within Club Hotels' ownership. However, Club Hotels' ownership of the hotel commenced after the application was submitted in 2005, and so management of the route during this period cannot be taken into account. It has not been possible to substantiate other anecdotal accounts of previous closures - only limited weight can be attributed to this evidence.

13.5 Twenty years' use without interruption

The route appears to have been used on foot in every year since the earliest use in the 1930s, with the bulk of public use falling between the 1970s and the 2000s, although it is evident from user evidence that it is still widely used today. The details provided in the forms and statements indicate that there were no permanent obstructions prior to 2005. Only after use was called into question by the 2005 application do some witnesses report that they were unable to use the route, when work on the Holt Court development commenced, or when the refurbishment of the hotel was undertaken, although some users also maintain that the route was available for use during this time (given that the manager of the hotel has given dates of 2006 – 2008 for refurbishment works, it is possible that these users have recalled obstructions that fall outside of the relevant twenty year period). It is apparent that the vehicle barrier that appeared at the eastern end of the route in the 1980s or 1990s did not interrupt pedestrian use of the route, as people either walked around it (believing that it was only there to regulate vehicular access), or simply don't remember it being there. Three witnesses refer to the gate in the White Horse Hotel's coaching entrance, but all say that a doorway cut into the gate was always left open and enabled them to continue onwards.

13.6 Mr Bramley and Mr Perfect, who live on Latimer Street, both made reference to annual 24 hour closures in their statements, which they say were carried out by the hotel whilst it was owned by Trusthouse Forte, but cannot recall exact dates. Mr Bramley's detailed evidence suggests that the closures ceased when ownership of the hotel was sold to Macdonald Hotels, and further research suggest that this sale occurred in 2001. However, none of the other witnesses, when specifically asked about this point, can recall the hotel implementing regular closures. This could be attributed to their not using the route on the day(s) the route was closed, which is quite conceivable, but the absence of any corroborating documentary or user evidence relating to closures from either other witnesses or previous landowners has made this evidence difficult to substantiate, or to evaluate in relation to the relevant period.

13.7 'Without force, stealth or permission'

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

None of the witnesses reports having to climb, or jump, over anything to gain access to the path and, as has been established, there appear to have been no permanent obstructions across the path, or notices to advise the public that they should not be there.

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 who filled in forms or gave statements reportedly saw others (mainly locals) while using the path. The claimed route runs past the main access to the hotel, so it would have been apparent to the proprietors if the route was being used for reasons other than as a means of accessing their establishment.

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

Mrs Sillence worked at the White Horse Hotel from 1955 – 1960 and so some of her use during this time will have been private and should therefore be discounted. Mr Davis and Mrs Love made reference to using the route to access Mascot's Bakery, which was situated towards the Latimer Street end of the route. If these visits were not part of an onward journey they would also need to be discounted, although Mrs Love has given a variety of reasons for using the route, all of which satisfy the above test. No other witnesses appear to have sought permission to use the path and used the route in the belief they had a right to do so.

As previously mentioned, some witness evidence refers to annual closures implemented by the hotel. Such closures are often employed to demonstrate that public access of routes is permissive only, and according to Mr Bramley, the hotel was most attentive to this matter throughout the years it was owned by Trusthouse Forte. If these closures could be substantiated, the application of the legal tests under Section 31 might be considered harder to satisfy, although a dedication at common law could be considered between 2001 and 2005, during which time the reported closures allegedly ceased. As has already been set out, there is limited evidence of the alleged closures, and as the legal test for making an order under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 is that rights are shown to subsist or are *reasonably alleged to subsist*, it is thought that the application can still be considered under Section 31.

Overall, it appears that the majority of use has been of the type that can qualify for the acquisition of public footpath rights on this path during the relevant period.

13.8 Use by the public

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. The number of users in each year needs to be considered.

It is considered that the evidence that has been provided is of a quality that satisfies the above test. The user evidence chart shows that recorded use commenced in the 1930s, and by the 1950s that use had increased to nine witnesses. By the 1970s there were twenty-four witnesses to use of the path and by the time the claim was submitted in 2005 this number had increased to thirty-four users. All remaining use commenced after 2005, and so has not been taken into account (although it should be noted that widespread public use of the route continues to this day). All users report having seen other local people whilst using the route, which indicates a level of use consistent with the route's urban setting. Of the thirty-four witnesses, twenty-three people claim to have used the route at least twice a month. This evidence indicates that there has been widespread use by the public in every year within the relevant period.

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.

Save for Mrs Sillence's five year employment at the White Horse Hotel, no witnesses have reported having any connection with the landowner, and whilst the positioning of the hotel entrance and the bakery along the route make it inevitable that some people will have used the route solely to reach those establishments, the evidence also indicates that the majority of users have used the route as a short cut.

- 13.9 It is apparent that local people have been using the claimed route since at least the 1930s onwards, with the bulk of evidence of public use commencing during the 1970s. The user evidence submitted, on the balance of probabilities, is thought to be sufficient to indicate that the public have acquired a right to use the claimed route as a public footpath during the twenty year period between 1985 and 2005. However, dedication of a public right of way may not be presumed if there is sufficient evidence that the landowners did not intend to dedicate the path as a public footpath.

13.10 Actions by the landowners

In the absence of any direct evidence from the landowners who were in situ at the time, it is difficult to ascertain what actions (if any) were taken to challenge or manage public use of the route between 1985 and 2005. The user evidence referencing annual closures is anecdotal, and whilst it is perhaps unreasonable to expect the casual observer to recall exact dates, the absence of any further information about the alleged closures means that little weight can be attributed to this evidence.

Some user evidence makes mention of a sign toward the Latimer Street end of the route reading 'no public right of way' that was erected shortly after the application was submitted in 2005. This was apparently removed soon afterwards and not subsequently replaced. It is not clear who erected this sign, but as it appeared after the use of the route was called into question, it falls outside the twenty year period of 1985 – 2005 and so does not have a bearing upon the investigation.

- 13.11 Mr Bingham's evidence dates from 2006, when Club Hotels Ltd assumed ownership of the hotel (although the Land Registry gives a date of 2007). As the application to record the route as a public footpath was submitted in 2005, and the relevant period for analysing the user evidence under Section 31 of the Highways Act 1980 is therefore 1985 – 2005, Mr Bingham's evidence cannot be taken into account. In his evidence Mr Bingham acknowledges 'daily' public use of the path – it is therefore reasonable to assume that previous managers of the hotel, being situated so close to the claimed route, would have also been aware that the public were using the route for means other than accessing the hotel.

13.12 Conclusions under Section 31, Highways Act 1980

In the absence of any evidence from any of the previous landowners that there was no intention to dedicate the route as a public right of way, this application, with its accompanying evidence, could be considered to give rise to an assumption that the public have acquired rights over the claimed route, on the balance of probabilities, under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, during the relevant twenty year period. Although there is credible evidence provided by users of the path that closures were implemented during the relevant

period of 1985 - 2005, these allegations have not been supported by evidence, and therefore the advice to Members is that the claim can be considered under Section 31.

13.13 Analysis of the evidence under Common Law

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. 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 of the type that has been applied for. 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. 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 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 type being claimed, or turning people back.

13.14 Conclusions under Common Law

There is evidence of user which suggests that a dedication has taken place at common law. Whilst there are anecdotal accounts of annual closures that suggest use of the route was with permission prior to 2001, it has not been possible to substantiate this with evidence. Therefore, it could be inferred that before 2005 no actions were taken to rebut any suggestion of a footpath dedication. Even if there were, either the evidence has been lost or the previous owners no longer have any interest in proving that they did not intend to dedicate. This point notwithstanding, if use prior to 2001 were to be discounted, according to the same anecdotal evidence, Macdonald Hotels' failure to implement any closures during their tenure and thus allow the public to use the route without hindrance during the period 2001 – 2005 provides a case for a common law dedication. Despite the brevity of this period, it is considered that the volume and frequency of use is sufficient for a dedication to be inferred. Given the close proximity of the hotel to the claimed route, it is likely that use by the public would have been obvious to the landowners, and they appear to have acquiesced in this use. The route has been maintained to a level suitable for pedestrian use, and the use of the route by walkers demonstrates their acceptance of it, thereby satisfying the requirements of the common law.

14 Comments on the Report

- 14.1 The applicant has stated that there is nothing she wishes to add to the report. At the time of writing no comment had been received by the landowner.

15 Conclusions

- 15.1 The public's right to use the path was brought into question by Miss Phoebe Merrick's application of 2005.

Agenda Item:

- 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 since the 1930s.
- 15.4 There is evidence under Section 31 of the Highways Act 1980 to suggest that the claimed route has been used by the public as of right and without interruption for a full period of 20 years.
- 15.5 There is evidence that a common law dedication has taken place between 2001 and 2005.
- 15.6 If Members agree with paragraph 14.4 and/or 14.5 and that, on the balance of probabilities, it can be reasonably alleged that a right of way subsists, then they should direct that a Map Modification Order is made to record the claimed route as a public footpath.

16 Recommendation

- 16.1 That a Definitive Map Modification Order be made to record a public footpath with a variable width of between 1.8 metres and 5 metres, as shown by green shading between points A – B on the Committee Plan.

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

Claim Reference: 885

Location

Countryside Access Team
Room 0.01
Castle Avenue
Winchester
SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment:

2 Impact on Crime and Disorder:

2 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.

The test for making a decision to add a path to the Definitive Map is made on the balance of probabilities (as clarified by case law – it is not explicit in the 1981 Act) whether or not public rights subsist or are reasonably alleged to subsist.

Unopposed Orders can be confirmed by the County Council.