

HAMPSHIRE COUNTY COUNCIL

Decision Report

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| Decision Maker: | Regulatory Committee |
| Date: | 22 October 2014 |
| Title: | Application to record a footpath from Boundary Road to St. Paul's Church car park, in the Parish of Bursledon, on the Definitive Map |
| Reference: | 6169 |
| Report From: | Director of Culture, Communities and Business Services |

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EXECUTIVE SUMMARY

1) Summary of decision area:

1.1. This is an application, made under section 53(3) of the Wildlife and Countryside Act 1981, to record a route in the Parish of Bursledon on the Definitive Map as a footpath. The claim is based on evidence from 9 local residents. They have used the path on foot from the 1950s and continue to do so. While the freeholder, Eastleigh Borough Council has been, in effect, an absentee landowner and has done nothing to protect its land against the acquisition of public rights, the volume of use has not been of the nature that would come to the attention of a reasonable landowner. The claim is therefore recommended for refusal.

2) Legal framework for the decision:

2.1. WILDLIFE AND COUNTRYSIDE ACT 1981: (53)

Duty to keep definitive map and statement under continuous review:

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

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

2.2. PRESUMED DEDICATION AT COMMON LAW:

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

2.3. HIGHWAYS ACT 1980 s.31:

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

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

3) Summary of legal tests:

- 3.1. Under 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 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.

Agenda Item:

- 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.

MAIN REPORT:

1) Purpose of report:

- 1.1. The purpose of this report is to set out the facts of the case to enable Members to determine whether the public has acquired a right of way through the provisions of Section 31 of the Highways Act 1980 and/or through a dedication at common law.

2) Claimant:

- 2.1. The application was made in 2005 by **Mr. I. Wilkinson**. The application was accompanied by 9 completed user forms.

3) Landowners:

- 3.1 The claimed route is owned by **Eastleigh Borough Council**, whose registered office is at Eastleigh House, Upper Market Street, Eastleigh SO50 9YN.

4) Description of the route (please refer to the map attached to this report):

- 4.1. The claimed route leaves Boundary Road (the U527) where it forms a cul-de-sac to the south of Chamberlayne Road. It runs in an easterly direction over a strip of grassland, adjacent to number 34 Boundary Road, to reach the car park of St. Paul's Church. The path is 68 metres long, and 0.6 metres wide, bounded on the north by the fence of 34 Boundary Road.

5) Background to the claim:

- 5.1. The Pilands Estate, Bursledon was built in the 1950s, and the land over which the claimed footpath runs is a strip of grass alongside the last property on Boundary Road. This land was, according to Eastleigh Borough Council, never adopted as highway in 1956, but remained under the control of Winchester Rural District Council, until the local government reorganisation of 1974 transferred ownership to Eastleigh. A group of rose bushes, planted in the middle of the strip at its western end, is still in place. A Large Scale Voluntary Transfer (LSVT) of the council housing stock took place in 1996, to Eastleigh Housing Association. At this time, the land alongside 34 Boundary Road was retained, along with many '*other similar areas capable of potential further development*'¹, by Eastleigh Borough Council.
- 5.2. The Borough Council states that '*a number of garages had been constructed to serve the houses on that particular section of Boundary Road. The Pilands Estate was redeveloped in the mid-1990s, but this did not include the land alongside 34 Boundary Road. However, the land occupied by the garages was redeveloped as a car park for St. Paul's Church.*' The strip of grass once had a tarmac'ed path along its northern edge, leading to these

¹ Email from Eric Reed, Principal Development Engineer, Eastleigh Borough Council, dated 17th October 2013

garages. Traces of the original tarmac are still visible in places under the vegetation.

- 5.3. Eastleigh Borough Council made a planning application for residential development on the land in June 2005. Consent was given for a 3-bedroomed detached house, with double garage. The planning officer's report paragraph on consultation responses referred at paragraph 11(iv) to '*loss of footpath across the site*'. At paragraph 31, the report states that '*there is no formal right of way but there was previously a footpath adjacent to the boundary with No 34 Boundary Road, which used to serve the garage court at the rear of the houses, now the site of the Church. However, this has not been used for a number of years and any claim to have a right of way established is not a material consideration in determining this application*'. Further, paragraph 32 says that '*the proposed new dwelling would not impact on a right of way*', and a new section of footpath would be created to continue the footpath at the front of the existing properties on Boundary Road. It may be that the correct term should be 'footway'.
- 5.4. The application to record the route as a footpath was made shortly after. The application alleges that members of the public have walked over the land, without challenge, to the extent that they have now acquired a public right of way.
- 5.5. Members of the public have provided evidence that they have been using the claimed path on foot, with use dating from 1954, and the bulk of it occurring between 1980 and 2005. The user potentially continues, as nothing has been done by the freeholder to prevent access to the land.
- 5.6. Eastleigh Borough Council now wishes to sell the land.

6) Issue 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. This type of evidence may disclose rights other than those claimed by the applicant, for example, they may show that a lane is an old road for vehicles, not merely a footpath or bridleway. The County Council is under a duty to record such rights as are found to exist,

even if they are not claimed by the applicant.

- 6.4 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.

7) Documentary evidence:

- 7.1. Large-scale Ordnance Survey mapping between 1871 and the 1930s shows Pilands Copse, the area of woodland on which the housing estate was constructed, and there is no indication of this path on any of these maps.

- 7.2. Plan attached to Agreement, dated 1st March 1953 (Hampshire Record Office 'HRO' 39M73/C29)

This plan is attached to an agreement between Winchester Rural District Council and Brazier and Son, the builders, for a number of 'Wates' houses and flats to be constructed at Pilands Wood. The plan shows the layout of Chamberlayne Road and Boundary Road, off Hamble Lane, and the grass strip alongside what was to become 34 Boundary Road. It lies immediately to the east of a round feature, which is presumably a turning circle for the residents of Boundary Road. No path is shown running over the strip, but garages are shown to the east behind the road, though in a different configuration from that eventually built.

- 7.3. Plan attached to a letter, Eastleigh Deanery Pastoral Committee letter, dated 10th December 1953 – HRO 55M82/B7/2

- 7.3.1 A letter from the Reverend Birch to the Bishop discussed developments on the Pilands Wood Estate, and referred to a site to be left vacant '*for the eventual erection of a church or village hall*'. At the bottom left-hand corner of the plan the strip next to 34 Boundary Road is shown, again adjacent to the turning circle. There appears to be a pecked line running parallel to the boundary fence of No. 34, and a round feature, denoting a shrub or tree, at the west end of the strip of grass. This may correspond to the rose bushes that are currently found at this location.

- 7.3.2 St. Paul's Church was eventually dedicated on 9th November 1958, and a photograph of about 1960 (HRO 130M83/PZ61) shows a one-story pre-fabricated building with a curved roof, set in a lawn, with houses glimpsed in the background.

- 7.4. Block Plan for Pilands Estate, scale 1:300, laid before County Roads and Bridges Committee 17th December 1956 (provided by Eastleigh Borough Council)

The plan shows the road layout for the Pilands Estate, and the strip of grass over which the claimed route runs is shown, adjacent to the turning circle, as on the previous plans. The area covered by grass is shaded green, as are other verges and parcels of land not reserved for house curtilages or highways. There is a pecked line running parallel with the fence of No. 34 Boundary Road, which continues around the corner and runs along the frontages of the houses. This has a blue tint, and seems to represent a path. The path runs alongside the whole of the boundary

fence of 34 Boundary Road and terminates some metres to the east of a block of garages. The plan is annotated in red ink. A curved line has been drawn around the edge of the eastern side of the turning circle, and a doubled ended arrow extends from the turning circle to the end of the grass strip, which has a curved eastern end. In the middle of the arrow has been written the words 'NOT TO BE TAKEN OVER' in red pen, and the grass and path have been scribbled over. None of the other spaces coloured green appears to have been treated in this way. It is not known who made the annotation or when it was made, but it seems clear that the intention of it is to signal that this piece of land should be left as it is.

7.5. Ordnance Survey National Grid map, 1:2,500, 1965

This map was revised in 1964, and shows the grass strip alongside No. 34 Boundary Road. There is a pecked line parallel to the southern boundary fence of No. 34, part of a pecked line delineating the grass strip. The gap between this and the fence this suggests a path running alongside that fence. To the north of the eastern end of the path is a double row of small buildings. These probably correspond with the garages that were provided for the occupants of Boundary Road. These were later demolished as part of the redevelopment of St. Paul's Church. Eastleigh Borough Council has confirmed that this path, in this location, was provided for the residents of the southern section of Boundary Road to reach the garages behind their houses.

7.6. Third Definitive Map of Public Rights of Way 1964

This map does not show the claimed route as a public right of way.

7.7. Documents provided by Eastleigh Borough Council, 2005

The Contracts and Negotiations Manager of Eastleigh Borough Council has provided this investigation with material, principally an extract of an officer's report relating to Planning Application F/05/54351, laid before Eastleigh Borough Council Planning Committee in October 2005. This was for a three-bedroomed detached dwelling, with detached double garage at rear and new vehicular access. Planning permission was granted, to be implemented within five years of the date on which it was given. Members' attention is drawn to:

- Paragraph 11 (Consultation Responses) – states that the following concern was raised in one of three letters of objection, namely '*loss of footpath across site*'
- Paragraph 31 (Access and Parking) – the officer states that there is '*no formal right of way but there was previously a footpath adjacent to the boundary with No 34 Boundary Road, which used to serve the garage court at the rear of the houses, now the site of the Church. However, this has not been used for a number of years and any claim to have a right of way established is not a material consideration in determining this appeal.*'
- Paragraph 32 (Access and Parking) – this paragraph continues the theme of the previous one. '*The proposed new dwelling would not impact on a right of way. A new section of footpath would be created to the front of the new dwelling, continuing the existing footpath to the front of properties in Boundary Road. The new dwelling does not interfere with the existing footpaths to the rear of the site, leading into the Pylands Wood development.*'

8) User evidence:

- 8.1. Nine completed user evidence forms were received with the application in 2005. Two statements were also taken.
- 8.2. The raw user evidence has been put into the form of a chart, which is **Appendix 1** to this report. These charts are, of necessity, a generalisation, but may give a feel for the extent of the use claimed.
- 8.3. The earliest reported use of the way as a footpath was in 1954, and there were two users up to 1980. By 1990 there were five users, and this level of use continued until Mr. Wilkinson made this application in 2005. The use of Mr. McNaughton cannot be shown on the graph because he does not indicate when he started using the path, though he says he stopped using it in 1998. The same is the case with Mrs. Coleman, who did not specify when her use ended. There are five users who have put forward use for 20 years or more. The bulk of user seems to be between the years 1980 and 2005. Three witnesses used the path on a daily basis, one used it 200 times a year, two 100 times, another '50%', and **Mrs. Barber** said she walked it '*often*'.
- 8.4. None of the users reported the presence of stiles, and none referred to gates. Two users referred to difficulties with the surface of the path; **Mrs. Coleman** indicated that the '*path became unsafe because it was overgrown and uneven with tree roots*', and **Mr. McNaughton** commented that the path had been left '*to grass over*'. Some tarmac can be seen under plants close to the boundary fence with 34 Boundary Road. No users report having to climb anything or having to use force to gain access to the footpath on foot, and no users report seeing notices on the path.
- 8.5. The applicant **Mr. Wilkinson** reports having been told by '*Kevin Warren of EBC it [the claimed path] is for the use of garage renters only*'. No others mention being stopped or challenged.
- 8.6. **Mr. Edwards** and **Mrs. Poynter** were tenants of Eastleigh Borough Council, for all the time they have lived at the Pilands Estate.
- 8.7. Two witnesses have responded to the question as to whether the path was used in the exercise of a private right. These are the applicant and his wife, and they state that they were entering their own property. The claimed route, which runs alongside a tarmac'ed road, taken together are the only way to reach their property from Hamble Lane. Mr. Wilkinson does report in his statement that Mr. Warren of Eastleigh Borough Council did challenge him to show that he had a private right in his deeds to take his vehicle over the tarmac'ed road, and it may be that the same might apply to any right to walk over the claimed route.
- 8.8. All the witnesses report seeing other people on the path, and all of them say that they saw local people and strangers. Seven of the users said that they saw people walking the path and four saw people using bicycles.
- 8.9. The relevant period to be considered in relation to the acquisition of public rights over the claimed route is 1985 to 2005. This is derived from the serving of the notices under the Wildlife and Countryside Act 1981, section 53, on the County Council, alleging that the Definitive Map is in error and

that a public right of way should be recorded on it by means of Definitive Map Modification Order.

- 8.10 Applications to modify the Definitive Map are initially considered under section 31 of the Highways Act 1980. Section 31 requires that the user evidence is analysed to assess whether there is evidence of sufficient unchallenged use to result in a deemed dedication of public rights over a relevant period. This is a statutory period of 20 years, running back from the date when the public's right to use the way has been challenged. A dedication of public rights will be deemed to have taken place if there is sufficient evidence of 20 years' unchallenged use by the public, the use being of a volume capable of coming to the attention of a reasonable landowner. However, a deemed dedication cannot take place if there is sufficient evidence that the relevant owners of the land did not intend to dedicate such a right to the public. Whether there is such evidence will be discussed in the next paragraph, and the question of whether the volume of public use is capable of coming to the landowner's attention will be addressed in the analysis of the evidence.

9) The Landowners:

- 9.1. A statement was provided to the investigation by Mr. Charles Harvey, the Contracts and Negotiations Manager for Eastleigh Borough Council on 10th April 2014. Mr. Harvey also completed a form relating to the ownership and management of the land on 29th January 2014.
- 9.2. The land that the claimed path runs over is owned by Eastleigh Borough Council, who purchased it on 18th July 1952. A copy of title number HP675091 was supplied by the Borough Council, showing that this land was registered on 17th July 2006 at the Land Registry, and refers to a conveyance of 1st April 1953, between Edith Chamberlayne and Winchester Rural District Council. It also records that the tarmac'ed road south of the grass strip, which allows access to the applicant's property, is '*subject to the rights granted by a Deed of Grant dated 16 December 1994 made between (1) Eastleigh Borough Council and (2) Brian...Searles and Violet...Searles*'.
- 9.3. Mr. Harvey confirmed that the Borough Council was the freeholder of the land crossed by the path, and of the land adjoining it to the south, and also that the Council is the occupier of the land. The Council does not regard the claimed path as a public right of way, stating that '*there is no path or other hard ground surface – it is only a grass area*'. The tarmac'ed road alongside the strip of grass is subject to private rights, including for vehicles, is owned by the Council and is not signed as being private. Mr. Harvey points out that this links to two footpaths, round the site of St. Paul's Church.
- 9.4. In answer to the question of whether the Borough Council has seen members of the public using the claimed path, Mr. Harvey has answered no, but adds that the Council '*would be agreeable to members of the public using the tarmac driveway positioned immediately to the south of this land as a footpath as that would then link up to the existing restricted byway*'. Mr. Harvey confirmed that there has been a path along the boundary of 34 Boundary Road, '*allowing residents to access the former garages on the*

Church site. These are *'now demolished'* and there is *'now no physical sign of this path'*. He says that *'the users of the garages had a licence to occupy them, amounting to permission'*.

- 9.5. He confirms that it is *'private Council owned land'* and that *'no rights of way granted over the land nor any request directly made to Eastleigh Borough Council as landowner'*. No members of the public have ever been stopped or turned back, and the Council has *'not witnessed anyone walking over the land'*.
- 9.6. There have never been any gates across the claimed path or notices put up. Mr. Harvey understands that *'a hedge was historically located across the route of the claimed pathway although this no longer exists on site'*. The grass has been maintained by the Borough Council's grass cutting service 'Street Scene' *'under its contract procedure'*. The contractor has been *'cutting the grass regularly for many years, about once every four weeks'*.
- 9.7. Mr. Harvey supplied copies of documents already discussed at paragraph 7.7 which he says demonstrate that *'this grass land was never subject to adoption'*; nor was it fenced at any time.
- 9.8. Mr. Harvey states that *'nothing has been done to prevent people from using this strip'*, and that *'there have been no signs denying a right of way on this land, because there has been no reason to put any there'*. *'No-one from the Parish Council has contacted Eastleigh Borough Council about any problems with this piece of land, and none of the people mowing the land have reported anything when they have been working there.'*
- 9.9. Mr. Harvey has not been aware of any problems, such as parking of vehicles on the land, though there are parking issues elsewhere on the estate. He has not himself seen anyone using the land. There is no worn path, and he draws attention to the planning application document which asserts that no right of way has been established over the grass strip (see paragraph 7.7).

10) Consultations with other bodies:

- 10.1. The following persons and bodies have been consulted about the claim: Eastleigh Borough Council, Bursledon Parish Council, the local Member Councillor Keith House, the Open Spaces Society, the Ramblers, the Byway and Bridleway Trust, Hampshire County Council's Area Countryside Access Manager (South), and Highways Management. At the time of writing, the following responses have been received.
- 10.2. A response was received from the Principal Engineer of Hampshire County Highways indicating is the view of **Hampshire Highways** that *'part of the land which the application covers is public highway'*, and he has provided a copy of the adoption plan showing the adopted highway in red. Up to the shrub bed, the land is shown on the plan as adopted, according to their records.
- 10.3. The response of **Eastleigh Borough Council** to the consultation forms the context material for the background information, contained in paragraph 5.

- 10.4. The local Member is aware of the application.
- 10.5. No other comments have been received.

11) Analysis of the evidence:

11.1. The documentary evidence does not provide evidence of a historical origin to the claimed path, and thus the application must turn on evidence of use on foot in recent years.

11.2. For section 31(a) of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:

- the physical nature of the path must be such as is capable of being a right of way at common law
- the use must be 'brought into question', i.e. challenged or disputed in some way
- use must have taken place without interruption over a period of twenty years before the date on which the right is brought into question
- use must be *as of right*, i.e. without force, without stealth and without permission
- use must be by the public at large
- there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

11.3. Physical nature of the path

Dealing with the criteria as listed above, 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. (Questions such as need, suitability and safety cannot be considered during this investigation, and do not assist in the determination of the question of what public rights can be said to subsist on the way.)

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

There is one event which could be said to bring the public's right to use the way into question, namely:

- The serving of notices by Mr. Wilkinson on 18th October 2005, under section 53 of the Wildlife and Countryside Act 1981 on the County Council, as the Highway Authority, alleging that the Definitive Map is in error in not showing the claimed path as a public footpath.
- This criterion has been satisfied.

11.5. Twenty years' use without interruption

There appears to have been use on foot in every year between the earliest use recorded in the evidence graph in 1954 to 2005, when the user evidence forms were completed. The evidence in the forms and statements indicates that there has been some use in each year between that date and the bringing into question of the public's right to use the way. There is no evidence from witnesses of obstructions preventing use, or of any closures.

11.6. '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.* None of the witnesses reports having to climb, or jump, over anything to gain access to the path on foot. Use that continues after it has been made clear to the public that the landowner does not wish them to use the path also falls under this heading, in that it is contentious. The representative of the landowner, Mr. Harvey, confirms that no actions were taken to let members of the public know that they should not use any path over the strip of land, and therefore this part of the legal test appears to have been met.

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 who filled in forms or gave statements appear to have seen others while using the path on foot, and these were mainly locals, and all saw walkers. It appears that their use was quite open. There is no reason to believe that any of the use in the relevant period was by stealth. However, what level of use is required to meet this test when the landowner is, in effect, an absentee, is a question that is discussed later in this report, at paragraphs 11.7 and 11.13.

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. Two users (Mr. Edwards and Mrs. Poynter) were tenants of Eastleigh Borough Council, all the time that they have lived on the Pilands Estate, and their use of the claimed path must be discounted, on the grounds that they effectively had permission. The applicant and his wife reported using the footpath in the exercise of private rights, and it appears that they had a private right, including with vehicles, over the tarmac'ed road to the south, to reach their property. This is confirmed by Mr. Harvey of Eastleigh Borough Council, though the existence of private rights over the road was questioned by his colleague, as reported by the applicant. If the claimed path was the only route by which Mr. and Mrs. Wilkinson could reach their property on foot, it might be that their use of it was with private rights, but there is an alternative route alongside, and therefore a question hangs over their use and whether it qualifies. There were nine forms accompanying the application, on which only seven users who provided dates for their use. Two witnesses certainly walked the path with permission, so there are only five users that have put forward evidence that qualifies for the acquisition of public footpath rights on this path during the relevant period, and two of those may have been exercising private rights.

11.7. 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.*

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

graph shows that use on foot commenced in 1954 with one reported user. Use increased slightly from the 1970s, with 3 users over the decade, and 5 from 1980 up till 2005, when the forms were completed. Two users did not provide start and finish dates, so that use cannot be included in the graph, though they have used it. In relation to the relevant period, it seems on balance that there were 9 users as a maximum figure, even when use was heaviest. It is not known what proportion of *actual* use these 9 forms represents.

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.

It has already been noted above that 2 people were tenants of the Eastleigh Borough Council and their use during the periods of their tenancies must be discounted. While it can be said that evidence taken from users living at a number of addresses might be felt to carry more weight than evidence from the same number of users living at one address, there is nothing to suggest that evidence should be taken from only one user at an address. The location of the claimed path at the edge of a large estate, close to a major access road, is such that there would potentially be a large number of users of the claimed way. Officers feel that there may not be enough users to raise the presumption that a public right of way on foot has been acquired over the path, on the balance of probabilities because the number of users providing evidence is low, in the context of a housing estate.

11.8. What can be understood from this evidence is that local people have been using the claimed route on foot from 1954 onwards, for recreational and exercise purposes. The bulk of public use falls from 1980 until 2005. User continues. On the face of the material discussed, the user evidence submitted with this application, on the balance of probabilities, it is not clear that the public have acquired public rights over the strip of land between Boundary Road and St. Paul's Church car park, in the parish of Bursledon. In any circumstances, dedication of a public right of way will not be presumed if there is sufficient evidence that the landowners did not intend to dedicate the path as a public bridleway. Therefore, the evidence put forward by the owners must now be examined.

11.9. Actions by landowners

The landowner, Eastleigh Borough Council, took over the Pilands Estate in Bursledon in 1974, and has, in essence, been an absentee landlord, in that there is no resident manager or member of staff on site. Prior to that date, the Estate was owned by Winchester Rural District Council, which was equally an absentee landowner. No instructions have been given by Eastleigh Borough Council to staff to turn members of the public away from using the strip of land. Indeed, a path with a tarmacadamed surface had been provided (still detectable against the boundary fence of the neighbouring property) to allow those residents with garages at the rear of Boundary Road a means of reaching them, before a section of the site was redeveloped as St. Paul's Church. Use to reach the garages by Eastleigh Borough Council would have been in the exercise of a private right, and would not qualify for the acquisition of a public right. The Contracts and

Negotiations Manager has stated that no signs prohibiting use or indicating that there is no public right of way over the land were ever put up, and the land has not been fenced at any time. There have been no annual closures, notices that use is permissive and can be revoked at any time, and no submission of a section 31(6) declaration under the Highways Act 1980 to demonstrate that there was no intention to dedicate public rights over the land.

- 11.10. The strip of land was maintained, in that it was mowed regularly by EBC staff, firstly at an interval of every four weeks, and latterly about every seven weeks. The staff were in a position to see users, but the Manager received no reports of public use from them, and they had not been instructed to turn such users away.
- 11.11. Only the applicant reports being challenged by an Eastleigh Borough Council employee, but this was in connection with his right to use the tarmac'ed road to his property, and not in connection with the path. No users report being stopped, or being told that the path was not a public footpath. This supports the view that the landowners did nothing to prevent public footpath rights being acquired.
- 11.12. Members may find evidence that the path is a footpath, and no evidence that the landowners didn't intend it to be one.
- 11.13. It would be expected, at this point in a report on an investigation that it would be possible to come to a clear-cut conclusion about the legal tests and whether the presumption of a dedication after twenty years' use is correct, having examined the evidence under the tests set out in section 31 of the Highways Act 1980.
 - The user evidence does suggest that the route has been in use by the public without challenge for the required duration of time. However, given the extent of the Pilands Estate and the proximity of a major road accessing the estate, the submission of only nine completed user evidence forms to support the allegation of the acquisition of public footpath rights poses a difficulty. The type and volume of use by the public is expected to be sufficient to come to the attention of 'a reasonable landowner'. The landowner had no presence on site and has offices situated 6 miles away.
 - With such a large pool of potential users on the doorstep of the land, it is surprising that only 9 forms have been submitted in support. The applicant was invited to supply more evidence of use, but has not done so. In an urban setting, it may be that there does need to be a larger volume of users to meet the requirements of the volume test, particularly when the landowner is absent, than might be required in a rural setting, where there are fewer potential users.
 - By doing nothing to show the users that there was no intention of dedicating any public rights over this strip of land, the freeholder was taking a chance. In the event, the owner's application for planning permission appears to have given rise to this claim.
 - While it could be argued that a legal test ought to apply equally to all circumstances, and it might not be fair to expect an applicant to supply a very much large number of user evidence forms (a) because they are in an urban setting and (b) because the landowner

is absent, the basic test is that use is of a type and volume to be able to come to the attention of a reasonable landowner. It is for the applicant to organise his or her own evidence gathering. The applicant has tendered no more evidence than the original 9 forms, the use recorded on two forms has had to be disregarded because it was by tenants, and the use of two others is possibly with private rights. The fact that the landowner did nothing to show the public that it did not want public rights to be acquired may indicate indolence, or may show that the volume of use was not sufficient to come to its notice. Eastleigh Borough Council has made it clear that they did nothing to protect the land as a choice.

- On balance, officers do feel that 9 forms in a setting where there were undoubtedly a large number of people who might actually have been using the path but for which there is no direct evidence, does not support the conclusion that a deemed dedication has taken place. On the evidence before this investigation, the user does appear trivial and sporadic in nature. Therefore officers conclude that the available evidence does not meet the legal test of 'use by the public'.

11.14. 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 on foot. 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.

11.15. 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 user must be obvious to the landowner, 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.

11.16. There is no evidence of user on which Members could find that a dedication has taken place under common law. The Negotiations and Contracts Manager of Eastleigh Borough Council was not aware that any use by walkers was taking place. The ignorance of the user by the public on the part of the freeholder means that the requirement that the landowner in some way acquiesced in this use cannot be demonstrated.

12) Comments by the Applicant and Landowner:

12.1. At the time of writing, no comments have been received from either the applicant or the landowner.

13) Conclusions:

- 13.1 There is evidence that some members of the public have walked on foot on the land in the ownership of Eastleigh Borough Council. The landowner, situated some way from the land, has done nothing to indicate to members of the public that there is no intention to dedicate public rights on the land. However, the volume of use captured (9 user evidence forms, with a maximum of 7 possible qualifying users) in its context would appear to be trivial and sporadic, and therefore does not qualify under the provisions of the Highway Act 1980, because it was insufficient to come to the attention of the landowner and does not meet the 'use by the public' test.
- 13.2 The application cannot succeed under common law, because the requirement that the landowner acquiesced in the use cannot be shown.

14) Recommendations:

- 14.1 That the application to record on the Definitive Map a public footpath from Boundary Road to St. Paul's Church car park, in the Parish of Bursledon, be refused for the reasons set out above.**

CORPORATE OR LEGAL INFORMATION:

Links to the Corporate Strategy

| | |
|--|--------|
| Hampshire safer and more secure for all: | yes/no |
| | |
| Maximising well-being: | yes/no |
| | |
| Enhancing our quality of place: | yes/no |
| | |
| OR | |
| <p>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.</p> | |

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.)

(Quote list of documents here: e.g. list the relevant letters, memos, etc. and their location)

Document

Location

File CR 886

Countryside Access Team Office,
Room 0.01, 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.

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.