

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	15 July 2015
Title:	Application for a Definitive Map Modification Order to record public footpaths between King's Farm and Arnewood Drive, Hordle
Reference:	6777
Report From:	Director of Culture, Communities and Business Services

Contact name: Harry Goodchild

Tel: 01962 846044

Email: harry.goodchild@hants.gov.uk

1 Executive Summary

- 1.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record public footpaths over land at King's Farm, Hordle. The claim is supported by user evidence which the applicant believes demonstrates that the public have acquired rights through long use without challenge.
- 1.2 It is considered that the evidence submitted in support of the application is insufficient for it to be inferred that, on the balance of probabilities, the claimed routes should be added to the Definitive Map. The application is therefore recommended for refusal.

2 Legal framework for the decision

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

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

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

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

b) the expiration... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way [to which this Part applies]
- ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
- iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

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

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

PRESUMED DEDICATION AT COMMON LAW

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

3 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 claim was submitted in March 2006 by **Mr Kenneth Aitken**, a resident of King's Farm Lane, Hordle.

5 Landowners

- 5.1 Philipson Estates
King's Farm
King's Farm Lane
Hordle
SO41 0HD
- Mr Michael and Mrs Margeret Shore
223 Everton Road
Hordle
SO41 0HE

Dorrienne Clarke
Fairoaks, 221 Everton Road
Hordle
SO41 0HE

Mr Vernon Holloway
Follys End, Everton Road
Hordle
SO41 0HE

Fiona Slee
The Beeches, Everton Road
Hordle
SO41 0HE

- 5.2 The landowner most affected by the application is Philipson Estates, which owns King's Farm (through which the majority of the claimed routes run). The remaining landowners listed above have an ownership or private access interest in Arnewood Drive. All parties have been given an opportunity to comment on the application, but only Mr Murray-Philipson of Philipson Estates has responded. As the majority landowner, it is the actions of Philipson Estates which have been assessed in reaching the recommendation.

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

- 6.1 Shortly before the application was lodged with the County Council, the majority of the claimed routes were blocked off to the public, and since then their character has changed. The routes originally claimed by Mr Aitken comprised of two paths, both originating at King's Farm (Point B on the Committee Plan). One ran northwards along a grass path between two fields to Point D, whereafter it crossed the field on its eastern side to meet Hordle Footpath 739 (Point F). The other route, again a grass path bisecting an agricultural field, ran eastward to meet Arnewood Drive (Point G).
- 6.2 Upon receipt of the application in 2006, it was observed that neither route made a southwards connection with a public highway, invited Mr Aitken to amend his application to show how both routes might have been accessed from the south. Mr Aitken submitted a revised plan within two weeks, this time including access points between Points A – B, and G – H. Both roads are metalled, and the southern section of each is recorded on the List of Streets). An additional link

between Points D – E, forming another connection north-westwards across the field to Footpath 739 was also included, but the original link between D – F was left out of this submission.

- 6.3 Despite the variation in the submissions received from the applicant, as the user evidence provided indicates that all routes have been walked at some point, the view was taken that the question of public rights over all routes should be investigated.

7 Background to the claim

- 7.1 According to the witnesses who provided evidence of their use, access to the claimed routes was first brought into question in August 2005, when notices appeared at King's Farm advising that they were not public footpaths and that the access would be restricted. According to the applicant, access was then blocked off in January 2006, when new gates and barriers were erected on the farm which were locked during evenings and weekends. It would therefore appear that all public access to the claimed paths ceased at this time.
- 7.2 During the investigation of this claim, it has been difficult to substantiate the accounts of users of the path. Two of the witnesses have died since providing evidence (although they were interviewed shortly after the claim was submitted), whilst another has moved away from the area. Other witnesses have not responded to invitations to speak about their use of the paths, meaning that only the user evidence forms they completed in 2006 (forms which, although useful in establishing periods and frequency of use, only provide basic information) can be evaluated. This means that some of the questions that have arisen during the investigation regarding public use have not been able to be addressed.

8 Issues to be decided

- 8.1 The issue to be decided by this committee is whether there is evidence to show that, on the balance of probabilities, higher rights than those currently recorded subsist, or are reasonably alleged to subsist, on the routes shown on the Committee Plan.
- 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 route point to it having public rights as a result of dedication in the near or distant past. 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 Countryside Access Team. Members are invited to inspect these, or the originals, when considering this report.

9 User Evidence

- 9.1 No historical documentary evidence has been discovered that would support the dedication of a right of way over any of the claimed routes. The routes appear on Ordnance Survey County Series maps dating from the late 19th century, but in all cases (except for Kings Farm Lane, which is listed in the Book of Reference accompanying the First Edition as an 'Occupation Road'), the paths are shown as having the same status as the surrounding land (mostly arable), and no status can be inferred based on this evidence. As a result, the application must be considered based on the evidence of use by the public under Section 31 of the Highways Act 1980, or under common law.

- 9.2 There is evidence to suggest that at least some of the routes have been used by the public since the early 1950s. The evidence is comprised of eight user forms (which are depicted in the chart at Appendix 1) and three supplementary statements, all of which are summarised below.

9.3 Mr Kenneth Aitken (completed statement in 2015)

Mr Aitken moved to Kings Farm Lane with his wife in 2000, at which time his use of the claimed paths began. Neighbours had advised him that they had used the routes, and he saw other local people walking them as well (usually dog walkers, occasionally families), although this use was sporadic – perhaps one or two times per week. Although on his evidence form Mr Aitken stated that he walked the routes on a weekly basis, when interviewed he thought that his use was limited to 2-3 times per year, usually coinciding with visits from his grandchildren (it is this more detailed account that has been used when evaluating Mr Aitken's evidence).

Mr Aitken's use was spread evenly between route A-B-D-E or A-B-D-F and route A-B-G-H. As he recalls, both routes were worn grass paths (which had been allowed to become overgrown in recent years), each with an estimated width of 10-12 feet and maintained to a basic standard by the farm, which he presumed was to allow access to the surrounding fields.

Mr Aitken recalled that a gate had always been situated at Point G (Gate 3 on Committee Plan 2), with gaps at the side enabling pedestrian access (he said this gate is now kept locked, but it is not clear whether it was locked during the relevant period). A gate allowing access onto the east/west path (Gate 2 on Committee Plan 2), which had hitherto been either left open or simply closed on a latch, was first locked in late 2005 (the first challenge to Mr Aitken's use of the routes that he can recall). When people then started climbing over this gate, barbed wire was added around the top, and when people then tried to access

the route via a hole in a nearby hedge, this gap was filled by newly planted saplings. A similar process was undertaken on route B-D, with an existing gate being replaced by a new gate and fence at Point C (Gate 4 on Committee Plan 2) in around late 2006. Prior to this, Mr Aitken's use was never challenged by successive site managers, whom he identified as John Caines and Colin (surname unknown), nor was permission to walk the routes sought from them.

Mr Aitken does not recall seeing any signage along any of the routes prior to 2005 (there is now a 'no trespassing' sign at the southern entrance to King's Farm but this appeared in 2009). In his view, the restriction of access was not imposed aggressively and was not directed towards pedestrians; rather he believes it was prompted by fears over security after a break in resulted in stolen property and equipment at several of the units. However, he does recall being warned by a local resident that they had been advised while walking on the land that they were trespassing and that if they continued to do so they would face more serious consequences. Once Mr Aitken gained the impression that it was inappropriate for him to continue using the routes sometime in 2006, he stopped walking them.

9.4 Mrs P Bishop (completed form in 2007)

According to the detail on her form Mrs Bishop began walking at King's Farm in 1960, and her use continued until 1992. On the map accompanying her form, she indicated that she had walked routes A-B-C-D-E and B-G. She estimated a frequency of use of around 50 times per year, and stated that she saw other people using the routes on foot.

Mrs Bishop did not recall encountering any obstructions or meeting with any challenge during her use of the routes. She recalls that she used to take her aunt to King's Farm to buy young plants from the farm shop, and recalls that access to the paths was not restricted.

9.5 Mr P Clark (completed form in 2006)

Mr Clark confirmed use of route A-B-C-D-F between 2002 and 2005, at a rate of 300 times per year. The walk was, according to Mr Clark, part of a round trip to the paper shop at Everton whilst walking the dog, during which he stated he saw other people walking the routes. He stated that he passed through gates, and that these had been locked in the weekend prior to him completing the form (January 2006). He marked the location of one gate on the plan accompanying his form (Gate 4).

In late 2005, Mr Clark states that notices appeared on the farm advising that access was about to cease, and claimed that they disappeared soon afterwards when he advised the land agent that they were 'not official'. At the time he completed his form, access to the farm's car park had apparently been obstructed on Saturday afternoons and all day Sunday.

9.6 Mr Timothy Perkins (completed form in 2005)

Mr Perkins stated that he walked variously along G-C-D-E and G-C-D-F on a daily basis for recreation and observing wildlife from 1980 until 2005, when a notice appeared on the farm that read "*Attention dog walkers, this is not a*

footpath for walking dogs and the track will be fenced off in the near future.” Mr Clark states that this notice appeared in August 2005 - his use ceased soon after this in September 2005. He also saw other people when walking the routes.

Mr Perkins did not respond to an invitation to be interviewed about his use of the paths.

9.7 **Mrs Barbara St. John** (completed form in 2005, made a statement in 2007)

Mrs St. John stated that she had walked routes C-D-F and B-G at a frequency of 80 times per year, between 1956 and 2005. When interviewed in 2007, she claimed that she had walked routes A-B-C-D-E (as well as A-B-C-D-F when crops blocked access to Footpath 739) and, less frequently, B-G-H.

Mrs St. John stated that, at the time of the interview, she had lived at Sky End Lane (opposite Kings Farm Lane) for 64 years. Her father had been a farm labourer who worked at Batchley Farm just north of Everton. When she was a child King’s Farm was used for rearing pigs – there were no signs or gates to indicate that public access was prohibited. Since the age of 14 she had been for recreational walks (about twice a week) with her family in the King’s Farm area, and as an adult she continued to walk the paths at a rate of about four times per week.

According to Mrs St. John, there always used to be a field gate at Point B (Gate 1), but it was always left open. She also confirmed the existence of a farm shop near Point C. After this closed in the 1990s the building was used to sell garage doors. Because shop owners were having break-ins a five bar gate was installed at the side of the building, but there was a gap for pedestrians to walk through on both sides (Gate 4). The path between C-D was enclosed on both sides with a wire fence to keep animals in, and at Point E there was a stile that led on to the public footpath.

In 2005, Mrs St. John heard that other walkers had been stopped by an employee of the farm called Colin (although he never stopped her). Towards the end of that year, hand-written notices appeared on gateposts saying *‘Attention dog-walkers, this is not for walking dogs and this track will be fenced off in due course’*, or words to that effect. By early 2006, a new gate had been installed near Point C (Gate 4) that left no room for pedestrian access, and round the same time the gate was locked between B-G (Gate 2). It was at this time that Mrs St. John’s use of the paths ceased.

Mrs St. John also provided a photograph, taken in April 2005, looking north from Point C. In it, a well-worn earth path is visible on the grass strip running between the fields.

9.8 **Mr R Stephens** (completed form in 2007)

Mr Stephens declared use of routes A-B-C-D-E and B-G at a rate of twice per day between 1975 and 2007. He stated that while using the paths he passed through gates, which were, until ‘recently’, unlocked. He also recalled that at this time, barbed wire that was placed on top of Gate 2, and added that large branches were placed in such a way so as to render access through Gate 4 more difficult. He marked the location of these locked gates on the plan accompanying his user form, as well as Gate 3.

Mr Stephens stated that he had sought permission to use the route from the farm manager, Trevor Parsons, in 1985, and again from the landowner, Mr Murray-Philipson, in 1990. More recently, he recalled that Colin the farm employee had advised him that the route was not public, but because he had been walking the routes for so long, his use was accepted.

Mr Stephens did not respond to an invitation to be interviewed about his use of the paths.

9.9 **Mrs E Sweet** (completed form in 2007)

Mrs Sweet gave evidence of use over routes A-B-C-D-E and A-B-G-H between 1985 and 2003, on a daily basis, primarily to walk her dog. She said that she saw other people while walking the routes. She stated that her use had never been obstructed, but recalled recently seeing locked gates at the farm (she also marked the location of three gates on the plan accompanying her form (Gates 1, 2 and 4). Her use was never challenged, but like Mr Stephens, she confirmed that she sought permission to walk the routes from the then farm manager Trevor Parsons.

9.10 **Mrs W Todd** (completed form in 2005, and a statement in 2007)

Mrs Todd completed a user evidence form in 2005, and was then interviewed in 2007 (although she omitted to sign the resulting statement). She moved to Hordle with her husband in 1959, and owned a hardware shop on Everton Road. The managers of King's Farm were among their customers. In her form of 2005, Mrs Todd confirmed use of routes B-C-D-F and B-G, but when interviewed in 2007, she advised that her use had included routes A-B-C-D-F (or when the route was not cleared of crops, A-B-C-D-E) and to a lesser extent, B-G-H. From the time she moved to Hordle she walked the claimed paths at King's Farm about once a week with her children. She saw other people whilst using the routes. On her form she advised that there were gates on the land that were locked, but which had gaps to the side which enabled pedestrians to walk through. She did not specify the locations of these gates.

Mrs Todd stated that access was first challenged in or around August 2005, when notices went up at the farm stating that the routes were not for dog walking. She also confirmed that men working in the industrial units had once told her that the routes were not public, but did not say when this was. Mrs Todd also commented that legitimate access over Footpath 739 had been discouraged by the farm owners by ploughing and the planting of crops every autumn.

10 The Landowner

10.1 The owner of King's Farm, and as a result, the landowner most affected by this application, is Mr Hylton Murray-Philipson of Philipson Estates, who has owned the land for 30 years. When consulted on the application, he wrote to the County Council to state that he refuted the suggestion that he had at any time given anyone permission to walk across his land, citing recent break-ins, thefts and arson at the farm as reasons for resisting any attempt to add to the area's rights of way network. The County Council also received statements from two people

who, between them, managed the farm on Mr Philipson's behalf between 1971 and 2005 – these statements are detailed below.

- 10.2 **Mr Trevor Parsons** lived at King's Farm and managed the farm and its surrounding lands between February 1971 and August 1991 as manager of the Philipson Estates. He claimed that during this time, no member of the public ever had permission to walk on any of the claimed routes, and for most of the time those routes were used for taking livestock to the farm buildings for milking. Mr Parsons states that no general right of access existed or was ever granted (and that he was not in a position to grant such a right). He recalls very few occasions when members of the public left Footpath 739, and cannot recall anyone walking between Points D – C or B – G, though access from Everton Road was frequently used by the public for the purposes of visiting the farm shop. Gates were kept closed at Point D and at Point G (Gate 3), with the gate at G mostly kept locked.
- 10.3.1 **Mr Michael Sandell** acted for Philipson Estates in his capacity as a Partner/Consultant of Fisher Hoggarth Chartered Surveyors (now Fisher German). Fisher Hoggarth was appointed to act for Philipson Estates in 1990. From this date until 2005, Mr Sandell was responsible for managing property belonging to Philipson Estates. This included King's Farm - Mr Sandell would visit the farm up to eleven times per year, in each case for an entire day.
- 10.3.2 Mr Sandell stated that four gates were erected between 1990 and 2005 on route B - G (although Mr Parsons also mentioned a gate at Point G, suggesting it was there before Mr Sandell began managing the farm). A field gate was erected which allowed access across Arnewood House Drive to the farmland which was occasionally locked (Gate 3), as well as another which controlled access to the field on the east side of Arnewood House Drive. Following concerns expressed by tenants of the piggery units relating to trespassers and incidents of theft, he arranged for a field gate to be erected at next to these buildings (Gate 2), complete with a padlock so that this gate could be locked every night by the last tenant leaving the units and reopened the next morning. He also arranged for a gate to be erected near Point B shortly after a break-in at the former farm shop (Gate 1), so as to try to control access to the parking area adjoining this building out of hours.
- 10.3.3 There were up to eight tenanted commercial units operating from the former farm shop and the piggery units between 1992 and 2005, and access was required by the public on a daily basis as goods were sold from these units. Mr Sandell states that in the years following 1992 the farm shop at King's Farm was operated as such, with access for farm shop customers being via King's Farm Lane to the car park adjoining the farm shop only.
- 10.3.4 Mr Sandell was not aware that any member of the public had ever been granted permission to walk any of the claimed routes, save for a brief period when the occupiers of Arnewood House were granted access whilst their drive was being repaired. He recalled seeing the occasional person walking on the claimed routes, but not with consent, and in such instances he would warn them that the routes were not public. He states that from his experience at that time the routes did not appear to be used daily.

10.3.5 Colin Vaughan of Bashley Plant Hire was tenant of a large building at King's Farm. He regularly undertook contract work on the land, based on Mr Sandell's instructions, including tractor work, improving access to the farm, fencing and general maintenance work. He would help in the control of trespass and when he saw dog walkers he would ask them to leave the land.

10.3.6 Mr Sandell also explained that in addition to the commercial units there were other buildings at King's Farm, including the farmhouse, Yew Tree Cottage and up to 17 commercial units let in the former farm buildings - in total there were 25 tenanted commercial units and two dwellings which had permitted access directly from Everton Road via Kings Farm Lane.

10.4 **Mr Christopher Snow** worked on King's Farm for Philipson Estates between 1976 and 1994, and between 1991 and 1994 was a tenant at Yew Tree Cottage, situated on the farm. His main duties during this time involved using a tractor to work in the fields. During this time, he claimed that the only users of Section A-B (King's Farm Lane) were owners of properties that fronted onto the lane.

Mr Snow confirmed that there were gates positioned next to the farm shop and on the lane, and also provided a map showing gates at Points D and E. He was not aware that anyone was ever granted permission to walk the routes, and never received any instructions regarding the claimed paths. He did not involve himself in matters relating to public access to the claimed routes.

10.5 On 8th August 2005, Fisher German, agent for Philipson Estates, wrote to the County Council to ask that they attend to the matter of waymarking those rights of way which ran through their client's land (which had not, in their experience, always been clearly waymarked). They also advised that once this had been completed, it was their intention, on behalf of the landowner, to deposit the necessary plans and statements under Section 31(6) Highways Act 1980 to clarify what public rights of way were acknowledged by the landowner. On 10th August 2005, Fisher German wrote again to advise that further to their previous letter, they had visited the area that week and in a short space of time encountered three different people who had lost their way trying to find a bridleway. Further to this correspondence, the then Rights of Way Field Officer met with representative of Fisher German on site, and subsequently arranged for the routes crossing the estate to be signposted and waymarked.

11 Consultations with Other Bodies

11.1 The following people and organisations have been consulted on this application: Rambler's Association, Auto Cycle union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, Hordle Parish Council, New Forest District Council, County Councillor Alan Rice, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager). Responses are shown below.

11.2 Ramblers' Association

The Footpath Secretary for the area states that the logic of the application is self-evident, as it provides a link between residents of Hordle and Footpaths 739 and 740, and several more footpaths besides. He stated that route B-G 'is well walked', but that the route between Points D and E is currently sown with winter

wheat and there is no sign of the track (or of Footpath 739), mainly due to the installation of the gate at Point C.

11.3 Cyclists' Touring Club

The CTC supports the application.

11.4 Area Countryside Access Manager

The Area Manager knew of no information relevant to the claim.

11.5 Hampshire Highways

Hampshire Highways knew of no information relevant to the claim.

12 Analysis of the evidence

12.1 As has been established, no historic documentary evidence has been discovered to support the acquisition of a public right of way, and so the application must be considered on the evidence of long use under Section 31 of the Highways Act 1980, or under common law.

12.2 **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
- 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

12.3 Physical nature of the routes

Despite the variation in their surfaces, it is considered that each of the paths is capable of being a right of way at common law. Both sections A-B and H-G have a metalled surface, whilst sections C-D and B-G followed worn grass paths (at least at the time the application was submitted). Even on sections D-E and D-F, it is possible to discern a worn path on aerial photography dating from 2005, around the time the application was made.

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

Whilst the landowner contends that gates were locked on regular basis, this is not reflected in the user evidence, and so it is difficult to infer when use might have been challenged based on this evidence. Mr Aitken's application of March

2006 would appear to have been the latest action which called public use into question, but several accounts amongst the user evidence suggest that notices challenging public access went up on King's Farm in or around August 2005, and so using this as a basis for the 'relevant period' (being the twenty years leading up to the date public use was called into question), the period of use that must be examined is 1985 - 2005.

12.5 Twenty years' use without interruption

There is a conflict in the evidence relating to this issue. The user evidence shows that at least some of the claimed routes have been walked every year between 1956 and 2006, with the bulk of the use taking place after the mid-1970s. This same evidence also indicates that there were no obstructions that restricted access on any of the claimed routes, with the first locked gates appearing in early 2006. However, the evidence submitted by the landowner contradicts these accounts, with both Mr Parsons and Mr Sandell asserting that the gate at Point G was frequently locked throughout the relevant period. Mr Sandell also states that the gates erected on at Points B and X were locked 'out of hours'.

12.6 'Without force, stealth or permission'

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

Current DEFRA guidelines describe the use of force as including *the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate*. Mr Aitken recalled the existence of a gate with gaps to the side at Point G (Gate 3), which enabled him to walk through, whilst Mrs St John recalled a gate with similar access at Point C (Gate 4). Mrs Todd stated in her user evidence that "*gates were locked but pedestrians could walk round the side*". Furthermore, Mr Stephens and Mrs Sweet both referred to the existence of Gates 2, 3 and 4 and so it is reasonable to assume that they encountered a similar scenario when walking the routes. The submissions of Michael Sandell indicate that all of the gates on the farm were locked at least occasionally, with Gates 1 and 2 being locked each evening and on weekends prior to this date. If this was the case, this could be seen as a clear demonstration to any members of the public entering the land (although perhaps to a lesser degree in the evening) that access was not permitted. Although no specific dates for the installation of any of the gates have been given by either users or landowner's representatives, Mr Sandell indicated that all were installed during his tenure (ie between 1992 and 2005), and the available evidence suggests that Gates 1, 2 and 3 were all in place during the relevant periods. On balance it is considered that, under the above definition, use by the public was 'by force'.

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.

Use of the routes appears to have been open and without stealth and all witnesses reported seeing other members of the public. Given that the claimed routes converge at the centre of King's Farm, it is reasonable to expect that their frequent use by the public would not have gone unnoticed by farm employees, but the accounts of Mr Sandell and Mr Parsons make it clear that only occasionally did they witness any members of the public walking anywhere other than on existing public rights of way. The existence of a shop and numerous commercial units at the heart of the farm may have made it harder for those

managing the farm to distinguish between people visiting these premises (in the exercise of a private right) and those who were actually walking the claimed routes.

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

Here again there is an inconsistency in the evidence. Two users, Mr Stephens and Mrs Sweet, state that they had obtained permission, and given that they were able to name Mr Parsons as the person from whom permission was obtained (and in Mr Stephens' case, Mr Murray-Philipson as well). It is reasonable to assume that both believed such permission had been granted. However, the landowner and his employees deny that permission to walk the routes was ever given to any member of the public. It has been impossible to ascertain the truth of the matter, but if permission was granted, it would serve to weaken the application, as use by these two witnesses would then not have been 'as of right'.

12.7 Use by the public

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

12.7.1 *The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.*

Here the number of users in each year needs to be considered. According to the user evidence, the first use of the path was in the 1950s, and by 1975 four people were using the route. By the mid-1980s the number of users had increased to six people. The final two witnesses commenced their use after 2000, in the last five years of the relevant period. Of the eight users, the frequency of use varied significantly – three users stated that they used the paths at least once per week (although this includes the applicant, who when interviewed more recently indicated that he'd used the routes much less frequently). Another witness stated they had used the route approximately 80 times per year, whilst the remaining four witnesses all gave frequencies of at least 300 times per year (with one giving a frequency of twice daily). Despite the relatively low number of users, the frequency of use by these eight people appears to be of a significant level. However, it is considered that there are a number of factors which affect the strength of this evidence.

12.7.1.1 As has been established at 12.6, two of the most prolific users of the paths, Mr Stephens (twice daily) and Mrs Sweet (once daily), stated that they had sought permission from the landowner to use the routes, which covered a significant period of their use within the relevant period. Whilst the extent of any agreement is unclear, if their use was with permission this would mean that their use was not 'as of right'. Such use would not meet the requirements of Section 31, and as a result could not be taken into account when determining the application.

12.7.1.2 The user evidence makes it clear that some of the routes included in the application have been walked more than others. Only three users stated that they had walked between G-H, with the same applying to D-F. It is apparent that all

witnesses walked the line between C-D, but not everyone continued along the same line thereafter, with use spread between A-B and G-H to the south, and D-E and D-F to the north. It is unclear how use was spread between the various routes walked by each witness, but inevitably where numerous routes have been specified by each witness, the frequency of use given on forms will have been diluted (both Mrs Todd and Mrs St John said in their statements that they had walked B-G less frequently than the north-south route).

12.7.1.3 Public access to the farm appears to have been commonplace due to the presence of commercial units and a farm shop on site, and it could be argued that this would have rendered public use of the claimed routes less apparent than might otherwise have been the case. This notwithstanding, given the setting of the claimed routes - in close proximity to a large number of residential properties in a village the size of Hordle (some 1660 dwellings according to the website of the parish council) - it could be argued that the evidence of use put forward is not of a volume that is sufficient for the acquisition of public rights to be inferred. In his evidence, Mr Snow observed that most of the people who walked Section A-B lived on Kings Farm Lane – whether or not this was the case, it is interesting to note that at the time the application was made, seven of the eight witnesses lived within a few hundred metres of the claimed paths, suggesting that the routes were known only to those living in the immediate vicinity, rather than by the wider public. It is arguable that such a limited spread of user is not considered to be sufficiently representative of ‘the public’.

12.7.1.4 The relatively small amount of detailed evidence relating to public use of the routes makes evaluating the strength of the application difficult. When discussing his use of the path in more detail, Mr Aitken ventured that rather than walking the routes weekly, as had been recorded on his form, he had in fact walked them much less frequently, at a rate of about 2-3 times per year. Given the apparent conflict between the submissions of the users and the landowner, it would have been of preferable to have interviewed more users in order to explore the assertions on their forms, but as previously stated, this has not been possible. Given the limitations inherent in user evidence forms, their evidential weight is less than that of a detailed witness statement, and the low number of forms provided amplifies the absence of sufficient evidence of the volume of use.

12.7.2 *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.*

No witnesses report having had any connection to the landowner. In her user evidence form, Mrs Bishop mentioned that she used to regularly take her aunt to King’s Farm to buy plants (presumably from the farm shop), so it is arguable that at least some of her use (particularly of A – B) was in exercise of a private right and the weight of her evidence should be reduced accordingly.

12.8 Actions by the landowner

12.8.1 The landowner, through the actions of his agents and employees, claims to have resisted public access to the claimed routes where it has been observed. Throughout the tenure of both Mr Parsons and Mr Sandell, it is apparent that neither had the impression that the routes were in regular use by the public, but where they did observe public use, it was reportedly challenged. Instructions

were also reportedly passed to Colin Vaughan, a person in the landowner's employ, to challenge anyone seen walking on the land. This is corroborated by some of the users.

12.8.2 During his stewardship of King's Farm, Mr Sandell stated that he installed four gates on the land, one of which was occasionally locked (Gate 3), and two of which he claimed were locked at weekends and at the end of each working day (Gates 1 and 2). Such a measure could be construed as a demonstration to the public that access to the claimed routes was not permitted. However, no dates have been given and the details surrounding this point remain unclear. Some users report gaps to the side of the gates which enabled pedestrian access even when the gates were locked. However, when the landowner installed new gates in 2005 such access was prevented.

12.8.3 Mr Sandell's submission makes it clear that, because of the existence of commercial units and a farm shop on site, visits to King's Farm by members of the public were commonplace. Against this backdrop, it is conceivable that public access to some of the claimed routes would not have been apparent to farm employees. This might explain why users state they were able to walk the routes without challenge.

12.9 Conclusions under Section 31, Highways Act 1980

There are a number of contradictions between the user evidence and the submissions made on behalf of the landowner. User evidence indicates that members of the public have been using the claimed routes since 1956, and use appears to have been open and without stealth. However:

- It appears that, given the existence of gates (that at certain times during the relevant period appear to have been locked), at least some use was by force.
- It appears that some use was permissive.
- The amount of evidence put forward by the applicant is low in the context of the location of the routes, close to a well-developed area.
- Evaluation of the qualifying use on the claimed routes shows that it was not at a frequency or volume that was likely to have come to the landowner's attention.
- The landowner's submissions indicate that anyone straying from existing footpaths was challenged when observed, and that the routes were restricted outside of working hours and at weekends by the locking of gates on the farm, which would be a clear indication of a lack of intention to dedicate.

In light of the above, it is considered that the evidence of use is not sufficient, on the balance of probabilities, for a dedication to be inferred under Section 31.

12.10 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.

12.11 Conclusions under Common Law

It is considered that the requirements for a dedication at common law are not satisfied in this instance. As with the analysis under Section 31, it would appear that some use might have been permissive and that some use was by force, and the volume of use itself is not of a level whereby it could be safely assumed that the owner knew about, and acquiesced in, use by the public. It appears that use was challenged when encountered, and measures then taken to ensure public access ceased altogether.

13 **Comments by the Applicant and Landowners**

- 13.1 The applicant has advised that he feels that because of the increased use of the premises within the Kings Farm Rural Workshops, he considers that is now inappropriate for public rights of way to be recorded across the site, as officers have concluded.
- 13.2 The landowner has confirmed that there are no further comments that they wish to make.

14 **Conclusions**

- 14.1 The public's right to use the path is considered to have been brought into question the erection of signs at Kings Farm in August 2005.
- 14.2 No historic documentary evidence has been discovered to indicate that the claimed routes have been dedicated as public rights of way.
- 14.3 There is evidence of public use of the paths between 1956 and 2006.
- 14.4 The amount of use by the public during the relevant period of 1985 – 2005 is insufficient for the claimed routes to be recorded as public rights of way under Section 31, Highways Act 1980.
- 14.5 The amount of use by the public is insufficient for a common law presumption to be inferred (ie that the landowner intended to dedicate the claimed routes as public rights of way).

15 Recommendation

- 15.1 That the application for a Definitive Map Modification Order to record public footpaths between King's Farm and Arnewood Drive, Hordle, be refused.

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.)

<u>Document</u>	<u>Location</u>
Claim Reference	Countryside Access Team Castle Avenue Winchester SO23 8UL

IMPACT ASSESSMENTS:

1 Equality Duty

1.1 The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

1.2 **Equalities Impact Assessment:**

2 Impact on Crime and Disorder:

3 Climate Change:

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.