

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	21 October 2015
Title:	Application for a Map Modification Order to add a bridleway at Junction 9 of the M3, Winchester
Reference:	6900
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(3) of the Wildlife and Countryside Act 1981 to record a public bridleway at Junction 9 of the M3 motorway, in Winchester. The claim is supported by evidence of use by 154 members of the public, covering the period 1985 to 2011.
- 1.2 Despite the considerable amount of user evidence, it is considered that there is no evidence to support a presumption at common law that the landowner intended to dedicate bridleway rights, and so 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 1835, Section 72

If any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers....every person so offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding level 2 on the standard scale...

HIGHWAYS ACT 1980

Section 327

- (1) The provisions of this section apply in relation to any land belonging to Her Majesty in right of the Crown...or belonging to a government department...
- (2) The appropriate authority in relation to any land and a highway authority may agree that any provisions of this Act specified in the agreement shall apply to that land...

Section 31

- (9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.

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 evidence which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

3 Claimant

- 3.1 The application was made in 2011 by **Sue Coles** on behalf of the Cyclists' Touring Club (CTC), a national cycling charity.

4 Landowners

- 4.1 Secretary of State for Transport Hampshire County Council
Great Minster House The Castle
76 Marsham Street Winchester
London SO23 8UL
SW1P 4DR
- 4.2 With the exception of Section A – B, which falls within the jurisdiction of Hampshire County Council as local highway authority, operational and maintenance responsibility for the land over which the claimed route runs falls to Highways England (HE), appointed by the Secretary of State for Transport as strategic highway company under the provisions of the Infrastructure Act 2015 and is the highway authority, traffic authority and street authority for the strategic road network. However, prior to the claim being submitted, the management of the land lay with the Highways Agency (HA), an executive agency of the Department for Transport. Given that it was responsible for the management of Junction 9 during the period under consideration, reference is often made to the HA in this report.

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

- 5.1 The claimed route commences on a metalled footway (separated from the road for most of its length by a grass verge) just north of the Tesco superstore on Easton Lane (Point A on the Committee Plan). From here it proceeds in an easterly direction parallel to the road before passing into a subway that runs under the south-western corner of the M3's Junction 9 roundabout (Point B). On the other side of the subway (Point C), the route climbs up a short slope to a footway running alongside traffic heading west on the southern over-bridge (Point D). Here a strip of red surfacing approximately 0.35 metres in width has been painted along its length (reportedly to discourage cyclists from straying too close to the carriageway). After approximately 80 metres, the route turns northwards (Point E) and continues for approximately 155 metres, until it reaches the second subway which runs underneath the eastern side of the roundabout (Point F). The route leading north-westwards away from the subway entrance is recorded as Winchester Bridleway 502. The claimed route is metalled for its entire length and has a variable width of 1.8 metres to 3 metres.

6 Issues to be decided

- 6.1 The issue to be decided by this Committee is whether there is evidence to show that the claimed route should be shown on the Definitive Map as a bridleway. Current DEFRA guidance provides that use of a way by non-mechanically propelled vehicles (such as a pedal cycle) can give rise to a dedication of bridleway rights. Such a dedication would legally record access for walkers, cyclists and horse-riders at Junction 9. It should be noted that the HA has previously declined to designate any part of the claimed route that falls within its ownership as a cycleway.
- 6.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that a decision to make changes to the Definitive Map must not be made simply because of the desirability of such a change, or its role 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 Documentary and user 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 near or 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 piece of evidence will be sufficiently cogent to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 6.4 Section A – B of the claimed route falls within the extent of a public highway which is managed by Hampshire Highways (even where the surfaced path is not immediately next to the road), and for a number of years blue cycling signs erected at Point A have indicated that this section can be used by cyclists. However, officers have been advised by colleagues in Hampshire Highways that despite the presence of this signage, the necessary legal process to formally designate the route as ‘shared use’ has not actually been undertaken, and therefore it still has the legal status of ‘footway’ over which the public has a right of access on foot only (Hampshire Highways has confirmed that the discrepancy relating to the designation of Section A - B will be rectified as soon as practicable). Under the provisions of Section 72 Highways Act 1835 (as amended by Section 85 Local Government Act 1888), cycling on a footway by the side of the road is illegal and so it would appear that cyclists, in acting in accordance with these signs, have actually been using this section without the right to do so. As it is not possible to acquire prescriptive rights through illegal use, it follows that the public cannot have acquired a right to use this section through long use, and so Section A - B should therefore be disregarded.
- 6.5 No information is held by the County Council regarding the extent of highway land for the remainder of the route due to it falling under HA jurisdiction, and although officers have attempted to establish this position with the HA, the extent of highway land between B - F is unclear. However, Section D – E runs next to the carriageway of the over-bridge, and in the absence of any information to the contrary, officers consider that the principles of the 1835 Act should apply, meaning that this section must also be excluded. This leaves B – D and E –F as the only sections not precluded under the 1835 Act.
- 6.6 It is apparent that the claimed route was created as part of the works to construct Junction 9 in the mid-1980s, and despite the fact that public rights were apportioned on the surviving sections of Easton Lane either side of the junction, the claimed route itself was given no formal designation at the time. It is apparent through discussions with the HA (and latterly HE) that it is aware of no further information that might shed any light on this matter, but it has stated that as the route is part of the roundabout’s infrastructure on operational land, it is possible that formal designation was considered unnecessary at the time, the path being the equivalent of a footway adjacent to a road or verge. In light of this, it is likely that pedestrians already have a right to use the claimed route, and so officers

have not considered any evidence provided which solely documents use on foot.

- 6.7 Copies of most of the documents referred to in this report are available for inspection in the offices of the Countryside Access Team. Members are invited to inspect these when considering this report.

7 Background to the claim

- 7.1 Prior to the extension of the M3 motorway, Easton Lane was a public road that carried vehicular rights which provided a continuous route between Easton and Winchester. This link was severed during the construction of the motorway in the 1980s. In the years prior to construction, a series of orders relating to adjoining roads and public rights of way were made by the Minister of Transport (which included the creation of Winchester Bridleway 502, adjoining the claimed route). Although not created by such an order, provision was subsequently made for public access through Junction 9 by means of the construction of a footway and two subways running through the roundabout (B – F). The available evidence suggests that this route was opened to the public in or around 1985.
- 7.2 In June 2010, a site meeting took place at Junction 9 to discuss the possibility of including a route through Junction 9 as part of the National Cycle Network (NCN) 23, which at that time ran up to (but not through) the junction on both sides. The meeting was attended by representatives of the HA, Winchester City Council (WCC), Hampshire County Council (HCC), the CTC and the sustainable transport charity Sustrans. At this meeting, various design and safety issues were discussed, and it was agreed that a report would be prepared considering how concerns raised by the HA could be addressed. This report was submitted to the HA for consideration later that year, but in a letter to WCC in December 2010, the HA pointed out that a number of its concerns had not been satisfactorily addressed by the report. It considered cycle use through the junction was illegal, and ultimately rejected the proposal (to date NCN23 still terminates at of the route running through the junction). Consequently, in April 2011 the applicant submitted an application to HCC as an attempt to protect any cycling rights that previously existed or that might have been acquired.
- 7.3 In May 2013, the applicant learned of HA proposals to reduce congestion at Junction 9 by increasing the number of traffic lanes on the southern over-bridge from two to three. The applicant (as a representative of the CTC) objected strongly to the proposals on the grounds that the removal of an existing separator strip between the carriageway and the footway on the over-bridge which was being proposed to facilitate this alteration would bring cyclists into close proximity with vehicular traffic, and that the presence of protruding wing mirrors (particularly from HGVs) represented a safety risk to pedestrians and cyclists. In response to the concerns raised by the CTC, the HA painted a red separator strip (0.35m in width) on the over-bridge footway in 2013, but this remedial measure was deemed insufficient by the CTC on the grounds that it placed an onus on non-motorised users to keep away from the edge of the footway and did not address the issue of the proximity of traffic to the path. The HA confirmed to the County Council that in December 2013 it erected “Cyclists Dismount” signs at the entrance to each subway (it should be noted that signs are advisory, and not mandatory).

- 7.4 A Non-Motorised User safety audit, carried out by the HA in advance of implementing its proposals, acknowledged that the claimed route represented a strong desire line for cyclists, given its location in relation to NCN 23. The audit stated that *“currently cyclists have to dismount prior to entering the subways and walk through the junction until they are back on NCN 23”*. The applicant claims that this does not properly recognise use by cyclists, and claims that the HA had been aware for some time that cyclists were cycling through the entire subway and over-bridge system.

8 Documentary and User Evidence

- 8.1 The claimed route has only physically existed since the mid-1980s, and so there is little in the way of documentary evidence that relates to it. Much of which has been reviewed has been provided by the applicant, and is detailed below. Whilst the evidence does not indicate that the claimed route has ever been the subject of any formal dedication, it is useful in establishing how it came into existence, and what discussions have taken place since then regarding its management.

8.2 M3 Popham to Compton – Letter from Department of Environment and Transport - 11 July 1980

This letter was issued in the wake of local public inquiries dealing with the extension of the M3 through Winchester (from Popham to Compton) between 1976 and 1977. The letter summarised the inspector’s findings, and in a paragraph dealing specifically with pedestrian access between Winchester and Easton, the Inspector’s conclusions were reported as follows:

“...the Inspector said that a segregated crossing for pedestrians should be provided and concluded that the best location would be near Easton Lane. He suggested that subways or bridges in the north-east and south-west corners of the interchange roundabout might be the best solution. The Secretary of State and the Minister agree with the Inspector’s conclusions, and underpasses will be incorporated in the design of the interchange roundabout for use by pedestrians in the locations recommended by the inspector.”

8.3 M3 Popham to Hockley Side Roads Order (No. 2) - 1980

Following the inquiries into the extension of the M3, this order was one of several that were made to secure the M3’s passage through the Winchester area. This particular order extinguished the section of Easton Lane where Junction 9 is now situated, and also created a new bridleway on the eastern side of the junction to link with the claimed route (Winchester Bridleway 502). No provision was made for the claimed route in the order, and it is not even shown on the order plan – no onward connection was shown from Bridleway 502.

8.4 Letters between the Department of Transport and Environment and Hampshire County Council – February to March 1984

This exchange of letters between G L Benham, Director of the Department of Transport and Environment (DOTE), and the County Surveyor of HCC, addresses the issue of a subway under the Winchester Bypass, situated a little way to the south of Easton Lane, and by now obstructed by the newly constructed motorway. In his letter of 8th February 1984, Mr Benham seeks HCC’s views on a proposal to seal off and fill in the subway. A plan accompanying Mr Benham’s letter shows the area in question, and also shows

the new Junction 9 roundabout. A 'proposed footpath' running through the junction's new subway network on the line of the claimed route is highlighted. The County Surveyor offers no objection to this proposal, and states that the County Council "*do not consider this subway would provide any useful pedestrian link. With the proposed Easton Lane interchange there is a satisfactory route for pedestrians from Winchester to Easton designed to prevent at-grade crossing of carriageways.*"

8.5 Letter from Phil Marshall, HCC County Surveyor to Ted Hart, Highways Agency – February 2002

This letter was sent to summarise matters discussed at a site meeting between HCC and the HA at Junction 9, in advance of the HA commissioning a feasibility study to investigate a number of concerns raised by a safety audit. In the letter, Mr Marshall acknowledges the possibility that the study may recommend the increasing of the number of lanes on the southern over-bridge from two to three, and that if this were to be the case, the HA would have insufficient funds to widen the bridge to accommodate this. He further acknowledges the HA position that, given the width of the footway and the proximity of the footway to any reconfigured traffic flow over the bridge, the HA would require 'Cyclists Dismount' signs to be installed if the footway was ever converted to a cycle way.

Mr Marshall goes on to set out the County Council's position, namely that it was their intention to design a cycle route along the Easton Lane corridor within Winchester, including a route through Junction 9, and to include this route as part of the National Cycle Network. He states that "*the County Council would be very concerned if modifications to the junction are prejudicial to the provision of a high quality cycle route. Specifically, sections of the route requiring cyclists to dismount would not be considered acceptable by the County Council.*"

The letter closes with a reference to correspondence between Sustrans and the applicant (on behalf of Hampshire Cycling) in 1999 relating to the National Cycle Network east of Winchester, a copy of which had been sent to Mr Marshall. The letter reportedly states that "*We [Sustrans] have been given specific assurances that the Highways Agency will provide a high quality crossing on all their motorways and trunk roads as part of their contribution towards encouraging cycling. I would not expect to see any difference here [Junction 9].*"

8.6 Email from Mott Macdonald to Sue Coles – 19th February 2004

This brief email from an employee of Mott Macdonald to the applicant states:

"I have had a call from the Highways Agency to confirm that the underpass has no specific designation as a footway, cyclepath etc.

This is because the underpass forms part of the M3 bridge structure and therefore is part of the motorway. As I understand it you cannot have a footway, cycleway etc as part of the motorway system. Thus the floor of the underpass is simply available as an 'undesignated' access, maintained by the local authority for public use."

8.7 Winchester On The Move – Cycle Map (Winchester City Council) – June 2004

This map was produced by WCC in partnership with the CTC and HCC. It shows NCN 23 running north-east out of Winchester along Easton Lane, proceeding through Junction 9 using the claimed route and on towards Easton. The legend

describes the route as being *“Part of the Reading to Southampton long distance cycle network developed by Sustrans.”*

8.8 Ordnance Survey Landranger Map (Winchester & Basingstoke) 1:50,000 – 2005

On this map, a line of green dots shows the National Cycle Network. Even at the relatively small scale, the claimed route appears to have been included as being part of the route, as one of the dots is positioned directly on top of Junction 9 (it is interesting to note that on subsequent versions of this map, the green dots have been repositioned and no dot is situated on Junction 9).

8.9 National Cycle Network 23 (Reading to Southampton) – Junction 9, Way Forward – Report to the Highways Agency – September 2010

This 14 page report was submitted to the HA by WCC on behalf of cycling groups following the site meeting in June 2010 to discuss the possibility of routing the NCN through Junction 9 (see 7.2). The report addresses a number of safety and suitability concerns raised by the HA, highlights several benefits of the scheme and its desirability given other proposals to expand the NCN in the locality, and speculates that cyclists had probably already acquired rights over the route through long use.

8.10 Letter from W Moore (Highways Agency) to A Hickman (Winchester City Council) – 6th December 2010

The HA response to receiving the report referenced at 8.9 rebuts a number of its assertions relating to safety and suitability, and ultimately rejects the proposal to designate the route as a cycleway due to it not meeting HA standards. Mr Moore also addresses the question of public rights:

“...this route is currently designated as a ‘footway’ and therefore cyclists do not have a legal right to cycle along it. I would therefore suggest that this would not give cyclists the acquired rights you have mentioned. The use of footways and subways by cyclists at this location has not been challenged by the HA – we are not an enforcement agency; this role would need to be performed by the police. Cyclists should dismount when using footways and subways that are not designated as a shared facility.

Mr Moore also alludes to the cycling sign situated outside Tesco on the Winnall roundabout (just to the west of Junction 9):

“The sign that is situated at the Winnall roundabout and referred to in your proposal, is not a regulatory sign and therefore does not give permission to cycle, only guides towards the subway....the sign is also outside the HA boundary and therefore has not been erected by us. It is unlikely that we would have given approval.”

8.11 M3 Junction 9, Winchester – Roundabout Improvement Feasibility Report – October 2011

This report was produced by the Environment Transport and Economy department of HCC, and considered possible remedies to traffic congestion both on the over-bridge and on Easton Lane. Included among the suggested measures is the addition of an extra lane on the southern over-bridge (a measure which has since been implemented). The claimed route is briefly mentioned: *“A shared pedestrian and cycle footway exists linking Winchester in the west to the village of Easton in the east.”* The claimed route is not mentioned

further, but this fleeting reference to it suggests that at the time this report was produced, the County Council considered it to be a 'shared use' route.

8.12 Letter from the Highways Agency – 31st July 2013

Provided by the HA, this letter responds to an email sent to Norman Baker MP by a member of the public earlier that month. As the letter has been redacted, the names of the recipient and sender are unknown, though the sender does identify himself as the Service Delivery Manager responsible for a scheme to improve Junction 9. In the letter, it is stated that the current configuration of the M3/A34 interchange was designed by HCC in 1985, and the design of the footway does not meet required standards to enable it to be classified as a shared footway and cycleway. The main reason given is the inadequate width, with the HA stating *"it cannot be designated as a cycleway even though cyclists choose to cycle through the junction."* Later in the letter, the writer states that *"we do encourage cyclists to continue using this junction as it connects the two end points of the National Cycle Network 23 but we do recommend that they dismount due to the limited space available."*

8.13 The above evidence is of little assistance in determining whether a deemed dedication has taken place, although it is clear from the Side Roads Orders that the route was given no specific status at the point at which it was created. Analysis of the evidence has been difficult, as it is apparent that the HA has been unclear about the official designation of the claimed route, variously describing it as 'undesignated access' and a 'footway'. However, the correspondence does indicate that although the HA has been involved in discussions about the provision of cycling access through the junction for many years before the application of 2011, at no point did it intend to dedicate such access, and on various occasions voiced their opposition to people cycling through the junction.

9 User Evidence

9.1 The application was supported by 165 user evidence forms, covering use dating back to the mid-1980s. A visual representation of this use can be viewed in the form of two bar charts at Appendix 1. Of the 165 forms provided, 11 have been discounted as either the use described was on foot only (see 6.4) or no frequency of use was given. As a result, the application has been considered based on the evidence of 154 users, whose use is summarised below. The use of five witnesses who provided more detailed accounts of their use is described in more detail between 9.1.5 and 9.1.9.

9.1.1 Of the user evidence considered, 14 people used the route on a bicycle at least once per week, 23 people used the route at least twice per month, with 64 people using the route at least once a month. 25 people claimed to have used the route infrequently (twice a year or less). The vast majority of users (141) stated that they had also seen other cyclists whilst using the route.

9.1.2 26 users describe having seen signs on the claimed route, but none that appear to have discouraged cycling, and many mention the fact that the route is signposted as part of NCN 23 (it should be noted that these signs only direct cyclists towards the junction as they were erected on land outside of HA control by WCC). The 'Cyclists Dismount' signs were (according to the HA) installed in

December 2013, over two years after the claim was submitted, and so these signs were not reported in the user evidence.

- 9.1.3 Seven users describe encountering obstructions along the route, with five giving descriptions. None of the obstructions were permanent - encroaching vegetation, flood water and vehicles temporarily blocking the route are given as reasons. Six users describe passing through gates, although it is not clear where these gates were situated – there is no record of the claimed route ever having been gated – however it is possible that these references are to a gate situated at the eastern end of Winchester Bridleway 502 which meets the claimed route at Point F.
- 9.1.4 One user states that they were employed by the landowner, but it is apparent that their use was ‘as of right’ as they were using the claimed route as part of a longer commute to their place of work. No users reported ever having been challenged whilst using the route and only one reported using the route with permission, although this ‘permission’ was inferred from signage near the route which indicated it was available to cyclists (presumably the aforementioned NCN signs).
- 9.1.5 **Sue Coles**, the applicant, made a statement in June 2014 covering her use of the route. She lives in Winchester, and has memories of using Easton Lane on a bicycle before the M3 was built. She began using the claimed route once the M3 was opened in or around 1985 and since then has used it around 20 times per year, mainly for recreation. Her assumption was that the land was owned by the HA or HCC, and she believed she had a right to use the route and that it had been provided for non-motorised users to cross the M3 safely. Whilst using the route she has seen other users, mainly cyclists, but also the occasional walker. The claimed route has always been surfaced with tarmac and of a consistent width, save for occasional vegetation encroachment of the eastern section. The junction itself has never been gated nor had any signage on it to challenge cycling, but in the mid-1990s the Cycling Officer at WCC arranged for blue circular promotional cycling sign to be erected outside Tesco, which is still there today. The ‘Cyclists Dismount’ signs were installed after the claim was submitted to HCC [as corroborated by the HA], and she has never seen any other any other signs prohibiting cycling use. Her use of the route has never been challenged or interrupted since 1985, and she only became aware that her use was considered illegal by the HA at a site meeting in 2010.
- 9.1.6 **Lucy Collis**, a resident of Easton, completed a user evidence form in 2011, and made a further statement about her use of the route in June 2014. Mrs Collis moved to Easton in 2000, and from that time until 2008 used the claimed route to get to Winchester by bicycle every weekday as part of her commute to work in London. Since 2008, she has used the route less frequently but still rides into Winchester about twice per week, mainly for the purposes of shopping and visiting her tennis club. Throughout her use of the route Mrs Collis says she occasionally saw other people using the route - she was always of the opinion that the route was public and that the HA were sensibly facilitating public access across the M3. Her use of the route has never been challenged, and she was never aware of any signs along the route, other than those which promoted cycling [it is presumed these were the NCN signs]. The route has always been of the same character as long as Mrs Collis has been using it – it has always been the same width and surfaced with tarmac.

- 9.1.7 **Terence Morris**, who resided at Lower Road, South Wonston, completed a user evidence form in 2011. In it he stated that he cycled through the junction daily from the time it was built until 1999, and thereafter at a rate of 5-6 times per year. He reported seeing no gates or notices prohibiting his use, and that his use never challenged. In addition, he stated that at the time the motorway was built, he was Vice-Chairman of the Winchester M3 Joint Action Group (JAG), formed in 1973 to protest against the completion of the M3. In his form, Mr Morris stated:

“...during the recess of the public inquiry in the summer of 1976 I took part in a private hearing between the Executive of the JAG and Department of Transport officials at which the proposals for cross-motorway access proposals were discussed. These included the obstruction of Easton Lane and the closure to through traffic.....the underpass/subway was agreed for use by walkers, cyclists and horse riders as a way of maintaining a convenient route for such users....”

Mr Morris died shortly after submitting his evidence and so it was not possible to obtain further information. Whatever the route's intended use when it was opened in 1985, the lack of any formal designation made its intended use unclear (the 1980 Side Roads Order would appear to have been the ideal opportunity to address this issue).

- 9.1.8 **Nick Goulder** completed a user evidence form in 2011. He used the claimed route by bicycle 20-30 times per year between 1985 and 2011, mainly for recreation, but occasionally to go shopping. He reported seeing local people using the route by bicycle. He saw no signs or obstructions along the route during this period, and his use was never challenged. He also stated that the Theatre Royal in Winchester regularly arranged fund-raising bike rides that passed through the junction.
- 9.1.9 **Shirley Howe** completed a user evidence form in 2011. She used the route by bicycle 5 times per week between 1996 and 2011. She confirmed that she encountered no obstructions or any signage prohibiting public cycling, and that her use had never been challenged. She described the claimed route as a safe route to Winchester for cyclists.

10 The Landowner

- 10.1 The land over which the claimed route runs was appropriated by the Departments of Environment and Transport in the 1970s, and the registered landowner is now the Department for Transport (DfT). The land is managed and maintained by HE (previously the HA) in its capacity as an executive agency of the DfT, and so it can be inferred that the actions it has taken are those of the landowner.
- 10.2 The earliest available evidence of the HA's awareness of this matter is the site meeting and subsequent correspondence between the County Surveyor and the HA in 2002 (see 8.5), but it is apparent from that letter that the HA had discussed the matter with Sustrans as early as 1999. The HA's view on how cycle use through the junction would need to be managed also dates from this period, as demonstrated by Ted Hart's indication that 'Cyclists Dismount' signs would be necessary if the NCN was routed through the junction. The email from Mott Macdonald to the applicant in 2004 (see 8.6) makes it apparent that the matter was still being discussed some years later.

- 10.3 In a response to the consultation on this application in 2014, the HA completed and returned a pro-forma in which it gave details about the management of the claimed route. In its submission, the HA stated that it considered the route to be a public footpath (although it should be noted that the entire route currently has no recorded status) but that it is aware of historic use by walkers and cyclists. It submits that use of the route by cyclists has been challenged by various items of correspondence between the HA, CTC, the local MP and a private individual (copies of which have been forwarded to HCC) in which the HA has stated that the route should not be used by cyclists. The date given for the installation of 'Cyclists Dismount' signs is given as December 2013 – no other signage or notices are mentioned in the HA statement. The HA state that they have been maintaining the route and installed the 'separator strip' when the number of traffic lanes increased from two to three.
- 10.4 In a covering email accompanying the form, the HA summarises its belief that the route should not be recorded as a bridleway (Appendix 2). Reasons given include safety concerns, such as the width of the over-bridge and the height of the subways being below current standards, and it is also submitted that the junction layout, the public's right to use the route on foot 'as a matter of course', and the recently installed 'Cyclists Dismount' signs indicate that the HA have never intended to dedicate the route as a bridleway. It is stated that future use will be reviewed as part of the Junction 9 improvement study.

11 Consultations with Other Bodies

- 11.1 The following persons and bodies have been consulted about the claim: Winchester City Council, Byways and Bridleways Trust, British Horse Society, Ramblers Association, Auto-Cycle Union and the Open Spaces Society. HCC Highways, HCC Planning and the HCC Area Countryside Access Manager.

11.2 The Ramblers Association

The area representative has stated:

"The Ramblers would strongly welcome the addition of this route to the definitive map. It provides an important (historic) link into the countryside east of Winchester which (in the eyes of many walkers) was broken when the M3 was constructed. The existence of the route through the junction is not currently well publicised, and is not apparent on maps, particularly the OS.

Alternative ways for walkers to get from the Easton Lane area of Winchester directly to the countryside around Easton village are quite lengthy. Without protection of definitive map status we fear that this route could be arbitrarily closed at some time in the future, for example if the motorway junction is ever modified."

11.3 County Councillor Fiona Mather

Councillor Mather has stated:

"I have no comment to make other than that I am aware that there is a long history re the Winchester Cycle Working Group and Junction 9 and if this route is granted the status of a bridleway there will be significant ramifications."

- 11.4 At the time of writing no other responses have been received.

12 Analysis of the evidence

- 12.1 The relatively recent construction of the claimed route means that there is little documentary evidence which can be relied upon to establish its status. The inspector's decision in the matter of the M3 inquiry made provision for pedestrian access, but as no legal process was undertaken to record the route at the time, it is unclear whether the route was being provided for any other class of user. In the absence of any supporting documentary evidence, the application must turn on evidence of public use in recent years, in tandem with the actions of the landowner.
- 12.2 It is a principle of common law that long usage cannot give rise to the acquisition of rights if that use is illegal and consequently, under the provisions of the Highways Act 1835, all sections of the claimed route that are deemed to fall under this classification must be excluded from this investigation on the grounds that any use over them by cyclists will have been unlawful. Under the 1835 Act, it is against the law to "*ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers*" upon a "*carriage of any description*". Section 85(1) of the Local Government Act 1888 narrowed the definition of 'carriage' to include (among other vehicles) the bicycle. The definition of a 'footway' has been tested in the courts over the past century, but its classification as a path running alongside a carriageway has remained unchanged. Therefore, it is against the law to ride a bicycle on *any* footway which is adjacent to a road. It therefore follows that Sections A – B and D – E of the claimed route must be excluded from consideration.
- 12.3 The provisions of Section 31 of the Highways Act 1980 do not apply to 'Crown Land', and for the purposes of the Act land held by a government department falls within this classification. As the land over which the claimed route runs is owned by the Department for Transport, Section 31 cannot operate and so the application must be considered at common law. Many of the tests that must be met in order to satisfy a dedication at common law are similar to those under Section 31. However, there is no necessity for use to have been called into question for a common law presumption to be inferred, there is no minimum period of user, and the amount of user which is sufficient to imply the intention to dedicate is dependent on the particular circumstances of the case.

For a presumption of dedication to be inferred at common law, 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
- use must be *as of right*, i.e. without force, without stealth and without permission
- use must be by the public
- there must be sufficient evidence to infer that the landowner positively intended to dedicate the way as public

12.4 Physical nature of the path

Those sections of the path not already ruled out (see 12.2) are linear in nature, with a clearly defined route, allowing users to pass and repass, and so are capable of being dedicated as a right of way at common law.

12.5 'Without force, stealth or permission'

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

None of the witnesses report having to negotiate any barriers or stiles (six users mention passing through open gates, but it is not clear if these were situated on the claimed route (it is possible users might have been referring to structures further down Bridleway 502). There is no evidence that the route has ever been gated, and none of the witnesses refer to a gate being locked).

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

Cycle use on the claimed route by the public appears to have been open and of a volume capable of coming to the attention of a reasonable landowner. The majority of users have stated that they have seen others using the route on a bicycle and it is apparent that the landowner has been aware of cycle use along the route for some time, as demonstrated by the recent addition of the 'Cyclists Dismount' signs and red separator strip, and the significant correspondence that has taken place between the landowner and various other bodies about cycling on the route (some of which has been detailed in Section 8).

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

Only one user indicated that they had used the route with permission, and they had inferred this from promotional cycling signs prior to reaching the claimed route – this does not, in law, constitute permissive use. Many users stated that they felt they had a right to use the route, and that it had been provided for them as a safe link between Winchester and the Itchen Valley. The HA stated in the pro-forma it submitted to the County Council that it had granted permission for people to use the path (by circling the relevant question with a 'yes'), but it does not elaborate further, and it has also confirmed that it erected no signage on the claimed route prior to 2011 that might have conveyed this message to the public. It would therefore appear that public use of the route has been 'as of right'.

12.6 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

Reasons given for using the route vary from recreation to a daily commute into Winchester. All users appears to have been using the route as if they were exercising a public right.

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.

Evidence of cycling from over 150 witnesses demonstrates a significant level of use. Considering the number of witnesses who were using the route on a daily basis, it is reasonable to expect this to have come to the attention of the landowner, and correspondence received from the landowner confirms that this had indeed happened.

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.

The locality of the route and where it leads makes it highly likely that the route has, in the main, been used for public recreation and the user evidence bears this out. It also appears that a significant number of users were using the route as part of a daily commute. Nothing in the witness evidence suggests that any of the users were using the route in exercise of a private right.

12.7 Summary of User Evidence

The evidence provided indicates that members of the public have been enjoying uninterrupted and unchallenged use of the claimed route on bicycles in significant numbers since 1985, without force, stealth or permission, and at a frequency and volume that resulted in use coming to the attention of the landowner. However, dedication of a public right of way may not be presumed if there is sufficient evidence that the landowners did not intend to dedicate the path as a public footpath.

12.8 Actions by the landowner

In their capacity as agents of the landowner, it is apparent that the HA (now HE) has been aware of public cycling through the junction for a number of years prior to the application of 2011, and that they have been involved in lengthy discussions regarding the possible provision of cycling access. No evidence has been put forward by the HA to suggest that the route has ever been gated, obstructed or signed in a way that would discourage or prevent cycle use prior to 2011. However, whilst it is apparent that the HA has been aware that people have been cycling through the junction it has resisted proposals to create a cycleway through the junction on safety and suitability grounds, and has stated that it considers cycling through the junction is illegal.

12.9 Summary of Evidence at Common Law

Section 31(9) of the Highways Act 1980 preserves the position at common law, where a presumption of dedication may nevertheless be inferred if the conditions of Section 31 are not met (as in this case). For a dedication at common law to be inferred, there must also be positive evidence of the landowner's intention to dedicate, and therefore the responsibility for demonstrating that a dedication of public rights has taken place falls to the applicant. The quality of user from which dedication can be inferred under Section 31 or at common law is well-established (without force, stealth or permission) but unlike Section 31, it does not automatically follow that a dedication should be inferred at common law in

the event that use of a way by the public has occurred without challenge. In *Mann v Brodie* [1881], Lord Blackburn said that:

"Where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

Despite evidence of user as of right, courts were free to infer that this was not because there had been a dedication at common law but because the landowner had merely tolerated such use (*Folkestone Corporation v. Brockman* [1914] being a prime example). In a more recent example, the decision by Hampshire County Council to refuse an application for a public footpath in Fordingbridge was referred to the Planning Inspectorate following an appeal by the applicant. In dealing with the question of whether the presumption of dedication could be inferred at common law, the Inspector stated that *"the appellant has not pointed to any action on the part of the freeholders from which an inference of their intention to dedicate a public path at common law might reasonably be drawn"* and subsequently refused the appeal.

- 12.10 Officers consider that, based on the available evidence, it is not possible to infer that the landowner intended to dedicate the claimed route as a right of way for cyclists. The evidence of use by the public is particularly strong, and it is apparent that the HA took no steps between 1985 and 2011 to stop cycling though Junction 9, despite being aware of it. However, whilst it is clear that this use has been 'tolerated' by the HA, it is also apparent that it did not approve of cycling through the junction, as evidenced by its refusal to designate the route as a cycleway and its assertion that cyclists should not ride through the junction itself (see 8.10). The correspondence viewed shows that the HA has been involved in discussions about cycling rights at Junction 9 since the late 1990s, but this does not demonstrate a *positive intention* by the HA to dedicate such rights.

13 Comments by the Applicant

- 13.1 The applicant has raised a number of issues (on behalf of the CTC) which she feels demonstrate the HA's acquiescence in use of the route by cyclists. In addition to highlighting some minor discrepancies (which have been corrected), she has also made the following comments:
- 13.2.1 *Bridleway 502*: This bridleway, created at the time the motorway was built, runs from the point where highway rights were extinguished in Easton Lane to Point F, i.e. the start of the subway. This gave walkers, cyclists and horse riders the right to access the subway from the village of Easton and in the opposite direction provided a route from Point F to Easton village. No onward connection is shown on the M3 side orders. There is some evidence, e.g. statement by Terence Morris, that an onward connection was planned. The absence of relevant side orders does not indicate an absence of intent. It would seem strange to create a bridleway leading to a subway that could not be used by cyclists. HE was silent on the issue of cycle use between 1985 and 2002 and

only raised concerns when it became clear that HCC was seeking to route NCN 23 through the junction.

Given that BW 502 gives cyclists legal access to Point F, the undesignated access in Mott McDonald's email could refer to both pedestrians and cyclists. This provides evidence of a positive intent to create a route for pedestrians and cyclists following the truncation of Easton Lane and the creation of a motorway junction that was manifestly unsuitable for both categories of users. Further convincing evidence for this is the fact that no junction was provided between BW 502 and the vehicular carriageway.

- 13.2.2 *NCN23*: To our knowledge, the first proposal to route NCN23 through the junction was in March 1998 when a letter was sent by John Timms, Area Manager Team 3 of the Highways England to Paul Turner at HCC in which he states that the Highways Agency does not object in principle to the proposals to route and sign NCN23 through the junction. From 1985 until 2002, no objections were raised to use by cyclists and this provides further evidence that at the time the motorway was constructed in 1985, there was a positive intent to create a route for pedestrians and cyclists through the junction. It was not until 2002 that there is any evidence that HE had any misgivings and these misgivings related specifically to the routing of NCN23 through the junction. By this date, HE already had its own plans to reconfigure the junction of the M3/A34. The existence of a signed cycle route through the junction could have affected the reconfiguration and it could be argued that HE did not wish its plans to be hampered by signing the NCN23 through the junction.
- 13.2.3 *Height of Subways*: HE asserts that the route cannot be a cycleway because of a) the height of the subways and b) the width of the overbridge path. The height of the 2 subways varies between 2.24 and 2.26 m; HE cites a minimum of 2.4 m for a subway used by cyclists. However, HE has allowed subways with lower heights. e.g. NCN2 under the A272 at Chichester is 1.9m. The subway under the A36 at Salisbury is 2.2 m. In 1985, the subways would have complied with standards and in addition, deviations from standard are admissible. Winchester CTC regularly uses these subways and it has members who are over 6' 3" in height and even with a helmet, they are not touching the top of the subway. The low headroom markings provide adequate warning.
- 13.2.4 *Status and width of southern overbridge*: As stated above, the status of the overbridge must be clarified. Is it a footway or is it part of the undesignated access available for public use? The current width of the path is 1.9 m. Although the guidance recommends a minimum width of 2m, widths of 1.5 are admissible on short sections of shared use paths. This section is extremely short. Visibility is good and so conflict with other users on the path is unlikely. Cyclists generally feel safer cycling across the bridge than walking.

14 Comments by the Landowner

- 14.1 Highways England agrees with the recommendation that the application should be refused, and has emphasised that the major improvement scheme for Junction 9 is now a committed scheme under the Highways England Route Investment Strategy (RIS), which will provide an opportunity to develop a comprehensive non-motorised user solution. This scheme is included in Phase 1

of the RIS for completion by 2021, the consultation for which will involve engagement with CTC and Sustrans. Given this planned restricting of the junction, HE is of the view that any change in status of the existing crossing will be pre-emptive and temporary.

- 14.2 HE also draws attention to the letter of 6 December 2010 from Wayne Moore of the HA to WCC [referenced at 8.10 and included in its entirety at Appendix 3]. Whilst acknowledging that safety is not a relevant factor in determining the application, HE believes the letter is important as it details its significant safety concerns, and emphasises that concerns relate to subway heights as well as the bridge structure. HE does not support use as a cycleway or bridleway through what it deems to be 'substandard structures'.

15 Response to Comments by the Applicant and Landowner

- 15.1 It is acknowledged that steps could have been taken by the Minister of Transport at the time of construction to make the status of the claimed route clearer. Given the creation of Bridleway 502 at the same time, officers also understand why the CTC has inferred that it was intended that the claimed route should also carry bridleway rights. However, there is no evidence to indicate the route was dedicated in this way, though it would have been open to the Minister of Transport to do so (it should be noted that a bridleway link crossing the M3 was expressly created by a Side Roads Order a mile to the south at Highcliffe). Contemporaneous references to the claimed route at the time Junction 9 was built indicate that the route was being built to accommodate pedestrians, but makes no reference to any other class of user. In light of this, officers do not consider that an inference can safely be drawn that the route was originally constructed with the intention of being used by cyclists.
- 15.2 Officers have not had sight of the 1998 correspondence to which the claimant has referred, but it would appear to be part of the ongoing communication between the HA and either WCC or HCC in which the routing of NCN 23 through Junction 9 was discussed. These discussions were still taking place in 2002, and it is apparent that at that time the HA had yet to formally commit itself either way (see the reference at 8.5 to the fact that the HA would require 'Cyclists Dismount' signs to be installed *if* the footway was converted to a cycle way). Subsequent correspondence shows that the HA eventually rejected the proposals to designate the route as a cycleway (see 8.10).
- 15.3 Comments relating to the suitability and safety of the route for the accommodation of cyclists (be they for or against) cannot be taken into account, and have no relevance to the question of whether the public have actually acquired rights through long use. The fact that the junction is soon to undergo major improvement works should also be disregarded when determining this application.
- 15.4 The arguments put forward by the applicant rely upon the HA's acquiescence in public cycling through the junction and its involvement in discussions about cycling access through the junction. Reference is also made to the fact that an absence of a relevant side order does not indicate an absence of intent, but whilst this may be true, this is not the same as a 'positive intention', and it is

considered that these submissions do not identify any evidence of a positive intention to dedicate public cycling rights on the landowner's part.

16 Conclusions

- 16.1 The documentary evidence reviewed is insufficient to infer that cycling rights subsist on the claimed route.
- 16.2 There is evidence of public use of the route by cyclists between 1985 and 2011.
- 16.3 The land over which section B - F runs is exempt from the provisions of Section 31 of the Highways Act 1980 on the basis that it falls within the category of 'Crown Land'.
- 16.4 Public use of the route by cyclists between points A – B and D – E cannot give rise to any presumption of dedication under common law because of the provisions of Section 72 Highways Act 1835, as amended by Section 85 Local Government Act 1888.
- 16.5 The evidence reviewed is insufficient for a presumption of a dedication of bridleway rights to be inferred at common law between points B –D and E – F.

17 Recommendation

- 17.1 That the application for a Definitive Map Modification Order to record a public bridleway between points A – F, as shown on the Committee Plan, 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.)

Document

Claim Reference: 1098

Location

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.

Impact on Crime and Disorder:

Climate Change:

1.1.1 How does what is being proposed impact on our carbon footprint / energy consumption?

1.1.2 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.