

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	10 February 2016
Title:	Application for a Definitive Map Modification Order to record public footpaths at Rectory Field, Headley
Reference:	7311
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 public footpaths at Rectory Field, in the village of Headley. The claim is supported by evidence of use by seventy-five members of the public, covering the period 1934 to 2012.
- 1.2 It is considered that the evidence submitted in support of this application is sufficient to support the acquisition of four of the claimed routes as public rights of way, and it is therefore recommended that a Definitive Map Modification Order is made to add these paths to the Definitive Map.

2 Legal framework for the decision

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

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

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

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

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

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

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

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

- 1) 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.
- 2) The period of 20 years referred to in subsection (1) above 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 such as is mentioned in subsection (3) below or otherwise.
- 3) Where the owner of the land over which any such way as aforesaid passes—
 - a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
 - b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.
- 4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.
- 5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.
- 6) An owner of land may at any time deposit with the appropriate council—
 - a) a map of the land on a scale of not less than 6 inches to 1 mile, and
 - b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

- (i) within ten years from the date of the deposit, or
- (ii) within ten years from the date on which any previous declaration was last lodged under this section.

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 application was submitted in 2012 by **Mr Peter Mackey**, a resident of Headley.

5 Landowner

- 5.1 The Guildford Board of Diocesan Finance
Diocesan House
Quarry Street
Guildford
Surrey
GU1 3XG
- 5.2 Since the earliest evidence of public use, Rectory Field has been owned by the Guildford Board of Diocesan Finance ("The Diocese"). In the early 1950s, an oral tenancy for the entire field was granted to J Ellis and Sons.
- 5.3 In 1999, Ellis and Sons sub-let the southern half of Rectory Field to Ms Sharron Kay. Ms Kay used the land to graze animals and, as stipulated by the terms of the tenancy, fenced the entire land that was let to her. Ms Kay is still the sub-tenant for the land, which is still fenced.
- 5.4 Ellis and Sons' tenancy was surrendered in December 2010, and Rectory Field was subsequently re-let to Mr Andrew Luff, who immediately fenced the land not already sub-let to Ms Kay. He has since used it for agricultural purposes.

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

- 6.1 Rectory Field is situated in the centre of Headley, and is bordered by roads on three sides – Long Cross Hill to the north, High Street to the west, and Crabtree

Lane to the south. For most of their length where they run alongside Rectory Field, Long Cross Hill and High Street do not have footways set aside for use by pedestrians. Immediately adjacent to the field is the Church Centre and All Saints' Rectory, with local shops and the Holly Bush Inn also situated on High Street within close proximity. The land slopes from west to east and has variously been used for grazing livestock, growing crops or has been left fallow. Vehicular access to the field is possible via a metal gate in the north-east corner, which is now kept locked.

- 6.2 Given that all of land has now been fenced off for at least several years and has been variously used for growing crops and grazing, most of claimed routes are no longer visible on the ground. The application is for a number of paths. One is a 'diagonal' path which commenced at the north-eastern corner of Rectory Field at a junction with Long Cross Hill and proceeded in a south-westerly direction across the field, exiting it at a point between All Saints' Rectory and the Church Centre and running over a grass verge to a junction with the High Street (A – B and A - G on the Committee Plan). Another, peripheral route ran through A-C-B-D-F-E, with a further path crossing the middle of the field running between A-D.

7 Background to the claim

- 7.1 In the 1980s, the Diocese applied for planning permission to build houses on Rectory Field. This application provoked strong feeling in the village, and a group of villagers subsequently travelled to London to hand-deliver a petition to Lambeth Palace which protested against the proposals. Following a local inquiry the permission was overturned.
- 7.2 Rectory Field contained sheep between 1985 and 1990. This period aside, the evidence indicates that a number of paths running across and around the perimeter of the land were used by the public until 1999, when the southern half of the field was let to and subsequently fenced by Ms Sharron Kay, an action which, either directly or indirectly, rendered most of the paths around the perimeter of that half of the field inaccessible to the public. Upon taking on the tenancy for the land in 2011, Mr Luff fenced the remainder of the field, thus obstructing public access completely. This action met with opposition from local people, and the application to record the claimed routes as public footpaths was submitted in June the following year along with 21 user evidence forms. Mr Luff has since provided a permissive path that runs through A-C-B.
- 7.3 As Commons Registration Authority for Hampshire, the County Council also received a separate application to record Rectory Field as a Town or Village Green (TVG) in 2012. The legislation that governs the recording of TVGs differs from that detailed in Section 2 and that application has been dealt with separately, and is the subject of a separate report to be presented to this Committee. It is however apparent that much of the evidence supplied in support of the TVG application came from people that had walked the paths claimed by Mr Mackey. Officers are of the view that this evidence is relevant to the application to record public footpaths at Rectory Field, and should be considered alongside the user evidence forms initially provided in support of Mr Mackey's application.
- 7.4 During the course of the investigation, a discrepancy became apparent between those forms originally submitted with the application and those submitted in support of the TVG application. On the forms submitted with his application, Mr

Mackey had marked lettered various points on the user evidence map and invited users to draw lines between those points to indicate which routes they had walked. As part of this process, Point G was marked due west of Point A, but this appeared to be at odds with the lines drawn on the TVG forms, which indicated that users had walked a more south-westerly line from Point A. When this was pointed out to Mr Mackey he confirmed that he had marked Point G in the wrong place, and that the south-western line was the route that people had actually walked. Officers have written to some of those witnesses who submitted user maps that contained the error, and most have replied to confirm that they did indeed walk the south-western line towards the High Street. It is considered that the discrepancy in the two sets of evidence has arisen due to the mistake originally made by Mr Mackey, and as many of the affected users have written to clarify their use, the line between A-G as shown on the Committee Plan should be the route considered.

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 claimed routes.
- 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 points to it having public rights as a result of dedication in the distant past. Any such rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 8.4 The documents cited 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.

9 Documentary Evidence

- 9.1 There is no historic documentary evidence to suggest that any of the claimed routes have ever been dedicated as public rights of way, and none of the paths appear on historic or recent mapping. However, officers have seen correspondence relating to and photographs of Rectory Field which are of some relevance to the investigation.

9.2 Photographic Evidence

9.2.1 1:10,000 Aerial Photograph – 1971 (Appendix 2a)

This black and white aerial photograph of Rectory Field is held by the Hampshire Record Office. The land is scarred, presumably as a result of ploughing, and there appears to be a faint diagonal line running south-westwards from the entrance at Long Cross Hill (Point B) for a short distance before fading out. The land appears to be unfenced near the Rectory and Church Centre.

9.2.2 Aerial Photograph (1:10,000) – 1991 (Appendix 2b)

Taken shortly after a period when the land was reportedly fenced for livestock, this colour photograph shows Rectory Field as being entirely grassed, with a fence visible between the Rectory and Church Centre and continuing south to the rear of the Holly Bush pub. A yellow line, possibly wear as a result of foot traffic, is visible along the line of Route A-C-B but no other routes are visible. It is unclear as to whether any other sections of the field are fenced.

9.2.3 Aerial Photograph (1:20,000) – 1996 (Appendix 2c)

Again, the entire field appears to be covered with grass in this photograph. The scale at which it was taken makes it difficult to ascertain whether any paths existed round the edge of the field at this time, but a clearly defined route running directly between Points B and E can be seen, with a spur linking the path to Point A. A further worn path can be seen linking Points A and E.

9.2.4 Aerial Photograph (1:10,000) – 1999 (Appendix 2d)

This photograph, taken from a layer on the County Council's Geographic Information System (GIS), shows that the land had by now been split, with the northern half of the field apparently having recently produced a hay crop - no routes are visible on the ground in this section. Remnants of worn paths running through long grass are still visible in the southern half of the field, with a route running round the perimeter as well as the remains of a path which, based on its trajectory, appears to have once run directly between Point B and Point E. A worn line can clearly be seen exiting the field and running between Points A and G.

9.2.5 Aerial Photograph (1:10,000) – 2000 (Appendix 2e)

This GIS photo shows the northern half of the field now covered with a crop of some description. Faint diagonal lines in this half of the field are a possible indication of use between Points A and B, but a clear route is not apparent. However, a route does appear to be in existence on A-C-B. A fence can now clearly be seen running round the perimeter of the southern half of the field.

9.2.6 Aerial Photograph – 2005 (Appendix 2f)

The 2005 aerial photography in GIS shows that both the northern and southern halves of the field have completely grassed over, with paths clearly visible on the diagonal A-B route and the perimeter A-C-B and A-D-B routes. There also appears to be a worn path between Points A and E, on a slightly different alignment to that visible in the 1999 aerial view, and a worn line exiting the field at Point A in the direction of Point G can also be seen. A thin line running along the line of A-D suggests the presence of fencing. It is difficult to infer the width of the walked routes but on average this appears to be approximately 1.5 – 2 metres.

9.2.7 Aerial Photographs – 2007 (Appendix 2g & 2h)

Two photographs provided by the Headley Village website show an aerial view of Rectory Field from the east, taken from a glider. The land is still covered by grass of varying lengths, and a worn route is clearly visible between A-B and A-C-B (in one of the photographs it also appears that someone is walking along route A-B). The worn route of path A-B continues out of the field and onto the grass between the Church Centre and the Rectory towards Point G. The fencing separating the northern and southern halves of the field can be clearly seen.

9.2.8 Aerial Photograph – 2008

This photograph, taken from Google Earth and provided by Mr Luff, reflects the situation captured in the photographs of the preceding three years. The fencing surrounding the southern half of the field can be clearly seen, but there is no sign of a route running outside it. The northern half of the field is still grassed, with routes clearly shown running between A-B and A-C-B, and from Point A in the direction of Point G.

9.2.9 Photos provided by the landowner – 2007 - present

The Diocese has provided photocopies of photographs which it states were taken of Rectory Field in August 2007 and January and August 2009.

August 2007 – Photocopies of two photos (labelled as being taken in August 2007) apparently taken from the Church Centre and looking to the east and north-east, show both halves on the field. The southern half of the field contains long grass, but the northern half appears to be covered with ragwort which is several feet high. The quality of the copies and the angle from which they are taken makes it impossible to infer the existence of any routes in the northern section of the field.

January and August 2009 – These photos show both halves of the field. The southern half of the field appears to be covered in long grass and contains two donkeys. One photo shows a fence running round the field perimeter. Other photos taken from near the Rectory show the northern half of the field. Again, the quality of the copies is poor but it is apparent from these photographs that the field is covered with ragwort, but a worn path is clearly visible in the foreground running between Points A and B.

June 2015 - The Diocese has also provided photos which show the land in its current state, with the northern half of the field containing a crop and surrounded by a barbed wire fence. A clearly labelled permissive path is shown running through A-C-B. The current tenant Mr Luff also provided a photo showing old fencing amongst the undergrowth at Point A, which he states was at some point unlawfully removed.

Undated – This photo, taken from Point B, shows what appears to be a crop in the field, with a worn area in the foreground indicating that this entrance was used for vehicular access. There does not appear to be a route through the crop but again, the quality of the photocopy makes it unclear.

9.3 Correspondence

9.3.1 Letter from Mr Peter Ellis to Ms Sharron Kay – 29th May 1999

This letter, a copy of which has been provided by the landowner, documents the continuation of a discussion between Peter Ellis and Sharron Kay over the proposed sub-letting of the southern half of Rectory Field. In the letter, Mr Ellis set out the conditions for the arrangement, including the fee that was payable and the steps Ms Kay would have to undertake to maintain the surrounding hedges. He also stipulated that Ms Kay must fence her portion of the land prior to putting animals out to graze. Mr Ellis then referred to public access:

“The public we are all concerned about. The ploughing and cutting around the whole area has, for the time being, reduced the path through the centre and to the Holly Bush. You need the animals available as soon as the fencing is completed. The distance between maize crop and your fence say 3 feet. I think the walking public will adopt a re-routing of their walks, the most difficult gap being close to you.”

9.3.2 Email from Mr Ian McDonald - 6th October 2015

In an email to the County Council, Mr McDonald confirmed that during the 1980s his wife started to rent land at various locations to keep livestock, including Rectory Field, which she rented from Mr Ellis. He and Mrs McDonald believe they occupied the land between 1985 and the end of July 1990. His message continues:

“There was some fencing when we arrived, especially between points E and F on your plan. It had obviously been there a long time. We were happy that it was good enough to prevent sheep getting out onto Crabtree Lane. The rest of the field either had no fencing (between points A and E and the exit at point B, for example) or poor fencing which would not have been sheep proof. As a result we fenced most of the field and it did keep the sheep in. In other words, while we were there the whole field was fenced.

When we left Headley in 1990 we yielded up the field to Mr Ellis with all the fencing still in position.

From the foregoing you will appreciate that we would not have welcomed people walking in with the sheep. There was a bit of vandalism quite often at point F on your map, when the fence was bent down and litter was left. This was probably bored youths moving from the Recreation Ground, but we never saw anyone in the field. Every time it happened we repaired the fence, and luckily no sheep ever escaped.

There was absolutely no evidence of any routes at all in the field during our occupation. However, we gave up the field 25 years ago and have no idea what has gone on since.”

10 User Evidence

- 10.1 The documentary evidence alone is insufficient to indicate that the claimed routes have ever been dedicated as public rights of way, and so the application must be determined based upon the evidence of use by the public in recent years.
- 10.2 There is evidence to suggest that the public have been using at least some of the claimed routes since the 1930s. The evidence is comprised of twenty-nine forms and statements, twenty-one of which were submitted with Mr Mackey's application. An additional forty-six people who originally submitted evidence in support of the TVG application were also identified as having used some of the

claimed routes, and their evidence has also been considered. Some users who completed forms also made statements relating to their use, some of which are detailed below. The dates of use for all seventy-five users are shown in a chart at Appendix 1.

- 10.3 The evidence of use put forward indicates that, prior to 2011, the routes at Rectory Field had been used in every year since 1934, although the number of users was for a long time of a low volume. By 1970 there were ten users, and by 1980 there were fourteen. By 1990 there were twenty-nine users and forty-six users by 2000. Only eight of the seventy-five users were not using the routes by the time the land was fenced off in 2011. Twenty-eight users put forward use of twenty years or more. The bulk of user appears to be between 1990 and 2011.
- 10.4 Nine people said that they used the route(s) on a daily basis, twenty-two more than once a week, twelve once per week, eight at least once a fortnight, and four people once a month or less. Four people did not provide a frequency of use, and nine people gave frequencies that were unclear (with descriptions of use ranging from 'rarely' or 'occasionally' to 'most days').
- 10.5 The majority of users claim to have walked more than one of the claimed routes, and the bulk of this use appears to have been spread between three routes – A-B (seventy-three users), A-C-B (fifty users) and A-D-B (forty-five users). Thirty-two people indicated that they walked the short section between Points A and G, though it is likely that most (if not all) users walking route A-B continued their journey along this route. Twenty-two people said that they used A-E-F, and seven people gave evidence of use on D-F.
- 10.6 **Mr Peter Mackey** moved to Denmead Cottage on Long Cross Hill (situated less than a hundred yards from Rectory Field) in 2000, and began using the claimed routes around that time. They offered a safer alternative to walking up Long Cross Hill, which has a number of blind corners and, in some places, has no footway. The diagonal route across the field served as a short cut to the village shops and surgery, and Mr Mackey used this 2-3 times per week. The perimeter routes were used daily for the purposes of walking the dog. By the time he moved to Headley the southern half of the field had been fenced.

In Mr Mackey's view, the land didn't seem to be used for any distinct purpose; it was ploughed occasionally, but on such occasions the diagonal route was quickly re-established. The field was rarely cropped or harvested and was mostly grassed. The vegetation never got above waist-high, and never established itself on the diagonal path due to foot traffic. There was never a gate at the opening to the field at Point B, and although there was some bundled up barbed wire next to the Rectory, there was no indication as to where this might have once been erected. He never saw any notices of any description, save for when the field was used as an overflow car park during the village fete. He was never challenged or heard that anyone else was, which might explain why the closure of the land in 2011 provoked such a strong reaction amongst local people.

- 10.7 **Mr Robert Emuss** moved into Barn Cottage in 1981. He recalls the land being fenced for sheep, and believes it was available for use around 1986-87. His use began after the fencing was removed. He would occasionally walk the routes around the edge of the field, but predominantly used the diagonal route about once a week to get to the local shops, avoiding the dangerous road. He often saw other people using this route.

He doesn't remember ever seeing Mr Ellis on the land, and gained the impression that he wasn't much interested in it – save for the occasional crop of maize the field was mainly grassed, and was cut periodically. Any crops that were sown never established themselves on the diagonal route. Mr Emuss never saw anyone working on the land.

There was a wire fence that had been trampled at Point A, which Mr Emuss took to be remnants of the fencing that was in place when the field contained livestock. Apart from this there were no gates or stiles restricting public access to the land, nor were there any signs relating to public access. Mr Emuss' use was never challenged and he assumed that, as use by the public was open, the Diocese were happy for this to continue.

- 10.8 **Mr Kevin Hilberry** has lived at Long Cross Farm since 1994, and used the paths at Rectory Field from that time up until 2011. He mostly used the diagonal A-B route, but occasionally made use of the paths round the perimeter too (including the link that went down behind the Holly Bush pub). The routes in the southern half of the field were rendered inaccessible once the land was fenced in 1999. Mr Hilberry used route A-B approximately once per week.

The diagonal route remained available even when the land was occasionally sown with a maize crop (maybe one or two years). Whilst some walkers might have shifted to the perimeter routes during this time, the diagonal route remained in use, and although it was occasionally ploughed out it was quickly trodden back to hard earth. He never saw anyone working on the land prior to Mr Luff taking it over.

He never knew the ownership of the land and it appeared to be in regular use by local people. He has no recollection of there ever having been livestock in the field since he moved to the area. He couldn't be sure that there wasn't initially a stile at Point A, but he stated that his wife recalled pushing their baby son across the diagonal route in a pushchair (he is now 20), so any obstructions that may have previously existed had been removed by that time. Other than this, he does not recall any gates, obstructions or notices prior to 2011.

- 10.9 **Mr Robert Larder** began using the claimed routes in 1990, when his family got a new dog. Between them, he and his wife would visit the field 4-5 times per week to walk the dog, and Mr Larder's use was spread between the diagonal route and the routes running round the perimeter of the field. He had no idea who owned the land but it seemed to be generally accepted by local people that it was open space available for public use.

The diagonal route seemed to be the most used, it was well-trodden and served as part of a direct route linking Arford with the rest of the village. He often saw other people walking the routes, though the routes round the western and northern edge of the field appeared to be used more than those running round the eastern and southern edge.

Mr Larder never saw anyone working on the land. Occasionally the land was ploughed and although this did not affect the perimeter routes, it did for a time remove the diagonal route. However, this was quickly re-established, often within days. He could not say with certainty whether the fencing of the southern half of the land physically obstructed use of the paths in the section, but within a short

period of time the encroachment of vegetation meant that these routes fell into disuse – Mr and Mrs Larder ceased their use of those paths around that time.

Mr Larder never saw any signage challenging public use and there were never any gates or other obstructions that prevented use. Other than the donkeys in the southern half of the field, he does not recall any other livestock on the land after his use began in 1990.

- 10.10 **Ms Rosemary Schofield** has lived at The Paddock, Headley (situated a short walk from Rectory Field) for over fifty years. She started walking on the land in the late 1990s for the purpose of exercising her dog, but also remembered the land being fenced for the purposes of holding sheep in the late 1980s (she thought between 1988 and 1989). Ms Schofield used to own sheep herself around this time and took them to be dipped at Rectory Field when the land was sub-let to the McDonalds.

She would usually enter the land at Point F and walk round the perimeter of the field through Points E-A-C-B. It was still possible to walk round the southern half of the field after it was fenced for the donkeys but Ms Schofield thought that the sub-tenant Sharron Kay was encouraged to allow the route to become overgrown, and within a few years access became impossible. Route D-F was inaccessible as soon as the field was fenced. She only recalled the diagonal A-B route being well-used after the southern half of the field was fenced off.

Ms Schofield would normally visit the land several times per week for the purposes of dog-walking and as a member of a local walking group that would often utilise the diagonal and northern perimeter routes on Rectory Field as part of a longer walk. She often saw other people using the routes, including joggers and other dog-walkers. She never saw any signs on the land indicating that it was not public, and was never challenged.

- 10.11 **Mrs Phyllida Smeeton** moved to The Old Rectory, situated opposite the church centre, in 1986. Her use of the claimed routes began at that time, mostly on route A-B, which she walked on a weekly basis. This route was very well used, and she often saw local people from Arford walking it. The other routes round the edge of the field were less well-used, mostly by dog walkers.

She was aware that the land was owned by the Diocese, and took part in the march to Lambeth Palace to protest against the proposed development in the 1980s. There didn't appear to be any opposition to the public using the land, and the field was often left fallow and was full of ragwort. Mr Ellis used to attend weekly coffee mornings at the church centre, and so must have seen people walking through the field.

The diagonal route was comprised of sandy soil and was about six feet wide. There was never a crop on this route as far as Mrs Smeeton can recall. There was no gate in the north-eastern corner of the field, just a gap, and there was no fencing at the Rectory end, just the remnants of some old fencing that had been beaten into the ground – it had been like this for some time.

Part of the land was fenced for sheep shortly after Mrs Smeeton moved to Headley, she thinks between 1988 and 1990. The sheep were owned by the McDonalds who lived at Headley Fields, and the Smeetons knew them slightly as their children were friends. There were only about ten sheep in the field at this time and they often escaped – on one occasion Mrs Smeeton found them

wandering up the drive of her property. Only part of the field was fenced at this time and the diagonal route and perimeter routes were still available. Other than this period, she has no recollection of there being livestock in the field.

There were never any notices on the land indicating that you couldn't walk there. Mrs Smeeton's use was never challenged and she never heard that anyone else's was. There was an assumption that the land was available for public use and no-one seemed to question this, not even Peter Ellis.

11 The Landowner

- 11.1 Both Rectory Field and the adjoining land that accommodates the Church Centre are owned by the Diocese of Guildford, and the available evidence suggests that Rectory Field has been within its ownership since at least the 1950s. The Diocese objects to the application and submits that the evidence does not support the acquisition of public rights. In June 2015 Charles Russell Speechlys LLP submitted a Statement of Facts on behalf of the Diocese, along with a witness statement of Kenneth Mussell, who has been Property Manager for the Diocese since 2009. Submissions were also received from Mr Andrew Luff, who has held the tenancy at Rectory Field since 2011.
- 11.2 **The Diocese** has submitted a Statement of Facts which sets out the recent history of the management of Rectory Field. It states that the Diocese granted an oral tenancy to J Ellis and Sons in the early 1950s, and from this time the land was variously used by the tenant for the purposes of growing wheat, barley and vegetables until the 1970s, whereafter Ellis and Sons moved to producing corn on the cob. From the early 1990s, the land was reportedly used for growing maize fodder until 2005, after which the land was left fallow, with the grass being topped each year.
- 11.3 On or around 29th May 1999, Ellis and Sons sub-let the southern half of Rectory Field to Ms Sharron Kay for the purposes of grazing animals. As a condition of her tenancy, Ms Kay fenced this area of land (this area remains fenced to date). The landowner submits that access between E-F-D would have been impossible from the time the land was fenced.
- 11.4 The tenancy to Ellis and Sons ended on 7th December 2010, following the granting of a Deed of Surrender. From May 2011 onwards, Rectory Field was let to Mr Andrew Luff. Upon taking on the tenancy, Mr Luff fenced the area not already enclosed by Ms Kay, and shortly afterwards created a permissive path running through A-C-B.
- 11.5 **Mr Kenneth Mussell** has been the Property Manager for the Diocese of Guildford since 2009, and submitted a witness statement on behalf of the landowner which reiterated a number of points made in the Statement of Facts. His additional points are included below.
- 11.5.1 Mr Mussell states that on 29th June 2009, the Diocese made an application to the Agricultural Lands Tribunal for a Certificate of Bad Husbandry against Ellis and Sons, with the primary complaint being related to the tenant's failure to control and eradicate the spread of ragwort on the land. This followed a letter (a copy of which has been forwarded by the Diocese) in 2008 which raised the issue with Ellis and Sons.

- 11.5.2 On 26th June 2009, Mr Mussell inspected the land let to Ellis and Sons for the purpose of the application mentioned at 11.5.1. At this time the southern part of the field was fenced and occupied by two donkeys. Mr Mussell also noted that the boundaries to Rectory Field were very overgrown.
- 11.5.3 Mr Mussell states that at no time during the leasing of Rectory Field to Ellis and Sons have the Diocese consented to or ever had any intention to dedicate any part of the land as a public highway, though he does not provide any further information in this regard.
- 11.6 The Diocese provided statements from two people in connection with the application to record Rectory Field as a Village Green, which they did not submit with their representations regarding this application. Officers consider that these statements are relevant to the investigation.
- 11.6.1 **Mrs Julia Whittaker** moved to The Old School House (which is situated immediately adjacent to Rectory Field's eastern boundary) with her family in April 1995. At that time she states that the field was being used to graze sheep. She recalls that there was a gate at Point B which was kept locked to prevent public access and that there was fencing across the access at Point A. During this time her husband would take their dog walking, and he found that access to Rectory Field was not possible. Mrs Whittaker cannot recall how long the land was fenced, believing it to be at least a couple of months but no more than six months, and thinks that the sheep were gone by September 1995.
- 11.6.2 After the sheep were removed from the field, Mrs Whittaker states that it was used to make hay until 1998/99, and thereafter the northern half was used to grow maize (the southern half having around this time been let to Ms Sharron Kay). During this time the public trampled a diagonal path through Rectory Field (Mrs Whittaker provided a plan to illustrate the route which shows a line between Points A and B). From 2005 onwards the land was left fallow and Mrs Whittaker cannot recall any farming activity taking place until Mr Luff was granted his tenancy in 2011.
- 11.7.1 **Ms Sharron Kay** also provided a statement, in which she confirmed details relating to her sub-tenancy (as discussed earlier in this report). She moved to the Old Holme School in late 1994 and lived there until approximately 2006. Before being granted the sub-tenancy in 1999, Ms Kay recalls occasionally seeing people walking a direct route between Points A and E, whom she believed to be walking to and from the paper shop or Holly Bush pub in the village centre. After fencing off the southern half of the land in 1999 she did not see anyone walking on this part of the land, but instead saw people walking between Points A and B (Ms Kay provided plans illustrating both the aforementioned routes).
- 11.7.2 During her sub-tenancy, Ms Kay recalls that Ellis and Sons used the northern half of Rectory Field to grow crops (either maize or hay), but that the crops weren't always very good and weren't always cut, resulting in the land becoming quite overgrown.
- 11.8 During the investigation of this application, officers spoke on two occasions to **Mrs Mary Irwin-Brown**, who is the daughter of Peter Ellis. Although Mrs Irwin-Brown did not make a formal statement, notes were taken during these conversations, and although these carry less evidential weight than a statement, it is considered

that the anecdotal evidence provided by Mrs Irwin-Brown is relevant to this investigation.

- 11.8.1 Mrs Irwin-Brown stated that her father first became involved with the land in the 1950s when he offered to farm the land for the then Canon, Mr Tudor-Jones, who was grateful for the assistance. Mr Ellis became a sitting tenant at that time, but there was no lease or other formal agreement, though Mrs Irwin-Brown stated that Mr Ellis made a note at the time to record that the agreement had been reached. Mr Ellis was very much in favour of public access to the countryside, and was much opposed to the Diocese's attempt to build on the land in the 1980s, to the extent that he spent private money fighting it. He believed the land should be held as open space and shouldn't be built over or access restricted.
- 11.8.2 Although he was aware that people were walking through the field, Mr Ellis would get annoyed when people destroyed crops and if he saw anyone walking across the land he would politely ask them to walk round the edge so as not to damage them. On several occasions he ploughed the land to discourage use of the diagonal path, but it didn't work and people continued to walk the route. When he grew crops, these would be sown on the diagonal path but the use of this line by walkers meant that the crop wouldn't grow on it. It was difficult to grow crops on the land as the soil was so sandy.
- 11.8.3 Mrs Irwin-Brown is aware that her father gave permission for a local person to keep sheep in the field for a couple of years and that the land was fenced for this purpose, but as she was out of the country at the time she cannot be sure on the dates. Any fencing carried out at this time would have been undertaken by the owner of the sheep, as her father wouldn't have spent any money fencing the land on someone else's behalf. Mrs Irwin-Brown returned to the UK in around 1991/1992 and there were no sheep kept on the land after that date - during the 1990s the land was mainly used to grow maize fodder. There was never a gate at the north-east corner of the land, just a wide gap.
- 11.8.4 During the 1990s, Mr Ellis was approached by Ms Kay who asked if she could rent the land so she could keep some donkeys on it. He gave permission for this on the condition that the land was fenced prior to putting her stock out to graze. He also stated that she shouldn't fence the south-eastern corner so people could walk round the field edge, thus enabling people to walk round the boundary edge to the pub. Before he died, Mr Ellis asked Mrs Irwin-Brown to protect the land and to try to keep it available for public use. She received numerous phone calls from concerned residents when Mr Luff fenced the land in 2011.

11.9.1 **Landowner Objections**

The Diocese objects to the application for the following reasons:

At various times fencing has been erected around Rectory Field, and this would have prevented access to the land. It states that the land has been used for the grazing of sheep intermittently since at least 1988, including the five month period between April and September 1995, when fencing was erected around the field and a locked access gate installed. The Diocese maintains that access to the land at this time would only have been possible with the use of force and also refers to the fencing of the southern half of the field by Ms Kay as an act which would have made access to the paths in that half of the field inaccessible. In evidence submitted in relation to the village green application, the Diocese stated that "the

erection of fencing by the tenants/sub-tenants of rectory Field demonstrates that the landowner (and those authorised by him) have exerted control over the land.”

- 11.9.2 In addition to the fencing, the Diocese maintains that it would not have been possible for the public to have used the land as of right and without interruption due to the use of the land for growing crops and vegetables between the 1950s and 2005.
- 11.9.3 The Diocese submits that the routes A-E-F-D and A-D-E-F would constitute a right to wander, and for this reason believes that these paths should be disregarded.
- 11.9.4 Only 14 of the initial 21 users allege use for a full period of 20 years, but in any event, the Diocese maintains that this would not be possible due to the fencing of the land and its use for agricultural purposes.
- 11.9.5 At no point during the tenancy of Ellis and Sons was the tenant given consent to dedicate public rights.
- 11.10 Mr Andrew Luff has held the tenancy to Rectory Field since May 2011 and also opposes the application. Mr Luff challenges the evidence provided in support of the application on the following grounds:
- Use of the paths upon which crops were being grown would amount to criminal damage
 - Some users gave evidence of use of the southern half of the field, but Mr Luff states that this was not possible after 1999 due to the land being fenced, and contends that this discrepancy casts doubt on the evidence of these users.
 - One user states that their use was with permission from Peter Ellis

Mr Luff believes that any footpath other than the existing permissive route would make farming activity difficult and expensive. Further, he states that the existing permissive route, which is supported by the parish council, seems to satisfy everyone and that there is no need for additional routes. In his submission he also stated his belief that a field should not be open for anyone to use simply because it isn't fenced.

The above objections are addressed in Section 13.

12 Consultations with Other Bodies

- 12.1 The following people and organisations have been consulted on this application: The Ramblers, Auto Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, Headley Parish Council, East Hampshire District Council, County Councillor Ferris Cowper and Hampshire County Council's Area Countryside Access Manager. Responses are shown below.

12.2 The Ramblers

The Footpath Secretary for the area given the following response:

When I was checking some of the BVPI-surveyed paths in Headley on 9th June, I talked to a resident of several years whilst at Rectory Field. The lady indicated that she had often walked across the single diagonal path that existed; this could be accessed from

the Village Centre building grassed area. The lady didn't recall any other paths across the field.

My impression is that the raft of paths shown on the map you sent is not appropriate; diagonal paths would involve through-the-crop transit and a complete peripheral path seems excessive, especially if the field has a long history of arable crops.

13 Analysis of the evidence

13.1 As has been established, no historic documentary evidence has been discovered from which an inference of dedication can be drawn, 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.

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

For Section 31 of the Highways Act 1980 to operate and give rise to a presumption of dedication, the following criteria must be satisfied:

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

13.3 Physical nature of the routes

It is considered that all of the claimed routes are capable of being rights of way at common law. The Diocese has stated that use of some of the routes would have amounted to wandering over the land, but the aerial photographs viewed indicate that all of the claimed routes were well-walked. Worn paths can be seen on the diagonal A-B route, route A-G, the perimeter routes and route A-D.

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

There are five reported actions which could be said to have brought the public's right to use the path into question:

- The fencing of the land by the McDonalds (thought by them to have been at some point in 1985)
- The fencing of the land in 1995
- The fencing of the southern half of the land by Ms Kay in May 1999
- The fencing of the northern half of the land by Mr Luff in May 2011

- Mr Mackey's application of June 2012

Each of these actions is discussed below.

13.4.1 Fencing of the land – 1985

The landowner states that the land was been fenced 'intermittently' since at least 1988. There is corroborating evidence in the form of the correspondence from Ian McDonald stating that, as far as he could recall, he and his wife kept sheep on the land between 1985 and July 1990 (see 9.3.2) and fenced the entire field for this purpose. A number of users stated that the land was fenced and contained sheep during the late 1980s, with the period 1988-1990 being cited in several submissions. Although all evidence provided is purely anecdotal, officers consider it reasonable to accept the recollections of Mr McDonald, who for some time has had no connection with the land and no longer lives in the area, at face value. It is apparent that the fencing was carried out by the McDonalds and not by Mr Ellis, and was undertaken in order to keep livestock in the field as opposed to challenging public use. However, the length of time the land would have been unavailable would have constituted a significant interruption to public use sufficient to call it into question, which gives a relevant period of 1965 – 1985.

13.4.2 Fencing of the land – 1995

Based on the statement of Mrs Whittaker, the Diocese has asserted that the land was fenced for a period of several months during 1995 for the purposes of containing livestock. However, no evidence has been provided to support this assertion, and nowhere is such an action acknowledged in the user evidence. Further, users who were interviewed were specifically asked if the land was fenced during 1995 – no-one recalled this having occurred. Officers are of the view that as there appears to be no evidence that the land was fenced at this time, and only anecdotal evidence provided by the landowner, there is insufficient evidence to regard this as an event which called public use into question.

13.4.3 The fencing of the southern half of the land by Ms Sharron Kay - May 1999

It is widely acknowledged that the southern half of the field was fenced by Ms Kay in 1999. Some witnesses state that some routes round the edge of this area of the field remained available for use after the fencing went in (A-E and E-F), but that the close proximity of the fencing to the field boundary and the fact that the routes quickly became overgrown meant that public declined after 1999. Whilst this would suggest that users of these routes were not overtly challenged by this action, it does indicate that it led to a reduction in use, something which is considered later in this report. Conversely, the evidence provided indicates that due to the close proximity of the fencing to the perimeter of the field, D-F was rendered inaccessible as soon as the land was fenced. As with the previous instance in the late 1980s, the purpose of fencing this parcel of land was to contain livestock, not interrupt public access. However, as the land has been fenced for a considerable period of time (and remains fenced today), this action is considered to have interrupted public use of route D-F under Section 31, giving a relevant period of 1979 – 1999 for this route.

13.4.4 The fencing of the northern half of the land by Mr Andrew Luff – May 2011

There is clear evidence from both the landowner and users that the northern part of Rectory Field was fenced and gated in May 2011, with accompanying notices making it clear that public access to the field was not permitted. The fencing of the land and accompanying signage clearly brought 'as of right' use of routes A-B, A-C-D and A-D-B by the public to an end and is considered to have been sufficient to call use in to question, giving a relevant period of 1991 – 2011 for the northern half of the field.

Application submitted by Mr Mackey – June 2012

Mr Mackey's application of June 2012 called public use of the remaining routes A-G and A-E-F into question, giving a relevant period of 1992 – 2012.

13.5 Twenty years' use without interruption/Use by the public

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. Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more. 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.

There is no evidence to suggest that any of the users were employed by, or had a particular connection to either the Diocese of Guildford or Mr Ellis. Use appears to have been by a wide range of local inhabitants, primarily using the land for recreation or as a short cut between Arford and Headley. It is not a requirement of the legislation that all witnesses provide evidence of twenty years' use.

It is accepted that some witnesses have put forward evidence of use on sections of the land at times when they would have been inaccessible, but officers attribute this apparent discrepancy to the limitations of the user evidence forms (which do not cater for different periods of use on multiple routes) and consider it reasonable to infer that where this occurred users were indicating continued use of areas of the land that remained accessible.

Public use of each of the claimed routes is considered below.

Route B-E

Although not claimed by the applicant, it is apparent from the aerial photography of 1996 and 2000 that for a period of at least four years, a longer route was walked on a straight line between Points B and E (as confirmed by Ms Kay at 11.7.1), with a spur linking this route to Point A, and that use of this line was apparently interrupted by the fencing of the southern half of the field in 1999. The route does not appear on the earlier aerial photography of 1991 (probably as a result of the land only recently having been made accessible to the public) and no evidence of use of this route has been put forward by the applicant. It would therefore appear that, based on the evidence that has been put forward regarding dates for the fencing of the land, this route was not in public use for the necessary

twenty year period. The implications that the existence of this route has on Route A-B are discussed below.

Route A-B

None of the users indicated that the growing of crops interrupted public use, with many claiming that crops simply didn't establish themselves due to the footfall of users, which maintained a path throughout. Some users recall the walked line occasionally being ploughed out, but that within days it had been re-established by foot traffic. None of the users reports the existence of any gates or fencing that obstructed their access to the land during the period 1991 – 2011, and so the prima facie evidence indicates that public access to Route A-B has been uninterrupted during this time, thus satisfying the requirements of Section 31.

The evidence of public use of this route is significant, with seventy-three users stating that they walked this path, many of them several times per week. However, as discussed above, it is apparent from available aerial photography that the walked line between A-B varied slightly during the relevant period. It is reasonable to infer from the available aerial photography that the public were walking on B-E for at least part of the relevant period of 1991 – 2011. This is reflected by Ms Schofield's recollection that the diagonal path did not come into existence until the southern half of the land was fenced. Given the subtle difference between the line of the two routes, and the fact that their termini were the same, it is perhaps understandable that none of the users differentiated between the two in their evidence. However, the existence of Route B-E casts doubt on whether the public have used A-B for a sufficient period of time to satisfy the requirements of Section 31, as it is unclear as to whether A-B was actually walked while this 'alternative route' was available.

Route A-G

Use of this route appears to have been uninterrupted during the relevant twenty year period 1992 – 2012, and no obstructions have ever been reported at Point A which might have discouraged the use of this path. The path appears to have been well-used by the public during this time.

Route A-C-B

Even when crops were planted on the land, the user evidence indicates that a narrow path was walkable round the edge of the field on A-C-B throughout the relevant period of 1991 - 2011, and public use of this route appears to have been unhindered during this time. It also appears to have been well-used by the public, with fifty people giving evidence of use. Mrs Page identified it as an alternative route that she used in deference to the landowner when crops were being grown on the land, while others observed that it route was used more often during those periods. It would appear that there has been sufficient use of this path by the public during the relevant period to satisfy the requirement of Section 31.

Route A-D-B

There are no reports of this route being obstructed during the relevant period of 1991 – 2011. However, although well-walked, it appears that the east-west length of Route A-D-B (running between A-D) would only have become an obvious route

around the northern half of Rectory Field after the southern half of the land was fenced in 1999. It is considered unlikely that the public would have used this section of the route in large numbers without a boundary feature to guide them, and as a result, officers are of the view that on the balance of probabilities A-D-B has not been 'enjoyed' by the public for the entirety of the relevant period 1991 – 2011 and as a result does not meet the requirements of Section 31.

Route A-E-F

This route does not appear to have been obstructed by fencing prior to Mr Mackey's application of June 2012, but several users who were interviewed admitted that their use of Route A-E-F was curtailed by encroaching vegetation shortly after the southern section of Rectory Field was fenced in 1999. This obstruction is not considered to have been an interruption for the purposes of Section 31 (that is, the public's use being interfered with by the landowner or someone acting on their behalf), but it is apparent that public use did cease about this time and so the level of use by the public during the period 1992 – 2012 was not sufficient to satisfy the requirements of Section 31.

Route D-F

There is clear evidence that the fencing of the land by the McDonalds between 1985 and 1990 constituted an interruption to public use during the most recent relevant period of 1979 – 1999, and the relevant twenty year period prior to this action is 1965 – 1985. There is no reported obstruction to public use of this route during that period, but recorded use by the public is low. Ten users put forward use of this route, seven of whom did not begin to walk it until after the end of the qualifying period, and the earliest use of the remaining three users did not commence until 1967. It is therefore considered that there was insufficient public use of this route between 1965 and 1985 for a presumption of a deemed dedication to arise.

13.6 'Without force, stealth or permission'

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

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

None of the witnesses reports having to climb or jump over anything to gain access to the claimed routes, with access being apparently unobstructed prior to 2011 save for the periods when the land was fenced for livestock during the period 1985 – 1990 and from 1999. It would appear that not only did both these actions come to the attention of local people, but also that in each case the fencing that was installed was respected by local people, with no reports of vandalism or forced entry. It is reasonable to assume that any other fencing erected on the land would have been publicly acknowledged and similarly respected.

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 land by the public appears to have been open. All witnesses who filled in forms or gave statements saw other people using paths on the land. Some

witnesses also stated that Mr Ellis knew the land was being used by the public - Mrs Smeeton stated in her evidence that Mr Ellis attended a weekly coffee morning at the Church Centre, which overlooks Rectory Field, and so he would have on occasion seen people entering and exiting the land.

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

One user, Mrs Antoinette Pull, stated that her use was with the permission of Mr Ellis, and such use would not be ‘as of right’. Ms Rosemary Schofield indicated on her user form that permission had been sought from Mr Ellis to hold the village fete on the land, but also gave evidence of regular use of the paths at Rectory Field for which permission was not sought. All other use appears to have been ‘as of right’.

13.7 Summary of User Evidence

The evidence provided indicates that members of the public have been using the claimed routes for a number of years without force, stealth or permission. However, the use of most routes appears to have either been interrupted during the identified relevant periods or of a volume which was insufficient to meet the requirements of Section 31, save for routes A-C-B and A-G, which appear to have been used for a full period of twenty years in numbers capable of coming to the attention of the landowner. However, dedication of these routes may not be inferred if it can be demonstrated that the landowner did not intend to dedicate the route as a public footpath.

13.8 Actions of the landowner

13.8.1 Throughout the period(s) of use in question, the freehold to Rectory Field has been held by the Diocese of Guildford. However, it would appear that by virtue of an oral tenancy granted by the Diocese to Ellis and Sons in the 1950s, the land has been managed by Mr Ellis. No evidence has been put forward to indicate that the Diocese has itself addressed the question of public access to the land, or ever given explicit instructions to its tenant to prevent the public acquiring rights.

13.8.2 Based on the evidence submitted by Mr McDonald, public access to the land was not possible between 1985 and 1990, and it is widely acknowledged that the southern half of the land was fenced in 1999. Both these actions served to interrupt public use, and because of their significant duration these interruptions are sufficient to rebut the presumed dedication of some of the claimed routes. It should be noted that these actions were not carried out by the landowner or its tenant, but by sub-tenants, and the intention in both cases was to contain livestock, not to challenge public use. There is no evidence of any act on the part of the landowner or tenant which challenged public access to Rectory Field prior to 2011.

13.8.3 Mr Ellis appears to have been aware of the fact the public were walking across the land, evidenced by his letter to Sharron Kay in 1999 in which he referred to the likelihood of the public “re-routing their walks” after fencing was installed (9.3.1). It is suggestive that when acknowledging the fact that public use of the path to the Holly Bush would be interrupted by the fencing, Mr Ellis appeared to be relaxed about the prospect of people subsequently walking on alternative

routes across the land and made no mention of any measures that might be implemented to prevent this from happening. The “ploughing and cutting” which Mr Ellis stated had “reduced” the path through the centre may well have had that effect, but user evidence suggests that a path was quickly re-established whenever the land was ploughed. It is considered that the ploughing of the land should not be interpreted as an act aimed at preventing public use as it was consistent with previous farming practice. This view is supported by the courts, in particular by *Owen v Buckinghamshire County Council [1957]*.

- 13.8.4 The Diocese has stated that the land was used for agricultural purposes from the 1950s, and in particular from the early to mid 1990s a maize fodder crop was grown in Rectory Field until 2005, meaning that access to the land would not have been possible during this period. However, aerial photography from 1991 and 1996 show the land apparently grassed, with the latter showing a well-worn path on B-E, and the aerial photograph of 1999 shows the remnants of this path still evident on the ground. Other paths are also visible on the land during this period. The assertions of the landowner conflict with those of users but, save for an undated photograph taken from Point B showing a crop in the field (see 9.2.9), no evidence has been provided to support the Diocese’s position. Although it appears unlikely that the route that crossed the field (A-B) satisfies the requirements of Section 31, it may still be considered at common law (see 13.11.1).
- 13.8.5 The Diocese maintains that the land was fenced for a period of several months in 1995 for the purposes of holding livestock, a view which is supported by a statement from Mrs Whittaker. However, this anecdotal account aside, no other evidence has been put forward to corroborate the assertion, and there is no acknowledgement of such an occurrence in any of the user evidence. Again, there is conflict in the evidence here, but officers consider that the evidence provided by the landowner is insufficient to rebut the considerable evidence of user.
- 13.8.6 It is clear that the actions of Mr Luff upon the commencement of his tenancy coincided with an interruption to public use of the northern half of the land. He went to the extent of fencing the land, erected clear signage indicating that public access to the land was not permitted, and later offered a path on permissive basis only. These actions contrast with Mr Ellis’ tenure, during which there is no evidence to suggest that he challenged public use (despite being aware of it), as well as some anecdotal evidence to indicate that he acquiesced in public use of the land. It is reasonable to suppose that the Diocese was aware of public use of the land, given the fact that it had a Property Manager who apparently visited the land and might reasonably have been expected to infer that people were walking there (if not from actually witnessing people on the land then perhaps from the worn paths visible on the ground).
- 13.8.7 The Diocese states that at no time were Ellis and Sons given consent to dedicate public rights. However, it is unclear as to whether any instructions were issued to Mr Ellis regarding public access. There appears to have been no formal agreement covering the tenancy of Ellis and Sons, which may have contained such instructions (and which is common in such situations), and as there is no evidence of any instructions subsequently being issued by the Diocese regarding public access, it could reasonably be assumed that there were none.

13.9 **Conclusions under Section 31, Highways Act 1980**

It is considered that only routes A-C-B and A-G have been used in sufficient numbers and for the required period of twenty years without interruption to give rise to a presumption of dedication by the landowner. Officers are of the view that there is no evidence of any action by the landowner or tenant during the respective relevant periods to demonstrate a lack of intention to dedicate these routes as public.

13.10 **Analysis of the evidence at common law**

This application 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. 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 at common law, and depends on the facts of each individual 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.

There is evidence of user on some of the claimed routes from which a dedication could be inferred at common law, as follows:

13.10.1 **Route A-B**

This route appears to have come into existence once the southern half of the land was fenced by Ms Kay in 1999, and according to user evidence was walked without interruption until Mr Luff fenced the northern half of the field in 2011. Public use of the route appears to have been significant, with users stating that there was no obstacle to their use, even during periods when crops were grown in the field (through which a route was still walked). Various aerial photographs dating from 2005 show a worn path on this alignment, which gives some indication as to the volume of use.

13.10.2 **Route A-G**

There is significant evidence of uninterrupted and unchallenged use on this route over a considerable period of time, and it is considered that it meets the requirements for a common law dedication.

13.10.3 **Route A-C-B**

This route appears to have been available ever since the land became accessible to the public again in 1990, with evidence of a large number of users and no evidence of any interruption to their use prior to 2011.

13.10.4 **Route A-D-B**

Although probably only walked on the alignment now claimed since 1999 when the fencing of the southern half of the land made it a viable path, this route also appears to have been heavily used by members of the public (particularly dog-walkers) who were not stopped until 2011.

13.10.5 **Route A-E-F**

The available evidence suggests that use of this route would only have been possible prior to 1985, and between 1990 and 1999. Although there is evidence of use covering both periods, some users admitted during interviews that their use had actually been predominantly on Route A – B. On balance, it does not appear that public use of this route has been sufficient for the landowner to have reasonably inferred that the public were asserting a right of way over it.

13.10.6 **Route D-F**

As established at 13.7, the evidence of public use of this route since the 1960s is limited, with only nine people gave evidence of use. This evidence is not considered sufficient for a common law dedication to be inferred.

13.11 **Conclusions at common law**

13.11.1 It is considered that there is evidence of user from which a common law dedication can be inferred on Routes A–B, A-G, A–C–B and A–D–B. A significant number of people have used routes A-B and A-D-B over a period of twelve years (1999 – 2011), and route A-C-B over a longer period of twenty-one years (1990 – 2011). Given the lack of a reported challenge or any obstructions, it would appear that use of A-G could date back even further, although with no means of accessing the land between 1985 and 1990 it is doubtful whether such use actually occurred. In the absence of any direct action on the part of the Diocese during this time it could be inferred that Mr Ellis’s actions in managing the land were representative of the landowner’s intentions. As there was no formal tenancy agreement between the Diocese and Ellis and Sons there is no evidence of any instructions being issued by the Diocese regarding public access and so it must be assumed that there were none.

13.11.2 In Mr Ellis’ letter to Ms Kay in 1999 he stated that he expected the public to adopt new walking routes across the field once the southern portion of the land was fenced. It is also apparent that he did not intend to do anything to prevent or discourage this from happening. Further insight into Mr Ellis’ attitude towards public access can be inferred from Mrs Irwin-Brown’s (albeit anecdotal) account that he instructed that Ms Kay leave a walkable path round the edge of her fencing. Descriptions of Mr Ellis in the user evidence by those that knew him give the impression that he was aware that the public were accessing Rectory Field and was happy for it to continue.

13.11.3 Mrs Irwin-Brown reported that Mr Ellis used to ask people to walk round the edge of the field when crops were being grown. This is not reflected in the user evidence, but if such a request was issued it would not necessarily reflect an intention not to dedicate, and could instead be attributable to concerns about damage to crops. As has been discussed, it is reasonable to interpret the ploughing of the land as an activity in keeping with the farming practices that had

previously place there – it is apparent that users did not interpret this action as an act designed to discourage use. Similarly, the growing of crops on the land would not be inconsistent with an intention to dedicate, and it is clear from the user evidence that people continued to walk Route A-B even when the land was planted.

- 13.11.4 As the freeholder, only the Diocese would have the capacity to dedicate public rights. There is no evidence of the Diocese attempting to prevent public access to the land during this period, although it could reasonably be assumed that it was aware of how the land was being managed through visits by its employees and the proximity of the land to the church and the church centre. The Diocese has stated that it has had no right to possession of the land and could not interfere with persons permitted by the tenant to cross the land (see Appendix 3) – this statement appears to be at odds with the statement put forward in response to the village green application (detailed at 11.9.1), in which the Diocese stated that it had exerted control over the land through the actions of its tenants and sub-tenants. Given the lack of clarity regarding the conditions of the tenancy, it is unclear how the Diocese can conclude that it had no power to prohibit public use. This point notwithstanding, the landowner would nevertheless still have had the power to erect notices under the provisions of Section 31(4) of the Highways Act 1980, which makes specific provision for a freeholder to erect notices inconsistent with an intention to dedicate public rights on land occupied by tenants. There is no evidence of this action having been taken.

14 Comments by the Applicant and Landowners

- 14.1 Mr Mackey has made the following comments:

Although not claimed under this application it should be noted that the actual diagonal route across the field, whether it was B-A or B-E should be considered the same. The exit to the field between point A and point E was rather blurred up to the erection of the fence separating the two halves of the field. People could have exited anywhere along the line from A to E. When the fence was erected, the exit was pushed to point A.

Officer's comment: It is considered that, in light of amount of deviation between the two routes, it is not possible to consider the user evidence as applying to both routes, and although it appears that B-E was well walked for at least several years, there is no clear evidence regarding how well-used this route was, as users have given evidence to support route A-B. It is therefore considered that the evidence of use is insufficient for a dedication of route B-E to be inferred.

- 14.2 The Diocese has submitted a detailed response to the report, including an opinion from legal counsel. This submission is included in full at Appendix 3.

15 Conclusions

- 15.1 The public's right to use the paths was variously called into question by the fencing of the southern half of the land in 1999, by the fencing of the northern half of the land in 2011, and by Mr Mackey's application of 2012.

- 15.2 The historic documentary evidence viewed is insufficient to infer that any of the claimed routes are public rights of way, but there is evidence of public use of paths on the land dating back to 1934.
- 15.3 There is evidence under Section 31 of the Highways Act 1980 to suggest that routes A-C-B and A-G have been used by the public as of right and without interruption for a full period of 20 years.
- 15.4 There is evidence of public use between 1999 and 2011 from which a dedication can be inferred at common law on A-B, A-G, A-C-B and A-D-B.
- 15.5 There is a lack of clear evidence as to the width of the claimed paths, but based on contemporary aerial photography and witness evidence the average width of the claimed paths appears to be 1.5 metres.
- 15.6 If Members agree that, on the balance of probabilities, it can be reasonably alleged that a right of way subsists over the paths described in paragraphs 15.3 and 15.4 and, then they should direct that a Map Modification Order is made to record those routes as a public footpaths.

16 Recommendation

- 16.1 That a Definitive Map Modification Order be made to record a public footpath with a width of 1.5 metres, on route A-B, as shown on the Committee Plan.
- 16.2 That a Definitive Map Modification Order be made to record a public footpath with a width of 1.5 metres, on route A-G, as shown on the Committee Plan
- 16.3 That a Definitive Map Modification Order be made to record a public footpath with a width of 1.5 metres, on route A-C-B, as shown on the Committee Plan.
- 16.4 That a Definitive Map Modification Order be made to record a public footpath with a width of 1.5 metres, on route A-D-B, as shown on the Committee Plan.

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

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

Section 100 D - Local Government Act 1972 - background documents

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

DocumentLocation

Claim Reference:

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

- 1 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.