

**HAMPSHIRE COUNTY COUNCIL**

**Decision Report**

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	16 March 2016
<b>Title:</b>	Application for a Map Modification Order to record a public bridleway between Naishes Lane and Ewshot Lane, in the parish of Church Crookham
<b>Reference:</b>	7352
<b>Report From:</b>	Director of Culture, Communities and Business Services

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**1 Executive Summary**

- 1.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a public bridleway between Naishes Lane and Ewshot Lane, in the parish of Church Crookham. The claim is supported by user evidence from 47 local people dating from 1955 which, the applicant believes, demonstrates that the public have acquired a right of way through long use without challenge.
- 1.2 Whilst there is evidence of use by the public it has also been established that during the period of public use, the land over which the claimed route runs was subject to byelaws stating that public access to the land was with revocable permission, as well as statutory deposits made by the landowner under Section 31(6) of the Highways Act 1980 to protect the land from a prescriptive claim, and it is therefore recommended that the application is refused.

**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].

#### 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.

#### HIGHWAYS ACT 1980 – SECTION 31(6)

Section 31(6) enables landowners to deposit with the relevant local authority a map and statement showing the ways (if any) which they admit are dedicated as public rights of way. If they then, within ten years, deposit a statutory declaration that no additional ways have been dedicated since the deposit of the map this is sufficient, in the absence of proof to the contrary, to establish that no additional ways have been dedicated during the period between the date of deposit of the statement and map and the date on which the declaration is lodged. The landowner may continue to deposit similar declarations at intervals of ten or fewer years with the same effect.

### **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 made in 2012 by **Mrs Valerie Hall**, a resident of Church Crookham. It was supported by 47 user evidence forms providing use by the public on foot, horseback and on a bicycle. The applicant also provided a statement setting out the history of the site and giving details of her own use.

#### **5 Landowners**

- 5.1 Between 1855 and 2002, the land was owned by the **Secretary of State for Defence**, referred to hereafter as the Ministry of Defence (MoD). In 2000, the land was sold to **Taylor Wimpey Developments Limited** (Taylor Wimpey).
- 5.2 Through their legal representatives, Addleshaw Goddard LLP, Taylor Wimpey object to the application, and in a submission made to the County Council in March 2013, cited the existence of byelaws and permissive signage which would have meant that public use of the land could not have been 'as of right'.

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

- 6.1 The claimed route, known locally as the 'Gurkha Path', runs through the site of the former Queen Elizabeth Barracks (QE Barracks), which was sold and vacated by the MoD in 2000. At the time the claim was submitted, the route ran between two tall wire mesh fences along a surfaced track, bordered by vegetation and grass verges on each side. In recent years, the land use has changed - the fencing has been removed and the land either side is in the process of being redeveloped by the current owner.
- 6.2 The route commences at a junction with the 'C156' Ewshot Lane (Point A on the Committee Plan) and proceeds in a north-easterly direction for approximately 75 metres before turning south-east and continuing in that direction for a further 770 metres to a junction with Naishes Lane (Point B), which although partly recorded on the List of Streets, is unadopted at the point where it meets the claimed route.

#### **7 Background to the claim**

- 7.1 The earliest map depicting the claimed route in any way is the Ordnance Survey County Series map of 1930, which shows only the northern half of the route, apparently as a private access track. QE Barracks (originally called Boyce Barracks but renamed in 1948) was built in 1938, and subsequent OS mapping shows the track extending southward to meet Naishes Lane, presumably to facilitate access through the barracks by MoD personnel. The site previously fell within the parish of Crondall, but the parish boundary has since changed, and the area now falls within the parish of Church Crookham. The earliest recorded use of the path by horse riders commenced shortly afterwards in 1955.
- 7.2 According to the applicant, during the 1990s the MoD installed bollards at each end of the path to prevent vehicular access. Also around this time the security fencing around the barracks was replaced. Notices along the fence indicated that public access to the barracks itself was prohibited and warned of the presence of guard dogs inside the barracks. The applicant reported that the Gurkha Path was retained running through the middle of the site, and at no point was access to the public restricted.

- 7.3 The land was sold to Taylor Wimpey in 2000. According to the applicant, an initial planning application for the redevelopment of the site was submitted in July of that year, and around this time three signs were erected at intervals along the chain link fencing bordering the path which read *“Use of this path is with permission of the owner”*. At the time the application was submitted in 2012, two of these signs had disappeared, but the remains of a third could still be seen (the applicant provided a photograph showing this).
- 7.4 During the years that followed, successive planning applications submitted by the landowner in 2000, 2004 and 2010 indicated that it intended to retain the Gurkha Path, though the status of the route was unclear, with the planning application in 2010 labelling the route as a ‘Green Lane’. Subsequent discussions between the applicant and planning officers of Hart District Council revealed that although access to the path for horse riders was considered, it was eventually ruled out due to the possible conflict with vehicular, cycling and pedestrian traffic. As a result, in 2012 the applicant submitted an application to record the path as a bridleway, based on evidence of long use by the public.
- 7.5 As is the case with other routes on the site, for the next few years the Gurkha Path is to be maintained by the developer. However, officers are given to understand that in due course (at a point which has yet to be determined) responsibility for the route will be passed to Church Crookham Parish Council. At this time a decision will be made as to what status (if any) the route should be recorded. This prospective change does not have a bearing on determining this application, and is mentioned purely for Members’ information.

## **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 route A-B.
- 8.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).
- 8.3 Historic and documentary evidence has been examined to see whether the past history and use of the 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 originals of many of the documents referred to in this report are only available in public record offices, but copies, transcripts or tracings of most documents are available for inspection in the offices of the Rights of Way

section. Members are invited to inspect these, or the originals, when considering this report.

## **9 User Evidence**

- 9.1 In the absence of any documentary evidence to support this application, the matter must be determined based up evidence of use by the public. Forty-seven user evidence forms were received with the application providing evidence of such use. The frequency of use varies - the least frequent user states that they used the path 3 times per year, whilst two witnesses claimed daily use. Thirty-three people gave use of once a week or more and eleven users gave use of at least once per month.
- 9.2 The earliest reported use of the path is in 1955, and by 1980 the number users had increased to seven. Three additional witnesses began using the route during the 1980s, and ten further users commenced their use during the 1990s. The remaining witnesses began using the path after 2000. All users reported seeing other people using the path.
- 9.3 None of the users reports having to negotiate any stiles and the only reported obstruction to use is occasional fly-tipping and the structures installed by the MoD to combat it – neither are acknowledged to have prevented access to the path by horse riders.
- 9.4 None of the users report having been stopped, being told that the route wasn't public, or having sought permission to use the route. On the subject of notices, six people recalled seeing signs warning of the presence of guard dogs, one remembered signage relating to the military barracks (but did not give further details) and another stated that access to the land either side of the path was prohibited. Two users (including the applicant) recall signage after 2000 stating that use was with permission.
- 9.5 It is clear from the user evidence that local people have been using the Gurkha Path since the 1950s. The bulk of the use put forward commenced after 2000, when the land was within the ownership of Taylor Wimpey.
- 9.6 Crown Land (which includes land belonging to the MoD), is not subject to a claim for public rights under Section 31 Highways Act 1980, irrespective of the quality and quantity of user evidence supporting the application. Consequently, prior to 2000 this application can only be considered under common law.

## **10 The Landowner**

- 10.1 As has been established, the land over which the claimed route runs was, until 2000, owned by the MoD, and formed part of the Aldershot and District Military Lands. Land Registry documents relating to this land indicate that it was conveyed to the War Department in 1855.
- 10.2 In 1994 the MoD submitted a Statutory Declaration under Section 31(6) of the Highways Act 1980 in which it acknowledged public rights of way already in existence on the land, and further declared that no additional ways had been dedicated to the public. This deposit was renewed in 2000 and did not expire until 2010. As a result, not only was the MoD invulnerable to a claim under Section 31 of the Highways Act 1980 due to its 'Crown immunity', but by virtue of

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the deposit made under Section 31(6) it also protected itself from a claim under common law during the period 1994 – 2000.

- 10.3 Up until 2000, the land was managed on behalf of the MoD by Defence Estates. In 2005, the County Council received an (ultimately unsuccessful) application for a public footpath over Tweseldown, a land parcel immediately adjacent to QE Barracks. In response to the consultation on this application, Miss Claire Dalton of Defence Estates forwarded a copy of the Aldershot and District Military Lands Byelaws 1976 to the County Council. These byelaws are reproduced in notice form on the perimeter of the affected lands. In correspondence relating to the 2005 application, Miss Dalton highlighted the fact that the MOD “offer the public permitted use of land (albeit that the land sometimes has to be cordoned off for military use)”. She also drew attention to the signs placed on the Military Training Area which conveyed these byelaws to those persons using the land. Taylor Wimpey’s submission of March 2013 also drew attention to the 1976 byelaws.
- 10.4 The 1976 byelaws cover a number of topics, including use of the land by the public. Under section 2, the byelaws provide that:

*‘Subject to the provisions of these Byelaws the public are permitted to use all parts of the Military Land not specially enclosed or the entry to which is not shown by notice as being prohibited or restricted, including those Ministry of Defence roads thereon which have been constructed or made up for general use by vehicular traffic, for the purposes of open-air recreation at all times when the Military lands are not being used for military purposes for which they are appropriated.’*

Therefore, all use by the public from 17th May 1976, when the byelaws came into force, was with the permission of the Ministry of Defence. The 1976 byelaws revoked the byelaws in respect of the Aldershot and District Military Lands, dated 23<sup>rd</sup> March 1950 - it has not been possible to obtain a copy of these byelaws, but given that they were made under the provisions of the Military Lands Act 1892 (for the purposes of regulating the use of MoD land), it appears likely that their provisions were substantially similar to the succeeding byelaws. The 1976 notices contain a plan showing the extent of the Military Lands in the Aldershot area and a schedule listing the affected areas by name – the area accommodating QE Barracks is identified on the plan, whilst the schedule for the area includes the description: “Aldershot Military Town and other training areas and other land situated west of the Farnham-Farnborough Road and Hawley Lane and extending to Warren Corner, **Cron dall**, Fleet, Hawley, Farnborough and including part of Yateley Common” (emphasis added).

- 10.5 As reported by the applicant and one other user, upon acquiring the site in 2000 Taylor Wimpey displayed signs along the length of the path indicating that use by the public was with permission (it is not clear if this permission was ever revoked – it does not appear to have been based on the accounts of users of the path). In addition, the 31(6) deposit originally lodged by the MoD in 1994 which did not expire until 2010 offered protection against a prescriptive claim which was transferred to Taylor Wimpey upon their acquisition of the land in 2000.

## 11 Consultations with Other Bodies

11.1 The following persons and bodies have been consulted about the application: Hart District Council, County Councillor John Bennison, The Ramblers, The Open Spaces Society, The British Horse Society, The British Driving Society, Byways and Bridleways Trust, the Area Countryside Access Manager. At the time of writing, the following responses have been received:

### 11.2 Church Crookham Parish Council

*"I believe that this path is locally known as the Gurkha Path and it used to be a pathway on the Queen Elizabeth Barracks MOD land. My understanding has always been that pathways on MoD land were not public rights of way. The path is well used and still exists and runs through a new housing development. It has currently been closed by the developer as they are building next to it and the path is extremely muddy. Local horse riders did use this path and the Parish Council asked the developer to provide an alternative bridleway for them. A new bridleway has been put in over the SANGS land and is use by horse riders.*

A further response from the Parish Council reports the decision at a parish meeting, where *"It was resolved not to make any decisions about the designation of the Gurkha Path until it is handed over to the Parish Council from Taylor Wimpey and the surrounding development is completed. The Parish Council will then be able to monitor its use and canvas local opinion before any changes are requested."*

### 11.3 Cyclists Touring Club

*"I personally have ridden the route on three occasions between 2008 and 2010, using the path on bicycle as a route when exploring the significant local network of WW2 defence fortifications and pillboxes.*

*On my use of the trail, I do not recall any signs indicating that use of the trail was subject to restrictions, though was obviously aware of the (at that point disused) military camp presence with heavy security fencing on either side of the trail, which was otherwise unblocked at either end, allowing easy passage. Each time I used the trail I did so openly, in daylight hours, without challenge.*

*From appearance, I took the path to be in common and widespread usage by members of the public, and the extensive fencing indicated to me that it had been clearly set aside from the rest of the military camp as a dedicated route for public access across the training area.*

*On the wider question of whether the trail should be retained as a right of way (bridleway or restricted byway) I believe that it would be beneficial to a significant portion of the public for it to be recorded as such, as this would both secure its status, and see the route recorded on the definitive and OS maps. Many cyclists such as myself depend on the use of OS maps to plan our routes, so simple and clear indication that public rights exist on easily available mapping is clearly beneficial to the off-road cycling community.*

**11.4 British Horse Society**

*“Whilst the British Horse Society has no evidence regarding the history and use of this route nor of its legal status either at present or in the past, the Society does support the application to record this route as a bridleway.*

*This area of Hampshire has very few recorded bridleways. This forces horse riders to use roads which are under increasing pressure from a large amount of development with little or no provision for improved infrastructure. Riders need therefore to take every opportunity to find and use off-road routes where they can be safe from vehicular traffic. I am informed that this particular route has been used by horse riders, cyclists and pedestrians for many years yet the developers who now own the site through which it runs wish to close it to horses. I understand that the route is considerably wider than the minimum 2m required for a bridleway and is/will be of a suitable surface for a multi-user route. The route also enables riders to avoid using Ewshot Lane which is narrow and winding but with a speed limit of 60mph.*

*The British Horse Society is aware of research by the University of Surrey that shows that there are negligible problems caused by horses using paths with cyclists and pedestrians but in contrast we believe that there are as many as 10 accidents involving horses on the roads every day in Great Britain.*

*We would therefore endorse every application to retain or create bridleways wherever it is possible to do so, and would hope that Hampshire County Council would support this position.”*

**12 Analysis of the evidence**

12.1 As set out at 9.6, MoD property is Crown Land, and is not subject to the provisions of Section 31 of the Highways Act 1980. By virtue of the 1994 landowner deposit made under the 1980 Act, both the MoD and Taylor Wimpey were also protected from a claim up until 2010 (when the deposit expired). As a result, the land has been protected from a user-based claim under Section 31 and common law between 1994 and 2010. Consequently, this application can only be considered under common law prior to before and after this period.

12.2 Unlike Section 31, common law does not lay down any specified period during which unchallenged use by the public must be demonstrated, and under common law, the burden of proving an inference of dedication of public rights lies with the applicant. Any such inference of dedication must rest on the assumption that the freeholder of the land was aware of, and acquiesced in, public use of a way, and all use must be without stealth, force and permission to qualify. To consider the merits of the application under common law, it is necessary to consider how the land has been managed by both the MoD and Taylor Wimpey.

12.3 The MoD website makes clear what public access is permitted over various lands within its ownership. Despite having disposed of QE Barracks, it still owns nearby land (including the adjacent Tweseldown Race Course) which falls under the category ‘Aldershot and Minley Training Areas’. This land is described on the MoD website as follows:

*“Public access is permitted along all public rights of way within both training areas at all times. Open access on foot is allowed in areas within the managed access symbol on the Ordnance Survey Explorer maps. This access is subject to the terms and conditions of the Aldershot and District Military Byelaws, which are displayed at the principal access points onto the training areas. Do not interrupt any military training activities and please observe the conditions of the Byelaws all times.”*

- 12.4 The Byelaws state that the public ‘are permitted’ to use all parts of the Military Lands not specifically excluded in some way ‘for the purposes of open-air recreation at all times’. The byelaw notices are prominently displayed around the land at the main points of access, and allow the MoD to reserve the right to close off the land at any time, thus rendering the permission extended to the public as revocable, further reinforced by the fact that breaking the byelaws is a criminal offence. The byelaws apply even if there are no signs present or evident, though the absence of signs would have an effect on their enforcement. In these circumstances, it can be said that during the period when the QE Barracks site was under the ownership of the MoD (the commencement of which pre-dates the earliest evidence of public use in 1955) there was no intention on its part to dedicate public rights of way on the Aldershot Military Lands under common law.
- 12.5 As discussed at 12.1, the deposit made by the MoD under Section 31(6) of the Highways Act 1980 covered the land in question between 1994 and 2010, and so it can be said that during that period there was no intention on the part of either landowner to dedicate the Gurkha Path as a public right of way. Further, it is apparent that signs were maintained along the route from the outset of Taylor Wimpey’s ownership in 2000 which made it clear that public use of the path was with permission.
- 12.6 To summarise the above, it would appear that the landowners have protected themselves between 1955 and 2012 as follows:
- **MoD ownership**
    - 1955 - 2000 – claim cannot be considered under s31, MoD protected from claim under common law by byelaws dating from 1950.
  - **Taylor Wimpey ownership**
    - 2000 - 2010 – protected by s31 deposit originally lodged by MoD.
    - 2010 - 2012 – protected by permissive signage along route.

In light of the above, it would appear that use of the Gurkha Path has not been ‘as of right’, and so it is considered that the claim does not meet the requirements for a common law dedication.

### **13 Comments by the Applicant and Landowners**

- 13.1 **Mrs Hall** has accepted the findings of this report, but has expressed the hope that the County Council will be supportive of the route being dedicated as a public bridleway when Church Crookham Parish Council consider the status of the path when they take over responsibility for it in a few years’ time.

13.2 **Taylor Wimpey** has, through its legal representatives, confirmed that all the relevant evidence has been considered and that there do not appear to be any inaccuracies in the report. In addition, it has forwarded an updated submission to that originally supplied in March 2013, included in its entirety at Appendix 1.

#### **14 Conclusions**

14.1 There is evidence of public use of the path since 1955.

14.2 The application cannot be considered under the provisions of Section 31 of the Highways Act 1980 during the period when the land was owned by the MoD (1955 – 2000).

14.3 The existence of byelaws covering the land in question prior to 2000 prevents the acquisition of public rights (1955 – 2000).

14.4 A Section 31(6) deposit which ran until 2010, and ‘permissive’ signage maintained on the path by the landowner from 2000 indicates that use has not been ‘as of right’ during Taylor Wimpey’s ownership (2000 – 2012).

14.5 It therefore follows that the claim cannot succeed under Section 31 or under common law.

#### **15 Recommendation**

15.1 That the application be refused.

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

<b>Hampshire safer and more secure for all:</b>	yes/no
Corporate Improvement plan link number (if appropriate):	
<b>Maximising well-being:</b>	yes/no
Corporate Improvement plan link number (if appropriate):	
<b>Enhancing our quality of place:</b>	yes/no
Corporate Improvement plan link number (if appropriate):	
<b>OR</b>	
<b>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.</b>	

**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: 1110

Location

Countryside Access Team  
 Castle Avenue  
 Winchester  
 SO23 8UL

## **IMPACT ASSESSMENTS:**

### **1 Equalities Impact Assessment:**

### **2. Impact on Crime and Disorder:**

### **3. Climate Change:**

- 3.1 How does what is being proposed impact on our carbon footprint / energy consumption?
- 3.2 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.**