

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	18 May 2016
Title:	Application for a Definitive Map Modification Order to record a restricted byway between Slade Bottom Road and Lye Farm Road, in the Parish of St Mary Bourne
Reference:	7354
Report From:	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 restricted byway between Slade Bottom Road and Lye Farm Road, near the village of Stoke, in the Parish of St Mary Bourne. The claimed route is currently not recorded as a public route of any description. If the route is recorded on the definitive map and statement, the public would have the right to use the route on foot, bicycle, on horse-back and in horse-drawn vehicles. The claim is supported by user evidence which the applicant believes indicates that the route was once a full public carriageway, but during the process of the investigation officers have discovered a large body of historic documentary evidence which is also relevant to the claim.
- 1.2 During the investigation, evidence was also discovered that indicated the possible existence of higher rights on St Mary Bourne Footpath 1, which adjoins the claimed route. These rights were not claimed by the applicant but, having discovered the evidence, the County Council is nevertheless obliged to consider these rights in its capacity as the 'Surveying Authority'. The evidence for the existence of higher rights on St Mary Bourne Footpath 1 is also set out and analysed in this report.
- 1.3 It is considered that the evidence submitted in support of this application is sufficient for it to be inferred that, on the balance of probabilities, both routes were once full public highways, and it is therefore recommended that a Definitive Map Modification Order made to record both routes as restricted byways.

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

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 67: Ending of certain existing unrecorded public rights of way

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

(2) Subsection (1) does not apply to an existing public right of way if—

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

(3) Subsection (1) does not apply to an existing public right of way over a way if—

(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles:-

- (i) was reasonably necessary to enable that person to obtain access to the land, or
- (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

3 Claimant

- 3.1 The application was made in 2011 by **Mrs Pauline Wood**, a resident of Stoke.

4 Landowners

- 4.1 The land over which both routes run is owned by **Mr Robert Romanes** and **Ms Christine Dandridge** of Lower Ashe Farm, Overton, Basingstoke, RG25 3AJ. Mr Romanes and Ms Dandridge acquired the freehold to the land in 2011 - prior to this the land was owned by **Mr Mark Maclay**, who has also provided evidence relating to his management of the land.

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

- 5.1 Route A-B-C: This route, known locally as 'The Drove', is the subject of Mrs Wood's application. It is a track just under a kilometre in length with a width varying between 7 and 10 metres, and it is bounded on both sides by trees and hedgerows. The route commences opposite farm buildings on Slade Bottom Road (U37) and proceeds in a north-westerly direction for a distance of 240 metres before turning north-eastwards on a right angle. At this corner a pond is situated just inside the southern boundary of the route. The route continues north-west for a further 700 metres, at which point it reaches a junction with Lye Farm Road (also recorded as 'U37'). A short section of the claimed route is already recorded as a public right of way, forming part of St Mary Bourne Footpath 1, which has been recorded as a public footpath since the production of the first Definitive Map of Public Rights of Way for Hampshire in 1953. This path makes up the northernmost 115 metres of the claimed route.
- 5.2 Route B-D: The remainder of Footpath 1 not already described above runs north-eastwards from a junction with the claimed route (Point B) on a track varying between 5 and 8 metres in width, which shows signs of use by four-wheeled vehicles. After approximately 410 metres it reaches a junction with the road 'U5' Doiley Bottom (Point D on the Committee Plan). A track, currently recorded on the Definitive Map as St Mary Bourne Footpath 2, meets the route from the south about halfway along this longer section. The statement which accompanies the definitive map describes Footpath 1 as running from the U5 road "*...along verge of arable field, over fence, along verge of arable field, then northwards along enclosed track 10 ft. wide to U37.*"

6 Background to the claim

- 6.1 The claim is supported by user evidence from twenty-five local people, many of whom have also used Footpath 1 on horseback, but officers have also discovered a substantial amount of historical evidence during the investigation which relates to both routes.

- 6.2 The claimed route is currently gated at Points B and C, and according to the current landowner, these gates have been in place for a number of years, and briefly locked on an annual basis. This would be of relevance when considering evidence of use by the public in recent years, but due to its relatively recent installation, will have no bearing on the analysis of historic documentary evidence. The landowners have cited concerns over the implications for managing the route should it be opened up to the public; for example, regular use of the track by farm vehicles or threat such access might pose to livestock. Such issues cannot be taken into account when determining whether or not public rights have been acquired but, depending on the outcome of this investigation, the Countryside Service can work with the landowner to address any management concerns.

7 Issues to be decided

- 7.1 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 on section B-C, under the provisions of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981,, and whether section A-B-D ought to be shown as a highway of a different status, under the provisions of Section 53(3)(c)(ii). Case law has decided that the burden of proof associated with Map Modification Orders made under the Wildlife and Countryside Act 1981 is 'on the balance of probability', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, Members should make an order so that the evidence can be tested at a public inquiry. If a right of way is considered to subsist or reasonably alleged to subsist, then the route's status and width of that way must also be determined.
- 7.2 If Members are satisfied that a change should be made to the Definitive Map, they are also asked to consider whether any of the exemptions contained in Sections 67(2) and (3) of the Natural Environment and Rural Communities (NERC) Act 2006 apply to those rights. Although not claimed in this case, evidence discovered as part of this investigation may point to the routes having once been full vehicular highways, and if exemptions under NERC can be shown to apply, the County Council would be under a duty to record those rights.
- 7.3 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 or documentary evidence).
- 7.4 Historic and documentary evidence has been examined to see whether the past history and use of the routes point to them having public rights as a result of dedication in the distant past. Any such rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficient 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.

- 7.5 Evidence forms and statements taken from those who have used the routes or have knowledge of them in living memory can show that higher rights have been acquired as a result of a recent dedication at common law, or a deemed dedication under s.31 Highways Act 1980. It may not be necessary to examine this type of evidence if the historic and documentary evidence shows that higher rights were dedicated in the past and still subsist, although the user evidence may add credibility to the earlier evidence of dedication. This type of evidence is also useful in determining the width of the path.
- 7.6 The originals of many of the documents referred to in this report are only available in public record offices, but copies of most documents are available for inspection in the offices of the Countryside Access Team. Members are invited to inspect these, or the originals, when considering this report.
- 7.7 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. However, where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order as unopposed.

8 **Documentary Evidence**

Information on the background and evidential weight which should be attached to particular historical sources is included at Appendix 1, which should be read in conjunction with this section.

8.1 **Early maps and plans**

- 8.1.1 **Isaac Taylor's Map of Hampshire – 1759** (1 inch to 1 mile)
This map shows most of the roads in the Stoke area which are now full public highways, including Slade Bottom Road and Lye Farm Road. The untidy appearance of this map when compared with those produced later makes it difficult to identify some of the routes in the locality, and it does not appear that either of the routes is depicted. As such this map offers little support to the application.
- 8.1.2 **Thomas Milne's Map of Hampshire – 1791** (1 inch to 1 mile)
Milne's map shows A-B-C with solid parallel lines (which the legend describes as 'enclosed road') running on the current 'L' shaped alignment between Lye Farm Road and Slade Bottom Road. There are no lines at either end of the route that might indicate barriers or gates. Sladen Green, a route situated a little way to the north-east of the claimed route which is now recorded as an unclassified road, is not shown - this route is shown on maps that both pre-date and came after Milne's map, suggesting that Milne considered the claimed route to be of greater significance as part of the local highway network. B-D is not shown.

- 8.1.3 Ordnance Survey Drawing – 1808 (2 inches to 1 mile)
 A-B-C is shown as having a similar width to other roads in the locality (ie part of the local highway network), with solid parallel lines indicating its enclosure between boundaries. B-D is now shown, adjoining the claimed route from the west – the northern boundary of the route is shown by a continuous black line, indicating a solid boundary feature, whilst the pecked line on the southern side of the route indicates that it was unenclosed.
- 8.1.4 Ordnance Survey ‘Old Series’ Map – 1810 (1 inch to 1 mile)
 This map is based upon the earlier 1808 drawing but the detail is generalised to accommodate the map’s reduced scale. Both routes are shown in the same way as on the 2 inch drawing, but on this map A-B-C widens significantly when reaching an area of woodland about halfway down its longer north/south length (now known on OS mapping as ‘*Mosdall’s Copse*’), progressively narrowing again as it reaches its south-western corner.
- 8.1.5 Christopher Greenwood’s Map of Hampshire – 1826 (1 inch to 1 mile)
 A-B-C is shown in similar fashion to the OS map of 1810, although the widening of the route shown on the earlier OS map is not reflected. The legend indicates that the route was a ‘*cross road*’, a contemporary description for highways running between, and joining, other highways. A line is shown across the southern entrance to the claimed route, possibly indicating a gate or barrier of some description at the route’s junction with Slade Bottom Road. The northern boundary of B-D is shown by a pecked line, giving the impression that the whole route was by now unenclosed.
- 8.1.6 Summary of Small Scale Maps
 Given the small scale of the majority of the maps described above, any route shown on them would have been a noticeable feature in the landscape. The inclusion of both routes on the maps by the OS and Greenwood suggests that they were considered to be part of the local highway at that time, whilst the claimed route’s inclusion on Milne’s map (whilst other routes now recorded as public roads were excluded) offers further support to the application.
- 8.1.7 Tithe Map and Award – 1841 (14 inches to 1 mile)
 All parcels of land, including roads, are numbered and are listed in the Award, where there is a separate section for ‘Roads and Waste’. The parcel numbers written within the boundaries of both routes (615 & 630) are included in this section, as are the parcel numbers for Lye Farm Road and Slade Bottom Road (which are both now County ‘U’ Roads). This indicates that none of these routes were ‘titheable’ land, and supports the proposition that they were instead part of the local highway network. The widening of A-B-C, first seen on the earlier OS map, is also reflected, and for the first time the pond in its south-western corner is shown by a small square within its boundaries. B-D is shown as being enclosed east of its junction with Footpath 2, with a pecked line on the southern boundary west of this junction indicating the route was open in this section.

8.2 Estate plans, sale documents and conveyance documents

8.2.1 Survey of Earl of Portsmouth's Estate – 1785 (6 inches to 1 mile approx.)

This colour map covers an extensive area of the old St Mary Bourne parish including the Stoke area, as surveyed by George Barnes in 1785. On this plan land parcels are annotated with numbers which probably indicate ownership by the Earl of Portsmouth, but roads are not numbered. A-B-C is shown by parallel solid lines and coloured light brown, in the same way as other routes which are now public roads. The northern end of the route appears to be unobstructed, but a faint line can be seen across the junction with Slade Bottom Road at the southern end, which may indicate the presence of a barrier or gate. The eastern section of B-D is shown in the same way, although no route is depicted where the western half of Footpath 1 now lies - it is possible that at this time the eastern half of the route only provided access to the adjacent field, but over time a route was established linking with the road to Newbury to the west (as indicated on the Tithe Map – see 8.1.6). The fields to the north and south of this area are labelled '*Diley Down*'.

8.2.2 Sale Particulars – Estate at Stoke – 1859

This document lists lands for sale at auction by Frederick Ellen of Andover, spread across eighteen lots which are shaded with various colours, the majority of which are situated to the north and north-east of Stoke village. On the accompanying plan A-B-C is shown shaded brown, in the same way as other routes which are now recorded as public roads. Its junctions with Slade Bottom Road and Lye Farm Road appear to be open. The northern-most end of Lye Farm Road is annotated "*To Cruxeaston*". Lot 10 abuts the eastern side of the north/south length of the claimed route, described in the Particulars of Sale as being "*situate near Lot Nine...situate between and adjoining the two roads leading from Stoke to Crux Easton*" (Lye Farm Road and Slade Bottom Road). There is nothing on the plan to distinguish the claimed route from Lye Farm Road, and so it appears that the author of this plan considered both routes to be part of the local highway network. B-D is also shaded light brown, and is shown as a route between solid boundaries which is open at both ends, connecting the claimed route with Doiley Bottom (the northern end of which is annotated "*To Newbury Turnpike*").

8.2.3 Sale Particulars – Stoke House Estate - 1891

This document lists twenty-two lots comprising the Stoke House Estate, to be sold at auction, again by Frederick Ellen and Son. Again, all lots are coloured, and this time are annotated with their Tithe parcel numbers – on this plan public roads are distinguished by their lack of shading. Two lots abut A-B-C. Lot 22, which lies immediately to the east of the route, is named in the schedule as '*Stub Down*', and is described as "*Abutting upon the road to Newbury...*". The northern end of Lye Farm Road, which is shown running continuously into A-B-C, is annotated "*From Newbury*", indicating its status as a public road. The lots for sale run along a narrow corridor running north-east from Stoke, and the lands either side of this corridor are not shown. B-D falls within this area, and is not shown (nor is its junction with the claimed route).

8.2.4 Conveyance Plan for land at Stoke – 1898

In this document, which details lands purchased by Joseph Webb of Whitchurch from the Trustees of Thomas Longman, parcels on the plan are shaded with various colours and numbered in accordance with the numbering set out in the Tithe Map and Award. Roads are shaded light brown, and many are annotated to indicate onward destinations. A-B-C is shown as being part of a continuous route running into Lye Farm Road, the northern end of which is annotated "*From Newbury*", and is shaded in the same way as other roads, distinguishing it from parcels which are to be sold. B-D is shown in the same way as on the Tithe Map (ie partly enclosed), but is not shaded brown. It is however distinct from the parcel immediately to the north (which is shaded green), and is shown as providing an unobstructed link between the claimed route and Doiley Bottom, which is also labelled "*From Newbury*".

8.2.5 Sale Particulars – Estate at Stoke including Slade Bottom Farm and Stoke Farm - 1899

This document details lands situated to the north and north-west of Stoke forming part of Slade Bottom Farm and Stoke Farm, for sale at auction by Mr Allan Herbert of Andover. Again, public roads are unshaded on the accompanying plan, thus distinguishing them from the coloured land parcels being sold. The northernmost end of Lye Farm Road, shown running continuously into A-B-C, is annotated "*To Lye Farm*", whilst Slade Bottom Road is labelled "*To Crux Easton*". Between them, Lot 3 and Lot 8 contain land parcels which abut various sections of A-B-C. Lot 3, which is described as '*an enclosure of freehold grass and woodland known as 'High Down Pond Field'*', is described as "*abutting on the road leading from Stoke to Lye Farm...*". Lot 8 contains parcels that abut the claimed route, Lye Farm Road and Slade Bottom Road, and which are described as being "*adjoined by Good Hard Roads...*" - no distinction is made between the claimed route and other routes which are now public roads. B-D is not shown, and the area through which the route runs is undetailed and labelled "*Earl of Portsmouth*". However, a short section of the route's junction with A-B-C is shown and, like other public roads, is also unshaded. Lot 2, identified in the particulars as '*Doiley Down*', abuts this area to the north, and is described as being bounded "*on the south by land belonging to the Earl of Portsmouth, on the east by the road leading to Lye Farm, and on the west by the road leading from Stoke to Newbury.*" This document appears to offer clear support to the proposition that A-B-C was a public road, but is more ambiguous as to the status of B-D.

8.2.6 Summary of estate/conveyance plans and sale documents

None of the above documents which show the routes in question depicts either as being part of the estate or land to be conveyed or sold at auction. In every case the land that forms part of a private estate is shown by a colour and/or parcel number, whilst the two routes in question (where they are shown) are uncoloured, unnumbered or shaded in identical fashion to other routes that are now public roads. As roads (and their status) were not the primary focus of these documents, it cannot be said with certainty why some routes in the locality were omitted or only partially shown on some documents, but based on their depiction and description in earlier evidence, it is reasonable to infer that in each case it was the intention of the author of the schedule and plan to depict both routes as forming part of the public highway network. Further, it can be argued that it would have been advantageous to the auctioneer (or whoever was selling the land in

question) to show the local communication network to prospective purchasers. The depiction of B-D on later documents suggests that by the end of the 19th century its significance had diminished, as it was either no longer shown in the same way as other roads, only partially shown, or else not shown at all.

8.3 Ordnance Survey large-scale maps

8.3.1 Ordnance Survey County Series 1st Edition - 1871 (25 inches to 1 mile)

A-B-C is shown by solid parallel lines with a width varying between 5 and 12 metres. The widening of the route halfway down its north/south section, originally shown on the OS map of 1810, is also shown here. A square shape shown within the extent of the highway in the south-eastern corner of the route also indicates the location of the pond. Pecked lines at the southern end of the route at its junction with Slade Bottom Road indicate the extent of the parcel, the northern end of which extends all the way to Lye Farm, indicating that the section between these two points was considered to be one continuous route (the east-west section of Lye Farm Road which meets the northern end of A-B-C is separated from this length by pecked lines). There are no solid lines which might have indicated the existence of gates or other barriers at either end of the route. B-D is shown running between solid boundary features varying between 4.5 and 7.5 metres apart which, for the first time, now extend west of the junction with the route to the south (St Mary Bourne Footpath 2). The western extent stops approximately 50 metres short of Doiley Bottom at a junction with an area described in the accompanying Book of Reference as '*Rough Pasture*', and a small circle with a '*W*' next to it indicates the existence of a well at the point where the route meets this woodland.

NB - This map (and subsequent large-scale Ordnance Survey mapping) has been used to calculate the width of the routes between boundaries defined by solid line features.

8.3.2 Ordnance Survey County Series - Book of Reference – 1873

The first edition of the County Series is the only OS map to have an accompanying book that describes every land parcel depicted. The parcel number attributed to A-B-C is '30' and for B-D it is '34'. The listing for both numbers in the Book of Reference is '*Road*'. Slade Bottom Road and Lye Farm Road are also listed in this way. This evidence indicates that at the time the surveyors regarded both routes as having the same status as other roads which are now full public highways, possibly because the information available to them suggested this was the reputation of the route.

8.3.3 Ordnance Survey County Series 2nd Edition – 1895 (25 inches to 1 mile)

There is only one change in the depiction of both routes when compared with the earlier map of 1871 - a rounded pecked line delineates the route of A-B-C as it passes the pond in the south-western corner. As on the 1st Edition, a bracing symbol linking the pond to the route indicates that it formed part of the land parcel considered to be highway.

8.3.4 Ordnance Survey County Series 3rd Edition – 1908 (25 inches to 1 mile)

There is no change in the depiction of A-B-C from the 2nd edition, but the western end of B-D is now shown with a pecked line across it some 50 metres short of

Doiley Bottom, and thus ‘petering out’ in the middle of the field through which it runs. The area of woodland next to Doiley Bottom shown on this edition is much smaller than on the previous two maps (only 20 metres wide), suggesting that it had by this time been cleared to some extent.

8.3.5 Ordnance Survey National Grid Series Map – 1977 (1:2,500)

A-B-C is shown as an enclosed ‘Track’, with a route roughly 3 to 4 metres in width shown running between wider boundary features varying between approximately 6 and 10 metres wide. No gates or barriers are indicated, with pecked lines at each end of the route indicating a different surface to the adjoining roads, suggesting that these have by now been metalled. The pond is not shown on this map, with an unannotated area shown inside the south-western corner of the route. B-D is also shown as a ‘Track’ between solid boundaries about 6 to 8 metres apart, save for a thirty metre section at its western end, which is shown as being unenclosed and running on a curved alignment around the northern side of a small parcel of what appears to be vegetation.

8.3.6 Summary of Ordnance Survey evidence

All three large scale County Series maps show both routes in the same way as other routes in the locality that are now public roads, and both are described as ‘road’ in the First Edition Book of Reference. After the Second World War it appears that both routes declined in importance as they were labelled ‘Track’ on the 1977 map and were distinguishable from the metalled roads by pecked lines which indicated a change in surface material.

8.4 Highway Board Minutes and other administrative records

8.4.1 Minutes of Whitchurch Highway Board – 1863

21st April 1863

“The Surveyor was directed to report the names of all the Highways (except Turnpike Roads) and their length in each of the thirteen highway parishes comprising the district, dividing such highways into three classes in each parish, namely:

- 1) *Roads of primary importance*
- 2) *Roads of secondary importance*
- 3) *Driftways which have never been formed into roads”*

30th June 1863

The Surveyor produced a Schedule of Highways as requested at the June meeting. St Mary Bourne Parish was divided into its six tithings, including Stoke, for which the Surveyor included three roads of primary importance, two roads of secondary importance and six ‘driftways’. Each road was briefly described and given a length in miles, furlongs and poles.

- 8.4.2 Most of the roads listed in the Schedule either carry names that are no longer used to identify them, or alternatively are not named and are simply identified by a description (“Road leading from Little London”, for example). Based on their lengths (which have been matched to within a few yards) and description, both A-B-C and B-D have been identified in the schedule, and are listed as follows:

Class	Route	Miles	Furlongs	Poles
3	<i>Doiley Down Road</i>	-	2	28 (594 yds)
3	<i>Broad Drove</i>	-	4	5 (907.5 yds)

NB - 1 Pole = 5.5 yards
1 Furlong = 40 Poles (220 yards)

Both routes have been measured on a contemporary map (OS County Series of 1871) using the Geographic Information System and the length of both routes have been identified as matching the distances listed above (allowing for the divergence in the methods of measurement used on the ground in the 1860s and on digital mapping). 'Doiley Down Road' has been further identified by its description in other documents (ie running through an area described as 'Doiley Down' on 19th century sales particulars, and annotated on the 1785 Survey of the Estate of the Earl of Portsmouth as 'Diley Down'). It is apparent from the length and description given that this route is that now recorded as St Mary Bourne Footpath 1 (A-B-D). The remainder of the claimed route not covered by Footpath 1 (B-C) measures approximately 910 yards in length, and appears to match the entry for 'Broad Drove'. Again, the description of this route appears to match the claimed route (which is still referred to by local people as 'The Drove').

Taking the above into account, this exercise either appears to have either produced a remarkable coincidence, or strong evidence that the two routes were considered by the highway authorities to be public highways. Though their categorisation as 'driftways' suggests that both routes were not considered to be of importance in the Stoke area, it indicates that they were nonetheless acknowledged to be 'highways'.

8.4.3 St Mary Bourne Vestry Minutes – 1863

Following the above undertaking by the Whitchurch Highway Board the previous month, this Vestry meeting took place on 2nd May 1863 to:

"...consider the best means to be adopted respecting the public and private roads.

It was the unanimous decision of the meeting that there are some roads which it is desirable to relieve the Parish of the expense of repairing and it was resolved that there be a committee to inquire what are the roads it is desirable to relieve the Parish of the expense of repairing and to report the same to a future vestry."

At the subsequent Vestry meeting on 30th May 1863, the Committee presented their report, which recommended whether a number of routes in the parish should continue to be maintained at the expense of the parish. One of the entries reads:

"It was hereupon moved and seconded that Doyley Down Road ought not to be repaired at the expense of the Parish. Upon a show of hands this motion was lost."

This evidence shows that at this time Doiley (or 'Doyley') Down Road - identified at 8.4.2 as A-B-D - was acknowledged to be a publicly maintainable highway, hence

its inclusion in the schedule prepared for the Whitchurch Highway Board the following month. It is not clear why 'Broad Drove' was omitted from the discussion at the Vestry meeting, but irrespective of whether it was being maintained by the parish at the time, its subsequent inclusion in the Schedule of Highways later that year lends strong support to the application.

8.4.4 Quarter Sessions

Officers have conducted a search of Quarter Session records, Roadway Proceedings and other relevant material and have found no evidence that public rights have ever been extinguished on either route.

8.4.5 Summary of Highway Board Minutes

The 1863 Schedule of Highways for the parish provides a comprehensive record of those routes that were considered to be public highways at that time, and the inclusion of 'Broad Drove' (identified as B-C) and 'Doiley Down Road' (identified as A-B-D) in this list supports the view that at the time both were considered to be public roads. Further, the decision taken at the Vestry meeting in May 1863 to continue maintaining Doiley Down Road provides strong evidence of its reputation at the time.

8.5 County/District Highway and Planning records – 1929-1946

8.5.1 Highways Handover Map (Whitchurch Rural District Council) - 1929

This map was prepared by Kingsclere and Whitchurch Rural District Council to show those routes that it considered publicly maintainable highways at the time responsibility was transferred to the County Council. This map purports to show public footpaths as well as carriageways, but neither route is highlighted. It can be inferred that the Highway Authority did not consider these routes to be a publicly maintainable highways. However, this document was not subject to public scrutiny, and so is not a comprehensive record of public highways in the locality at this time, and may not have been subject to research into the tithe or inclosure documents.

8.5.2 Joint Planning Scheme Map (Kingsclere and Whitchurch District) - 1937

In 1933 Joint Planning Committees were established in Hampshire to implement the requirements of the Town and Country Planning Act 1932. The Committee for North West Hampshire included representatives from the County Council and Andover, Kingsclere and Whitchurch and Winchester Rural District Councils. Each rural district set up its own planning sub-committee which produced draft plans detailing proposals which included new streets, the widening of existing roads, building lines, land use and development densities. These plans also show existing highways which were placed into three categories: classified roads (shown by brown colouring), highways repairable by the inhabitants at large (shown by orange colouring) and highways over which the public had a right of way (shown by yellow colouring). The map produced by the Kingsclere and Whitchurch sub-committee covering the Stoke area shows Stoke Road, Doiley Bottom and Binley Bottom shaded orange to indicate that they were highways repairable by the inhabitants at large. The claimed route is shaded yellow, indicating that it was considered to be a public right of way, but not a route maintainable at public expense. Intriguingly, B-D, which only two decades later was claimed by the parish as a right of way as part of Footpath 1, is not shaded.

8.5.3 Highways Maintenance Map (Kingsclere and Whitchurch Rural District Council) – 1946

This map was prepared by the County Highways Surveyor to show those routes that were considered to be publicly maintainable. Neither route is shaded, indicating that the County Surveyor did not consider either to be his responsibility. Again, this is an internal document that was not subject to public scrutiny or input, and may not have involved any research by County council staff.

8.5.4 Summary of local government records

Of the documents produced by local authorities in the period 1929-1946 which show the status of public 'highways' in the St Mary Bourne area, two of those documents - the 1929 Handover Map and the 1946 Maintenance Map - do not record either A-B-C or B-D as publicly maintainable roads or other highways, while the other document published between those dates, does record A-B-C as a highway over which the public had a right of way. It is necessary to consider how the documents were produced to decide what weight to give to the different pieces of evidence.

8.5.5 The 1929 Handover Map was drawn up by the Rural District Council as a record of what they considered to be publicly maintainable highways and passed to the County Council on transfer of responsibility. There is no record of any public involvement or consultation as part of that process. Similarly, the 1946 Maintenance Map was also an internal document, produced by the County Surveyor, as a record of those routes that were considered to be publicly maintainable. Again, there is no record of any research, public involvement or consultation in the drawing up of these documents.

8.5.6 In contrast, the process by which the Planning Schemes of the North West Joint Planning Committee were produced was more democratic, involving local meetings with Parish and District Councillors, advertisements in local newspapers, meetings with local landowners and consideration of objections.

8.5.7 The documents that do not record either route as a 'highway' were not subject to public involvement and probably no research, but the document that indicated the claimed route was a highway over which the public had a right of way went through an extensive process of public consultation and scrutiny. On that basis this document must be given greater weight. It demonstrates that, as late as 1937, the highway authority considered route A-B-C to be part of the public highway network and there was apparently no dissent to this classification from the parish council, district council or local landowners.

8.6 Evidence Post-First Definitive Map

8.6.1 Ramblers' Survey – 1978

During the late 1970s, the Rambler's Association undertook a systematic review of every recorded public right of way in Hampshire and submitted their findings to the County Council. The survey records St Mary Bourne Footpath 1 as follows:

“From U37 SSW along stony track between hedges 8m apart for 110m. Then WNW along earth track between barbed wire fence on L and hedge on R m

apart for 200m to junction with FP2. Then the same 6m apart for 180m. Then veering R and L for 5m through gap and then WNW through trees with hedge on L for 20m to road.”

8.6.2 Statutory Deposit made under Section 31(6) Highways Act 1980 – 25th January 1999

This deposit, submitted to the County Council during Mr Maclay’s ownership, consists of a statutory declaration stating that he did not intend to dedicate any further public rights of way (whilst acknowledging those that already existed on an attached map). This deposit prevents the acquisition of new or higher rights on the land based on public use after the date of submission, but it does not cover use by the public prior to this date, nor does it affect rights acquired in the distant past.

9 User Evidence

9.1 Mrs Wood's application was accompanied by evidence of use from twenty-five people in the shape of user evidence forms detailing use of A-B-C on foot, bicycle, horse-back and in a vehicle dating back to the 1960s, some of whom also provided evidence of use of B-D. Some of these users have also provided further information in the form of statements. Some of the user evidence is detailed below, and the dates of use are shown in a chart at Appendix 2.

9.2 **Ms Rosie Bliss** has lived in the area since December 1978, when she moved to Egbury, a village situated approximately two miles south-east of the routes under investigation. When she moved to the area she bought an OS map and began to plan some circular riding routes, and found the claimed route and Footpath 1 as a result.

From late 1979 until about 2003 Ms Bliss used route A-B-C on horseback about 60 times per year. She also rode on Footpath 1, though to a lesser extent than the claimed route due to the steeper gradient. From the late 1990s she also drove a carriage down the claimed route, at a rate of about 15 times per year, and would also walk the route several times per year. Occasionally she would pass other people riding on both routes, much more so from the 1990s onwards, and she used to ride with other people on both routes on a regular basis.

Initially Ms Bliss did not give much thought to the ownership of the land, as it was never mentioned by anyone or proved to be an issue. Latterly she came to know that the land was owned by Mark Maclay as he owned the nearby dairy. She had no connection to him and didn’t know him or his family when she started to use the routes, but came to know them quite well through various events in St Mary Bourne in which they both participated. Ms Bliss never sought any permission to ride on either the claimed route or Footpath 1.

In the 1970s and 1980s there were no gates at either end of the claimed route, although at the southern end there was sometimes a big piece of rope stretched across its junction with Slade Bottom Road (Point C). It appeared to be there for the purposes of controlling the movement of livestock – it wasn’t always there, but when it was Ms Bliss would simply unhook it. There was an old gate at the Lye Farm Road end of the route but it had long since fallen into the brambles. Later on a gate appeared at Point B but it was always open. At the western end of Footpath 1, at its junction with Doiley Bottom, there was an old steel gate, which is

still there today. This was always closed but never locked. The route appeared to be used by the landowner for access but Ms Bliss never saw any livestock being herded along it.

Ms Bliss moved to Vernham Dean in 2004. Her use of both routes on horseback had ceased in 2003 after her horse died, but she continued to ride the claimed route in a carriage with friends until about 2009. Her use was never challenged on either route, whether she was walking or riding a horse or carriage, and she did not see any notices relating to public access.

- 9.3 **Mrs Sue Prior** has lived in Stoke since 1978, and used both the claimed route and Footpath 1 on foot from that time at a frequency of approximately once per week. From 1995 onwards she began using both routes with a horse and carriage, on average about 50 times per year, although the rate of usage increased during the summer months to about twice per week. Of the usage, about two-thirds was on A-B-C – route B-D was used to a lesser extent due to its steep gradient.

Mrs Prior often saw people walking and riding horses on both routes. The landowner at the time, Mark Maclay, was aware that both routes were being used by horse riders and carriage drivers, and never challenged or restricted it in any way. This arrangement has continued since the land changed hands in 2011. The only notice she has ever seen on either route requested that the public take care during lambing season, approximately 1-2 years ago. Mr Maclay always used to fill in pot-holes and clear fallen trees from route A-B-C as it was probably used by him to move livestock.

At Point D there has always been a gate which was kept shut but which has never been locked. People using the route on foot utilise a gap to the side of the gate installed when fencing was repaired in the area. The gate at Point B only appeared a few years before the land was sold in 2011, and was often left open and was never locked. The gate at Point C may have been there for about 10-12 years now. Shortly after it was installed a handle was added to it, she believes specifically to enable it to be opened by horse riders without the need to dismount.

- 9.4 **Mrs Pauline Wood** moved to Stoke in 1962 and from that time began using both routes on horseback approximately 50 times each per year. When she first started using the routes she never considered who might own them, as they appeared to be separate entities to the adjacent land. She later became aware that the land was owned by the McClenaghans, who were Mr Maclay's inlaws. They were aware that both routes were being ridden by horse-riders and carriage drivers, and made no objection to this use. Mrs Wood often saw people riding and walking on both routes.

Mrs Wood recalls that there has always been a gate at the western end of Footpath 1, but it has never been locked to her knowledge. A gate appeared at Point B in around 2009 but again, she has never known this to be locked. The gate at Point C has been there slightly longer but has also posed no barrier to use. Mrs Wood's use has never been challenged or been as a result of the landowner's permission. She submitted the claim due to uncertainty over whether public access was going to be allowed under the incoming owners but they have been very accommodating and have allowed public use to continue even after the claim was submitted.

10 The Landowner

- 10.1 Since 2011, the land over which both routes run has been owned by Mr Robert Romanes and Ms Christine Dandridge. The application was made by Mrs Wood in the same year and, having received notice of its making, the landowners wrote to the County Council to confirm that whilst they were happy to allow 'permissive' use of the path on foot, they were opposed to the route being recorded as a definitive right of way as it would impinge on their ability to manage the land (for example during harvest and lambing seasons). They also confirmed that they understood that the previous landowner, Mr Mark Maclay, had consistently locked the path up every year to prevent the presumption of dedication arising.
- 10.2 During the investigation, the County Council also received representations from Mr Maclay. In his submission, Mr Maclay advised that during his 40 years of ownership, The Drove was fenced and used as grazing as necessary, and that the gates were regularly locked. Mr Maclay maintained the route, clearing fallen trees and branches and mowing it in the summer. In the late 1990s, following private searches and enquiries to the County Council, the route was gated.
- 10.3 During his ownership, Mr Maclay stated that walkers were tacitly allowed to use the route because they were not asked to leave. Bicycles and vehicles were not permitted, and horse riders and carriage drivers were allowed to use the route only if they had been given permission. He states that the route was closed and the gates padlocked at least for a few days every year, with the most recent instance being from 28th - 30th July 2011.

11 Consultations

- 11.1 The following people and organisations have been consulted on this application (*please note that the original consultation was for the claimed route A-B-C only*):
The Ramblers, Auto Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, St Mary Bourne Parish Council, Basingstoke and Deane Borough Council, County Councillor Tom Thacker, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager). Responses are detailed below:
- 11.2 British Horse Society
The BHS supports the application.
- 11.3 British Driving Society
The BDS supports the application.
- 11.4 The Ramblers
The Ramblers support the application.
- 11.5 The Cyclists' Touring Club
The CTC supports the application.

- 11.6 County Councillor Tom Thacker
Councillor Thacker is aware of the application

No other comments have been received.

12 Conclusions to be reached from the evidence

- 12.1 Both routes have existed as physical features since at least the late 18th century, when they were shown on the survey prepared for the Earl of Portsmouth. They also appear on the commercial and Ordnance Survey maps of the early 19th century, and are shown in identical fashion to other routes which are now public roads. The 1st OS Edition also describes both routes as 'road'. A number of sale documents dating from the mid-to-late 19th century show both routes as falling outside the ownership of the property being conveyed or sold. Officers have discovered no evidence which suggests that rights have been extinguished on either route, nor have they seen any evidence to suggest that either has ever been permanently obstructed.
- 12.2 The evidence from the 1863 Schedule of Highways for St Mary Bourne Parish prepared by the surveyor of Whitchurch Highway Board, and the minutes of St Mary Bourne Vestry dating from the same year, offer strong support for the application. Both indicate that at the time, following an inclusive public process, both routes were considered to be public highways. There is evidence to suggest that by the early 20th century, the significance of both routes as part of the local highway network had diminished, as indicated by their absence from the 1929 Handover Map and 1946 Maintenance Map. However, any rights which existed on either route prior to this time will not have been lost merely through disuse. It is apparent that A-B-C was still considered to be public well into the 20th century, as it was depicted as a route over which the public had a right of way in the Joint Planning Scheme documents of 1937.
- 12.3 The user evidence supports the documentary evidence in depicting the claimed route as part of the local highway network. There is evidence of use by members of the public of both routes on foot, horseback, and in horse-drawn vehicles, apparently without interruption or challenge since the early 1960s and which has continued to the present day. The submissions of past and present landowners indicate that they took actions to prevent the presumption of dedication arising, and also raise questions regarding whether some public use could be considered 'as of right' - were the claim to hinge on the strength of user evidence alone it would be necessary to investigate this further. However, it is considered that the strength of the historic documentary evidence, which indicates that a common law dedication on both routes occurred at some point during the 19th century (or possibly even earlier), renders such action unnecessary.

13 Comments by the Landowner

- 13.1 Mr Romanes has indicated that he will not object to any order to record the routes as restricted byways provided that the routes are only signed with wooden fingerposts (which they will be), and that the gates that are in situ can be left,

unlocked, where they are. Although these gates were not evident at the time the routes are deemed to have been dedicated and so could not be specified in any order, the County Council is discussing the possibility of authorising the gates under the provisions of the Highways Act 1980 with Mr Romanes.

14 Natural Environment and Rural Communities Act 2006

14.1 There remains to be considered whether motorised vehicular rights have been extinguished on both routes by the NERC Act 2006. They will have been unless one of eight exceptions contained within Sections 67(2) and 67(3) of the Act applies. These exceptions are set out in Section 2 and are examined in turn below. It should be noted that Section 67(5) of the 2006 Act will have preserved the landowner's right to drive over the routes in order to gain access to adjoining land.

14.2 Section 67(2) – rights for mechanically-propelled vehicles will not have been extinguished on an existing public right of way if:

- (a) ***it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.***

No evidence has been discovered which indicates that either route was used by motorised vehicles during the period 2001-2006.

- (b) ***immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense).***

Neither route was recorded on the List of Streets at the time of commencement (A-B-D has been recorded as a public footpath since the production of the first Definitive Map in 1953 and so this exemption could not apply to that section in any case).

- (c) ***it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.***

No evidence was discovered during the investigation to indicate that either route came into being as a result of an express dedication or by statute.

- (d) ***it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.***

Neither route was constructed as a road for such use. There is clear evidence that both were in use as public highways prior to the introduction of motorised vehicles.

- (e) ***it was created by virtue of use by such vehicles during a period ending before 1st December 1930.***

There is no evidence of motorised vehicular use on either route prior to this date - any vehicular rights are likely to have been created as a result of use by horse-drawn vehicles.

- 14.3 The exceptions in Section 67(3), which require that application be made to the County Council prior to 20th January 2005, do not apply.

15 Conclusions

- 15.1 There is evidence that both routes have existed as physical features since at least the end of the 18th century.
- 15.2 There are numerous documents which, when taken as a whole, indicate that the routes formed part of the public highway network throughout the 19th century and early part of the 20th century. In the 1870s, the reputation of both routes with the Ordnance Survey was that of a road.
- 15.3 Both routes have been used by members of the public on foot, horseback, and in horse-drawn vehicles within living memory.
- 15.4 It is considered that the provisions of the NERC Act 2006 have extinguished rights for mechanically propelled vehicles on both routes, and so it is appropriate for both routes to be recorded as restricted byway (as opposed to byway open to all traffic).

16 Recommendations

- 16.1 That, based on historic documentary evidence, authority is given for the making of a Definitive Map Modification Order to record a restricted byway with a width varying between 5 and 12 metres, between B - C on the Committee Plan.
- 16.2 That, based on historic documentary evidence, authority is given for the making of a Definitive Map Modification Order to record a restricted byway with a width varying between 4.5 and 9.5 metres, between A - B - D 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.)

Document

Claim Reference: CR/975

Location

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment: N/A

2. Impact on Crime and Disorder: N/A

3. Climate Change:

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

How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts? N/A

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.