

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	16 November 2016
Title:	Application for a Definitive Map Modification Order to record a public footpath between Back Lane and the High Street, Vernham Dean, Parish of Vernhams Dean
Reference:	7877
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 public footpath between Back Lane and the High Street, in the village of Vernham Dean (which lies within the parish of *Vernhams Dean*). The claim is supported by user evidence which the applicant believes demonstrates that the public have acquired rights through long use without challenge.
- 1.2 It is considered that the evidence submitted in support of the application is sufficient for it to be inferred that, on the balance of probabilities, the claimed route should be added to the Definitive Map. The application is therefore recommended for acceptance.

2 Legal framework for the decision

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

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

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

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

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

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

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

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

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

PRESUMED DEDICATION AT COMMON LAW

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

3 Summary of Legal Tests

- 3.1 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. 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. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, Members should make an order so that the evidence can be tested at a public inquiry. Officers do not consider that there is such a conflict in this case.
- 3.2 If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
- 3.3 Where a Map Modification Order is made by authority of this Committee, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these

circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.

- 3.4 Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.

4 Claimant

- 4.1 The claim was submitted in August 2006 by Vernhams Dean Parish Council, and was subsequently determined to be 'duly made' by the County Council in December 2006.

5 Landowners

- 5.1 The land over which the claimed route runs is unregistered. The owners of the properties either side of the route have been consulted.

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

- 6.1 The claimed route is approximately thirty metres in length and is enclosed between property boundaries. It runs over an unmetalled track that runs between Back Lane (U55) and the High Street (C21), and which shows evidence of use by wheeled traffic, presumably for the purposes of access by adjoining landowners. Officers have measured the available width of the route, which is between 3 and 4.5 metres.

7 Background to the Claim

- 7.1 The claimed route has existed as a physical feature since at least the latter part of the 19th century, and is shown on the First Edition of the Ordnance Survey County Series Map (c1880) and the Vernham Dean Tithe Map (1839).
- 7.2 In 2006, following an exchange of correspondence with the County Council, Vernhams Dean Parish Council expressed an interest in making an application to add the claimed route to the Definitive Map. Around this time the then owner of Old Bakery Cottage, Mr David Rainey, contacted the County Council to make clear his opposition to the proposition that the route was a public right of way. In a letter to the County Council dated 30th May 2007, Mr Rainey stated that both he and his predecessors had parked their cars along the route, but that in recent years the Parish Council had written to him complaining of an obstruction to the right of way. He also confirmed that he had subsequently erected a fence and notices to alert people to the fact that the route was not public, but that these had been taken down shortly afterwards.
- 7.3 Mr Rainey sold Old Bakery Cottage in January 2016 to Mr Richard and Mrs Robyn Ruane. Mr Ruane has contacted the County Council to confirm that he accepts the assertion that the route has been in public use for a number of years, and that he does not oppose the application.

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, public rights subsist, or are reasonably alleged to subsist, on the route shown on the Committee Plan.

- 8.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be proved by historic documentary evidence or by evidence of use in the recent past.
- 8.3 Historic and documentary evidence has been examined to see whether the past history and use of the route point to it having public rights as a result of dedication in the near or distant past. Rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 8.4 Copies of most of the documents referred to in this report are available for inspection in the offices of the Countryside Access Team. Members are invited to inspect these when considering this report.

9 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.

9.1 Ordnance Survey Maps

9.1.1 Vernham Dean Tithe Map and Award – 1839

The claimed route is shown running on the line shown on later mapping in a similar fashion to other roads that pass through the village, all of which are un-numbered (in contrast to other, titheable land parcels). No barriers are shown at either end of the route where it meets a connecting road, and so it could therefore be inferred that the route formed part of the local highway network, though this document gives no further indication as to possible status.

9.1.2 OS County Series 1st Edition (25 inches to 1 mile) – c1880

The area of land through which the claimed route runs contains the parcel number '193', which the accompanying Book of Reference records as '*Houses and Gardens*', and a bracing symbol indicates that the route is considered to form part of this parcel (as opposed to being distinct from it). Pecked lines at the northern and southern end of the route indicate that the route was not gated or obstructed in any way. The route is shown as being approximately four metres wide, save for at the northern end where it is roughly six metres wide (NB – As stated at 6.1, officers have measured the current width of the route between the abutting properties, which appear to have been unchanged since the time this map was produced. It could therefore be inferred that the width of the route is the same as it was in the 19th century).

9.1.3 OS County Series 2nd Edition (25 inches to 1 mile) – c1899

The claimed route appears on this map in similar fashion to the First Edition, separated from the roads to the north and south by pecked lines. The buildings to the east and west of the route are labelled 'P.O.' and 'Smy' respectively, indicating the sites of the village post office and smithy.

9.1.4 OS County Series 3rd Edition (25 inches to 1 mile) – c1910

Again, the route is shown braced to the properties on both sides, but now there are no pecked lines at southern end of the route. The smithy is labelled.

9.1.5 OS County Series 4th Edition (25 inches to 1 mile) – c1924

The Fourth Edition shows the route in similar fashion to the earlier maps. Pecked lines are again shown at both ends of the route.

10 User Evidence

- 10.1 The Parish Council's application was supported by evidence of use from eight local residents, collected on user evidence forms. This evidence is summarised on the chart at Appendix 1.
- 10.2 The evidence put forward charts public use of the claimed route since the late 1960s. All users put forward use covering a full period of twenty years between the mid-1980s and the submission of the application in 2006.
- 10.3 Of the eight users, one gave a frequency of use of once a month, and three others used the route approximately twice a month. Of the remaining four users, two put forward use of one hundred times per year, and the other two stated that they had used the route several times per week. Most users used the route to visit the local Post Office, situated to the east of the route's southern end, whilst others used it as part of a recreation walk. Two users used it as a short cut to visit friends in Botisdone Road. All users report having seen other local people using the route.
- 10.4 Mr Middleton was the only witness who stated that his use had ever been challenged - in September 2006 when he was reportedly told by somebody (possibly Mr Rainey) that the public had no right to use the path. None of the other users reported being challenged.
- 10.5 Mr Watkin was the only witness to state that he had seen signage along the route. Erected on 30th September 2006, a sign at each end of the route reportedly read "Pedestrians Keep Right/Pedestrians Keep Left". According to Mr Watkin, these signs were taken down by parishioners on the day that they were erected.
- 10.6 None of the users reported having to pass through gates, or climb over stiles (or anything else) to gain access to the route. Four users stated that the route was occasionally obstructed by parked cars along the route, which due to its narrow width, made passage along it difficult. Mr Watkins reported the erection of seven fence posts along the centre line of the path, linked with fence wire, on 30th September 2006. At the time of writing (23rd October 2006) Mr Watkins reported that the posts were still in situ but that they had since been 'driven into the ground'. Mr Watkins also reported that an additional barrier consisting of loose crossed posts marked with white tape, which blocked part of the width of the route, were removed by Parish Councillors on the day they were erected. In his user evidence form, Mr Watkins added that *"Mr Rainey has declared that, if he fences off part of the right of way for a period of 15 years, he can claim both ownership of the land and exclusive right to park a car at the position shown on the map"* (Mr Watkins

refers to an area at the northern end of the claimed route, marked on his evidence map as lying adjacent to 'The Old Bakery Cottage').

11 The Landowner

- 11.1 Prior to the investigation being taken up for investigation, the County Council received correspondence from Mr Rainey, in which he indicated that he strongly opposed any claim that the area adjacent to his house was a public right of way. In this correspondence, Mr Rainey acknowledged that the fencing and signs had been erected by him and that they had been subsequently removed by local people. He also stated that given the fact that he had experienced difficulty in establishing ownership over the land concerned, he had been unable to enforce any closure of the route.
- 11.2 In May 2007, Mr Rainey provided a copy of a letter written as part of the local searches undertaken while he was in the process of purchasing The Old Bakery Cottage, written by Wheelers Solicitors of Ash Vale, Surrey. In it, reference is made to the fact that the lane between Back Lane and High Street *"appears to be a pedestrian right of way only although our clients and their predecessors have always parked cars on it without any objection."* As set out at 7.3, in January 2016 Mr Rainey sold The Old Bakery Cottage to Mr and Mrs Ruane, who do not oppose the application.
- 11.4 As has been established, the land over which the claimed route runs is unregistered. Given its inclusion in the 'Roads and Waste' section in the 1839 Tithe Award, it is likely that the land was in the hands of the Surveyors of Highways. However, in the absence of any corroborating evidence, and in accordance with the requirements of the Wildlife and Countryside Act 1981, the applicant erected notices addressed to 'the owner or occupier' on this section of the route for a period of six weeks at the time the claim was submitted. Other than Mr Rainey, no-one has subsequently come forward to identify themselves as having an interest in the land.

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, Vernhams Dean Parish Council, Test Valley District Council, County Councillor Timothy Rolt and Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager). At the time of writing, no responses to the consultation had been received, save for Test Valley Borough Council, which indicated that it had no comment to make on the application.

13 Analysis of the evidence

- 13.1 There is clear evidence of uninterrupted public use of the claimed route since at least the late 1960s, and the user evidence put forward supports the proposition that the route has been dedicated as a public right of way. The evidence of long use under Section 31 of the Highways Act 1980 and common law is considered below.

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 route**

The claimed route is capable of being a right of way at common law, as it follows a well-defined linear route.

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

Notwithstanding the fact that they were allegedly removed within a matter of hours, it could be argued that the signage and structures erected by Mr Rainey in September 2006 called public use of the route into question. This event pre-dated the County Council's acceptance of the Parish Council's 'duly made' application in December 2006, thus giving a relevant twenty year period of September 1986 – September 2006.

13.5 **Twenty years' use without interruption**

No interruption to public use was recorded in the user evidence provided until September 2006.

13.6 **'Without force, stealth or permission'**

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

There is no evidence to suggest use of the route has ever been as a result of force, perhaps with the exception of the removal of signs and barriers in September 2006. This action would however be irrelevant to determining the claim, as it was this event that effectively called public use into question.

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 route appears to have been open and without secrecy.

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

There is no indication in the user evidence provided to suggest that use of the route has ever been subject to permission.

13.7 Use by the public

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

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

Despite the relatively modest number of users, half of them attest to walking the route at least twice per week, with two people walking it several times per week. Further, all users stated that they had seen other people using the route. When considered in the context of a village the size of Vernham Dean, it is clear that this level of use would have come to the attention of a reasonable landowner (had they chosen to look).

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.

None of the use appears to have been in the exercise of a private right. Although many users cited visits to the nearby Post Office as a reason for using the route, they also give other reasons for using the route (such as recreational walking and visiting friends), and so it would appear that the use of the route has not been restricted to a particular class of user.

13.8 Summary of user evidence

The evidence of use indicates that local people have been walking the claimed route in every year since 1968, with the bulk of use falling after 1980. Use within the relevant period was not secretive or as a result of force, and appears to have been 'as of right'. There is no evidence to suggest that public access on foot has ever been physically obstructed between September 1986 and September 2006.

13.9 Conclusions under Section 31, Highways Act 1980

It is considered that the requirements of Section 31 have been satisfied in this case, and that the public have been using the route 'as of right' for a full period of twenty years (1986 – 2006).

13.10 Analysis of the evidence under Common Law

This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied from a sufficient period of public use without secrecy, force or permission, and the acquiescence of

those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back.

13.11 Conclusions under Common Law

There is evidence to suggest there has been a positive intention to dedicate the claimed route as a public right of way. The route's depiction on the 1839 Tithe Map, excluded from other titheable land parcels, indicates that at that time it was in the hands of the surveyors of highways, and was considered to be a public route. This may also go some way to explaining why there is still no registered owner for the route.

14 Conclusions

- 14.1 The documentary evidence indicates that the claimed route has existed as a feature on the ground since at least the early part of the 19th century, and there is evidence of public use of the claimed route within living memory dating back to the late 1960s.
- 14.2 The evidence put forward in support of the claim is sufficient for it to be reasonably alleged that the claimed route has been used by the public as of right and without interruption for a full period of twenty years (1986 – 2006).
- 14.3 The available evidence is also sufficient for a common law presumption to be inferred (ie that the landowner intended to dedicate the claimed route as a public right of way).
- 14.4 Officers consider that based on age of the properties abutting the route, the available width of the path has been largely unchanged since the 19th century, and so it would be appropriate for an order to record the currently available width of between 3 and 4.5 metres (see 9.1.2).
- 14.5 If Members agree with paragraphs 14.2 and 14.3 and consider that, on the balance of probabilities, it can be reasonably alleged that a right of way subsists, then they should direct that a Map Modification Order is made to record the claimed route as a public footpath.

15 Recommendation

- 15.1 That a Definitive Map Modification Order be made to record a public footpath varying between 3 and 4.5 metres in width, as shown between A-B 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: 572

Location

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment:

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

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

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

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

2. Impact on Crime and Disorder:

3. Climate Change:

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

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.