

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	22 March 2011
Title:	Application for the addition to the Definitive Map of footpaths at Barton Farm, in the parish of Headbourne Worthy and the city of Winchester
Reference:	2725
Report From:	Director of Culture, Communities and Rural Affairs

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1. Executive Summary

- 1.1. This is an application made under section 53(3) of the Wildlife and Countryside Act 1981, to record a network of paths over land known as Barton Farm, in the parish of Headbourne Worthy and the city of Winchester, as footpaths. The claim is based on evidence from 128 local residents. They have used the paths predominantly on foot, and with bicycles, from the 1960s, and continue to do so. The claim is recommended for refusal due to the actions of the landowners in showing that there has been no intention to dedicate public rights over the land.

2. Legal framework for the decision

- 2.1. WILDLIFE AND COUNTRYSIDE ACT 1981: (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 such that the land over which the right subsists is public path, restricted byway or, subject to section 54a, a byway open to all traffic

2.2. 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. Claimant

3.1. The application was made in 2004 by **Mrs. Kay Fernandes** of the 'Save Barton Farm Group'. For a number of reasons, Mrs. Fernandes is no longer able to act as applicant, and has nominated **Mrs. Chris Slattery** to act in her stead.

4. Landowners

4.1. The landowners are **CALA Homes (South) Limited** of Staines, Middlesex, **The Warden and Fellows of Winchester College** of Winchester, and **Mr. M. Burge** of Pitt. There is a section of the track that is apparently unregistered between the section owned by Mr. Burge and that owned by CALA Homes.

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

5.1. The application is for a network of paths over a large site, which is cultivated as arable farmland. Because parts of the claimed path link in with Headbourne Worthy Footpath 1, the description of the route has been broken down into sections.

5.2. **Path A to B:** The path commences at point A, at Well House Lane (the C95), where the path utilises the entrance to Well House Farm, and then turns south eastwards in a straight line to point B, where it forms a junction with Headbourne Worthy Footpath 1. It is a farm track with a grass and soil surface, running between two arable fields, is 4.5 metres wide and the tracks of the farm vehicles are visible. The length of this section is 378 metres.

- 5.3. **Path C to D:** The start of the next path lies to the south west of point B, some 150 metres along Footpath 1, at point C. This runs in a south easterly direction in a straight line, to point D. The path has a metalled surface, is 4 metres wide, and the length of the segment is 289 metres. It seems to be a farm road.
- 5.4. **Path D to E:** Point D is in the middle of a section of a claimed path that runs from the Andover Road (the B3420) to a junction with Footpath 1, where it passes under the main railway line from Southampton to London. From D, the path runs in a straight line in a south westerly direction to emerge on to the Andover Road North at Barton Farm (point E). The path here consists of a metalled track with some grass growing in patches on the crown, is 3.3 metres wide, and 351 metres long. It passes through a farm yard to reach the road, and here the path is wider, and more open, with an area to the north containing farm buildings. The rest of the path between arable fields, and has the appearance of an unfenced farm track.
- 5.5. **Path D to F:** From point D, the path also runs in a south easterly direction, again in a straight line, to point F, where Footpath 1 passes under the railway bridge. The path here is of a similar nature to the section for D to E, that is with a metalled surface, 3.3 metres wide, and it is 244 metres long. It also passes between arable fields and is unfenced.
- 5.6. These four sections of path comprise the claimed route to the west of the London to Southampton mainline railway. On the east side of the railway, the path runs from Footpath 1 as it emerges from under the bridge.
- 5.7. **Path G to I:** This is an unfenced farm track 3.2 metres wide, and 264 metres long, with an earth and grass surface, running in a straight line in a north easterly direction from point G. The current Ordnance Survey mapping shows this track by means of parallel pecked lines. On the ground, it splits into two at point I.
- 5.8. **Path I to H:** the path splits at point I and continues almost due south to point H. This path does not actually appear on the applicant's map of claimed routes, but analysis of the user evidence maps shows that the public has made use of this route and therefore it should be considered in this report. At H, the path emerges into Courtenay Road. This path is 1.5 metres wide, has an earth surface, and is 89 metres long. It has an earth surface and runs along the edge of an arable field.
- 5.9. **Path I to J:** When the application was made, the applicant indicated that people had walked along the path from point I to point J, where the path curves and then runs parallel to the fences of the properties on Courtenay Road and Colley Close. This path has an earth and grass surface, is 1.75 metres wide, and is 61 metres long between point I and point J. This path appears to terminate at a fence, and there is no entry into any of the properties, which are fenced off. Only three users indicated that they walked eastwards

from point J, and this use is not considered sufficient to merit examination.

- 5.10 A double-width locked gate has appeared across the path at point D, from about the end of October 2010, preventing passage along the path D to E.

6. Background to the claim

- 6.1. The land over which the claimed paths run is an extensive area of arable cultivation. The bulk of the land has been owned by CALA Homes since September 1998, at which time they entered into a lease for 999 years of that land with the Warden and Fellows of Winchester College. The land appears to have been used for agriculture for a long time. Barton Farm has been managed, and is currently farmed, by a tenant of Winchester College.
- 6.2. The site of Barton Farm was allocated to the adopted Winchester City Local Plan, where it was designated as a 'Reserve Major Development Area'. CALA Homes applied for permission to build 2,000 homes on the site in 2004, and this went to a public inquiry in 2006. This inquiry found that there was no immediate need to release the site for building at that time because the housing supply in Winchester was sufficient to meet the targets of the County Structure Plan. The 2009 South East Plan (successor to the County Structure Plan) increased the proposed housing targets for Winchester significantly, and the land to the north of the city has been indicated to be a suitable location if green field land is required. In the meantime, the land is still being farmed, and parts of the network of claimed paths appear to be being used regularly by members of the public, predominantly on foot.
- 6.3. Barton Farm itself started appearing on maps in 1871, and the field boundaries that have, over time, become utilised as farm tracks appeared by the 1930s. It seems that the nearby housing estates, from which walkers come, were built in the 1960s and 1970s.
- 6.4. In the 1960s a large new housing estate called 'Harestock' was built south of Littleton, on the west side of the Andover Road. This resulted in a population rise to 3,700 for the whole parish. About the same time there was development around Courtenay Road on the east side of the railway line. By the end of the 1960s and the start of the 1970s, there was a population close by to Barton Farm who would want to walk and exercise their dogs, and this is reflected in the user evidence bar chart found at Appendix 2.
- 6.5. The first recorded user dates from 1942 and the majority of the recorded use ends in 2008, when most of the user evidence forms were filled in. It is likely that many of the users are still using parts of the network of claimed paths.

7. Issues to be decided

- 7.1. The issue to be decided by this Committee is whether there is evidence to show that the claimed routes ought to be shown on the

Definitive Map as highways; that is as footpaths, bridleways, restricted byways or byways open to all traffic.

- 7.2. 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 in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).
- 7.3. Historic and documentary evidence has been examined to see whether the past history and use of the paths point to them having public rights as a result of dedication in the 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. This type of evidence may disclose rights other than those claimed by the applicant. For example, they may show that a lane is an old road for vehicles, not merely a footpath or bridleway. 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.
- 7.4. The burden of proof in these matters is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive 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 the landowners on the other, Members should make an Order so that the evidence can be tested at a public inquiry. However, this is not a step which should be taken simply to avoid making a difficult decision.
- 7.5. 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 urged to inspect these, or the originals, when considering this report. Appendix 1 is an evaluation of historical documents and should be read in conjunction with the paragraph relating to documentary evidence below.

8. Documentary Evidence

a) Ordnance Survey 1:2,500 County Series Map, third edition, 1909

The first map which officers have discovered that shows any part of the network of claimed routes is the third edition of the Ordnance Survey County Series, scale 1:2,500, dated 1909. This map shows the first part of the claimed route from D to E, running alongside the buildings of Barton Farm itself. Headbourne Worthy Footpath 1 is shown.

b) Ordnance survey 1:2,500 County Series Map, fourth edition, 1930s

Headbourne Worthy Footpath 1 is shown, and a number of new field boundaries are recorded on this edition, which form the fields along the edges of which people have walked, namely C to D, and E to D to F. However, only the first part of the track, by Barton Farm, and a part of the route D to E is shown.

8.1. National Grid 1:2,500 Map, 1951 and 1962 (Hampshire Record Office)

This map shows Headbourne Worthy Footpath 1, and an extended complex of buildings at Barton Farm, with a path running on its southern side, and the southern side of the field boundary. The path is shown by means of parallel pecked lines. It is braced into the field that it runs through. There is a gate across the path, set a little way back from the junction of the path with the Andover Road. This section of path corresponds to the claimed route from E to D, and the path then continues on a route correspond to D to F on the plan accompanying this report, to the point where it passes under the railway line. This is the only section of the network of claimed paths shown at this time.

8.3 Sales Plan, 1957 (Hampshire Record Office 98M86/65)

This plan does not show any part of the claimed network of paths, but does show the beginnings of the development of housing to the east of the path network, from which users would come.

8.4 National Grid 1:2,500 Map, 1999 (Hampshire Record Office)

The map shows Headbourne Worthy Footpath 1. The range of buildings at Barton Farm shown on this map is larger than that shown on the earlier National Grid map. A solid line is shown across the path, set back from its junction with the Andover Road, and this suggests that the earlier gate is still in place. All parts of the network of paths appear on this map, apart from the route I to H. The path at point J does not appear to connect with any property in Courtenay Road backing on to it.

8.5 Hampshire Millennium Aerial Photography, 1999

This aerial photography shows the whole of the network of claimed routes, as wide farm tracks. The routes seem to be open, except for point A where there appears to be a gate across the route set back from the edge of the road, by a barn. Beyond point I, the path runs to point J, and continues beyond to the field boundary, and along the field edge to Worthy Road (the B3047). There does not seem to be a connection with any of the back gardens of Courtenay Road.

8.6 Hampshire Aerial Photography, 2005

This later photography shows the network of claimed paths in a very similar way. There is a gate across the route in a similar position to the one shown in the earlier photography. However, on the section of path from I to J, the continuation beyond the field boundary is much less distinct, and there is also a clear spur

running off the path at about point J, which connects to an entrance into the back garden of 38 Courtenay Road.

9. Witness Evidence

- 9.1. Eleven user evidence forms were received with the application in 2004, with another 117 being provided in the time between the service of notices and the start of the investigation. One person gave a statement to amplify her form, on the matter of annual closures. Therefore, evidence from a total of 128 witnesses has been disclosed.
- 9.2. This evidence has been put into the form of a chart, at Appendix 2. Such a chart is, of necessity, a generalisation, but may give a feel for the extent of the use claimed. Frequency of use varies from a few times a year to daily. It seems that users are still able to access the paths, apart from the path from A to B, where there is a locked gate near Wellhouse Lane. It may be that they are not able to access D to E from the east, as a new double locked gate has been recently put up at point D. Most of the forms were filled in during 2008, which is the reason why the recorded use stopped at that year on the chart, though the network of paths is still in use.
- 9.3. The earliest recorded use of the network of paths is in 1942, but there is only one user before 1960. Between 1960 and 1969 13 users are recorded, and this rose to 36 between 1970 and 1979. Use increased steadily from that time onwards, probably in connection with the growth of housing and population in the immediate area. There were 59 users between 1980 and 1989, 76 between 1990 and 1999 and 116 between 2000 and 2008.
- 9.4. Seven users reported the presence of a stile or stiles. Two mention a stile at Well House Farm (path A to B). The other witnesses may have been referring to the stiles on Headbourne Worthy Footpath 1, as many users record that the definitive route is part of the network of paths that they use. Eleven witnesses comment on the presence of a gate. Three users report that the gate was at Well House Farm, and describe it as locked. No users report having to climb over anything, or having to use force to gain access to the path, and it is currently possible to use the whole network of these claimed paths, quite freely and without the use of any kind of force, with the exception A to B and D to E, where there are locked gates. Thirty nine users make mention of notices in their forms, and 22 of these mentioned the word '*Private*'. Six witnesses said that they saw notices that indicated that the path was not a public footpath, while two said that they saw public footpath signs (which may be connected with Headbourne Worthy Footpath 1). These sightings of '*Private*' signs are dated between 2005 and 2008, with the majority being 2008. One mentioned signs asking people not to let their dogs foul the land, another that dogs should be kept under control, three were connected with the outbreak of foot and mouth disease, one indicated the farm entrance and three users said that the sign they saw indicated the closure of the path. Three of the witnesses recalled seeing annual closures, and one of these

witnesses, **Mrs. Moore**, was interviewed. She saw notices that the footpath was '*closed today on only a few occasions*' at point H and F. Seeing one of these at point F, she discussed with her companion whether they should go on. Shooting was taking place, and she thought this was the reason that the landowners did not want walkers there. The notice at H clearly applied to the claimed path. This happened infrequently and there was no map attached to the notice. This seems to refer to the shooting closures that Mr. Burge refers to in his evidence. Mrs. Moore thought this happened in the 1990s, and concedes that these might have been posted on other occasions, but she saw them only three or four times. She did not see anyone on the land who was employed specifically to turn people away. The notices were not there after 24 hours, so Mrs. Moore suspected these were annual closure notices.

- 9.5. Nine witnesses mention either being stopped themselves or knowing of someone else who was stopped. One witness stopped using the path after having seeing a 'private' sign, and another when shooting was taking place. **Mrs. O'Connor** was stopped by a sign and locked gate. **Mr. Lindley** said he used the route A to B only once because of the locked gate, which he did not try to climb. One user was stopped at Well House Farm by the farmer, but no date for this is available. Another witness was stopped in 1993 at Barton Farm, while a user was stopped on the path between points A and B, again by the farmer. A user was told by the farmer that the path was not public, and another reports having been stopped by the house owner, though does no specify of which house. A further witness reported that his son had been stopped. Three of these reports relate to a direct challenge by the farmer (presumably Mr. Burge or his foreman), while another suggests a similar incident during the relevant period. There are no indications of dates when these challenges took place.
- 9.6. There are four references to obstructions on the network of claimed paths. One was reported at Well House Farm (point A) consisting of a gate that the witness did not climb over. This was in August 2008. Three more witnesses referred to the presence of a gate. Two said it was shut and locked and the other reported that it could be easily negotiated.
- 9.7. No witnesses report having any connection with the landowner, and there were only three references to the issue of permission. **Mr. Lee** had checked with Mr. Burge [who had day-to-day management of the land] if he minded Mr. Lee and his wife walking around his fields. Mr. Burge said he did not mind, provided they kept to the edges of the fields. This would constitute the seeking of permission and that permission being granted, so the use that Mr. Lee has put forward has not been included in the user evidence chart. **Mr. Pile** enquired of others if the paths could be used, but as none of these users would be in a position to grant permission, it seems that his use was as of right. **Mrs. Dubben** reports that she spoke with the farmer after she cleared up mess left by her dog. She also spoke with his wife, and comments '*on no occasion was I asked to leave*

or told that I did not have permission'. It may be that Mrs. Dubben actually means that she was not told that the path was not public, but it seems that she did not actively seek permission though she had the opportunity to do so. As far as private rights are concerned, **Mrs. Bradshaw** indicated on her form that she thought she may have exercised private rights because she would walk to her home via the field edge, but it seems unlikely that this use would fall under this heading. No-one else reported having used any of the paths in the exercise of a private right.

9.8. Witnesses said that they saw others while using the path, both locals and strangers. 113 users saw others on foot, while 69 saw people using bicycles, 21 noticing riders on horseback, and 15 saw vehicles, with another 3 seeing the farmer in a vehicle and two seeing people in wheelchairs. Users comment that the paths were *'in almost constant use'* (**Mr. Berry**), or that they were *'used continuously'* (**Mr. Greenwood**). **Mr. McManus** said that he could not *'recall an occasion when we did not meet other users of the same facilities, thus "custom of use" is extremely well-established'*, and **Mr. Secker** commented that *'they are all extensively used'*,

9.9. What can be understood from this evidence is that local people have been using a network of paths over land at Barton Farm from about 1960. The bulk of public use has occurred from the 1970s onwards, when two housing estates nearby were developed. Use continues on most of the routes in this network, though it seems it have tailed off or stopped for the route A to B at Well House Farm, where there is a gate which is generally kept locked. Users marked on maps those routes that they used. Not all users used each path, and some users indicate that they used some routes more than others. The figures are:

- A to B 45 users
- C to D 109 users
- D to E 70 users
- D to F 108 users
- G to I 111 users
- I to H 89 users
- I to J 36 users

9.10 Thirty five witnesses used the path network with bicycles, though the evidence does not disclose the frequency of use on any particular path. How this use relates to the different routes is as follows:

- A to B 13 users
- C to D 33 users
- D to E 21 users
- D to F 35 users
- G to I 35 users

- I to H 28 users
- I to J 13 users

9.11 It is not unreasonable to conclude that this use of the paths by the public on foot, and with bicycles, is capable of giving rise to a presumption of dedication under section 31 of the Highways Act 1980. Such a presumption will not arise if there is sufficient evidence that the relevant owners of the land did not intend to dedicate such a right to the public.

10. The Landowners

10.1. The land that comprises the majority of Barton Farm was owned freehold by Winchester College until 17th September 1998, when it was sold to CALA Homes of Staines. They bought the land with the sitting tenant, Mr. Mike Burge. The College then leased it back from CALA Homes for 999 years, and the land has been managed by Mr. Burge since the 1970s. Winchester College has owned Well House Farm from the 14th or 15th century. The tenant of Well House Cottage has supplied information that two paddocks, on either side of the Farm, are owned by CALA Homes and leased to Winchester College, and to themselves via Mr. Burge.

10.2. The history of the holding of the majority of the land that is the subject of this application is a little complicated, and the three parties involved with the ownership and management of it have given evidence to assist this investigation. It may be helpful to Members to set out a chronology of the evidence that has been provided by the freeholder, lessee and the lessee's tenant.

- Two deposits were made under section 31(6) of the Highways Act 1980 by the Estates Bursar of Winchester College and sent to Hampshire County Council, as the highway authority, in 1999 and 2007.
- On 19th October 2009, the investigating officer met Mr. Burge, the tenant, on site and he gave a statement, which he later signed and returned.
- Letter from Estates Bursar on 23rd October with information on what instructions were given to tenants.
- Meeting on 6th November 2009 with Mr. Emett, the Strategic Land Director of CALA Homes, in which he gave information on instructions issued to tenants.
- On 30th September 2010 this report was, in confidence and in draft form, sent to the applicant and the landowners in advance of the meeting of the Regulatory Committee, recommending that a Map Modification Order be made to record all the claimed paths on the Definitive Map .
- Letter of 8th October 2010, in which the Bursar of Winchester College commented on report.

- Letter of 11th October 2010 from Mr. Burge commenting on report.
- Email of 25th October 2010 from Mr. Emett commenting on report.
- Letters of 18th November 2010 from investigating officer to CALA Homes, Winchester College and Mr. Burge asking for more detailed information about management of the land.
- Letter of 23rd November 2010 from Mr. Burge with further information and a copy of his tenancy agreement.
- Letter of 23rd November 2010 from the Estates Bursar of Winchester College confirming that instructions to tenants were verbal.
- Email of 8th December 2010 to Mr. Emett asking for clarification of a clause in the lease held by Winchester College.
- Reply on 8th December 2010 from Mr. Emett confirming information and promising copy of lease.
- Email by investigating officer on 14th December 2010 to Mr. Emett asking for clarification of the contractual relationships between CALA, Winchester College and Mr. Burge.
- Reply on 14th December 2010 from Mr. Emett providing this information.
- Letter to the Estates Bursar of Winchester College from investigating officer on 14th December 2010 asking for clarification of dates when instructions to tenants were reiterated.
- Email on 15th December 2010 from Mr. Emett attaching a copy of the lease between CALA Homes and Winchester College.
- Letter from the Estates Bursar of Winchester College of 20th December 2010 confirming occasions when his instructions were re-iterated.

10.4 Further details of the landowners' actions are given below:

- 10.4.1 In 1999 and 2007, deposits covering Barton Farm were made under section 31(6) of the Highways Act 1980 by Winchester College and submitted to Hampshire County Council as the highway authority. Such deposits would serve as a substitute for measures such as locked gates, notices, fences and so on, normally employed to indicate to the public that there is no intention to dedicate a right of way. The presence of such a deposit can defeat a claim based on user evidence, though only from the time it is made. It does not act retrospectively, and is not effective for claims based solely on historical evidence.

- 10.4.2 Mr. Burge, the tenant of Winchester College was interviewed on 19th October 2009, for the purpose of taking a statement about his management of the land at Barton Farm. The following information is taken from that statement. He has farmed Barton Farm since 1973, first as manager and later as the tenant for life of Winchester College from about 1982. Mr. Burge owns a section of the track from point E to a point 79 metres north east of junction with Andover Road North, just past 'The Granary'. Mr. Burge has a connection with land, as his grandfather farmed it before him, when the land was a dairy farm. In the 1970s, Mr. Burge was not aware of people walking on the routes that are the subject of this application, because they walked on the public footpath, Headbourne Worthy Footpath 1. It is his view that people started using the network in the 1970s and 1980s, and these people were mainly dog walkers. People were coming from the Courtenay Road estate [on the east section of the path network] and Mr. Burge was aware that these walkers did not have a footpath joining their estate to the public footpath. He says in his statement, signed on 16th November 2009, '*we did not stop them from walking over the field to get to Footpath 1, but I was always aware that I should not allow a precedent to be created*', and '*this was general knowledge and it was my view that I should not allow footpaths to be established*'.
- 10.4.3 To this end, Mr. Burge carried out annual closures by blocking '*everything except the official public footpaths off, at points C, I, B and G*'. These closures were carried out annually, '*consistently*' between the months of January and March, so as to inconvenience the smallest number of people, from the mid 1980s until about 5 years ago, when Mr. Burge's foreman retired. The closures were advertised beforehand. The barriers and notices were generally put on site early in the morning of the day of closure, and removed 24 hours later. Mr. Burge has supplied a copy of a notice that would be water-proofed and attached to two pallets in an A-frame, each of which would be put up across the path as a barrier (the copy can be found at Appendix 3). The notice stated the reason for the closure, which was to prevent the public from acquiring rights on the routes. Mr. Burge started doing this '*when it became necessary, in the mid to late 1980s*' (before this time, there were fewer walkers) and these were usually made in March or April for one day. The foreman confirmed in a conversation on 19th October 2009 that he had put up the barriers with notices, and also that he had driven around to the various points during the day, to make sure that the barriers and notices remained in place. Mr. Burge said that these annual closures were not made at the behest of his landlords, Winchester College, but on his own behalf, and there was '*no adverse feedback from these annual closures*'.
- 10.4.4 A notice indicating that there is no public right of way has been in place at Well House Farm (point A) since 2006, and

the farm gate at the entrance to the land has usually been kept locked, except during July and August when agricultural operations go on, involving intense use of the machinery. As there are no gaps on either side of the gate, any walker entering at this point would have to climb over it. Mr. Burge also refers, in his statement, to a locked double gate at the end of the tarmac surface at the farm buildings of Barton Farm itself, which was present until about 1990, and this was locked for most of the winter and regularly at weekends. There was also a gate at the farm entrance, and this was mostly unlocked until 1990. Both gates are no longer there.

- 10.4.5 About ten or fifteen years ago, Mr. Burge did instruct his foreman to tell people that the route they were walking was not a public right of way. On some occasions, the use on the path was so heavy that the tractor driver would *'have to park up and tell people where the recorded footpath was'*. People were walking on routes across Barton Farm land, and Mr. Burge estimated that there were probably one hundred people a day making use of them (indicating the number of user evidence forms are a fair reflection of actual use).
- 10.4.6 In response to a letter of consultation asking for clarification about the management of land with regard to public access, the Estates Bursar of Winchester College confirmed in a letter of 23rd October 2009 that *'no instructions were given to Michael Burge with regard to unauthorised access, other than the standard tenancy clause not to assign, let or part with possession'*. In answer to a question whether the College had received any specific instructions from the lessor with regard to public access, the Bursar said it had received no such instructions.
- 10.4.7 At a meeting on 6th November 2009, Mr. M. Emmett, Strategic Land Director of CALA Homes, confirmed that his company had not issued any instructions to the lessees, Winchester College, regarding access by the public, and had not drawn up and supplied a deposit under section 31(6) of the Highways Act 1980. It appeared, at this meeting, CALA Homes had not taken any overt actions themselves to show that they did not intend to dedicate any public rights of way at the Barton Farm site.
- 10.4.8 After this draft report (recommending the recording of the claimed paths) was sent out the landowners in consultation, the Estates Bursar wrote on the 6th October that there was little evidence for the path A to B, because it had been *'blocked and protected'*. On the 8th October 2010 he wrote to confirm that, when he took over the management of the College Estates in 1981, he *'instructed **ALL** our farm tenants to take whatever steps were appropriate to both maintain existing rights of way, and stop the establishment of new ones'*. Tenants were advised to *'obstruct physically any permissive path or paths not recognised on Shrove Tuesday*

each year, and to close all tracks when shooting. It is his view that *'the College has been more robust than implied'* in the draft report.

- 10.4.9 Mr. Burge, in response to the draft report consultation, wrote on 11th October 2010, that *'the Estates Bursar of Winchester College **did** give me instructions to take appropriate action to protect our farm tracks from becoming official footpaths'*. Mr. Burge was unable to give any specific dates, but said this happened in the mid to late 1980s, when he began making the annual closures referred to in his statement. He mentioned the two deposits under section 31(6) of the Highways Act 1980, made by Winchester College. He stated that the annual closure notices were posted at points C, I, B, G, D and F. He *'categorically'* stated that there were at least 15 annual closures during the relevant period and therefore it is *'quite impossible for a 20 year period to be established irrespective of the precise dates'*. He re-iterated that Winchester College **did** give him instructions to carry out annual closures, *'whether by letter or verbal I cannot remember'*. There was a gate at point A, erected before 1989 and permanently locked since 2000. There were further gates at points E and D, in position up until the late 1990s. In every year since 1999 there had been pigeon shooting on the land, usually at weekends and between 5 and 20 times each year. On each of these occasions *'we have, by law, to erect signs and these signs would have been placed at any of the points (A to J)...These signs stated "Shooting in progress – NO Access"*.
- 10.4.10 Mr. Emmett, also in response to the draft report consultation, wrote in an email on 25th October 2010 that *'it is certainly the case that I have not issued verbal instructions to the College, I do not consider this necessary since the College is contractually required to "do everything possible to prevent the creation of new footpaths"*. It is his belief that both the College and the College's tenant, Mr. Burge, have *'taken the necessary steps to comply with this obligation'*. The current position of CALA Homes is that it will, if successful through the planning process, *'significantly enhance public access through the site, on both sides of the railway line'*.
- 10.4.11 The investigating officer wrote on 18th November 2010 to CALA Homes, Winchester College and Mr. Burge requesting more detailed information on the management of the land, and received the following replies.
- 10.4.12 Mr. Burge replied on 23rd November 2010, when he confirmed that he had received instructions to prevent the acquisition of any further public rights of way from the Estates Bursar. Mr. Burge also stated that there had been:
- A gate at E, in place before 1984 and *'frequently locked'*; removed in the early 1990s because of the increased use of

the farm buildings as offices – *‘they were not removed to allow walkers to pass’*

- Gates at D, in place before 1984 and removed in the early 1990s, locked for most of the winter and regularly at weekends
- Gate at A, installed before 1989 and permanently locked since 2000 except when opened for a few days during harvest to allow farm traffic to enter the field
- Signs at A, stating *‘Private No Entry’* and *‘Private No Right of Way’* on the locked gate and adjoining fence, in place since 2000
- Signs at E on the farm buildings, in place for 7 or 8 years, saying *‘Private Farm, No Public Footpath’*
- Sign at the farm gate, recently vandalised

Mr. Burge supplied a copy of his Tenancy Agreement, and said that paragraphs 5d and 12 *‘certainly indicate to me that it is my duty to preserve the integrity of the farm in all aspects’*. Paragraph 5d reads *‘not to permit or suffer any wilful or voluntary waste nor to do or suffer to be done on the Holding anything which may be or become a nuisance or annoyance to the Landlord or to the owners or occupiers of any adjoining land and to indemnify the Landlord against any claims by third parties in respect of any breach of this Clause’*. Paragraph 12 reads *‘To exercise the sporting rights in a sportsman-like manner and to preserve game maintaining and leaving a good breeding stock at the end of the tenancy And to ward off all poachers and trespassers taking such proceedings as are necessary to safeguard sporting on the Farm And not to sublet the sporting rights without the written consent of the Landlord’*.

10.4.13 The Estates Bursar wrote on 23rd November 2010 to confirm that he had given verbal instructions, *‘not written’*, to all farm tenants to *‘obstruct any permissive paths’*.

10.4.14 On 8th December 2010, the investigating officer emailed Mr. Emmett asking if he could clarify the wording relating to the acquisition of new public rights of way in the lease held by Winchester College from CALA Homes. He confirmed that the wording in the clause of the lease was:

‘3.8 As far as possible to prevent

3.8.1 the creation of any new footpath over the property...’

Mr. Emmett has provided the County Council with a copy of this lease.

10.4.15 The investigating officer wrote to Mr. Emmett on 14th December 2010 asking for clarification about the contractual relationships between the freeholder, leaseholder and sitting tenant at Barton Farm. Mr. Emmett confirmed that the land

was purchased by CALA Homes in 1998 from Winchester College, with Mr. Burge as the sitting tenant. Further he confirmed that Winchester College is Mr. Burge's landlord and receives his rent. CALA Homes is the freeholder, with Winchester College as their long-leaseholder. Mr. Burge's agreement with Winchester College is a Farm Business Tenancy, to which CALA is not a party. There is no direct contractual relationship between CALA and Mr. Burge, though the lease to Winchester College refers to the Farm Business Tenancy.

- 10.4.16 On 14th December 2010 the investigating officer wrote to the Estates Bursar at Winchester College, seeking information on when he reiterated his instructions to tenants regarding the prevention of the acquisition of public rights. The Estates Bursar confirmed, in a letter of 20th December 2010, that the same instructions were repeated later in 2004 and 2007 when there were problems with incursions by gypsies.
- 10.4.17 On 15th December 2010 Mr. Emmett sent a copy of the lease of 1998 between CALA Homes and Winchester College. In this lease Winchester College is the tenant, and clause 3.8 specifically requires the College to prevent the creation of any new footpath over the property. When CALA became the freeholder Barton Farm in 1998, no new tenancy agreement was issued to Mr. Burge. Instead, clause 3.9(b) of the CALA lease to Winchester College requires that the College should not '*deal with the property other than by way of the existing Agreement with Michael John Burge dated 26th March 1984*'. This would preclude the issuing of a new tenancy agreement to Mr. Burge, and implies that CALA Homes considered the terms of this existing tenancy sufficient to meet the requirements of clause 3.8 of the lease to Winchester College, requiring the College to do everything in its power to prevent the acquisition of new public rights.
- 10.5 Marcus Parry is a tenant of Winchester College, and lives in Wellhouse Cottage. He stated that he has no objection to the bulk of the routes that make up the application '*since most of the tracks marked on the map...have been in common use by dog walkers for many years*'. However, he does take exception to the route marked A to B because '*it is virtually never used and on the rare occasions that we do encounter people on it, it is usually because they are lost*'. He objects to it being recorded as a public right of way because it has been little used and also because '*it leads to Wellhouse Lane, with no speed limit or footpath for most of its length*' which makes it '*a dangerous road to walk along*'. Well House Farm itself now hosts a number of light industries. The traffic associated with these, along with agricultural operations, adds to the danger.
- 10.6 Since the intention was to prevent the acquisition of public rights, it could be said that the annual closures made by Mr. Burge represent a yearly interruption to use by the public, and to demonstrate that

there was no intention by the freeholder to dedicate fresh public rights. It could, therefore, be said that there is no period of uninterrupted use by the public and the requirement under section 31 of the Highways Act 1980 that the applicant demonstrates 20 years' of uninterrupted use cannot be met. Mr. Burge's authority for making these closures comes from verbal instructions to close off paths issued by the Estates Bursar of Winchester College in 1981. The Bursar's authority to tell the estate tenants to carry out these closures since 1998 comes from clause 3.8 in the lease the College holds of CALA Homes. Three witnesses recall having seen these annual closures. The representative of CALA Homes declares that he is satisfied that Winchester College and Mr. Burge have complied with the obligation put upon them by the clause in the lease, to the point that he sees no need to issue any separate instructions to them.

11. Consultations with Other Bodies

- 11.1. The following persons and bodies have been consulted about the claim: Winchester City Council, Headbourne Worthy Parish Council, the local Member Councillor Jackie Porter, the Open Spaces Society, the Ramblers' Association, the British Horse Society, the Byway and Bridleway Trust, the Area Countryside Access Manager, Highways Management and Minerals and Waste. At the time of writing, the following responses have been received.
- 11.2. **Headbourne Worthy Parish Council** supports the recording of the routes B to C, C to D, E to F, G to I and I to H as public footpaths '*without hesitation*'. Council members have used these paths '*without hindrance over many years for leisure purposes and when dog walking*'. Further, they have '*witnessed many members of the public doing the same*'. The path from I to J is presumably used mainly by residents of Courtenay Road. The Council feels that the situation with route A to B '*is not as clear cut*', since although it has been used by members of the Council on '*some occasions*', Mr. Parry the occupier of Wellhouse Cottage states that '*this path has been used by very few people as the farm gate is normally closed and locked, and the path only leads to Wellhouse Lane which is derestricted and without any proper footpath*'.
- 11.3. **Winchester City Council** has '*no objection to the proposed footpaths*'.
- 11.4. The representative of the **Ramblers' Association** is familiar with the Barton Farm site and has used most of the claimed routes himself in the last 8 to 10 years. '*Whenever I have visited the site I have almost invariably encountered other walkers using both the right of way and the claimed paths*'. He knows too that a number of members of the Ramblers' Association have '*made regular use of these paths*'. The Ramblers' Association would '*welcome the addition of these paths to the RoW network, particularly so in this case because of the threatened development of this site*'. He feels it is important that adequate facilities for non-motorised users are

provided on the site by the developer, and that the '*establishment of these additional rights of way would help with this*'.

- 11.5. The **Local Member** comments on the lack of use for the path from A to B and questions its inclusion in the application. She also mentions a route from point B to Headbourne Worthy across the field and not along Well House Lane, which is not included in the application.
- 11.6. No other comments have been received.

12. Summary of Evidence

- 12.1. The map evidence shows that the appearance of the network of paths is relatively late, and that most of the paths did not actually physically exist on the ground until the 1960s or later. This material does not prove that any of these paths was a public footpath, and thus the application must turn on the evidence of use in recent years. (Details of features reported by both users and landowners, and the number of users of each separate path, including with bicycles, can be found on the A3 amended Committee Plan at the end of this report.)
- 12.2. For section 31(a) 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
 - there must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

12.3. Physical nature of the paths

Dealing with the criteria as listed above, the network of paths is of such a character that the paths are capable of being rights of way at common law, in that they are linear in nature, with clear and defined routes, allowing users to pass and repass. Though some users refer to climbing over stiles in their user evidence forms, these witnesses have all used Headbourne Worthy Footpath 1, which has two stiles recorded in its Definitive Statement. Although one witness suggested that there might have been a stile at Well House Farm, there is no evidence that there has ever been one there. (Questions such as need, suitability and safety cannot be considered during this investigation, and do not assist in the

determination of the question of what public rights can be said to subsist, or be reasonably alleged to subsist, on the ways.)

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

It could be said that the annual closures carried out by Mr. Burge, as discussed in paragraph 10.6, could constitute challenges to the public's right to walk on any or all of the paths. The copy of the notice provided by Mr. Burge is dated 23rd March 1999, and so there is a twenty year period from 22nd March 1979 to 23rd March 1999 that could be considered. There has been mention of locked gates at various locations at various times, but there is not enough certainty to give rise to identifiable relevant periods. The other event that can be precisely pinpointed that serves this purpose is the serving of the notices by the applicant, on 31st August 2004, and this results in a relevant period of 30th August 1984 to 31st August 2004.

12.5. Twenty years' use without interruption

There appears to have been use on foot, and with bicycles, by the public, of the network of paths in every year in the two relevant 20-year periods (see Appendices 4a and 4b). Within this general picture, however, some elements need to be examined:

- The tenant farmer made a series of annual closures of the paths from the mid-1980s to about 2005, and provided a copy of the notice associated with these closures. It has not proved possible to pinpoint exact dates, apart from that on the copy notice itself, which has formed the basis of the first 20-year period. Three witnesses say that they saw these annual closures, and it gave one of them pause for thought about using the path. She says she saw them only 3 or 4 times, and didn't remember at what time of the year they were carried out. Another witness was quite clear about the purpose of the notices.
- For an interruption to use to be effective, it must be shown that the prevention of access must actually interfere with the public use and the public must be aware of it. For this to be the case, the locking of gates would probably be the most effective method. On a large site, this could pose problems, and Mr. Burge arranged for pallets to be put across the paths at several points, notices of the closure to be posted, and a member of staff to be in attendance (over the whole site of the claimed network) to ensure the barriers stayed in place. None of the witnesses report being stopped by a direct challenge from a member of staff in connection with these annual closures.
- The signs on the pallets put across the paths should have been clear enough to the public using the ways that there were annual closures, yet only three of the users report seeing them. Further, without a person standing at each set of obstructions continuously (which it seems was not the case) to turn away walkers, there would be little to stop people from

walking round the pallets and continuing along the paths. These factors may have diminished their success as a means of stopping the public from walking on the paths. They do not seem to have been brought to the attention of the majority of users. However, while these annual closures may not have been completely effective in preventing access to the paths, they were a clear demonstration of an intention not to dedicate.

- Mr. Burge reports that these pallet arrangements were put up at C, I, B, G, D and F, it seems that users on the days of the annual closures could have used Headbourne Worthy Footpath 1 without being aware of them. It is not unusual for witnesses not to see annual closures, and in this case it seems that only three out of 128 did.
- With relation to the significance of these closures, the following point is important. The annual closing of a path (whether it be physically, or by notice, or both) has always been recognised as a method by which a landowner can convey that he or she tolerates use of the way by the public by courtesy, but does not intend that users should acquire a legal right to use it. Any interruption to enjoyment of that use during the relevant period must be made by, or with, the authority of the landowner to be effective. While Mr. Burge said at the outset of the investigation that he made the annual closures on his own initiative, further evidence indicates that the Estates Bursar of the College did give verbal instructions regarding annual closures in 1981 to the College's farm tenants, and his ultimate authority came from a clause in the College's lease from the freeholder CALA Homes, discussed at paragraph 10.4.17.
- Therefore, it is submitted, that while it appears that these annual closures made by the tenant Mr. Burge were effective as demonstrations of an intention not to dedicate any public rights of way by the landowner, they may not have been effective as interruptions to use.
- Mr. Burge also locked the gate at point A permanently (apart from a few days per year) from 2000, and it had been in place for at least 11 years before that. This falls within both of the relevant periods, so there cannot have been 20 years' uninterrupted use on the path A to B. Any use of the path A to B after 2000, apart from on the days when agricultural operations dictated the opening of the gate, would have been by force, and thus not counted towards the acquisition of a public right. Two users report having seen the locked gate, and not continuing because of it.
- Mr. Burge reports that he had a gate at E before 1984 that was frequently locked, with another at D and a locked double gate at the end of the tarmac surface at the farm buildings. These were in place until about 1990 and therefore could have

constituted effective interruptions to use during the relevant periods.

- The larger, amended, Committee Plan attached to this report shows the spread of use on the network of paths. The most heavily used paths are C to D (109 users), D to E (108 users), G to I (111 users) and I to H (89 users) The map shows those places where Mr. Burge made his annual closures, and these could have formed effective interruptions, though are only remarked upon by three witnesses.

12.6. 'Without force, stealth or permission'

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

1. Force – to be as of right, use must not be as a result of the use of force. Climbing over a structure, breaking it down or cutting a fence all constitute force. None of these witnesses report having to climb over or break down anything to gain access to the network of claimed paths, and the whole network has been free of obstructions, apart from a gate that is locked at times at point A, and a newly installed locked double gate at point D. One witness reports that she stopped using the route between A and B because of this locked gate, but does not suggest that she climbed over it, and another witness, who was also deterred by the gate, explicitly said he did not climb over the gate. The small number of references to stiles in the user evidence seem to be connected with use of Headbourne Worthy Footpath 1. Therefore, according to the user evidence, which has not been contradicted by any other evidence, on balance it seems that force has not been used by the witnesses during the relevant period to access the claimed paths.
2. Stealth – to be as of right, user must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look. From the user evidence put forward, these paths have been extensively used by members of the public, as shown by the numbers who say they saw others while using the paths themselves. The tenant farmer Mr. Burge estimates that the paths have been used by about 100 people per day, and there is no doubt that the current landowner CALA Homes is aware of the use that is being made of this network. The company has sought to accommodate the need for routes for walking and cycling in its submissions for planning permission. Since it seems that there is no question of stealth in this use, it appears that the user has been of the type that can qualify for the acquisition of public rights on this network of paths during the relevant periods 1979 to 1999 and 1984 to 2004.
3. Permission – use as of right should not be using the ways with any kind of licence or permission. One witness seems to have sought permission to use the paths from the tenant farmer Mr. Burge, and been given it. Even though the user reports using the path hundreds or perhaps thousands of times, none of that use can be counted because it falls under this heading, and therefore

it has been discounted. One user thought she used the network with private rights, but it would seem that this is not the case, so it appears, on balance, that all the evidence, apart from that of Mr. Lee, qualifies to be included to demonstrate that this legal test is met.

12.7 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.

1. 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. The number of users in each year of the relevant period needs to be considered. The evidence of the many users has been recorded on the user forms and shown on the chart at Appendix 2, with one single user from 1942, and use beginning in earnest from about 1970, when the two local housing estates were constructed. There has been consistent use since that time, and the charts at Appendix 4a and 4b concentrate on the periods 1979 to 1999 and 1984 to 2004. Here it can be seen that there is use in all years of the two periods, albeit variable in quantity, with 54 users in the first period and 53 users in the second period whose use spans the whole twenty years. The tenant farmer and the landowner are both well aware that use is taking place. It is not known whether they are aware of use on bicycles. However, the larger Committee Plan shows that there has been use of all the routes with bicycles, though it is not possible to show in this investigation whether there was some use, in every year of each of the two relevant periods, of each path.
2. 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. While it can be said that evidence taken from users living at a number of addresses might be felt to carry more weight than evidence from the same number of users living at one address, there is nothing to suggest that evidence should be taken from only one user at an address. Even though some of the witnesses come from the same address, officers feel that there are enough users to raise a presumption that a public right of way on foot, and with cycles, has been acquired over the network of paths. None of the witnesses say they had a connection with either the landowner or the tenant farmer, so their use qualifies as being by 'the public'. The location of the path is such that people using the network of paths have come from a wider area around, from two housing estates in particular. Analysis of addresses of users shows that 50 witnesses live east of Barton Farm, 44 west of it, 21 to the south and 12 from elsewhere in Winchester. This is a good geographic spread, and so it appears, on balance, that there were sufficient users in the relevant period to meet this test. Indeed, use continues.

12.8 What can be understood from this evidence is that local people have been using a network of paths at Barton Farm in appreciable numbers from the 1970s onwards, for recreational and exercise purposes. The bulk of the public use falls from the early 1970s, and it has continued consistently ever since.

12.9 Therefore, on balance, officers feel that a presumption of dedication has been raised. However, dedication of a public right of way will not be presumed if there is sufficient evidence that the landowners did not intend to dedicate the network of claimed paths as public footpaths. Therefore, the evidence put forward by the current, and past, landowners must now be examined.

12.10 Actions by landowners, lessees and tenants

The current owners of the land, CALA Homes, and the former owners, Winchester College (now their lessees) have provided information about their management of the land, and the tenant for life, whose tenure spans both ownerships (Mr. Burge), has given a statement. In addition, the tenant of Wellhouse Cottage, Mr. Parry, has provided information about the route from A to B. The evidence shows that CALA Homes has inserted a clause in its lease to Winchester College that requires the College to do everything that it can to prevent the acquisition of any new public rights of way. It seems that verbal instructions were issued to farm tenants of the College by its Estate Bursar in 1981 to carry out annual closures and block routes off, and these instructions were re-iterated in 2004 and 2007. The contractual relationship is between CALA Homes and Winchester College, and the latter were explicitly instructed to prevent the acquisition of any private rights over the land. CALA Homes instructed Winchester College not to issue any fresh tenancy agreement to Mr. Burge, as might be expected when there is a change of freeholder. It seems that CALA Homes was satisfied with the clauses in the existing tenancy held by Mr. Burge. Clause 12 refers to warding '*off all poachers and trespassers*' in connection with shooting rights. Officers take the view that the instruction to ward off trespassers would also affect walkers, who would be trespassing on the land, and cease to be trespassers only when they had acquired a public right through unchallenged use for the required period of time. The closures of the land to walkers during days when pigeon control was carried out through shooting may also be effective interruptions to use, since these actions would probably fall within the '*taking such proceedings as are necessary to safeguard sporting on the Farm*' requirement in clause 12 of the agreement.

- Section 31(6) declarations for Barton Farm

The effectiveness of the two deposits made under the provisions of section 31(6) of the Highways Act hinges on who made them. The wording of the section states that '*an owner of land may at any time deposit with the appropriate council a map and statement indicating any existing rights of way, followed by a statutory declaration within ten years to the effect that no additional ways have been dedicated.* Section

31(7) clarifies that the word 'owner' refers to 'a person who is for the time being entitled to dispose of the fee simple in the land', that is, the freeholder. The Estates Bursar of Winchester College has confirmed on 23rd October 2009 that 'the college was not the freeholder but leaseholder in both 1999 and 2007', when these two declarations were made. If such a deposit is being made by an agent of the freeholder, this must be made clear in the wording of the statement and statutory declaration. There is nothing in either of these deposits that indicates that the College was acting as the agent of CALA Homes, despite the fact the College's lease instructed it to do everything to stop the acquisition of new public rights. The wording of the statement says that the 'Warden and Fellows are and have been since 29th September 1967 the owner within the meaning of the above section [section 31(6)]' of the land, when this was not the case in 1999 or 2007, and could be characterised as a misrepresentation of the facts, as there is no legal basis to make such deposits as the leaseholder. It appears that these deposits cannot act as an intention not to dedicate because they were not made by the freeholder. It seems to be the case that the freeholder at these dates, CALA Homes, has never made any such deposits itself, nor explicitly instructed Winchester College to make these deposits on its behalf. Therefore, there is no deposit that can show that there was no intention to dedicate public rights of way over this land during the relevant periods of 1979 to 1999 and 1984 to 2004.

- The locked gate at Wellhouse Farm

It is reported at paragraph 9.4 that eleven users said there was a gate at some point in the network of claimed paths. The location of this gate in seven of the reports is not identified, but the gates were reported as being unlocked. Two witnesses comment that the gate they saw was locked, and two refer to a gate being at Well House Farm, where one said it was locked. Further, a witness said that she was stopped from using the path A to B by a sign and the locked gate. A line is shown across the path A to B on current Ordnance Survey mapping, signifying the presence of a gate. This line appears on Land Registry maps, and the CALA Homes title plan suggests that the gate is outside their holding. The land around Well House Farm is unregistered, but information from the tenant of Well House Cottage confirms that the track passing through the Farm belongs to Winchester College. It seems that Mr. Burge controls the locking of this gate, and he says that it is usually locked for ten months of the year, in connection with his agricultural operations. Mr. Parry, states that A to B is 'virtually never used'. This may be because the gate is generally locked. Other references to gates are not specific as to location or dates. Mr. Burge refers to double gates at Barton Farm up to 1990, which were not always locked, and a single gate at the farm entrance which was

mostly unlocked, also present until 1990. None of the reports of gates by users identifies those gates as being at Barton Farm. The gates currently across the track at point D were put up in October 2010.

- Reports by witnesses of being stopped

Only three of the nine reports of users being stopped consist of apparent direct challenges by the farmer or his foreman. A further report is anecdotal, and contains no detail about how and when the person was stopped.

- Notices seen by users

Thirty nine users say they have seen notices and twenty two of these mentioned the word private, while twelve of these refer explicitly to wording indicating that there was no right of way. Only three of these appear to relate to the Well House Farm end of the network. Twenty two of these notices were seen in a period estimated to run from 2005 to 2008, and therefore outside both relevant periods. Other notices relate to foot and mouth and controlling dogs, are not relevant and have no effect on the success of the claim.

- Annual closures made by Mr. Burge

Mr. Burge made annual closures for about twenty years, and three witnesses corroborate this. These have been discussed at 10.4.3.

12.11 On the face of it, the volume, quality and duration of the use of this network of paths by the public on foot and with bicycles is sufficient to give rise to the presumption under section 31 of the Highways Act 1980 of a dedication of public rights. However, actions taken by the landowners in issuing instructions to their lessees and tenants that new rights should not be allowed to be acquired, and the actions of those lessees and tenants in demonstrating that lack of intention to dedicate, are sufficient to rebut this presumption.

12.12 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 paths by the public on foot, and on bicycles. 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 routes as public rights of way. 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 or ways by use.

12.13 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 routes are not public rights of way of the type being claimed, or by turning people back.

12.14 It does seem that all landowners have been aware of the use of the tracks by the public. There are two potential periods when common law could be used to consider the acquisition of public rights, and these are:

- Period A - from 1970, when the Harestock estate was completed and the population in the area rose, to 1981, when Winchester College's Estates Bursar told his tenants to make annual closures to prevent public rights from being acquired. Although there were 38 users during this period, there is insufficient evidence of which users used which paths at which times during this period, and it is not possible to pinpoint the degree of use of each path in the claimed network. There is also no evidence of any positive intention by the freeholder to dedicate public rights.
- Period B - between 1998, when the freeholder of the land changed, and 2004 when the notices were served. Although there has been even heavier use of the network of paths during this period, there is a lack of any other supporting evidence of a positive intention to dedicate on the part of the freeholder.
- In both these periods, the freeholder has been at one 'remove' from the agent managing the land, but has nevertheless issued instructions negating the intention to dedicate public rights over the land, which have apparently been carried out.

12.15 There is, therefore, no evidence on which officers can recommend that Members can find that there has been a common law dedication of any of these tracks.

13. Comments by the Applicant and Landowners

13.1. This report has, in confidence and in draft form, been sent to the applicant and the landowners in advance of the meeting of the Regulatory Committee to ensure that none has been misrepresented, that there are no material inaccuracies and nothing has been omitted from the report that would assist in determining this matter. These are their comments.

13.2. Mrs. C. Slattery has replied on behalf of the Save Barton Farm Group and makes the following points:

13.2.1 Mrs. Slattery states that the '*accessible footpaths*' on the map have been used by '*cyclists, ramblers, joggers and runners...horse riders and families with pushchairs and a few by disabled persons in electric wheelchairs*'.

- 13.2.2 Mrs. Slattery discusses the status of the different routes from the point of view of enabling children to cycle safely, and of the access links, to form continuous routes for cycling.
- 13.2.3 She refers to the locked gate at point D which has been recently installed, and points out that it was not there previously. The fact that it is now in place prevents access by the public of the section from D to E, which she characterises as the '*most important for the disabled, elderly and pushchairs*'.
- 13.2.4 Mrs. Slattery asks that the route from G to I to H be recorded as a bridleway. The '*historic route from I to H has in recent years been partially obstructed*', which has resulted in the public using the field margin, which ought to be protected for biodiversity. She adds that this path is required to be continuous to '*justify its status as a Right of Way*'.
- 13.2.5 Mrs. Slattery refers to a path running south-west from point C, which is not mentioned in the report. She says that access has been made for difficult for all users since '*the original RoW*' was diverted.
- 13.3. The Estates Bursar of Winchester College, Mr. Emmett the Strategic Land Director of CALA Homes and Mr. Burge in their responses to the draft report all comment on the motivation of the applicant. The Estates Bursar in a letter of 6th October 2010 said that '*most of the witnesses may have lost their objectivity by being members of the Save the Barton Farm Group*'. Mr. Emmett commented on 25th October 2010 that he questioned the '*timing and motives of the applicant*', given that the application was made in 2004, at the same time as CALA's original planning application. '*That the applicant is a member of the Save Barton Farm Group is not coincidental*', and Mr. Emmett feels it should be borne in mind that the '*objective of this group is to resist development rather than necessarily to establish new rights of way*'. Mr. M. Burge, Winchester College's tenant also comments that, as the applicant is a member of the Save the Barton Farm Group, '*this footpath issue may be instrumental in achieving her other objectives*'.
- 13.4. All other comments and information from these parties in response to the consultation are included in section 10.

14. Conclusions

- 14.1. Members will see from this report that the evidence provided by the owners of the land over which the claimed paths run have provided their evidence in two stages, the first during the investigation, and the second after they had seen a draft copy of the report recommending that the network of paths be recorded. The landowners, lessee and tenant said during the investigations that no specific instructions were given to stop the acquisition of rights by the public. Having read the report, the lessee and tenant now say that verbal instructions were given. Members will have to decide how they view this contradiction in the evidence. However, the freeholder has provided written evidence that specific instructions

were given to the lessee to prevent the acquisition of new public rights, and reliance was also placed on the existing contract with the sitting tenant, in which there was a clause instructing that trespassers should be warded off the land.

- 14.2. Mr. Emmett has provided a copy of the contract between CALA Homes and Winchester College. Mr. Burge has sent a copy of his tenancy agreement with the College and indicates the clauses that he considers require him to preserve the integrity of the farm. Officers take the view that clause 12 of Mr. Burge's tenancy agreement would be an effective instruction to show that there was no intention to dedicate any public right, and amounts to instructions by the College to prevent public access becoming rights recordable on the Definitive Map. Members may come to their own conclusions about the assertions of the Estates Bursar of the College that he did give verbal instructions to farm tenants to physically obstruct all routes not recorded on the Definitive Map on Shrove Tuesday each year, and by Mr. Burge that he was given verbal instructions to take appropriate action, which he did and is evidenced by the copy of the notices he has provided. These assertions were only made after the draft report was written and consulted on.
- 14.3. Mr. Burge owns a section of the track from point E to a point 79 metres to the north east, towards point D. In his initial statement, Mr. Burge said that there was a gate at the entrance to the farm (point E) which was mostly unlocked until 1990, and is no longer in place. After the report, Mr. Burge stated that the gate at point E was in place before 1984, was frequently locked until the 1990s, and only removed because of the increase in traffic using the track, and not to allow people to walk. As Mr. Burge is the freeholder of this land, the placing of a locked gate at the entrance to the farm can be interpreted as an intention not to dedicate the way as a public footpath and as an interruption to use. A legal case (*Rowley and Another v Secretary of State for Transport Local Government and the Regions* 2002) discusses the locking of gates in connection with interruptions to use and the intention behind the closing of the gates. The judge considered that if there is a '*factual interruption it matters not that nobody was in fact prevented from using the path*', and it '*is sufficient that they could not have done so had they wished to do so*'. In such circumstances it would seem that there could be no dedication of public footpath rights on the section E to D, even though Mr. Burge does not own all of this section. Mr. Burge also refers to signs indicating no right of way at E, in place since 2002 or 2003. The user evidence indicates that 18 witnesses saw signs at Barton Farm, point E, and these sightings appear to be during the years 2007 and 2008, so outside the relevant periods. For the purposes of this recommendation, officers have taken *all* the evidence received on face value.
- 14.4. Two twenty-year periods have been identified that would form relevant periods, namely March 1979 to March 1999 and 1984 to

2004 (the date of the service of the application to the County Council).

14.5. For section 31 of the Highways Act 1980:

- 1979-1999 – there is no clear 20-year period because of:
 - the verbal instructions given by the Estates Bursar of Winchester College in 1981 that tenants should prevent the acquisition of public rights over College Land, and these indicate that there was no intention to dedicate
 - the 1984 lease from Winchester College to Mr. Burge instructing him to prevent trespass
 - the annual closures, an accepted method of showing no intention to dedicate (and also possibly an actual interruption to use)
- 1984-2004 – there is no clear 20-year period here either, because of:
 - the 1984 lease
 - the annual closures, one of which was made on 23rd March 1999, and which apparently continued until about 2005
 - the 1998 lease from CALA Homes to Winchester College instructing the College to take all steps to prevent the acquisition of public rights of way

14.6. There is insufficient evidence on which a common law dedication can be found.

15. Recommendations

15.1. That the application be refused.

CORPORATE OR LEGAL INFORMATION:

Links to the Corporate Strategy

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

Section 100 D - Local Government Act 1972 - background documents

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

Document

Claim Reference 791

Location

Rights of Way Office,
Mottisfont Court,
High Street,
Winchester,
SO23 8ZF.