

**HAMPSHIRE COUNTY COUNCIL**

**Decision Report**

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	29 September 2010
<b>Title:</b>	Proposal to make a Definitive Map Modification Order to record a restricted byway in the Parishes of Shipton Bellinger and Kimpton
<b>Reference:</b>	2070
<b>Report From:</b>	Director of Culture, Communities and Rural Affairs

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**1. Executive Summary:**

- 1.1. The purpose of this paper is to set out the history and background to an irregularity that has been discovered in the depiction of a right of way shown on the definitive map. The path falls in two parishes and is known as Shipton Bellinger Restricted Byway No.19 and Kimpton Restricted Byway No.18. The legally recorded line of this route differs from the line currently used on the ground.
- 1.2. This paper seeks Members' authority to make a Definitive Map Modification Order to record the current used route as a restricted byway and to inform Members of the method by which the legally recorded, unused, route can be extinguished if, and when, the Definitive Map Modification Order is confirmed.

**2. Legal framework for the decision:**

2.1. WILDLIFE AND COUNTRYSIDE ACT 1981:

S.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 –

a) 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

## 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.

## 2.3. HIGHWAYS ACT 1980

S.116 Power of Magistrates' Court to authorise stopping up or diversion of highway

(1) "Subject to the provisions of this section, if it appears to a magistrates' court, after a view, if the court thinks fit, by any two or more of the justices composing the court, that a highway...as respects which the highway authority have made an application under this section – (a) is unnecessary, the court may by order authorise it to be stopped up..."

## 3. Claimant:

3.1. There is no claimant in this case. This issue has been initiated by Officers in the Countryside Access Team following representations by a landowner.

## 4. Landowners:

4.1. There is no registered or known owner of the used track (shown by an orange dashed line on the map accompanying this report) which forms the boundary between several properties in the locality. The land crossed by the legally recorded line (shown by a green dashed line on the same map) is owned by:

Mr G B Balding  
Kimpton Wood House  
Kimpton  
Andover  
Hampshire  
SP11 8PQ

## 5. Description of the routes (please see map attached to this report):

5.1. The route in question is part of a long, straight track that runs generally west to east across the parish boundary between Shipton Bellinger and Kimpton. It is known as the Old Coach Road and is recorded on the

definitive map as a restricted byway (shown by a dashed green line on the attached map). It is also recorded on the List of Streets as a publicly maintainable highway. In the locality of Kimpton Down Stables the recorded route (A-B-C) passes through the farm buildings, although the used track (A-C) passes just to the south of the same buildings. The used route consists of a three metre wide track bounded on both sides by fences set about six metres apart. Please note that the parish boundary between Shipton Bellinger and Kimpton is shown by black dots on the base map.

## **6. Background to the claim:**

- 6.1. As a result of a search of the definitive map, requested by a prospective purchaser of Kimpton Down Stables, it has been highlighted that the legal route of these two restricted byways is not the same as the route used on the ground. Both vendor and prospective purchaser urgently wish to clarify the route of the right of way to facilitate the property transaction and to ensure that the owner of the property is not vulnerable to legal action to require the removal of the buildings sited on the recorded highway.
- 6.2. The definitive map is not in error in showing the northerly route A-B-C through Kimpton Down Stables; this was the route of the public highway that was in existence for many years before any buildings appeared on the site. It would seem likely that the route of the highway was informally moved to the southern edge of the field along route A-C in 1940 to maximise food production during the war and not returned to its original route at the end of the war. Subsequently a farm, and later a stables, was developed on the site.
- 6.3. This means that there are two rights of way in this locality: the original, legal route A-B-C and the post war route A-C that has been in existence for about 70 years. Previous searches of the Land Charges Register requested by the owners of Kimpton Down Stables, and produced by the local authorities, did not reveal this discrepancy and it is only the publication of a new definitive map, at a larger scale, that has highlighted the variation between the routes.
- 6.4. If and when the current used route is recorded as a restricted byway then it would be appropriate for the County Council to extinguish route A-B-C on the grounds that it is not needed for public use. Normally this would be achieved by Order under section 118 Highways Act 1980. However, in this situation, it is in the interests of all parties to expedite the extinguishment by making application to the Magistrates' Court using section 116 Highways Act 1980. It is proposed that the Environment Department utilises its delegated powers for this purpose. This obviates the need to make two sets of Orders. The application to the Magistrates is publicly advertised and the County Council and any potential objectors have to argue their case in front of the Court.

## **7. Issues to be decided:**

- 7.1. The issue to be decided by this committee is whether there is evidence to show that a public right of way subsists, or is reasonably alleged to subsist, on route A-C (orange dashed line).

- 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 points to them having footpath, bridleway or vehicular 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 (subject to any statutory extinguishment under Natural Environment & Rural Communities Act 2006). 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 and statement. This type of evidence may disclose rights other than those claimed by the applicant. 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 Evidence forms and statements taken from those who have used the path or have knowledge of it in living memory can show that higher rights have been acquired as a result of a recent dedication at common law, or a deemed dedication under s.31 Highways Act 1980. It may not be necessary to examine this type of evidence if the historic and documentary evidence shows that higher rights were dedicated in the past and still subsist, although the user evidence may add credibility to the earlier evidence of dedication. This type of evidence is also useful in determining the width of the path.
- 7.5 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 and 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. Officers do not consider that there is any such conflict here.
- 7.6 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, as are witness evidence forms and statements. Members are urged to inspect these, or the originals, when considering this report.

**8. Documentary Evidence:**

8.1. 1870 Ordnance Survey County Series 25 inch Map – 1st edition

This map shows a very wide track, running east to west, immediately on the north side of the field and parish boundary. It crosses the parish boundary on the southern edge of a belt of trees called 'Markway Firs' where the parish boundary forms a right angle.

8.2. 1895 Ordnance Survey County Series 25 inch Map – 2nd edition

This map shows the track differently; this time it is about six metres wide and runs significantly north of the field boundary before crossing the parish boundary at the same right angled bend. This is the same alignment that is portrayed on the current definitive map and shown by a dashed green line on the plan with this report.

8.3. 1908 Ordnance Survey County Series 25 inch Map – 3rd edition

There is no material difference in the depiction of the track on this map compared to the earlier edition.

8.4. c1935 Ordnance Survey County Series 25 inch Map – 4th edition

There is no material difference in the depiction of the track on this map compared to the earlier edition.

8.5. undated Estate Map

This utilises a large-scale Ordnance Survey map of uncertain date upon which has been annotated various descriptions relating to the management of the land. Just north of the track appears the annotation "Ploughed out 1940" It is possible that this action included the track which was moved southwards to run along the field and parish boundary.

8.6. 1946 Highways Map

This document records those routes that the County Surveyor considered to be publicly maintainable highways. It shows the original track running well to the north of the parish boundary and coloured by an orange dashed line which the legend describes as an un-metalled road.

8.7. 1950 First Draft Definitive Map

This is the map that was submitted by Kimpton Parish Council showing those routes claimed by the parish for inclusion on the first draft map of rights of way in Hampshire. It shows the track on its old alignment well to the north of the parish boundary and coloured by a green dashed line which the legend describes as "Roads Used as Public Paths (Unmetalled Highways)".

8.8. 1957 First Definitive Map

This map again shows the original track running parallel to, and significantly to the north of, the parish boundary. This time it is coloured with a solid red line which the legend describes as a "Publicly repairable carriageway" and annotated "U57".

8.9. 1958 Second Definitive Map

The old track is shown in the same manner as the previous document.

8.10. 1964 Definitive Map

The original track is shown on the base map and highlighted by a green dashed line which, on this document, records a Road Used as a Public Path.

8.11. 1971 Ordnance Survey National Grid Map 1/2500 scale

This large-scale map is the first which officers have discovered that shows the Old Coach Road on its present day alignment (A-C) running very close to the parish boundary. It is obviously different from the earlier track because of its relationship to the parish boundary. Most of the track is now in the adjoining parish of Shipton Bellinger. For the first time there are buildings immediately north of the track which are described on the map as “Kimpton Farm”. The route of the original track (A-B-C) is not shown on this map, suggesting that, by 1971 at least, it was no longer a physical feature on the ground.

**9. Consultations with Other Bodies:**

9.1. Shipton Bellinger Parish Council

No objection.

9.2. Kimpton Parish Council

No objection.

9.3. Test Valley Borough Council

The Senior Transport Engineer has written to say that he has no information on how the routes have been used or managed over the years. He has no objection to the proposal to record the southern route as a restricted byway and to extinguish rights over the northern route.

9.4. Councillor P West – local member

No comment

9.5. Ramblers Association

No comment

9.6. British Horse Society

The Hampshire Area Secretary supports the proposed amendments.

9.7. Cyclists' Touring Club

No comment

9.8. Open Spaces Society

No comment

9.9. Adjoining landowners

All six adjoining landowners have been consulted on this proposal. The only response has been from Mr D Pakenham of Kimpton Manor Farm who has made the following statement regarding the Old Coach Road:

“I can confirm that this byway has been used by myself and employees of mine for the last 40 plus years as a footpath, bridleway and been used by tractors and an assortment of other vehicles to access land on both sides of the byway. I can also confirm that the coach road has been

used by horses and cyclists...and that for as long as I can remember the route of the Old Coach Road has not moved. The Old Coach Road marks the boundary of my farm and Kimpton Down Stables...”

#### 9.10 Local resident

Miss Downing of Appleshaw has written to say that she has lived in the village for the last 11 years but she has known the area around Kimpton Farm Stables since July 1979. From that date she has ridden horses in the locality, often using the track known as the Old Coach Road which runs past Kimpton Down Stables. This track has always followed the same route, on the south side of the stable buildings [A-C]. It has not changed its appearance or nature over the years; it has always consisted of a made-up track giving access to the stables and, beyond that, a pot-holed track which leads to Shipton Bellinger. Miss Downing has seen some other horse riders, cyclists and plenty of dog walkers using the Old Coach Road. It was also used by farm vehicles gaining access to the fields and buildings along the way. She has never known the track to be obstructed by gates or barriers of any description, she always assumed it was a public right of way.

### **10. Summary of Evidence:**

- 10.1. The key historic documents present a uniform picture. Before c1940 all Ordnance Survey maps consistently show the public highway running on the same alignment north of the parish boundary in Kimpton and crossing the parish boundary at a right-angle bend on the southern side of the woodland belt along route A-B-C. Post-1940 the track has moved slightly to the south so that it runs immediately on the north side of the parish boundary in Kimpton and runs into the adjoining parish at a different point, along route A-C. There are several instances around the County of paths being moved during the war to make best use of agricultural land, therefore it is entirely plausible that the track was moved at this time as the estate map suggests.
- 10.2. The early versions of the definitive map describe this route as either a Road Used as a Public Path (RUPP) or a publicly repairable carriageway. Notwithstanding its designation as a RUPP it is very likely that there were public vehicular rights over the route in question and therefore it probably should have been recorded as a Byway Open to All Traffic (BOAT). However, there have been two pieces of legislation in recent years which have had a bearing on the current status of the track.
- 10.3. Firstly, the Countryside and Rights of Way Act 2000 re-designated all existing RUPPs as Restricted Byways. This was partly an attempt to clarify what public rights existed over these routes, that is for walkers, cyclists, horse riders and horse-drawn vehicles, without preventing applications to upgrade to BOAT status, at a later date, if the evidence warranted it. However, in 2006 the Natural Environment and Rural Communities Act extinguished all public rights for mechanically propelled vehicles over routes that were recorded as footpaths, bridleways and restricted byways, subject to certain exemptions. Any public rights that may have existed for motor vehicles will have been converted to a private right of way, by virtue of section 76(5) of that Act over the route.

10.4. The used route A-C appears as a continuous feature on the ground without any barriers or gates of any description. There is no distinction between the original parts of the ancient highway to the west and east of Kimpton Down Stables and the more recent section south of the buildings between points A and C. The realignment of the track did not interfere with the public's ability to use the route as a long-distance highway. Those that have responded to the consultation remark that the current used route has been in place for at least 40 years and has been in regular use by the public on foot, horse back and bicycle, as well as being used by vehicles for access to private property. This type of use by the public is consistent with a restricted byway.

## **11. Conclusions:**

- 11.1. The definitive map correctly records the route of the ancient right of way known as the Old Coach Road.
- 11.2. Part of this right of way was informally diverted, circa 1940, during the war and not reinstated on its original alignment.
- 11.3. There is no record of comment or objection to use of the alternative route and all parties were unaware of the discrepancy until this year.
- 11.4. The currently used route (A-C) has been in existence for approximately 70 years. Evidence shows that this path was set out and constructed by the landowners to replace the previous track (A-B-C) for public use. Evidence also shows that the public has used this route on foot, on horse-back, with cycles and with vehicles. Thus, the elements necessary to satisfy the inference of dedication at common law (dedication by the landowners and acceptance by the public) have been satisfied.
- 11.5. It is considered that, prior to the coming into force of the Natural Environment and Rural Communities Act 2006, this route carried full public vehicular rights. However, any public rights that existed for motorised vehicles will have been extinguished by virtue of section 67(1) of this Act (it is not considered that this route is subject to any of the exemptions laid out in section 67(2) of that Act).
- 11.6. It is therefore appropriate to record the used route A-C as a restricted byway, which is consistent with its recent use by the public and the status of the remaining lengths of the rights of way.
- 11.7. It is considered that the extinguished public motorised rights over A-C will have converted to private rights for the benefit of the owners of the adjacent land by virtue of section 67(5) of the 2006 Act.

## **12. Recommendation:**

- 12.1. That authority be given to make a definitive map modification order to record the route A-C, as shown on the attached map by a dashed orange line, as a restricted byway with a width of 6.0 metres.

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

<b>Hampshire safer and more secure for all:</b>	no
Corporate Improvement plan link number (if appropriate):	
<b>Maximising well-being:</b>	no
Corporate Improvement plan link number (if appropriate):	
<b>Enhancing our quality of place:</b>	no
Corporate Improvement plan link number (if appropriate):	
<b>OR</b>	
<b>This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because:</b> Members' authority is required before the County Council can make a Definitive Map Modification Order	

**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.)**

<u>Document</u>	<u>Location</u>
File: Shipton Bellinger RB19 Kimpton RB18	Room 200 Mottisfont Court High Street Winchester SO23 8ZF