

Committee:	<b>Regulatory Planning and Highways Sub-Committee</b>
Date:	<b>12 October 2005</b>
Report by:	<b>Director of Law and Performance Management and Director of Transport &amp; Environment</b>
Title of Report:	<b>Claimed Public Footpath at South Hartfield House, Colemans Hatch</b>
Purpose of Report:	<b>To determine an application made under section 53(5) of the Wildlife and Countryside Act 1981 for an Order modifying the County Council's Definitive Map and Statement of Public Rights of Way.</b>

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## **SUMMARY OF RECOMMENDATION**

**To refuse the application for an Order to add a public footpath to the Definitive Map and Statement.**

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### **1. Introduction**

1.1 An application was submitted in 1991 by Mr Dunn, representative of the Ashdown Rambling Club, for an Order to modify the Definitive Map and Statement of Public Rights of Way for Wealden, by adding a public footpath from the Colemans Hatch Road to Kidds Hill. The claimed public footpath is shown between points A to H on the attached plan.

1.2 Sections A – A1-D and F-G-H are owned by East Sussex County Council. A1 - D and F- G - H of the route cross land registered as manorial waste and form part of the Ashdown Forest over which the public have a right of access.

1.3 Section D - E – F of the route is currently owned by Mr & Mrs Sandiford of South Hartfield House, Colemans Hatch, who oppose the footpath claim.

1.4 The claimed public footpath was not shown on the 1953 Definitive Map and Statement. It was not shown on the Definitive Revised Map and Statement, or on the 1971 draft Revised Definitive Map and Statement, no claim having been received.

1.5 It appears that public use of the route was called into question in October 1990 when gates and notices stating "Private Property - No Entry" were erected at points D and F by representatives of Mr & Mrs Sandiford. They state that they replaced the gates at the points where gates had been erected by the former owners.

### **2. Legal Position**

2.1 This is set out more fully in Appendix 1. A decision must be based on a consideration of all available evidence. It is a question of whether or not public footpath rights exist or can be reasonably alleged to exist. It is not about the desirability or suitability of having a footpath.

2.2 A path is deemed to be public if there is evidence of use by the public for 20 years without any interruption or challenge, unless there is sufficient evidence that there was no intention to dedicate it as a public path. It may also be deemed to have become a public path

under common law over a shorter period of time if the landowner has acquiesced to the public use.

### 3. Description of the Claimed Public Footpath

3.1 A site inspection was made in November 1991 which is in the evidence file.

3.2 The claimed public footpath runs from a junction with the Colemans Hatch to Gills Lap Road (C 473) in a south westerly direction for approximately 125 metres before turning to run north westwards for approximately 540 metres to join the (C2) Colemans Hatch to Wych Cross road.

**Table 1: Description of the claimed public footpath in 1991**

Section A-B	Tarmac surfaced track approximately 3 metres wide. At A, sign displaying "Little Furnace Farm"
Section B-C-D	Passes through a small area of woodland. Claimed path is not defined and at C is impassable due to brambles. There is no visible sign of usage. At D a field gate exists with notice "Private Property – no entry"
Section D-E-F	Grassy lane approximately 6 metres wide with a beaten path of 1.5 metres in width along the middle widening to 3 metres having a stone chipping surface, enclosed between hedges and trees. A field gate exist across path at F with the notice "Private Property-no entry"
Section F-G	Stone and rubble surface forming driveway to South Hartfield House
Section G-H	Very worn tarmac surface 3.5 metres wide

### 4. Summary of Documents

4.1 The documentary evidence suggests that the track came into existence as part of a network of tracks on the Ashdown Forest and followed the line of the forest boundary.

<u>1842 Tithe map</u> - Tithes were not payable on public highways.	For the western part of Ashdown Forest describes one section of the route B-C-D as "wasteland" and the remainder i.e. A-B and D-E-F-G-H as non-titheable. It is delineated in a similar fashion to other tracks and roads in the area, regardless of status.
<u>Greenwoods</u> 1825	Shown as a track but status not denoted
<u>Gardner and Cream</u> 1795	Shown as a track but status not denoted
<u>Ordnance Survey Map</u> – c1940  - c1974	The 1931 Ordnance Survey Map shows the path as partly enclosed at points D and F on the application plan with solid black lines –this indicates a barrier or gate. 1974 Edition shows the path in a similar fashion, It is indicated in two places as "track" and "path" (unmetalled).

<u>Uckfield Rural District Council 1935 Map</u>	The route was not shown on the Uckfield Rural 1935 Map prepared under the Rights of Way Act 1932.
<u>Ramblers Association Survey 1950/51</u>	The route was not claimed in the Ramblers Association Survey of paths in Hartfield Parish 1950/51
<u>Parish Survey 1952</u>	Not claimed under Parish Survey of 1952.
<u>Definitive Map -1953</u> Definitive revised map 1960 Draft revised map (abandoned) 1971	Not shown on any map.
<u>Inclosure Award</u>	Not shown

#### Agreement for permissive use of the route 1940

4.2 In 1940 an Agreement for use of section D-E-F of the route on a permissive basis was made between Lady Hildyard, the then owner of South Hartfield House, and Mr Lehmann owner of the properties The Ridge and The Ark, and fields and a cottage adjacent to the route. The Agreement granted Mr Lehmann and his successors in title specific rights of way over the route for access to the cottage and adjoining fields. This Agreement was passed to the Mr Lehmann's successor in title, Mr G M Raikes, in 1950 and now is held with the title deeds of the present owner Mr T M M Raikes. (Copy in Evidence file in members' room).

#### Draft Statutory Agreement by Mrs J Hildyard 1988

4.3 When Mr and Mrs Sandiford purchased South Hartfield House in 1988 this Agreement was drafted and stated at point 7:-

“ the track has been used by me and my agents, servants and friends to pass and repass over and along the property to Ashdown Forest with or without vehicles at all times for all purposes as of right and without interruption from the year 1972 (or thereabouts) until the present time”.

4.4 The track referred to is the claimed route F-E-D. Please note this Agreement has not been signed or dated for reasons unknown.

## **5. Consultations**

5.1 Consultations were carried out with local Councils and user groups in 1991 and in 2000.

5.2 Wealden District Council opposes the application. In 1991 Councillor Parsons wrote stating that the previous owner of South Hartfield House believed that section D-E-F of the track to be private although it had been in use by local people as a footpath for many years on a permissive basis. He noted that, as was the custom, gates positioned on the route were closed one day a year to deny permanent rights of way and that he did not see any case for making a footpath. In March 2000 Wealden District Council stated that they had no new information to add. They stated that for the reasons given by Councillor Parsons in 1991, they would oppose the claim for a public footpath along the route. In November 2004 Councillor Parsons responded by telephone to further correspondence confirming that he had, in 1991, approached Mrs Hildyard, who was an acquaintance of his, who told him that it was the family practice to close the gates on the claimed route one day a year to negate any future claim.

5.3 Hartfield Parish Council submitted correspondence in 1991 which recommended that the track should not be put on the Definitive Map. It was noted that until approximately 1988 the track was closed once a year by the owner of South Hartfield House. It was stated that at about that time the gate was broken and could not be closed. It was noted that since then there were new residents at South Hartfield House. It was felt that it was unnecessary to create another footpath in this area.

5.4 The Ramblers' Association Footpath Secretary for Hartfield Parish submitted correspondence in 1995 which stated that they did not have any evidence to support the claim. Miss Martin, a member of the Ashdown Rambling Club, which is affiliated to the Ramblers' Association, submitted an evidence form in support of the claim. In Evidence file.

## 6. Landowners & Adjoining Landowners

### Landowners

6.1 The table below shows the registered owners:-

Owner		Dates
A – A1	ESCC manorial waste	1885 - present
A1-B-C-D	ESCC - Part of Ashdown Forest – Manorial waste	1885 – present
D-E-F	Hildyard family	1934 – 1988
D-E-F	Mr & Mrs Sandiford	1988 - present
F-G-H	ESCC -part of Ashdown forest – Manorial waste	1885 - present

6.2 The current landowners of the route D-E-F, Mr & Mrs Sandiford, object to the footpath claim. Mr & Mrs Sandiford completed two owner/occupier questionnaires dated 1991 and 2000 in which they set out their objections to the footpath claim. They state that gates and notices were in place at the time of their purchase of the property in 1988 and that they replaced them at that time. They state that the previous owners told them that there was no public right of way along the route and that specific rights had at various times been granted to individuals to use the path/track.

6.3 The former owner, Mrs J Hildyard, whose family owned section D-E-F of the route from 1934-1988, disputes the view that the route has been considered a public right of way in the past. Mrs J Hildyard, former owner of South Hartfield House, completed an evidence form in 2000 which stated that during her family's ownership it was known that local people used the route as an access route for neighbouring properties. Mrs J Hildyard acknowledges the fact that until her father-in-law's death in 1964/5 the gates in place at each end of the lane were traditionally locked once a year. She further states that after his death this practice may have lapsed and when she and her husband inherited the property in 1976 the gates were fairly dilapidated.

6.4 The Conservators of Ashdown Forest submitted evidence in 1991 and 1998 which stated that as a result of the Ashdown Forest Act of 1885, which was renewed in 1974, the public have full right of access across the whole of the Ashdown Forest. They noted that section A1 - D, and section F – G - H of the route form part of the Ashdown Forest and as the public may walk wherever they please there is little significance in defining paths in this area. A – A1 is manorial waste owned by ESCC and this land is treated on the same principle as Ashdown Forest.

## Adjoining Landowners

6.5 The following adjoining landowners and residents object to the footpath claim.

Owner	Property
Mr GM & Mrs Raikes now deceased	The Ridge and The Ark from 1950.
Mr TM Raikes	Present owner of The Ridge, joint owner of The Ark and Noahs Cottage.
Mr Booker (deceased) & Mrs Booker	Resided at Noahs Cottage since 1951.

## 7. User Evidence in Support of the Application

### Evidence Forms

7.1 Fourteen people submitted evidence forms in support of the footpath application. (signatories marked with a \* also submitted written statements. These are in the evidence file in the Members' room).

NAME	PERIOD OF USE	COMMENTS AND USE OF CLAIMED ROUTE
Dr Chitham-deceased	1961-1991	Used often. Used the route for general walking over Forest to visit duck pond with children. Knew the previous owners. Neither he nor his family were ever challenged. Did not seek nor was given any permission to use the route. Did not recall any gates along route during this period.
Mrs Chitham *	1961-1990	
Mr Dunn – the applicant	1959-1991	Usage started once a year. 1986-1991 several times a year and often with groups of walkers. Used the route as a safe alternative to using a 'dangerous stretch of winding road without verges'. Believed it to be public since 1959 was a short link between areas within Ashdown Forest. Often encountered other users. Noticed new gates and notices "Private Property – no entry" in October 1990. claims local people called it an 'ancient public way'.
Mrs M Evans Submitted form in 1991 and 2000	1969-1991	Used once a week 1969 -1978 sometimes rode a horse on the route until moved to Hartfield then walked three/four times a week. States that the route has been used for many years for pleasure. Was told that the way was not public in 1990 by 'man from the estate'. Had not seen any gates across the route prior to 1990/1.
Mr P Fenton	1971-1990	States he used the route in daytime once or twice a year as part of a circular walk. Recalls gates at points D and F but states they were open.
Mr R H Gatland *	1980-1990	States he used the route as part of circular walk about once a year. 25 March 1990 led a guided walk along the route. No visible gates.
Mr Graves	1987-1990	Used once a year for recreation. Saw it shown on Pathfinder Ordnance survey map –revised 1980 edition as a continuous track.
Mr Hunt	1963 - 1976	Used occasionally as a direct link between blocks of Ashdown Forest.

Ms Martin *	1966-1991	Used on average three times a year as a member of the Ashdown Rambling group. Stated that she assumed the way to be public as no obvious indication to the contrary. Ashdown Forest gives unlimited access outside the boundary fences. Noticed way barred and erection of notices "private property – no entry" on 31/01/91.
Mr E. Mockford	1937-1987	Used three to four times a year during summer months walking and cycling. Did not see any obstructions, did not seek and was never given permission to use the route.
Mr Mordaunt	1959-1991	Stated that he used the route on a regular basis for approximately Thirty-two years for recreation and as a member of Buxted Parish Council's footpath committee.
Mr Parcell *	1973-1980	Used for pleasure twice a year. States that the path provides a useful link in the network of paths on and around forest And avoids narrow twisty road from Hatch Inn to Newbridge Splash.
Mr Philcox	1939-1960 1979-1988	Used the route on average twelve times a year. Acknowledges a gate at one end but does not recall it ever being closed. States his previous relations used the route.
Miss Steane	1951-1960	Used the route twice a week for recreation. She first believed the way to be public when her mother was told at the WRVS in 1951 by the Hildyards.
Miss Storey Submitted a form in 1991 and 2000	1961-1990	Used the route once or twice a year. Notes that the path forms an important link with the other side of Colemans Hatch.

7.2 It appears that the use of the claimed footpath by the public has taken place between 1937 and 1991.

7.3 All the signatories claim to have used the route as a footpath, one person used the route on a horse. Seven signatories claim to have used the route for a continuous period of twenty years during 1970-1990. The use of the path is summarised in the table appendix 2.

## 8. Other Information

### Reasons for Use

8.1 It appears that the signatories walked the way as part of a circular route which linked areas of Ashdown Forest.

8.2 In the past the track has also been used as an access route to adjacent properties. There is now an alternative road from which these properties can be reached.

8.3 Permissive use – see note 4.2 above.

8.4 None of the signatories had sought permission to use the route.

### Verbal Challenges to Use

8.5 Mrs J Hildyard, former owner of South Hartfield House, states that verbal challenges were made to people using the route if they were making a nuisance, 'i.e., fast driving with motor -cycles or cars', during her own and her families' period of ownership of the property.

8.6 It appears from the evidence in support of the footpath claim that until 1988 when Mr & Mrs Sandiford purchased South Hartfield House, there had been no verbal challenges to the use of the route as a footpath. Since that time verbal challenges have been made to the public.

8.7 Mrs Evans recalls that 'a man from the estate' of South Hartfield House told her that the route was not public in 1991.

### Signs Gates and Structures

8.8 Mr & Mrs Sandiford, the current residents of South Hartfield House (1988-present day) dispute the public footpath claim. They state that the gates and notices they erected at points D and F on the attached plan in 1988 replaced those in existence prior to their ownership of the property and were part of the refurbishment they undertook on purchasing the Estate. The information concerning the dates for the erection of the new gates conflicts with the users of the path who claim the way was not barred until 1990 when the gates and signs were erected.

8.9 Hartfield Parish Council state in consultation with ESCC 1991 that until about 1988 the track was closed once a year by the owner of South Hartfield House but that about that time the gate was broken and could not be closed.

8.10 Mrs J Hildyard, the former owner of South Hartfield House states that during her father-in-law's period of ownership of South Hartfield House until 1964/5 the gates at points D and F along the route were closed once a year. She states this practice was continued but cannot be sure of exact dates during her and her husband's ownership 1976 – 1988 and that around this time the gates fell into disrepair. She also states that there may have been a sign stating private property at the Colemans Hatch end – point F of the section of the route owned by South Hartfield House but she could not be sure.

## **9. Evidence in Opposition to the Application**

### Current owner's evidence

9.1 Mr & Mrs Sandiford, the current owners of section D to F of the route, completed two owner/occupier questionnaires dated 1991 and 2000 in which they set out their objections to the footpath claim. They state that there were gates in place at the time of their purchase of the property in 1988. The Sandifords state that they replaced the gates at that time as part of a refurbishment program on the estate. They state that the previous owners confirmed to them that there was no public right of way along the route and that specific rights had at various times been granted to individuals to use the path/track. They state that the 1940 permissive agreement together with the locking of the gates one day a year supports their belief that the track was used on a permissive basis only and negates any claim to public use.

### Former landowner's evidence

9.2 Lady Hildyard owned section D-E-F of the route between 1930-1976. She expressly granted rights for Mr Lehmann and successors in title to use the route on a permissive basis from 1940. In 1976 Mrs J Hildyard and Mr H Hildyard inherited title to South Hartfield House. Mrs J Hildyard confirms that nobody sought her permission to use the route during this period.

## Adjoining landowners' evidence

9.3 Mr GM Raikes, now deceased, of the "The Ark", Colemans Hatch owned land adjoining section D to E of the claimed public footpath, opposite to South Hartfield House. He stated in correspondence dated 1992 that he had owned the properties 'The Ridge' and 'The Ark', (marked on the attached plan), since 1950. He noted that he had a legal right of way over the track and that as far as he was aware there had never been a public footpath along the route. He stated that he had done his best over the past forty years to stop trespassers using it, whether on foot or horseback or in vehicles. He noted that when he bought his property in 1950 there were very substantial gates at both ends of the track, (at points D and F on the attached plan), and that his current neighbours Mr and Mrs Sandiford had replaced these in exactly the same position as the former ones. He stated that he had very strong objections to the track being designated a public footpath. Mr Raikes confirmed in correspondence dated 2000 that he continued to maintain his objections to the footpath application.

9.4 Mr TMM Raikes the current owner of 'The Ark' supports the views of his father. In November 2002 he submitted a plan which made reference to the private access Agreement made by Lady Hildyard in 1940 shown at point 4.2 above. Mr TMM Raikes has the Agreement in his possession which was passed to him with his title deeds when he became the owner of the property known as The Ridge. Mr Raikes drove his car along the track during 1961 -1965 and recalls on some occasions having to ask the Hildyards gardener to unlock the gates at point F on the plan.

9.5 Mr Booker (now deceased) submitted correspondence in 1992 in opposition to the footpath claim. He stated that he had been a resident of 'Noahs Cottage', which adjoins the path, since 1951. He noted that he had been the principal vehicular user of the track for the last forty years and had until recently been mostly responsible for its maintenance. He had therefore taken a very keen interest in the users of the track whether on foot, or on horseback. He stated that he had known the road to be private and owned until recently by the Hildyard family as part of South Hartfield House. He stated that he had warned off anyone that he had found on the track who he had known not to have a legal right of way.

9.6 In 2000 Mrs Booker submitted correspondence which confirmed that she maintained the views of opposition to the footpath claim held by her late husband. In July 2004 Mrs Booker submitted a statement stating that the gates at points D and F were mainly shut and she had to open them for her husband to drive down the track to and from their property. She recalls the practice of keeping the gates closed continued until Lady Hildyard died in the early 1970's. When Lady Hildyard's son and daughter in law inherited the estate (1976) the gates fell into disrepair and were not replaced.

## **10. Summary**

10.1 The documentary evidence does not prove the existence of a public footpath but does suggest that the claimed route came into existence as part of a network of tracks on the Ashdown Forest and followed the line of the ancient forest pale which delineated the forest boundary between 1272 and 1693. The part of the track A-B and D-E-F-G-H was later marked on the 1842 tithe map as non-titheable. Tithes were not payable on public highways. The route was shown on the 1931/1974 Ordnance Survey Maps as partly enclosed with some form of barriers at points D and F on the plan. It was not shown on the Uckfield Rural District Council map prepared under the Rights of Way Act 1932 or claimed in the Ramblers Association Survey of 1950/51. N.B. Map evidence is not conclusive.

10.2 Therefore the test which must be applied to this application is whether there has been evidence of use sufficient to raise presumption of dedication. That is, that the route has been



used by the public without interruption for 20 years. Section 31(1) of the Highways Act 1980 provides for the presumption of dedication of a public right of way following 20 years continuous public use. It states:-

*'Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.'*

10.3 For the purposes of Section 31 of the Highways Act 1980, the right of the public to walk along the claimed route was brought into question in 1990 when the applicant states the new owners of the South Hartfield House, put up gates and notices at each end of the path that is in their ownership. The notices stated 'Private – No Entry'. The period of use to be considered under Section 31 of the Highways Act is 1970 to 1990.

10.4 The track was developed as an access route which served a number of adjacent properties. In 1940 an Agreement for use of a section of the route on a permissive basis was made between Lady Hildyard, the then owner of South Hartfield House, and Mr Lehmann owner of the properties 'The Ridge' and 'The Ark', and fields and a cottage adjacent to the route. This documentary evidence shows that during the period of ownership of Lady M Hildyard the section of the route owned by South Hartfield House was considered to have private status and use by the adjacent landowner Mr Lehmann and his successors in title, to be on a permissive basis.

10.5 The Conservators of Ashdown Forest supported by East Sussex County Council as landowner of A-B-C-D and F-G-H do not believe the way to be a public path as it forms part of the Ashdown Forest and is therefore accessible to the public to wonder at will.

10.6 Mr & Mrs Sandiford, the current owners of section D – E- F of the route maintain that the track was not used as of right during the 1970-1990 period. In rebuttal to the claim they state that there was a challenge to the public use during the 1970-1990 period because there were gates placed at points D & F on the route which were kept closed and locked on one day of the year by the previous owners and were in place at the time of their purchase of the property in 1988. The previous owner Mrs J Hildyard confirms that gates were locked once a year in her father-in-law's ownership but cannot be certain if they were continued to be locked when her husband inherited the property in 1976 as she did not actively participate in the running of the Estate. Mrs Hildyard does confirm that the route claimed was not considered to be a public footpath during her family's ownership.

10.7 The applicant and the people who claimed to have used the route do not recall any locked gates.

10.8 Adjoining landowners support the view that the lane has the reputation of a private path and refer to specific permissive rights of way over the route and that there were gates that were locked at least one day a year.

10.9 A determination of this case will centre on the actions taken by the members of the Hildyard family who owned section D to F of the route during the 1970-1988 period, and Mr and Mrs Sandiford, owners of that section of the route from 1988 to the present. Is there evidence to show that during this period the landowners showed sufficient intention not to dedicate the route as a public right of way?

10.10 Lady M Hildyard owned the property during the 1930-1976 period. Mrs J Hildyard and her husband Mr H Hildyard inherited title to the South Hartfield House Estate in 1976. Mrs J Hildyard resided in the property from 1973 to 1988. Mrs J Hildyard states that she and her family considered the route to be private but knew that local people used the route to

access their property and Ashdown Forest. She states that the gates were locked one day a year. She acknowledges that the Agreement dated 1940 has been passed down to the various owners of adjoining properties. She states that no other sought permission to use the route and that people were challenged when using it if they were creating a nuisance by driving fast on motor bikes or in cars.

10.11 It appears that the Hildyard family considered the route to be private. From 1940 to 1976 the gates positioned at points D and F and were locked once a year to deny any permanent rights of way. This practice has been supported by both the Parish and Wealden District Council. From 1976 when Mrs J Hildyard's husband became the owner it is unclear whether or not the practice of locking the gates continued. The evidence for challenging users of the public footpath is conflicting with landowners and adjoining landowners stating that they often challenged people on the claimed path whilst the supporters of the claim do not recall any challenges and did not seek permission to use the route. Adjoining landowners state their use of the claimed path was by permission from the owners of the land crossed by the path to gain access to and from their properties. This is supported by a statutory declaration written by Mrs J Hildyard as documented in 4.3 above and given to the new owners Mr & Mrs Sandiford who purchased South Hartfield House and section D to F of the route in 1988. Mr and Mrs Sandiford maintain that they challenged public use from 1988 and replaced the old gates and notices.

10.12 The use of the claimed path by the seven users for the full twenty years period was on average infrequent with three users once/twice a year; three users several times a year and one user once a week.

10.13 Have the routes claimed been actually enjoyed by the public for a full period of 20 years?

10.13.1 It is clear from the witness evidence forms, that there is some unhindered use and enjoyment of this route by the public. From the usergram in Appendix 2, it is clear that there has been a period of at least twenty years' use by the public from 7 witnesses although the use is on average infrequent. However there is written evidence from past and present landowners that state the gates were locked at least once a year until 1976, possibly during 1976 -1988 and again from 1988.

10.14 Has this use been 'as of right'?

10.14.1 The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in *Sunningwell (2001)*, it is no longer necessary for a person to believe that they have the right to use the route before they set out. If a person uses a route for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*) and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.

10.14.2 The witness evidence forms and interviews carried out substantiate that witnesses felt they were not using the routes with force, neither were they being secretive in their use, none of the users appeared to be aware of any permission having been granted during the material period.

10.15 Did the landowner show that he had no intention to dedicate during the requisite period?

10.15.1 At South Hartfield House the previous owners have confirmed that it was the practice to lock the gates at points D and F on one day a year to negate a claim up until 1976. This practice may have extended from 1976 to 1988 but Mrs J Hildyard cannot be sure. From 1988 the current owners have confirmed that they replaced the existing gates and notices and continued to lock the gates. These actions serve to illustrate that the landowners had no intention to dedicate the route across the estate.

10.16 Is a Public Right of Way therefore reasonably alleged to subsist?

10.16.1 In *R v. Secretary of State for the Environment ex parte Norton and Bagshaw (1994)*, it was held that there is a distinct difference between the wording of section 53(3)(c)(i) and that in deciding whether a Public Right of Way exists, two tests must be applied. Firstly, where it is considered that a right of way which is not shown on the Definitive Map and Statement subsists (known as 'test A') and secondly a lesser test to establish whether or not a right is reasonably alleged to subsist (known as 'test B'). For the requirements of test A to be met, it is necessary to show that, on a balance of probabilities, a right of way actually subsists. However, for test B to be proven all that is necessary is to show that a reasonable person, having considered all the relevant evidence, could reasonably allege a right of way to subsist.

10.16.2 This was considered further in the most recent case of *Todd and Bradley v. Secretary of State for the Environment (2004)*. Here, it was decided that it was not satisfactory simply to confirm an Order based solely on test B, although it was possible to make an Order on those grounds. The stronger grounds contained in test A then had to be applied by the confirming authority before it could be confirmed.

10.16.3 However, in this case, there is evidence showing the landowners' lack of intention to dedicate and therefore the legal tests as set out in section 31 of the Highways Act 1980 cannot be met.

10.17 Is it possible to deduce dedication at Common Law?

10.17.1 Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. i.e. the dedication of a route as a Public Right of Way can be implied from evidence of use by the public and of acquiescence in that use by the landowner.

10.17.2 Under the common law the users must prove that the dedication has taken place during a period when the claimed footpaths were unobstructed and the landowners have acquiesced in such user. The user evidence is not strong enough to constitute dedication at Common Law.

## **11. Conclusion**

11.1 As previously mentioned, section 53 of the Wildlife and Countryside Act 1981 provides that the Highway Authority may make an Order to modify the Definitive Map and Statement if it is shown that the right of the public to use it is reasonably alleged to subsist.

11.2 For the reasons provided above, it is not considered that the legal tests set out in section 31 of the Highways Act 1980 have been met, and therefore it has not been possible to conclude that public rights of way are reasonably alleged to subsist along the claimed route.

## **12. Formal Recommendation**

12.1 It is recommended that the Sub-Committee refuse the application to make an Order to add public footpath from the Gills Lap Road to the Colemans Hatch to Wych Cross road at Colemans Hatch.

S A OGDEN  
Director of Law and Performance Management

BOB WILKINS  
Director of Transport and Environment

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## **BACKGROUND DOCUMENTS**

Evidence forms and statements, site inspection report, consultation responses, representations by the landowners and other interested parties, documentary evidence and historical research.

## Legal Position Relating To Claimed Public Rights of Way

1. The determination of the application for the claimed public footpath must be based on a consideration of all of the available evidence.
2. The application has been made under Section 53 of the Wildlife and Countryside Act 1981. Section 53 (3)b requires the County Council to modify the Definitive Map and Statement as a consequence of:

*'the expiration in relation to any way in the area to which the map relates 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'.*

Section 53(3)c(i) requires a modification if the County Council discovers evidence which, when considered with all other available relevant evidence, shows:

*'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',*

3. Section 31 (1) of the Highways Act 1980 provides for the presumption of dedication of a public footpath following 20 years continuous public use. It states:

*'Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'.*

4. It is therefore necessary to show that there has been uninterrupted public use for 20 years. The public must have used the path without hindrance or without the permission of the landowners. The 20 year period is calculated retrospectively from the time when the public use of the path was first brought into question.
5. The Sub-Committee must consider whether there is sufficient evidence to allege that the presumption is raised. The burden of proof is the civil one, that is, the balance of probabilities. Members must weigh up the evidence and if on balance it is reasonable to allege that there is a public footpath then the presumption is raised. The onus falls on the landowner to show any evidence that there was no intention on his part to dedicate the path as a public right of way. This would be by an overt act to show to the public that there was no such intention, e.g. notices, barriers, or locking a gate on one day a year.
6. Alternatively, a public right of way may be established over a shorter period of time under the common law i.e. the dedication of a way as a public right of way can be implied from evidence of user by the public and of acquiescence in that user by the landowner.
7. Rights of Appeal: If the County Council grants the application an Order will be made and public notice given. If any objections are made and not withdrawn the matter is referred to the Secretary of State for a decision. Otherwise the County Council confirms the Order as unopposed. If the application is refused the applicant has a right of appeal to the Secretary of State within 28 days of the serving on him of the notification of the County Council's decision.