

**Definitive Map Review 2006 – 2007
Parish of Malborough**

Report of the Director of Environment, Economy and Culture

Please note that the following recommendation is subject to consideration and determination by the Committee before taking effect.

Recommendation: It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding a footpath between points A-B (Proposal 1), as shown on drawing number ED/PROW/07/31.

1. Summary

The report deals with the Definitive Map Review for the parish of Malborough and the determination of a claim under Schedule 14 of the Wildlife and Countryside Act 1981 to record a public footpath.

2. Background

The original survey, under s. 27 of the National Parks and Access to the Countryside Act 1949, revealed seventeen public footpaths and one public bridleway which were recorded on the Definitive Map and Statement, Kingsbridge Rural District with the relevant date of 1 December 1954.

The review of the Definitive Map, under s. 33 of the 1949 Act, which commenced in the 1970s but was never completed, produced no proposals for change to the map in the parish of Malborough at that time.

In 1985, the South Hams Parishes Order transferred sections of the South West Coast Path and Footpath No. 7 to South Huish Parish. Footpath No. 16, West Alvington transferred to Malborough.

The Limited Special Review of Roads Used as Public Paths (RUPPS), carried out in the 1970s, did not affect this parish.

The following Orders have been made:

Kingsbridge Rural District Council Malborough Footpath No. 13 Diversion Order 1960 under the Highways Act 1959.

Kingsbridge Rural District Council Malborough Footpath No. 15 Diversion Order 1962 under the Highways Act 1959.

Devon County Council (Hay Court Path) (Parish of Malborough No. 1) Definitive Map Modification Order 1987 under the Wildlife and Countryside Act 1981.

Devon County Council (Footpath No. 15, Malborough) Public Path Diversion Order 1990 under the Highways Act 1980.

Devon County Council (Footpath No. 17, Malborough) Public Path Diversion Order 1990 under the Highways Act 1980.

Devon County Council (Footpath No. 3, Malborough) Public Path Diversion Order 1992 under the Highways Act 1980.

Devon County Council (Footpath No. 17, Malborough) Public Path Diversion Order and Public Path Creation Order 1995 under the Highways Act 1980.

Devon County Council (Footpath No. 10, Malborough) Public Path Diversion Order 1995 under the Highways Act 1980.

Devon County Council (Footpath Nos. 7 & 15, Malborough) Public Path Diversion Order 2003 under the Highways Act 1980.

Devon County Council (Footpath No. 30, Malborough) Public Path Creation Order 2003 under the Highways Act 1980.

3. Review

An application under schedule 14 of the Wildlife and Countryside Act 1981 section 53(5) was submitted on 24 February 1995 to add a footpath leading from Luckhams Lane to Chapel Lane in the parish of Malborough. Determination of the application was deferred pending the start of the Parish Review.

The current Review began in November 2006 with a public meeting held in the parish hall. The review was advertised in the Kingsbridge Gazette and on village notice boards. No additional claims or suggestions for modifying the Definitive Map were put forward following the parish meeting.

General consultations on two proposals were carried out and advertised in the parish and in the Kingsbridge Gazette. This report examines the claim for a footpath (Proposal 1) in Appendix I. A second proposal to divert part of the existing Footpath No. 5 has received no objections and will be progressed under delegated powers along with a number of other public path orders in the parish.

The responses were:

County Councillor Sir Simon Day	- no comment
South Hams District Council	- support the proposals
Malborough Parish Council	- supports the proposals
British Horse Society	- no comment
Byways and Bridleways Trust	- no comment
Country Land & Business Association	- no comment
Open Spaces Society	- no comment
Ramblers' Association	- no comment
Trail Riders' Fellowship	- no comment

4. Conclusion

It is recommended that an Order be made to add a footpath from the county road Luckhams Lane to the county road Chapel Lane.

Should any further valid claim be made in the next six months it would seem sensible for it to be determined promptly rather than deferred.

5. Reasons for Recommendation/Alternative Options Considered

To progress the parish by parish review of the Definitive Map in the South Hams.

6. Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing the report.

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Electoral Division: Thurlestone, Salcombe and Allington

Local Government Act 1972

List of Background Papers

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Background Paper	Date	File Ref.
Correspondence File	1993 to date	DMR/MAL

hb080507pra
sn/dmr 2006 malborough
3 hq 290607

Background to the Proposals

Basis of Claims

Wildlife and Countryside Act 1981, Section 53 (5) enables any person to apply to the surveying authority for an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 14.

Common Law presumes that a public right of way exists if at some time in the past the landowner dedicated the way to the public either expressly, the evidence of the dedication having since been lost, or by implication, by making no objection to the use of the way by the public.

The Highways Act 1980, Section 31 (1) states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

The Highways Act 1980, Section 32 states that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan, or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

Wildlife and Countryside Act 1981, Section 53[3][c] enables the Definitive Map to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows:

[i] that a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates;

Wildlife and Countryside Act 1981, Section 56[1] the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein but without prejudice to any question whether the public had at that date any right of way other than those rights.

Proposal 1. Schedule 14 Application to add a footpath from the county road Luckhams Lane, along a pathway to the south of the properties 'Moorview', to the county road Chapel Lane.

Malborough Parish Council has applied for the addition of a footpath along a pathway, between points A-B shown on drawing number ED/PROW/07/31.

Recommendation: It is recommended that a Modification Order be made to add the route as a footpath to the Definitive Map and Statement as shown on drawing no. ED/PROW/07/31.

1. Background

In July 1993 Malborough Parish Council wrote to South Hams District Council concerning the footpath between Luckhams Lane and Chapel Lane, adjoining 1 Moorview. The then tenant of 1 Moorview was negotiating to buy the property from the District Council and had

queried the status of the route. The Parish Council's view was that the route had long been accepted as a public right of way and they requested that it be recorded on the Definitive Map. The matter was referred to the County Council.

In 1995, following the sale of the property and an unsuccessful attempt to resolve the situation by means of a creation agreement between the County Council and the landowners, the Parish Council made a formal application under schedule 14 of the Wildlife and Countryside 1981 to add the footpath to the Definitive Map and Statement. The application was subsequently held on file pending the Parish Review.

2. Description of the Route

The route forms a link between the county roads Luckhams Lane and Chapel Lane, adjoining the property 1 Moorview, between points A and B on the plan. From Luckhams Lane it proceeds generally eastwards along a concrete pathway approximately 1 metre wide within a strip of land defined by hedges, walls and fences approximately 2 – 3 metres apart. There are gates at each end of the route, both of which are unlocked. The total length of the route is approximately 55 metres. Two further gates partway along on the northern side of the route give pedestrian access to the properties 1-4 Moorview.

3. Supporting Evidence

User Evidence

The Parish Council originally submitted thirteen user evidence forms in support of their application. A further eight user evidence forms were received as a result of the consultation, so in total there is evidence of use by twenty-one people to consider. The use covers a period from the early 1930s to 2007 and the level of use varies from daily to once or twice a year.

All had used the route on foot only. All of the users believed the route to be public, as a footpath. The main basis for their belief was they had used it themselves for a long time and assumed it was available to the public as it had always been open, was known locally and used as a public path. One user claims that people park their cars in Luckhams Lane and then use the route to go to chapel.

Three users remember seeing "private" or "Moorview residents only" notices on the route in 1993 when the previous residents of 1 Moorview moved in. Three users refer to notices at that time but cannot recall what they said. Two users remember signs saying "Council property", again in 1993, and which were then removed. The placing of "private" notice(s) on the route in 1993 appears to have called into question the public's use of the route as a public right of way and triggered the Parish Council's application.

The twenty year period of user evidence that needs to be considered under Section 31 of the Highways Act is therefore between 1973 and 1993. The user evidence submitted, summarised on the Chart of User Evidence, appears to indicate use by fifteen-nineteen people from 1973 to 1993. However, five of the evidence forms relating to this period relate to private access and cannot therefore be considered as valid user evidence, or should be considered with reservation.

Mr and Mrs Cole lived as tenants at 3 Moorview during the relevant period and had a private right to use the route to access their property. However, both were aware of public using the route. In her evidence Mrs Cole states that she was told the route was a public right of way when, in 1973, she tried to get it closed to stop her toddler getting out into the road.

Mrs March states that she used the route for visiting friends who lived at Moorview and would have an implied private right. She further clarified that since her friends had moved away she no longer had any call to use the route.

Mr CJ Parsons lived in one of the Moorview houses when it was first built in 1932 and would therefore have been exercising a private right to use the path to access his property. He also used the path to visit his brother who lived there from 1932 to 1993. It is unclear whether Mr Parsons used the route as a public right of way when not residing at or visiting the Moorview properties.

Mrs Rundle lived at 4 Moorview during the relevant period and would therefore have been exercising a private right to use the route to access her property.

A few other people admit to using the route to visit the Moorview properties, either for social reasons or business and therefore had an implied private right on those occasions. However, they also used the route as a public right of way at other times, for example as a short-cut to and from the shops, bus stop and/or chapel or on general walks around the village, and this can be considered valid user evidence.

Other than the notices erected in 1993, several users mention seeing notices which read "Please shut the gate" and also "No cycling, No skateboarding". Most people who submitted user evidence forms in 2007 refer to recently erected notices on the gates at either end of the route indicating that the route was private and for access to Moorview only.

One user states that they were told that the route was not public by the owner of 1 Moorview in the spring of 1994. Mrs Cole states that a previous tenant of 1 Moorview also told people that the route was not public.

Malborough Parish Council Minutes

No reference to the route in Parish Council Minutes has been found before 1993. A reference in the minutes of 21 July 1993 meeting appears to have been triggered by the placing of a "Private" notice on the route and the pending purchase of 1 Moorview by the tenants. It was agreed by the Parish Council that the path was a public right of way established by long usage. District Councillor Masters had discussed the matter with the District Council officers concerned and could assure all interested parties that the public right of way would be protected. The Parish Council decided that formalities should be initiated to have the path recorded on the Definitive Map and that the recently displayed "Private" notices should be removed.

At the meeting of 15 September 1993 it was reported that the status of the path at Moorview required further legal clarification. South Hams District Council confirmed that if 1 Moorview was sold in the interim the sale would be "subject to all existing rights" and with the specific reservation of a right over the route for other occupiers.

On 17 November 1993 it was reported that SHDC's Housing Manager had been discussing the footpath with local residents and there was expectation of the matter being resolved in a reasonable matter.

On 16 March 1994 it was reported that the footpath had been freed of previous obstructions and a fence constructed along the boundary of 1 Moorview to indicate route of path again available for public use. To simplify procedure for official designation of the path the clerk was directed to again ask SHDC to dedicate the path.

At the following meeting of 20 April 1994 it was reported that SHDC were investigating whether arrangements could be made in conjunction with the landowners to dedicate the path and add it to the Definitive Map.

On 18 May 1994 it was reported that the landowners of 1 Moorview had indicated their willingness to enter into a Dedication Agreement with DCC. To progress formalities the Parish Council unanimously resolved that public pedestrian rights do exist over the path and that a dedication agreement would benefit the inhabitants of the parish.

On 19 October 1994 however, it was reported that the owners of 1 Moorview had decided not to dedicate the path unless they received compensation. The necessity to proceed with an application for modification of the Definitive Map under WCA 1981 was noted and agreed.

On 16 November 1994 it was again agreed that a formal application be made to the County Council for the path to be added to the Definitive Map. It was noted that "further evidence may be obtainable regarding 1973 decision which did not permit closure of that path because of its recognition as a public right of way."

On 16 May 2001 the Parish Council discussed concerns that children were cycling and skateboarding along the Moorview path and agreed that appropriate signs be placed at each end of the route.

4. Landowner Evidence/Rebuttal Evidence

The entire length of the claimed route is registered under title number DN338043 which includes the house and garden of 1 Moorview, owned and occupied by **Mr and Mrs Chesswas**. They have owned the property since October 2005.

In response to the consultation process, Mr and Mrs Chesswas submitted a Landowner Evidence Form and supporting letter, expressing their strong objection to the claimed footpath. These are summarised below and published in full with the background papers to this report.

On their form Mr and Mrs Chesswas say that they were not aware of the Parish Council's application when they purchased the property and add that they would not have bought the property had they known. Shortly after purchasing the property they became aware that members of the public were using the path and told them that it was private access for 1-4 Moorview only, to which several parishioners responded that the path was a public right of way. Mr and Mrs Chesswas subsequently queried the status of the path with the County Council and were advised of the Parish Council's application to have the route added to the Definitive Map.

On their form Mr and Mrs Chesswas say that they put gates back at each end of the route in 2006 and placed "Private – Access Only 1-4 Moorview" notices on each gate. The gates are not locked as all residents/families need access. They also comment that they are aware of less people using the route since they have explained it was not public.

They comment that several people who originally completed user evidence forms used the route to visit friends and family at Moorview and believe that many confuse private access and public use.

Mr and Mrs Chesswas have also expressed concerns over the issues of privacy, safety, security and the effects of the path on their property.

The previous owners of 1 Moorview, **Mrs Bullen and Mr Taylor**, have also been asked for their views and have completed a Landowner Evidence Form in relation to their ownership/occupancy.

Mrs Bullen and Mr Taylor bought the property from South Hams District Council in January 1994. They had previously rented the property from the Council since approximately May 1993. When they purchased the property they say on their form that they were told by the Council that the path was access for 1-4 Moorview only.

Mrs Bullen and Mr Taylor were aware of members of the public using the route, mostly on Sundays to go to the Baptist Chapel, and state that they told people that the path was not public when it became apparent that people expected to use it. They mention in their supporting information that the previous tenant of 1 Moorview allowed people to walk through his garden if they asked.

They add that there were gates at each end of the path when they moved to the property and that there were signs stating "Private – Please shut the gate". The gate hangers were still in place when they sold the property in 2005.

Mr and Mrs Bullen and Mr Taylor had a fence erected beside the path to stop the public and their dogs walking all over their garden.

South Hams District Council submitted a landowner evidence form in 1995 in response to the Parish Council's application. They had by that time sold 1 Moorview to Mrs Bullen and Mr Taylor but completed the form in respect of their ownership. On their form the Council stated that they did not believe the path to be a public right of way and were not aware that public were using it. They state that they had not, nor had someone on their behalf, turned back or stopped anyone from using the path or told anyone that it was not public. They had not erected notices or signs stating that the route was not public.

When the issue was first raised with them in 1993, the District Council referred the question of the path's status to the County Council but did not deny public rights over the route. Correspondence on file also indicates that the District Council were proactive in attempting to resolve the matter by way of a dedication agreement prior to completion of the sale of 1 Moorview.

The owners/occupiers of other Moorview properties were contacted by the County Council in 1994 with regards to the proposed dedication agreement between the Council and Mrs Bullen and Mr Taylor, as they also had an interest in the path. **Mr Pepperell** responded then, and again recently, that the path had never been a right of way and was used only by tenants and their visitors. He has lived at No. 2 for over 70 years.

However, **Mr Cole** at No. 3 responded that in all the time he had lived at the property (since 1972) "the public has had use of the path without let or hindrance, so a right of way by usage is in no doubt".

5. Discussion

The route has physically existed since the early 1930s when the Kingsbridge Rural District Council developed the Moorview properties. No record has been found relating to the development of the properties or what status the Council intended for the path between Luckhams Lane and Chapel Lane, other than private pedestrian access to and from the Moorview properties. There is no doubt however, that members of the public have also been using the path as a through-route since it was created. Use of the route would be a considerable short-cut from Luckhams Lane to the chapel or village centre.

User evidence forms submitted refer to destinations which include the chapel, bus-stop, shops, football field and residences in Luckhams Lane. Others have used the path as part of recreational walks around the village.

All users and landowners refer to gates at each end of the route but that these were never locked. It appears that the gates were first put in place by the District Council sometime in the early 1970s. They were subsequently removed but then replaced by Mr and Mrs Chesswas in 2006.

Several people who submitted user evidence forms in 1994/1995 refer to "Private" and/or "Moorview residents only" notices having been placed on the gates in 1993 by Mrs Bullen and Mr Taylor. Other users remember notices appearing at that time but not what they said. No users recall seeing any such notices prior to 1993. This is supported by the minutes of the Parish Council meeting on 21 July 1993, which report that a "Private" notice had recently been displayed on the route.

Landowner evidence is not consistent concerning the date of the notices. On their landowner evidence form, Mrs Bullen and Mr Taylor state that "Private" notices were already on the gates when they moved to the property in 1993. On their form however, South Hams District Council state that they had not placed any signs or notices on the route stating that the way was not public during their period of ownership. There is no further evidence available to help clarify the date at which the "Private" notices first appeared on the route. The weight of evidence which is available suggests that notices were put up in 1993, between May and 21 July. Although it could have been earlier, as indicated by Mrs Bullen and Mr Taylor, there is no further evidence to support this.

The placing of the notice(s) on the route in 1993 could be considered as calling into question the public's right to use the route. It was this action which caused the Parish Council to bring the route to the attention of the County Council and request that the route be included on the Definitive Map as a public footpath.

User evidence submitted shows regular, consistent and apparent uninterrupted use of the route for the twenty year period prior to 1993 by between nine and fourteen users, whose use appears to be as of right, that is without force, secrecy or permission. This use is considered to be adequate to satisfy the requirements of section 31 of the Highways Act 1980. Furthermore, there has been use by at least seven members of public at any one time since the path was created in the early 1930s until 1993 when the route was called into question. The public have continued to use the path since it was called into question and up to the present-day, although such use cannot be counted for the relevant period.

The presumption that the way had been dedicated to the public can be contradicted by evidence to show that the landowner never intended to dedicate the way. During the twenty years prior to May 1993, there does not appear to be any evidence to show any lack of intention to dedicate. South Hams District Council, who owned the property during the relevant time, state that they were not aware that the path being used as a public footpath. They do not appear to have taken any action to prevent public access during that time.

Mrs Cole, previously a tenant of No. 3, states on her user evidence form that when she tried to get the path closed in 1973 she was told that it was a public right of way. She adds that the District Council said that all they could do was put "Private. Please shut the gate" on each gate. Two users report that they saw signs stating "Please shut the gate" but there is no evidence to suggest that private notices were put up at that time.

Mrs Bullen and Mr Taylor state that a previous tenant of 1 Moorview allowed people to use the path if they asked. Mrs Cole who previously lived at No. 3 also comments that the tenant of No. 1 used to object verbally to people using the route. However, there is no further evidence to support these statements.

Again, there is some disagreement between the observations of Moorview residents. Mr Pepperell of No. 2 considers that the path has only ever been used by residents and their visitors, whereas Mr Cole at No. 3 reports that the path had been used by the public without let or hindrance during his occupancy (21 years).

The Parish Council unanimously agreed on several occasions that they considered the path to be a public right of way on the basis of long usage. They refer to a decision made in 1973 which recognised the path as a public right of way. There is no further evidence available concerning this decision but the report does corroborate Mrs Cole's statement.

Although the path probably originated as a path for use by the Moorview residents and their visitors, use has, according to the users, not been solely for access to the Moorview properties. It appears that the route was being used as a public right of way by the public. Despite there being some contradiction of evidence, it is not sufficient to counter the weight of evidence of use.

6. Conclusion

On the basis of the evidence received on the balance of probabilities it is considered that sufficient evidence exists to indicate that a public right of way not presently shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist. User evidence has been submitted which shows regular and consistent use of the route as a public footpath for a number of years and during the twenty years period prior to the 'calling into question' in 1993 by the placing of "private" notices on the route. There is insufficient evidence to show that prior to 1993 the landowners took any action to indicate a lack of intention to dedicate.

Therefore, it is recommended that a Modification Order be made adding a public footpath between points A-B, as shown on drawing number ED/PROW/07/31, and if there are no objections to the Order, or if such objections are subsequently withdrawn, that it be confirmed.