



Committee report

Committee	APPEALS SUB COMMITTEE
Date	22 NOVEMBER 2016
Title	APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER – FOOTPATH, FORELANDS, BEMBRIDGE, ISLE OF WIGHT
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PURPOSE

1. This report sets out evidence to determine an application under schedule 14 of the Wildlife and Countryside Act 1981 (WCA81) for an order to modify the Definitive Map and Statement by adding a footpath at Forelands, Bembridge, Isle of Wight and/or varying the particulars relating to an existing public right of way shown on the Definitive Map and recorded as Public Footpath BB40 (BB40).

STRATEGIC CONTEXT

2. The Definitive Map and Statement records the public rights of way network. Delivering statutory duties in respect of it, in conjunction with the Rights of Way Improvement Plan, supports the Council's Corporate Plan 2015 to 2017, Priority 1: Supporting growth in the economy, making the Island a better place and keeping it safe.

THE APPLICATION

3. The application (including covering letter) (Appendix 1 – Item 1) dated 5 July 2013 submits supporting user evidence, photographs, maps and statements. The applicant is Mr Graham Ronald Ferris of Muse Cottage, Alma Place, South Street, Yarmouth, Isle of Wight PO41 0QQ.

LOCATION, SITE CHARACTERISTICS AND GENERAL HISTORY

4. The application claims use of paths and/or the correct alignment of BB40 as shown on the application plan. Starting on the coastal footpath at the southern end of a private car park known as Forelands Drive the path heads in a general south west direction to provide access to the beach. At the time of the application beach access was via a grass bank to the beach but access is now via timber steps installed by the Isle of Wight Council in 2014.

5. BB40 was recorded on the first Definitive Map for the Isle of Wight in 1952 and has not been subject to any legal changes since that time. The Definitive Map records the path in a general direction of the paths shown on the application plan (ie in a south west direction to the beach) but not along the same alignment.
6. Site maps of the claimed paths are in Appendix 2. Item 1: Extract of the current Definitive Map showing public footpath BB40 and other recorded rights of way in the area. Item 2: Current Ordnance Survey map with 2012 aerial image, a representation of the paths subject to the application (yellow dashed lines ABCDE, FE and XYZ) and the line of BB40 as recorded on the Definitive Map (dashed red line). Item 3: Annotated site photographs numbered 1 to 14 taken by the council to facilitate determination of the application.
7. Section ABCDE: Point A is on Public Footpath BB10 (coastal path) at the southern end of Forelands Drive and from this point the claimed path heads south down a concrete path/steps to a set of timber steps (point B) and then continues for a short distance along a concrete path upon reaching a concrete plinth (point C), upon which public conveniences existed in the period 1965 to 1998. It then continues south west diagonally across this plinth forming part of the grounds of a café called The Beach Hut to a flight of concrete steps (point D). After descending those steps it continues in a south west direction over café grounds in front of the café building. Access is then gained to the beach by a flight of timber steps (point E).
8. Section FB: Point F is at the junction of Public Footpaths BB10 and BB13 and from here an alternative route to the top of the timber steps (point B) exists along a concrete path/steps.
9. Section XYZ: This section of the claimed path shows a route taken by people along the eastern and southern perimeter of the plinth during the time that public conveniences existed thereon (permanent toilets in the period 1965 to 1987 followed by portaloos in the period 1987 to 1998).

BACKGROUND TO THE APPLICATION

10. In or about May 2012 a dispute occurred on the plinth of The Beach Hut café as to whether a public right of way existed across it. This led to the leaseholder erecting notices to the effect that no public right of way existed over the plinth. Enquiries were made with the council's public Rights of Way Service as to the route of BB40 which revealed that the legal line of the path in accordance with the Definitive Map was not across the plinth but along land to the south of it. It is believed that the dispute, notices and the information provided by the council were the determining factors for the application being made.

CONSULTATION

11. Bembridge Parish Council is the only statutory consultee. A copy of its response is at Appendix 3 – Item 1.

12. The present elected members for the area are Councillor Jonathan Bacon and Councillor Gordon Kendall, both of whom have been consulted. The response of Councillor Kendall is at Appendix 3 – Item 2. Councillor Bacon did not respond.
13. Landowners are contacted to explain the application and procedure for determining it, and invited to submit evidence. Their response is given under ‘Landowner evidence’ below. Property and landownership details, including Land Registry plans and documents, are in Appendix 4.
14. Landowners affected by the application are:

Freehold proprietors of land subject to the claimed path (IW50901): Elizabeth Anne Clarke, Christine Ann Paskin and John Ferguson Watt as trustees of the Forelands Drive Association c/o Seascope Cottage, 27 Forelands Field Road, Bembridge, Isle of Wight PO35 5TR.

Leasehold proprietors of land subject to the application (IW69092 and IW78219): Jonathan Richard Guy and Emma Guy (formerly McArdle) of 1 Monkton Street, Ryde, Isle of Wight PO33 1JN.

Freehold proprietor of land to the south of the plinth comprising a beach hut and grounds (IW57262): Elizabeth Anne Clarke of 13 Pembridge Gardens, London, W2 4EA.
15. All reports on modification order applications are submitted to landowners and the applicant for comment before it is submitted to the committee for decision. The comments made are copied at Appendix 9 (Item 1 – Applicant; Item 2 – Forelands Drive Association). Replies to the comments are dealt with in this report (where considered necessary).
16. If an order is made, there is a statutory advertisement period of six weeks during which anyone may make representations or objections.

LEGAL BACKGROUND

17. The council has a duty under section 53(2)(b) WCA81 to review the Definitive Map and Statement and to make such modification orders as appear requisite in consequence of events set out in s53(3).
18. Schedule 14 of WCA81 places a duty upon the council to investigate the matters stated in the application for a modification order and to decide whether to make the order applied for.
19. The panel is acting in a quasi-judicial role and the decision must be made on the basis of evidence before the panel and law relevant to the fact of dedication of a highway and to Definitive Map and Statements and on no other consideration. Guidance on the panel’s judicial role is provided at Appendix 5 – Item 2.

20. The council will determine the application on two grounds: (1) under section 53(3)(c)(iii) WCA81: discovery of evidence that particulars in the map and statement require modification; and (2) under section 53(3)(b) WCA81: the possible addition of a path to the Definitive Map by way of presumption of dedication pursuant to section 31 Highways Act 1980 (HA80) or by common law.

First ground:

21. Section 53(3)(c)(iii) WCA81 states that a modification order may be made where evidence has been discovered by the council which, when considered with all other evidence available to them, shows that there is no public right of way over land shown in the Definitive Map and Statement as a highway of any description, or any other particulars contained therein require modification.
22. The standard of proof when considering evidence for modifying the Definitive Map and Statement is the balance of probability. Full legal background information and guidance is provided at Appendix 5 – item 1 (paras. 1 to 6 and 14 to 25), item 5 and item 6.

Second ground:

23. An event under section 53(3)(b) WCA81 is the expiration of a period such that the enjoyment by the public of a way during that period raises a presumption that the way has been dedicated to the public.
24. The question to be determined is whether the evidence shows that a highway exists because dedication has occurred at common law or is deemed by operation of section 31 HA80.
25. The panel will have to decide on the basis of the evidence presented whether a presumption of dedication has been raised or a right of way is at least reasonably alleged to exist. The standard of proof to be applied is the balance of probability. Full legal background information and guidance is provided at Appendix 5 – item 1 (paragraphs 7 to 13), item 3 and item 4.

USER EVIDENCE

26. The application was lodged with 32 user evidence forms (signed by 36 individuals). The applicant and lead witness (Mrs Wills) arranged for 19 witnesses to be interviewed by the council.
27. Documentation relating to user evidence is at Appendix 6. Item 1: Copies of the 36 user evidence forms. Item 2: Copies of the user witness interview notes. Item 3: Summary of the evidence contained in user evidence forms and evidence provided during interviews. Item 4: User witness bar charts. Item 5: Email of the applicant dated 30 November 2015 providing further user witness information.
28. The user evidence forms predominantly provide evidence in support of the second ground (presumed dedication), although 13 witnesses confirmed use

prior to construction of the toilets in 1965 and this evidence will be evaluated and used to determine the first ground (along with other relevant evidence). Eleven of those 13 were interviewed and all provided their best recollection of the area prior to and during the toilets being constructed. All but one did this by marking on maps and photographs the location of buildings and paths at that time.

29. Use of the claimed paths has generally been for gaining access to the beach for usual beach activities, to walk along the beach and to walk a dog. A number of witnesses also refer to using the claimed paths for gaining access to the café, toilets and to visit friends and family who own beach huts.
30. The average stated width of the claimed paths is 1.4 metres, which is in the region of what is commonly claimed for a public footpath.
31. Twelve witnesses have indicated that they would not wish to attend a public inquiry (two of which requested anonymity). Four failed to confirm whether they would be prepared to attend. One witness confirms no use of the claimed paths. One witness (Harrop, now deceased) provides evidence of use for the period 1985 to 1989, during which time she was the lessee of the café. Six witnesses indicated that they were friends with the Preston family and one witness leased a beach hut from them.
32. The application does not claim a route on the plinth behind the former toilet structures. Only three witnesses refer to solely using a route on the plinth behind the toilets and the reason stated is for gaining access to the ladies' toilets on that side. Twelve witnesses refer to using a route solely at the front, six say they used both.
33. A number of witnesses, while explaining why they used the claimed paths, make reference to the path heading straight down to the sea wall formerly being in poor condition and more of a drainage gully than a path, and prior to the sea wall being constructed in the 1980s a high drop to the beach existed. Witness evidence also makes reference to not wishing to use the steps off the sea wall at the end of that path as they are steep and slippery and/or do not provide access to the beach at high tide. When questioned at interview a number of witnesses stated that they did not recall a path in front of the plinth below the railings (ie the legal line of BB40 as recorded on the Definitive Map). The lead witness refers to that area being open and it would have been possible to walk along that line prior to a beach hut being constructed thereon at some point shortly after the portaloos were placed on the plinth in 1987. Two other witnesses confirmed that they also used this route, one during the time of the permanent toilets and another up until the time the beach hut obstructed it. Numerous witnesses confirm that the concrete steps onto the plinth were added at the time when the plinth was raised and the portaloos were placed on it. Nine user evidence forms, which provide evidence of use before and after the toilets were on the plinth, only show a route diagonally across the plinth and make no reference to a different route being necessary when the diagonal route was not possible due to the existence of the toilets.

34. General comments are made to the effect that as the plinth was council-owned land and had public toilets on it (paid for by public money) then the public should have a right of way over it. Further, a diagonal (south west) route is the more natural and quickest way to gain access to the beach.
35. With regard to the second ground (presumed dedication) user evidence during and after the time the toilets were present on the plinth is set out in the user witness bar charts (Appendix 6, Item 4).
36. Maps and photographs lodged with the application and provided by user witnesses are included in Documentary Evidence below.

LANDOWNER EVIDENCE

37. Evidence provided by the landowners is at Appendix 7, items 1 to 6.
38. The landowners affected by the application are listed at paragraph 14 above.
39. (Item 1) The freehold is held by the Forelands Drive Association and its secretary, Professor Paul Richardson, was interviewed on 10 December 2015 at which he provided a statement on behalf of the association of the same date. The association acquired the land from the Preston family in 2003. A Local Land Charges search map, obtained at that time, is attached to the statement which confirms the route of BB40 as not crossing the plinth. The association maintains that a route diagonally across the plinth could not be taken continuously for 20 years due to the existence of the toilets. The claimed path at the time of the portaloos was not possible as they were located at the very front of the plinth. The majority of people (the general public) use the route straight down to the sea wall – minor and occasional use by beach hut owners and fishermen has occurred over the plinth when the café has been closed. The previous café tenants were the first to use the plinth as part of the café and permission was granted to them by the association on an annual basis.
40. The leasehold title to the café and grounds which includes the plinth is held by Mr and Mrs Guy. The lease started in February 2012 and they opened for business in March. As the area is open they allow persons to cross the café grounds and plinth when the café is closed with their permission but direct people around when it is open. They provide their account of the dispute that occurred on the plinth and the subsequent notices that they put up in May/June 2012. The use is not “public” as they believe the witnesses all to be friends and family of the lead witness and her two sisters. They believe the previous lessee of the café (Mr Haynes) to have been strict and to have stopped people accessing the plinth. A route diagonally across the plinth could not be taken continuously for 20 years due to the existence of the toilets, which were removed in 1998. Plans in the user evidence statements are unclear.
41. The freehold title to the beach hut and enclosure immediately to the south of the plinth is held by Mrs Elizabeth Clarke. Mrs Clarke is also a trustee of the Forelands Drive Association. Mrs Clarke has knowledge of the area from 1948 onwards and was able to provide a description of what she believed the situation to be during the 1950s and before the toilets were present. The

previous tenant of the café had use of the plinth in busy times, which was an informal arrangement ie not formally leased as the case is now. She recalls the previous tenant, Mr Haynes, complaining about people taking their dogs across the plinth and that it was bad manners using it as a short-cut.

42. Landowners have provided 63 forms signed by 64 individuals (Appendix 7 – Item 6) to confirm that they believe the official public footpath to be along the path straight down to the sea wall and then either along the sea wall to the timber steps (formerly a slope) or down the concrete steps off the sea wall. The forms also state they have never believed a public right of way to exist across the plinth. Two of the forms originally submitted have been disregarded following a query raised by the applicant (Appendix 9, Item 1). It transpired that two individuals had not signed the forms and they were signed by a third party on their behalf under a misunderstanding. Enquiries were therefore made by the council as to the validity of the remaining forms and it is confident that they have been completed and signed by the individuals named thereon.
43. Photographs and documents supplied by landowners are included in Documentary Evidence below.

DOCUMENTARY EVIDENCE

44. Documentary evidence includes photographs and maps provided by the applicant, user witnesses and the landowner together with documents held by or obtained by the council. The documentation is at Appendix 8.
45. Item 1: Extract of 1952 Definitive Map, enlarged versions of the 1952 map at the scales of 1:2500 and 1:1250; current Ordnance Survey (OS) Mastermap with 2012 aerial image and BB40 as recorded on the 1952 Definitive Map plotted thereon (green line); 1952 Definitive Statement, copy National Parks and Access to the Countryside Act 1949 (NPCA49) survey documents relating to Bembridge Parish held at the County Record Office - Draft survey map, objection and representation sheet and recommendation; Bembridge Parish Council Meeting minutes of the Footpath Committee dated 12 December 1950, 18 December 1951, 12 August 1952 and 9 June 1953.
46. The current OS Mastermap with 2012 image and BB40 plotted thereon confirms the precise legal line of BB40 in accordance with the Definitive Map. The notes of the evidence obtained from the Rights of Way files in respect of the procedures required to be carried out in accordance with NPCA49 at the County Record Office confirm that BB40 was not shown on the draft parish survey map but was added later following representations made by the Ramblers' Association. Reference is made to it being along a rough gravel track in a westerly direction. There is recommendation to BB40 being recorded straight down to the shore as opposed to the westerly direction due to a proposal by the parish council to install steps to the shore. There is a gap in the records regarding this proposal and ultimately the line of the path in the westerly direction is what is recorded on the final 1952 Definitive Map. The parish council reports of the Footpath Committee recorded in the parish council meeting minutes have been inspected for the period 1950 to 1953. The minutes of the meeting dated 12 August 1952 refer to the parish council proposing to

seek permission from Mr Preston to make safe access to the shore at Forelands. However, the minutes of the meeting dated 9 June 1953 make reference to a meeting taking place with Mr Preston where it was agreed to divert the access to the shore to its original position west of Channel View. It is unclear whether these minutes do in fact relate to BB40 but it does appear likely. The minutes of the meetings held in December 1950 and 1951 confirm compliance with the surveying requirements but make no specific reference to BB40. The Definitive Statement does not provide any clarification and simply describes the path as leading down from the top of the cliff from the junction of BB10 and BB13 and down some steps to the beach.

47. Item 2: Historic maps: Beach hut survey maps (dates unknown) drawn by the then freeholder, Mr Preston; Ordnance Survey Maps ranging from 1861 to 1983, historic aerial photographs dated 1946, 1968, 1971, 1999 and 2004.
48. OS maps from the 1800s show the land simply as coastal slope with no paths or structures. Later OS maps from the early 1900s reflect what was used as the base map for the 1952 Definitive Map. They show a path leading from the bottom of the coastal slope to a building and then continuing south west to the shore. The 1978 and 1983 maps show the toilets and the café and a path heading south. No other paths are shown. The 1946 aerial map is the only image available showing the land prior to the toilets. The 1968 aerial photograph shows with some clarity the position of the boat shed, café and toilets at that time as well as established paths. The 1971 aerial photograph is less clear but shows the same features. The 1999 aerial image confirms that the toilets were removed by that time and the area of land in front of the plinth being occupied by a beach hut. The beach hut maps show features on the ground but the accuracy of the actual position of these should be treated with caution as the scale does not appear to reflect the OS maps. Map 1 has been marked 1986-87 but what it shows on the ground in the area of BB40 is clearly what existed prior to the permanent toilets. Map 2 is likely to be from the era of the portaloos as the row of beach huts in front of the plinth are not shown. Both Maps 1 and 2 clearly show "Footpath to the Beach" as being straight (south) down to the shore (later to the sea wall).
49. Item 3: Photographs 1 to 20. Photographs 1 to 7 are images prior to the permanent toilets. Photograph 1 (1934) shows an area to the east of BB40 and does not assist in the determination of the application. Photograph 2 is an early photograph of the area. It shows Butler's boathouse and café in the background (with flag pole) with a row of beach huts in the foreground. Photograph 3, probably from a similar era as photograph 2, is a view of Butler's café in the foreground with the beach huts fronting the beach in the background. It also shows paths/tracks heading behind the beach huts. Photograph 4 provides no information which assists in the determination of this application. Photograph 5 shows a path to the shore in the foreground but the exact position of this in relation to BB40 is uncertain. Photograph 6 is believed to be an image from the early 1960s. It shows a white picket fence which is believed to roughly follow the path which exists now. Immediately behind the fence there appears to be a path and behind that path is an area of enclosed land referred to by some user witnesses as Butler's rose garden. Below this area is the seating area for the café. The beach huts are still in existence and

there appears to be a gap between the rear of those huts and the southern boundary fence of the café seating area. In the foreground of the image is a rockery which was referred to by user witnesses. Photograph 7 is a further image of the café and area but much less clear. Photographs 8 and 9 are probably from the late 1970s/early 1980s and show the permanent toilets. By this time the original café has been replaced and the beach huts have disappeared. Photograph 10 is a clear picture of what existed on the ground prior to the demolition of the permanent toilets in the mid-late 1980s. Photograph 11a and map 11b are a view of the area generally, described in more detail by the lead witness in photographs 12a, b and c. Photographs 13, 14 show the portaloos being placed on the raised plinth. Photograph 15 is believed to show the portaloos being removed. Photographs 16 to 20 show what existed on the ground in the area during the time of the portaloos. Steps have been added to the plinth and on the area of land in front of the plinth (previously open ground) a beach hut has been erected.

50. Item 4: Planning documents. The first document is a schedule of planning applications and decisions relating to the area and provides a reasonably accurate record of when the various structures were erected. The second document is taken from the file of documents held by the council on microfiche relating to the 1965 planning application for the permanent toilets. This is considered to provide a record of what existed on the ground at that time. The third document is a plan of the portaloos installed in 1987. Contrary to what many user witnesses recollect, the layout of the portaloos was different to the former brick built toilets in that the entrance to both the ladies and gents was at the front as opposed to the gents being at the front and ladies at the back as was the case with the previous permanent toilets. The fourth documents are copies of the four planning decisions listed in the schedule of planning applications.
51. Item 5: Parish council meeting minutes and newspaper clipping regarding the toilets from 1997/98 providing an indication that they were removed in 1998.
52. Item 6: Letter of Glanvilles Solicitors dated 4 March 2003 with map, council response dated 23 April 2003 and copy Local Land Charges search dated 17 January 2003. This documentation provides confirmation that the legal definitive line of BB40 was not across the plinth but to the south of it.
53. Item 7: Council report on title dated 31 October 2013. This document records that the land upon which the toilets were built (the plinth) was conveyed to the Isle of Wight Rural District Council (predecessor to the Isle of Wight Council) in July 1965 but there is no evidence of it being subsequently sold or transferred. The land was included in Mr Preston's title at the Land Registry in 2001 (now owned by Forelands Drive Association).
54. Item 8: Photographs of notices put up in 2012 by the lessees of the café (Mr and Mrs Guy).

EVALUATION OF EVIDENCE AND CONCLUSION: FIRST GROUND

55. Determination of the first ground is to consider whether there has been discovery of sufficient evidence to outweigh the presumption that the Definitive Map is correct in what it shows (The Trevelyan Presumption – Appendix 5 – Item 5 para. 4.19), the standard of proof in consideration of such evidence being the balance of probability. In the case of deleting what is shown on the Definitive Map, the evidence must be new, of sufficient substance to displace the presumption that the Definitive Map is correct and must be cogent (DEFRA circular 1/09: Appendix 6 – Item 6 para 4.33).
56. There is no dispute that a public footpath from the coastal path (BB10) to the shore existed in 1952 and the application is not seeking to delete BB40 from the Definitive Map so that no public right of way exists at all. What the application claims (in addition to the second ground) is that the legal line of BB40 as plotted on the 1952 Definitive Map was made in error and should be recorded along a different line ie the Map and Statement requires modification. Very clear evidence is required to show that an error was made. In *Leicestershire CC v SSEFRA 2002* (Appendix 5 – Item 5 para 4.20), which related to an application to modify the Definitive Map to show a path running along a different line, it was stated “if an inspector is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive ... The presumption is against change, rather than the other way around”.
57. The line of BB40 as plotted on the 1952 Definitive Map is shown by a green line on the current OS Master Map data with 2012 image at Appendix 8 - Item 1.
58. The 1952 Definitive Map used a 1947 Ordnance Survey base map. It records BB40 heading down the coastal slope to the western corner of a building and then following a dashed line heading west to the beach. There are no other buildings, structures or landmarks shown on the map which can be used as reference points and it is not known with any certainty whether, at the time of the surveys for the Definitive Map (circa. 1951), any existed, although the earliest historic photos of the area showing beach huts and other buildings have been referred to as being from the 1930s. The 1946 aerial image (Appendix 8 – Item 2) is of insufficient clarity to confirm the location of any particular structures or the route of BB40.
59. The Definitive Statement for BB40 (Appendix 8 - Item 1) is brief in its description of the path and its route and makes no reference to any land marks or structures which may have existed. It merely confirms that the path started on BB10 and led to the beach. However, the NPCA49 survey records refer to the path following a rough gravel path in a westerly direction of 70 yards. This is approximately the distance of BB40 as recorded on the Definitive Map (73 yards).
60. The NPCA49 survey records and the parish council meeting minutes confirm that the correct procedures were adhered to under the regime provided by that act. The recording of BB40 as plotted on the 1952 Definitive Map survived the

statutory opportunity to challenge it and the principle of regularity therefore applies ie the Definitive Map is correct in what it shows.

61. The majority of user evidence with regard to the upper section of the recorded route of BB40 (ie from BB10 to the building shown on the 1952 Definitive Map) suggests that a route never existed in this location – comments made were that there was no recollection of a path in this area, the cliff was too steep for a path to exist and the land consisted of a rockery in a private garden. However, one witness (Mr Roberts) who has clear knowledge of the area from the mid-1950s and later in a professional capacity (coastguard officer based at the Forelands Coastguard Station) was able to confirm that the path did run in this general direction prior to a drain being installed in the late 1950s/early 1960s straight down the coastal slope from Forelands Drive car park. After the drain was installed the public started using a path along ground which had been cleared for the installation of the drain. The garden comprising a rockery bounded by the white picket fence (photograph 6, Appendix 8 – item 3) is likely to have been extended across the legal line of BB40 once the path straight down from the car park had been established. However, this has not been used by the public for many decades and has not been maintained as BB40 by the council. The alternative route (ABC and FB as shown on the plan at Appendix 2 – Item 2) has been treated as and maintained by the council as the public right of way and routes along these lines are not believed to be disputed by the landowner.
62. With regard to the lower section of the recorded route of BB40 (ie from the building shown on the 1952 Definitive Map to the shore), user evidence was inconsistent as to the route of BB40 as was recollection of the exact location of buildings/land in the area ie boat shed, tea hut, cafe/rose gardens and beach huts. However, there is evidence (particularly Betteridge and Chatfield-Moore) that two paths existed, one either side of the area of land known as Butler's rose garden and café garden and this is supported by the plan included in the planning application for the permanent toilets (Appendix 8 – Item 4) and the 1968 and 1971 aerial photographs (Appendix 8 – Item 2) which show that these paths existed at that time. Further, the evidence of Mr Roberts confirms he used the path heading east-west in front of the café garden (and later the plinth) as shown on the planning application plan. The six user witnesses who were incorrect as to the position of the café, café garden and rose garden were the ones that were of the view that BB40 followed a line across land which later became the toilets. Photograph 6 (Appendix 8 – Item 3) shows a strip of land which existed in front of the southern fence of the tea gardens and the rear walls of the row of beach huts fronting the beach and it is along this land where BB40 existed.
63. The 1965 plan of the toilets is considered to be a key document as when considered with the user evidence, photograph 6 and the 1968/1971 aerial images it confirms, on the balance of probability, that when the area of land formerly consisting of Butler's rose garden and café garden was sold to the Isle of Wight Rural District Council for the purposes of constructing the toilets, there were no paths across this area but two paths did exist, one between the tea hut and the land that was sold for the toilets and a second on a strip of land to the south of the land sold off for the toilets and north of a row of beach huts fronting

the beach. This second path is considered to follow the legal line of BB40 in accordance with the Definitive Map.

64. Photographs 9, 10 and 13 are evidence that BB40 was still walkable along its definitive line in front of the plinth at the time of the permanent toilets. User evidence confirms that although this route was not used, the area was open and it would have been possible to walk along it until a beach hut was placed in front of the plinth (and later fencing of grounds around it) at some point after placement of the portaloos.
65. There is no new, sufficient or cogent evidence capable to show that an error was made in the recording of BB40 and that its legal route runs along a different line. In fact the evidence indicates that it was recorded correctly ie along the black dashed line plotted on the 1947 OS base map which line was south of the rose and café gardens (later becoming the plinth and toilets) and north of the row of beach huts fronting the beach. Following removal of the beach huts the legal line of BB40 was unobstructed until a beach hut and fence was erected shortly after the introduction of the portaloos in 1987. However, this obstruction did not (and does not) affect the legal line and status of the path nor has it ceased to exist because it has not been used as the maxim “once a highway, always a highway” applies.
66. In conclusion of the first ground, the Definitive Map is deemed to be an accurate record of the route of Public Footpath BB40. As there is no doubt as to its existence the correct way for the council to amend the Definitive Map so that Public Footpath BB40 is realigned is to consider and propose a Public Path Order pursuant to HA80. A modification order under section 53 WCA81 is not the correct mechanism to make such changes as confirmed in R v SSE ex parte Kent County Council 2605/93 (Appendix 5 – Item 5, paras 4.21 and 4.22).

EVALUATION OF EVIDENCE AND CONCLUSION: SECOND GROUND

Statutory dedication pursuant to section 31 Highways Act 1980

67. To come to a conclusion of deemed dedication under section 31 HA80 the following matters need to be considered:
 - (a) When was the use brought into question?
 - (b) Whether there is a “way over land” (and whether the “way” is of such a character that use of it by the public could not give rise at common law to any presumption of dedication)?
 - (c) Whether the “public” used the claimed path for a full 20 year period?
 - (d) Whether such use was “as of right”?
 - (e) Whether such use was “uninterrupted”?
 - (f) Whether there is sufficient evidence to show that there was “no intention by landowners to dedicate”?

68. All these steps are matters of fact to be decided according to the evidence. For guidance as to interpretation of section 31, see Consistency Guidelines, Appendix 5 – Item 3.

Bringing into question (a) (CG 5.4 to 6)

69. The means of bringing the claimed right into question must be sufficient to make it likely at least some users will be made aware the owner has challenged their right to use the path. The statutory period is a full 20 years calculated back from the date of bringing into question.
70. User evidence shows that the right was challenged in late May, early June 2012 when the lessees of The Beach Hut erected notices on both sides of the plinth and within other areas of the café grounds to the effect that no public right of way existed. Photographs of the notices are at Appendix 8 – Item 8. Accordingly, the statutory period for the purposes of deemed dedication is 1992 to 2012.

A way over land and its character (b) (CG 5.65 to 67)

71. The claimed paths are considered to be a way over land in the sense that there is land in existence and its character would be capable of dedication at common law.

Public use for a twenty year period (c) (CG 5.12 to 20)

72. The public means everyone but it is accepted that many rights of way only have local purpose, so user witnesses representing the public may be from the local community only.
73. Actual acts of use for a period of 20 years are required; it is not sufficient for users to be aware a route was once used, or could be used. Use of a way by different persons, each for periods of less than 20 years, will suffice, if taken together they demonstrate use over a continuous period of twenty years or more. Use should have been by a sufficient number of people to show that it was use by “the public”. It must bring home to a landowner that a right is being asserted against him and he had an opportunity of resistance and interruption. Usage, which is of such trivial and sporadic nature that it would not be likely to make a landowner aware of the potential claim of a right fails the test.
74. Evidence of use by family, friends, lessees or employees of a landowner should be given less weight, since they can be thought of as having the consent of the landowner, and are not representative of the public at large. In this case less weight should be applied to: (i) the six witnesses who indicated that they were friends with the former owner of the freehold, Mr Preston, (ii) nine additional witnesses who have indicated that they are not willing to attend a public inquiry, (iii) two additional witnesses who failed to confirm if they wished to attend a public inquiry, (iv) one witness (Robinson) who confirmed he was a beach hut owner. Further, the evidence of one user witness (Harrop) should be disregarded as she was a lessee of the café during her use and as such use

was not “as of right” (see below). One other witness (Roberts) confirms no use of the claimed paths at all. The applicant contends (Appendix 9, Item 1) that statements from individuals who are not willing to attend a public inquiry due to being elderly should not be discounted. However, it is not the case that such evidence has been discounted. Where a person has indicated that they are not prepared to attend a public inquiry to confirm their evidence, the evidence is generally assessed to have less weight than a person who is prepared to attend as it is unable to be questioned by an Inspector or the opposing party to probe its accuracy or completeness.

75. In this case, the current lessees of The Beach Hut consider that the user witnesses are not representative of the public as they have been told that they are all friends and family of the lead witness and her two sisters. However, the interview process conducted by the council did not reveal any collusion between the user witnesses and independent evidence has considered to have been provided. It should be borne in mind that when an applicant collects user evidence that there will be a degree of obtaining this from persons that are known to him/her.
76. With regard to 20 years’ use, the user witness bar chart (Tables 1 and 2, Appendix 6 – Item 3) confirm the periods of use across the plinth. Table 1 shows the period of use taking the most direct and diagonal route following removal of the portaloos in 1998. Table 2 shows that there has been no use along the front and eastern sides of the plinth since 1998 and that such use only occurred for the first six years of the 20 year period counting back from the time use has been brought into question (2012).
77. In respect of the route diagonally across the plinth this fails the fundamental 20 year test laid out in section 31. When counting back from the brought into question date there is only evidence of 14 years’ use ie from 1998 (when the portaloos were removed) until 2012. Use of this route prior to 1998 was physically impossible due to the portaloos being present over the line of the route.
78. The 20 year period must be a period which ends with the public right being brought into question. It is not enough to show that at some time in the past there had been upwards of 20 years’ public use as of right if the way then fell into disuse and the public right was never brought into question before the way fell into disuse. In *De Rothschild v Buckinghamshire CC* a statutory claim failed where the way had been enjoyed without interruption from 1914 to 1940, but the public right was not called into question until 1948, and the way had been unused from 1940 to 1947. The seven year gap was caused by the land being requisitioned, but the requisitioning did not itself “bring into question” the public right of passage. Accordingly, the routes around the outskirts of the plinth also fail the 20 year test set out in section 31 HA80, as although there is evidence of use by the public of these paths for over 20 years (1965 to 1998) there is no evidence of use for 14 years counting back from the time when the public’s right was brought into question (2012).
79. Is there an earlier event of the right being brought into question? The removal of the portaloos in 1998 cannot be classed an event that would have made

users aware that their right to use the routes around the former toilets was being challenged as such routes were still available for use but due to a more convenient route becoming available such routes fell into immediate disuse.

80. The leading case to support the above conclusion ie that the requirement of 20 years' use fails is R v SoS ex parte William Greaves Blake 1983. In this case it was argued that a period of use of 20 years in total over two separate routes could effectively be added to together in order to comply with the requirement and the case of Davis v Whitby 1974 was submitted in support. However, Davis v Whitby was not an approach that could be applied to section 31 HA80 as it concerned a private right of way. The Blake case effectively provides that where use of a path for say ten years along one line ends and subsequently a route along a slightly different line begins and continues for a further ten years, this will not be sufficient to satisfy the requirement for 20 years' use under section 31 HA80.
81. The applicant contends (Appendix 9, item 1) that after the portaloos were removed the path along the southern edge of the plinth remained open and in continuous use by (1) walking via of and using the public stand pipe for water situated on the south east corner of the plinth; (2) avoiding tables and chairs placed on the plinth by the previous tenants; (3) using the edge guard rail for support (eg by the elderly or infirmed); (4) large groups would spread out and occupy both the diagonal and edge route. However, other than the applicant, user witness evidence did not reveal the existence of or use of the water stand pipe. Further, no evidence of use of the southern edge of the plinth to avoid table and chairs or for support was mentioned by witnesses. In respect of groups, this is considered to have been a very rare occurrence and if and when it did occur it would have meant at least some members of a group walking at right angles in an unnatural manner.

Use as of right (d)

82. Use as of right means use without force, secrecy or permission.
83. In this case use is considered to be generally "as of right" although less weight should be applied to the evidence of users who confirmed that they were friends with or lessees of the Preston family (previous freeholders of the land) as such use could be regarded as being with implied permission.

Without interruption (e)

84. In order to constitute an interruption there must be some physical and actual interference which stops the public use for a time. The custom of locking gates to exclude the public on one day a year is a common example. There is no evidence of such interruptions in this case.

No intention to dedicate (f)

85. Sufficient evidence to negate presumption of dedication requires evidence of overt acts by the landowners during the statutory period directed at users of the way to make known the intention not to dedicate. Actions and wording of

notices must be inconsistent with the existence of a public right of way. Section 31(5) HA80 provides for notice to be given to the local authority where notices are torn down, section 31(6) provides a method of negating intention by depositing a plan and statement with the local authority.

86. None of the user witnesses explained circumstances which could be considered as “no intention to dedicate” for the purposes of section 31 HA80. However, one landowner (Mr Richardson on behalf of the Forelands Drive Association) explained that he observed the previous Beach Hut lessee (Mr Haynes) asking people not to cross the grounds and plinth or granting them permission to do so. A second landowner (Mrs Clarke) also referred to Mr Haynes complaining about people taking their dogs over the plinth and using it as a short-cut.

Conclusion

87. It is considered that the application fails to satisfy the necessary tests as laid out in section 31 HA80 to support a conclusion of deemed dedication because the requirement of a full 20 year period of use along at least one of the routes across the plinth is not satisfied.

Dedication at common law

88. Dedication at common law can be express or implied. The burden of proof is upon the person claiming the right to show that an owner actually decided to dedicate over his land a public right of way and that there was acceptance by the public. With express dedication the owner will have done something to make his intention clear, but in the case of implied dedication, intention may be difficult to prove.
89. The onus is on the claimant to prove intention from the evidence and in the case of implied dedication this is usually user evidence, which also serves to prove acceptance of the dedication. There is no minimum period or level of use required. However, use by the public must have gone on openly, uninterrupted, as of right and for so long that dedication can reasonably be inferred; the evidence must show use to have been so notorious that the landowner must have been aware of it, acquiesced in it and therefore intended to dedicate.
90. In this case, the user evidence is of too low a level to reasonably draw the inference that the owners were aware a public right of way was being asserted which should be resisted, to the extent that their lack of resistance is evidence of an intention to dedicate. This is especially the case when deducting from total number of witnesses (36) those who use may not be as of right (up to seven), those whose evidence should be disregarded (two) and those whose evidence should be given less weight (11), leaving only 16 user witnesses as of right who would be prepared to attend a public inquiry. The applicant contends (Appendix 9, Item 1) that statements from individuals who are not willing to attend a public inquiry due to being elderly should not be discounted. However, it is not the case that such evidence has been discounted. Where a person has indicated that they are not prepared to attend a public inquiry to confirm their evidence, the evidence is assessed to have less weight than a person who is

prepared to attend as it is unable to be questioned by an inspector or the opposing party to probe its accuracy or completeness.

91. As mentioned above in order for presumed dedication at common law to succeed there must be evidence that the landowner was aware of public use and decided and intended to dedicate a path. The user evidence in this case is insufficient for common law purposes and no other evidence has been provided by the applicant or user witnesses to prove the necessary intention. There are also a number of factors and surrounding circumstances which should be considered:
92. The first known freehold owner of the land subject to the claimed paths is Mr Preston. His two beach hut maps (Appendix 8 - Item 2) show the path straight down to the sea wall marked "footpath to beach". This is considered evidence of where he considered the public route to the beach to be before and after the toilets were introduced. If he had intended to dedicate a public footpath elsewhere then it follows that he would have marked it on those maps.
93. Mr Preston owned the land upon which the toilets were built prior to selling it to the Isle of Wight Rural District Council in 1965 (Appendix 4 – Item 5(ii)). The council subsequently submitted a planning application for construction of the toilets and the plan contained in that application (Appendix 8 – Item 4) confirms the layout. The toilets were strategically placed so that the existing paths around the plinth (including BB40 to the south of it) were not affected by it. It is not the case that the plinth was constructed with the intention of any part of it forming part of BB40. The purpose of the plinth was to provide a base for the toilets and separate concrete surfaced paths solely for the purposes of gaining access to the ladies and gents from the main paths that were already in existence. It does not follow that all land owned by a local authority over which the public walk to gain access for a specific purpose amounts to a public right of way that should be recorded on a Definitive Map. Such paths, which are common-place on local authority land and premises, are allowed to be used by way of licence ie paths to and within parks, leisure centres, crematoriums, offices, etc.
94. Other evidence that the council did not intend to dedicate any part of the plinth as a public right of way is the result of the Local Land Charges search dated 17 January 2003 and the council's letter to Glanvilles Solicitors dated 23 April 2003 (Appendix 8 – Item 6) both of which confirm the legal route of BB40 being to the south of the plinth.
95. There is ambiguity as to the legal owner of the freehold title to the plinth following removal of the toilets in 1998. The Report on Title (Appendix 8 – Item 7) confirms that up until at least 2008 the Isle of Wight Council considered itself to be the owner of the plinth. The council could not have been aware of the claimed use during the period from 1998 (when the toilets were removed) until 2008 especially as the established and obvious path for the public since construction of the sea wall in the 1980s was straight down the path to the sea wall and either down the steps off the sea wall or walking westwards along the top of the sea wall to the slope to the shore. This is supported by (i) the 64 statements (Appendix 7 – Item 6) supplied by the Forelands Drive Association

and Mr and Mrs Guy confirming use of that route by the public, and (ii) the council constructed the concrete steps/path (ABC & FB on Plan at Appendix 2 – Item 2), timber steps (B) and the concrete path straight down to the sea wall ie this is the route that has been considered and maintained by the council as the public right of way to the shore. The applicant contends (Appendix 9, Item 1) that the Forelands Drive Association is not the true owner of the plinth on the basis that Mr Preston could not have sold the plinth to it in 2003 if he had already sold it to the Isle of Wight Rural District Council (now Isle of Wight Council) in 1965 and therefore their views are irrelevant and should be disregarded. The circumstances surrounding the freehold of the plinth being included in the Forelands Drive Association's title is unknown ie it is unclear whether an error was made at the time of the sale in 2003 by the parties involved (or their solicitors) or by the Land Registry itself. The Land Registry has been made aware of the error but has advised that this would need to be resolved by way of challenge by the Isle of Wight Council. Accordingly, unless and until a challenge is made (and is ultimately successful) the plinth will be considered to be included in the title of the Forelands Drive Association on the basis that registered land is guaranteed by the state. For the purposes of determination of this application the association is considered to have been the registered proprietors of the plinth since 2003.

96. During ownership by the Forelands Drive Association (2003 onwards) the trustees thereof did not occupy the land and could not have been aware of the claimed use - they have for the most part of their ownership leased the café. The landowner evidence shows that they considered the plinth to be a private area by providing consents to previous café owners to use it, putting up fences on it and letting it out for functions (Appendix 7 – Items 1, 2).
97. If the various lessees of the café were aware of the claimed use and allowed it to occur then this cannot amount to presumed dedication at common law as an intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication ie the freeholder.
98. As mentioned above, the level of use required to satisfy the requirement of common law dedication is not considered to have been met. Only the freehold owners would have been able to dedicate. The freeholders could not have been aware of the use or if they were then it would have been impossible for them to differentiate between those persons using the routes across the plinth as a through route (ie a public footpath) and those using it to gain access to the toilets and/or the café.
99. Due to the above factors it is considered that the application fails to satisfy the requirements to support a conclusion of common law dedication.

DETERMINATION OF THE APPLICATION

100. First ground: There is no new, sufficient or cogent evidence capable to show that an error was made in the recording of BB40 on the 1952 Definitive Map and therefore no discovery of evidence that the Definitive Map and Statement require modification in accordance with s53(c)(iii) WCA81.

101. Second ground: It is concluded that the claimed route is not reasonably alleged to exist as a public right of way on the basis of deemed dedication under section 31 HA80 or common law due to the necessary tests failing in respect of the claimed routes over the plinth.

LEGAL IMPLICATIONS

102. In the event of an order being made and if no objections are received during the six week statutory advertisement period, the council may itself confirm the order as unopposed. If any objection is registered during the statutory period, or if the council considers the order requires any modification, it must be referred to the secretary of state. An independent inspector will be appointed by the Planning Inspectorate to hear the objections and decide whether the order should be confirmed, with or without modification. A public inquiry may be held in modification order cases as there is witness evidence to be heard.

103. The council bears the cost of arranging the inquiry and each side bears their own costs of appearing unless there are exceptional circumstances. An order becomes legally effective only if and when it is confirmed. The decision of the inspector concludes the modification order process.

104. In the event of an order not being made, the applicant may appeal to the secretary of state, who may direct the council to advertise an order which then follows the same procedure described above.

105. The validity of a confirmed modification order can be questioned by application to the High Court during a six week period from the date of publication of confirmation. This is a form of judicial review of the procedure only, not an opportunity to further challenge the evidence on which the order is based. Costs of litigation are awarded in the usual way according to the outcome of the application.

106. Public footpaths and bridleways dedicated after 16 December 1949 are not maintainable at public expense unless dedicated as part of a public path order or agreement or other formal adoption procedure under the HA80 or its predecessor.

IMPLICATIONS UNDER THE HUMAN RIGHTS ACT

107. In respect of Article 6 (right to a fair trial) of the European Convention on Human Rights, it is considered that by submission of the report to the applicant and to landowners for comments and by advertisement of an order with the opportunity of independent determination in the event of objection, the council has met the requirements of this article.

108. In respect of Article 8 (respect for private and family life) and Article 1 of the First Protocol (protection of property), the impacts that the modification order might have on the owners of property affected by any order which may be made and on owners of other property in the area and users of the paths before and after modification have been carefully considered. While there may be

some interference with the rights of owners and occupiers if a modification order is confirmed, it is considered proportional to the legitimate aim of the council and in the public interest.

IMPLICATIONS UNDER THE CRIME AND DISORDER ACT 1998

109. The council has a duty to make an order to modify the Definitive Map and Statement or not according to its conclusions on the evidence relating to the dedication of highways. Should a right of way be confirmed, any powers that may be available to the council with respect to public paths and byways for the purposes of reducing crime and disorder could be considered.

FINANCIAL IMPLICATIONS

110. Normal costs incurred in processing this application and resulting from adding the path to the Definitive Map and Statement, should this be the outcome, will be contained within current Rights of Way revenue budgets.

RISK MANAGEMENT

111. In the unlikely event of a High Court application costs follow the decision. Such applications normally involve high litigation costs and should the council be found at fault and costs be awarded against it, the council will be liable for those costs.

112. In the light of the legal and financial implications set out in paragraphs 102 to 110, the committee in making its decision is recommended to carefully follow the legal guidance set out in paragraphs 17 to 25 above and in all parts of Appendix 5. The committee should consider the material evidence and apply the legal tests which are outlined in this report.

113. The consequences of Options 1 to 4 are set out in paragraphs 102 to 112 above. These consequences are all part of the normal statutory procedures provided by WCA81 for reviewing the Definitive Map and Statement.

OPTIONS

114. The panel has a statutory duty to determine the application by making a decision. Depending on its conclusions on the evidence as to whether a presumption of dedication has been raised, or what public rights exist or are reasonably alleged to exist, if any, the panel will decide on one of the following options.

Option 1

115. Make an order on ground 1: that the Definitive Map and Statement require modification in accordance with section 53(c)(iii) WCA81

Option 2

116. Make an order on ground 2: to add the path described in the application to the Definitive Map and Statement.

Option 3

117. Make an order to modify the Definitive Map and Statement in some other way from Options 1 and 2.

Option 4

118. Reject the application by making no order but recommend that as soon as practicably possible the council investigates, consults on and thereafter makes (with landowner consent) a HA80 Public Path Diversion Order providing for a new alignment of Public Footpath BB40.

RECOMMENDATION

Option 4 – In view of the conclusions at paragraphs 100 and 101 it is recommended that the application should be rejected and no order should be made but it is recommended that as soon as practicably possible the council consults on and thereafter makes (with landowner consent) a Public Path Diversion Order pursuant to the Highways Act 1980 providing for a new alignment of Public Footpath BB40.

APPENDICES

[Appendix 1: Application](#)

1. Application.

[Appendix 2: Site Maps and photographs](#)

1. Definitive Map 2000 extract.
2. Current Ordnance Survey Master Map with 2012 aerial image.
3. Site photographs 1 – 14.

[Appendix 3: Consultation](#)

1. Bembridge Parish Council letter 21 June 2016.
2. Councillor Gordon Kendall email 16 June 2016.

[Appendix 4: Land ownership](#)

1. Land Registry official copies IW50901, conveyance 12 July 1948, transfer 17 April 2003.
2. Land Registry official copies IW69092.
3. Land Registry official copies IW78319.

4. Land Registry official copies IW57262.
5. Report on title, plans and conveyance dated 16 July 1965.

[Appendix 5: Legal background](#)

1. Legal background and guidance.
2. Quasi-judicial role of the panel.
3. Planning Inspectorate Definitive Map Consistency Guidelines, Section 5, pages 4 to 16.
4. Section 31 Highways Act 1980.
5. Planning Inspectorate Definitive Map Consistency Guidelines, Section 4, pages 7 to 9.
6. DEFRA Circular 1/09, pages 18 to 20.

[Appendix 6: User evidence](#)

1. User evidence forms.
2. User witness interview notes.
3. User witness use table – summary of evidence.
4. User witness bar charts.
5. Additional user evidence information.

[Appendix 7: Landowner evidence](#)

1. Interview note – Mr Richardson.
2. Mr and Mrs Haynes letter dated 3 February 2009.
3. Forelands Drive Association statement dated 10 December 2015.
4. Interview note – Mrs Clarke.
5. Mr and Mrs Guy statement 24 February 2016.
6. Landowner witness statements.

[Appendix 8: Documentary evidence](#)

1. Definitive map evidence.
2. Historic maps and aerial images.
3. Historic photographs 1 to 20.
4. Planning documentation.
5. Bembridge Parish Council meeting minutes.
6. Local search and legal query documents 2003.
7. Council's report on title.
8. 2012 notices photographs.

[Appendix 9: Applicant and landowner comments on draft report](#)

1. Applicant's comments dated 28 September, 10 October and 19 October 2016.
2. Forelands Drive Association's comments dated 24 October 2016.

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WENDY PERERA
Head of Place

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