

## Committee report

Committee	<b>APPEALS (SUB COMMITTEE)</b>
Date	<b>7 MARCH 2018 AT 10.00AM</b>
Title	<b>APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER: PUBLIC FOOTPATH NT46, CASTLEHAVEN, NITON UNDERCLIFF, VENTNOR, ISLE OF WIGHT</b>
Report Author	<b>DARREL CLARKE - RIGHTS OF WAY MANAGER</b>

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### PURPOSE

1. This report sets out evidence to determine an application under Section 53 of the Wildlife and Countryside Act 1981 (WCA81) for an order to modify the definitive map and statement by deleting a section of public footpath NT46 (NT46) at Castlehaven, Niton Undercliff, Ventnor, Isle of Wight and/or varying the particulars contained in the definitive map and statement in respect of that path.

### 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 Isle of Wight Council (Council) Corporate Plan 2017 to 2020, which contains detailed strategies and plans supporting the council's vision for the Isle of Wight to be an inspiring place in which to grow up, work, live and visit.

### THE APPLICATION

3. The applicants are Mr Leslie Richard Thorne and Mrs Lynda Elizabeth Thorne of Beach Cottage, Castlehaven Lane, Niton Undercliff, Ventnor, Isle of Wight PO38 2ND. Their application dated 29 October 2013 submits supporting evidence in the form of photographs and maps and reference to all relevant documentation in their previous application dated 7 December 2009 (Appendix 1, application items 1 to 10). Following submission of the application further evidence and information has been supplied by the applicants which is included in Applicants' Evidence (Appendix 6, items 1 to 5). *[Note following submission of the application the applicants requested that the plans at application items 5 and 6 be omitted and replaced with the plan at application item 10.]*

### LOCATION, SITE CHARACTERISTICS, GENERAL HISTORY AND BACKGROUND

4. Site maps and photographs are in Appendix 2. Item 1: Location map; Item 2: Definitive map 1952; Item 3: Definitive map 1952 (enlarged); Item 4: Definitive map 2000; Item 5: Definitive statement; Item 6: Site map (Ordnance Survey (OS) master map (current) with 2015 aerial imagery) annotated to identify features relevant to the application including council's representation of the route of NT46 as per the definitive map; Item 7: Site photographs 1 to 6 (2017) annotated to correspond with the site map (approximately) and being the council's representation of the route of NT46 as per the definitive map. NT46

starts at a small privately owned clearing generally used as a parking area towards the southern end of Castlehaven Lane at its junction with public footpaths NT38 and NT47 (closed) and public bridleway NT42 (point A on the site map). It heads south east along Castlehaven Lane to the harbour (point B) and then heads west to the eastern end of a sea wall forming part of the applicants' property, Beach Cottage (point C). It then runs along the top of that sea wall to the western end of it (point D). Subject to a decision made at a council committee meeting on 28 February 2011 (see paragraph 7 below), from the western end of the sea wall (point D) the definitive map shows the path running across coastal protection rocks and/or on the beach and then heading up the coastal slope in a northwest direction to rejoin NT38 (Point E). The section of NT46 between the end of Castlehaven Lane and the western end of the sea wall is the section subject to this application ie section B-C-D. The route of NT46 shown on the photos is the council's representation of the definitive map.

5. The section of NT46 between the eastern end of the sea wall (point C) and its junction with NT38 at the top of the coastal slope (point E) is currently closed to the public pursuant to a temporary traffic regulation order on the grounds of unsafe conditions due to damage to the upper structure and surface of the sea wall, the presence of coastal protection rocks and erosion of the coastal slope. This temporary closure does not affect the legal status of the relevant section of NT46 as a public footpath recorded on the definitive map, subject to the committee meeting decision dated 28 February 2011 (see paragraph 7 below).
6. NT46 was recorded on the first definitive map and statement for the Isle of Wight in 1952 (Appendix 2, Items 2 and 3) and has not been subject to any legal changes since that time subject to the committee meeting decision dated 28 February 2011 (see paragraph 7 below).
7. The applicants made a similar application in 2009 which was determined by the council at a committee meeting held on 28 February 2011, the decision being that the application be rejected but that a modification order be made before the next review and consolidation of the definitive map to remove the section of NT46 between the western end of the sea wall (point D on the site map, approximately) and the base of the coastal slope and to modify the definitive statement to remove reference to a path running along the western boundary of Beach Cottage, determined to have been recorded in error. The applicants lodged an appeal against that decision with the Planning Inspectorate on 4 June 2011. Pursuant to a decision made by the Planning Inspectorate dated 10 February 2012 (Appendix 1, application item 1) the appeal was dismissed.
8. A copy of the relevant page of the current definitive map (2000) is at Appendix 2, item 4 but this does not record the amendment to be made by modification order pursuant to the committee meeting decision on 28 February 2011.
9. The application claims amendment to the definitive statement by deleting reference to NT46 running along the top of the sea wall (between points C and D on the site map, approximately). Further the application claims to vary the particulars relating to NT46 to provide that it runs along the foreshore from a point south of Castlehaven Lane and running 35 metres west, although the applicants contend that this is the route already recorded in the definitive map and statement. The map drawn by the applicants at Appendix 1, item 10 is a visual representation of their claim. In summary the claim is that NT46 runs along the beach in front of the village green and the sea wall. The application includes evidence to support this claim and the council is under a duty to investigate this evidence and determine whether to make an order.

## CONSULTATION

10. Niton and Whitwell Parish Council is the only statutory consultee. A copy of its response is at Appendix 3, item 2.
11. The present elected member for the area is Councillor David Stewart. Councillor John Hobart is the Cabinet member for environment and heritage. Both have been consulted. Their responses are at Appendix 3, Items 3 and 4 respectively.
12. The landowners directly affected by the application are the applicants (Land Registry title no IW51889 - Appendix 4, item 1).
13. The following landowners are considered to be indirectly affected by the application:
  - (i) The Queen's Most Excellent Majesty In Right of Her Crown (the Crown Estate) which holds the freehold title to the foreshore (Land Registry title no IW66194 – Appendix 4, item 2) and may also be deemed to own the land beneath the coastal protection boulders fronting the sea wall and village green in accordance with a Crown Estate briefing note: shoreline management plans – sea level rise and coastal erosion (Appendix 4, item 3).
  - (ii) The Isle of Wight Council which holds the leasehold title to the foreshore referred to above (Land Registry title no IW44722 – Appendix 4, item 2).
  - (iii) Mr. Simon Rodley and Mrs. Helen Rodley, owners of Castlehaven caravan park (Land Registry title no's IW60377 and IW61332 – Appendix 4, items 4 and 5).
  - (iv) Niton and Whitwell Parish Council which is deemed to be the owner of Castlehaven Village Green pursuant to a decision made on 22 May 1981 under section 8(3) of the Commons Registration Act 1965 – Appendix 4, item 6.

The above have all been consulted on the application. Replies from Tricia Stillman on behalf of the Isle of Wight Council and Niton and Whitwell Parish Council are provided at Appendix 3, items 1 and 2 respectively. No other replies were received. Mr. Rodley has provided information considered to be evidence which is at Appendix 7, item 5 (paragraph 36 below).

14. 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 and the council's replies are copied at Appendix 9, items 1 to 8.
15. If an order is made, there is a statutory advertisement period of six weeks during which anyone may make representations or objections.

## LEGAL BACKGROUND

16. 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).
17. The subsection relevant to this application is 53(3)(c)(iii). This states that a modification order may be made where evidence has been discovered by a local authority which, when considered with all other relevant evidence available to them, shows that there is no public right of way over land shown in the map and statement as a highway of any description, or any particulars contained in the map and statement require modification.
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. The standard of proof when considering evidence for modifying the definitive map and statement is the balance of probability.

19. Definitive maps and statements were originally prepared by a statutory regime provided by the National Parks and Access to the Countryside Act 1949 (NPAC49). Surveying authorities (county councils) were required to draft a map and statement of all public rights of way in their area which in their opinion existed or were reasonably alleged to subsist. Parish and district councils were required to provide information on paths in their area and to hold a meeting to consider the information gathered before submitting it to the surveying authority. There were procedures for hearing and determining objections at both the draft and provisional stages before the final map and statement were published. At the draft, provisional and final stages, validity of the procedure could be challenged by application to the High Court within six weeks of the notice of publication of the draft, provisional or final map respectively. Other than this, the map and statement cannot be questioned in any legal proceedings whatsoever. Under WCA81 the map and statement is now reviewed by individual modification orders, to which a similar provision applies.
20. According to the principle of regularity it is assumed the proper procedures of a statutory regime have been carried out, in this case the NPAC49 as referred to above. This means that for any route shown on a definitive map it is assumed there was, at the time it was added to the map, evidence it was a right of way and moreover this evidence survived a statutory opportunity to challenge it. Therefore when considering whether a right of way shown on a definitive map exists, case law has established that the initial presumption, known as the 'Trevelyan presumption', is that the map is correct in what it shows (Phillips LJ in *Trevelyan v SoS for the Environment* 2001).
21. The advice of the Department of the Environment (Defra) is that everything shown on definitive maps and statements will have gone through a process of challenge and confirmation and that such documents are presumed correct unless there is very clear evidence that an error was made. The evidence needed to delete a right of way from a definitive map needs to fulfil all of the following stringent requirements (Rights of Way Circular 1/09 paras 4.30 to 4.35):
  - (i) The evidence must be new – an order to remove a right of way cannot be founded simply on re-examination of evidence known at the time the way was first shown on the map.
  - (ii) The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.
  - (iii) The evidence must be cogent.
22. It is for the applicant to prove that the definitive map requires amendment due to discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be deleted. It is not for a local authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete the way.
23. For the purposes of section 53 WCA81 when the definitive map and statement itself is under review, a conflict between the two documents which cannot be resolved by reasonably tolerant interpretation is evidence there has been a degree of error in their preparation. In this case there is no evidential presumption in favour of the map over the statement. To resolve the error, each document should be accorded the weight which analysis of the documents themselves and other relevant evidence, including evidence of the situation on the ground at the relevant date, appears appropriate. In this situation, what is required at review is a consideration of which route, or which other route (ie third possibility), on the balance of probability, is correct, in the light of all the relevant evidence, including the definitive map and statement (*R. (Norfolk CC) v SoS* 2005).

24. 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.
25. Guidance on determining modification applications (including information on the conclusive status of the definitive map and statement, deletions and conflict between the two) is at Appendix 5: item 1: Legal Background; Item 2: Guidance on the Quasi-Judicial Role of the Panel; Item 3: Paragraphs 4.30 to 4.35 of Rights of Way Circular 1/09 – Guidance for Local Authorities issued by Defra; Item 4: Paragraphs 4.18 to 4.23 of the Planning Inspectorate Definitive Map Order Consistency Guidelines issued to inspectors - ninth revision May 2015.

#### APPLICANT'S EVIDENCE

26. Evidence lodged with the application and additional evidence subsequently provided by the applicants is at Appendices 1 and 6. Appendix 1, application item 1: reference to all relevant documents relating to the applicants' first application dated 7 December 2009 (see paragraph 30, below); Item 2: Set of 12 photographs held by the council's Coastal Management Team and taken in 2004 and prior to the coastal protection works completed later that year; Item 3: Two copies of photograph 9 from the above with applicants' notes written thereon; Item 4: Copy photographs with note displayed at Niton Village Hall by Mr Adrian Eldridge; Items 5 and 6 have been superseded by Item 10. Item 7: Copy OS map 1946 upon which the applicants have marked features in the area; Items 8 and 9: Copy OS maps 2013 and 1946 upon which the applicants have marked thereon their interpretation of the route of NT46 in accordance with the definitive statement before and after the committee meeting decision dated 28 February 2011 in respect of their first application; Item 10: Copy OS map 1946 marked by the applicants and headed "Applicants' findings for the route the survey should have followed – the only route usable without climbing a wall or trespassing". Appendix 6, item 1: Note of interview with Mr Adrian Eldridge conducted by the council at the applicants' request with photographs and plan; Item 2: Additional Property Information Form; Item 3: Copy definition of "shore" provided by the applicants from a mid-twentieth century dictionary (Adhams); Item 4: Extract of transcript of planning hearing held on 16 December 2009 and copy emails of the applicants dated 10 and 17 March 2017 relating thereto; Item 5: Applicants' emails providing further information and evidence in connection with their application: 8 November, 5 December, and 16 December 2013; 16 December 2014; 14 July and 23 July 2016.
27. The applicants' evidence claims to show that the correct line of NT46 from the end of Castlehaven Lane heads west along the beach in front of both the village green and the sea wall (see applicants' map at Appendix 1, Item 10) as opposed to continuing to the end of Castlehaven Lane and then west along the top of the sea wall. The claim is that due to the definitive statement (Appendix 2, Item 5) recording NT46 as being down Castlehaven Lane "to shore" that upon reaching the shore it must have then continued west along the shore ie in front of both the village green and sea wall and that this is the route shown on the definitive map. A copy extract of a dictionary from the mid-20th century providing a definition of "shore" (in law) as land between high and low water marks has been provided to support this. Further, the applicants refer to the public footpath sign at the parking area at the top of NT46 which states "Public Footpath NT46: The Shore" as being further evidence that NT46 reaches the shore and then continues along it. The photographs taken by the council's Coastal Management Team in 2004 and prior to the coastal protection works completed later that year show the height of the sea wall in relation to the beach and are claimed to show that it would not have been possible to walk along the top of the sea wall then continue west due to the height difference. The applicants' emails at Appendix 6, item 5 contain further information and explanations supporting their claim.

28. The transcript of the planning hearing is said to contain evidence from a previous owner of Beach Cottage (Mr Wayman-Hayles, ownership circa 1972 to 1983) that the route along the sea wall was private. The additional property information form provided to the applicants at the time of their purchase of Beach Cottage and completed by the sellers of the property (Mr and Mrs Harvey, ownership circa 1983 to 2005) states that they were not aware of any rights of way across the property for access etc. (including public rights).
29. The evidence from Mr Eldridge is from 1951 onwards and supports the applicants' claim that NT46 was along the beach and not across the front of the green and along the top of the sea wall. He states that the area, including the sea wall, was private and all within the ownership of a Mr Haynes. At the eastern end of the sea wall there was a gate with a sign attached to it saying "private" and this is shown in a photograph from the late 1960s (Appendix 6, item 1, photograph 5). The public didn't use the sea wall as a route up to the cliff path (NT38). They used a route along the beach (seaward side of groynes in front of the sea wall) then up the coastal slope much further west than what is shown on the definitive map, nearer to the lighthouse. That route was tide dependent. He states that if the map does show NT46 along the top of the sea wall, then continuing at the western end would have been impossible due to a 12 foot drop to the beach, which has always existed. The definitive statement is incorrect as what is described is over private land and not used by the public. It was access for the Haynes family only. There was an element of public use (eg as an informal route to the café toilets in the western boundary of Beach Cottage) but this was trespass due to the private sign on the gate and the fact that Mr Haynes would challenge people that used it.
30. The applicants have referred to all relevant documentation relating to their 2009 application. The 2009 application was fully investigated by the council and its decision was not to make the order applied for. The applicants' appeal to the Planning Inspectorate against the council's decision was dismissed (Appendix 1, application item 1). The council's duty is limited to determining the current application on the basis of new evidence only (see paragraph 21 above) and is not required to reconsider or re-examine the first application, which was fully tested.

#### WITNESS EVIDENCE

31. At the applicants' request, Mr. Adrian Eldridge was interviewed (see summary at paragraph 29 above and full interview note and photographs at Appendix 6, item 1). As a result of notices put up by Niton and Whitwell Parish Council requesting historic information regarding NT46 and the village green it provided the council with names of potential witnesses: Mr. Peter Mogg, Mrs. Lynne Chessell, Mr. and Mrs. Foulsham and the Bowen family. These persons were interviewed / questioned by the council and notes are at Appendix 7, items 1, 2, 3 and 4 respectively. Mr. Simon Rodley, owner of Castlehaven Caravan Park has also been interviewed and a note of this meeting with photographs is at Appendix 7, item 5.
32. Mr. Mogg has recollection of the area from 1950s onwards. He recalls using the sea wall to gain access to a small plateau area (at the western end of the sea wall) and from there he and his friends occasionally scrambled down to the beach. From the western end of the sea wall he refers to using the path as described in the definitive statement i.e. along the western boundary of Beach Cottage by the stream to gain access to NT38. He recalls the owner (Mr. Haynes) getting cross with him if he used the footbridge to get to the café from that path but he had no objection to him using the path itself or the route along the sea wall. He does not recall any route along the beach and refers to the beach being very rough with big boulders and wooden groynes and stated that it would have been difficult to use the beach as a path without breaking an ankle.

33. Mrs. Chessell is Mr. Adrian Eldridge's sister and has recollection of the area from the late 1950s onwards. She recalls the route along the sea wall to a small green area at the western end of it where people sat for a bit more privacy than existed on the main green on the east side of Beach Cottage. It was possible to step down onto the beach from this area. Also from this area she recalls the path described in the definitive statement along the western boundary of Beach Cottage. About halfway up this path was a footbridge to gain access to Beach Cottage. She considered this to be a private access to the Cottage but the path itself and the route along the sea wall was used by everyone and treated as a public route. In her view this is the route of NT46. To the west of the small green area she recalls overgrown land but not a path. This land and the small green area were lost to erosion over time. There was no route along the shore due to there being very large rocks, boulders and groynes which were very difficult, virtually impossible, to walk along.
34. Mr. and Mrs. Foulsham. Mr. Foulsham owned Castlehaven Cottage (north of the caravan site) and has knowledge of the area from 1930s onwards. Mrs. Foulsham has known the area since 1966. Mrs. Foulsham answered council questions by email. They recall occasionally walking along the sea wall but state that it was rather pointless as the continuing path had fallen away in landslip. Mr. Foulsham recalls a concrete strip at the western end of the sea wall that didn't lead anywhere. People, mostly small boys, would scramble down to the beach in front of the mound from this concrete strip. Generally they do not consider there to be a path or a route used by the public. The public used the path through the caravan park to get to the lighthouse – going in front of Beach Cottage was not an option as it led nowhere.
35. Mr. Martin Bowen, Mrs. Pauline Filose and Mrs. Elizabeth Bowen (siblings): They have knowledge of the area from circa 1953 onwards. They remember being able to walk along the sea wall without any restriction and there was no gate and it was known as a public footpath. It was a very popular route which provided access to the beach or access up to the cliff path to the lighthouse. They recall a small green sitting area at the western end of the sea wall. From this area it was possible to get down to the beach. There was also a path up by the stream/western boundary of Beach Cottage but they tended not to use this as it was considered to be a private access way for people staying in the caravans at the top of that path. However, Mrs. Filose and Mrs. Bowen recall another route up to the cliff path from the small sitting area that was open to everyone to use. It was not generally possible to use the beach in front of the village green and the sea wall due to groynes and large rocks which were slippery. The outlet from the stream also made rocks slippery with algae. The beach here was very much a "no-go" area as it was quite treacherous. The beach in front of the mound which they accessed from the small green area at the western end of the sea wall was more accessible and you could explore rock pools etc. A number of photographs (taken between 1955 and 1957) were available at the meeting and subsequently copies were supplied to the council with dates and notes. Photographs 1, 2 and 3 are of the village green. Photographs 4, 5 and 10 show the small green area at the western end of the sea wall. Photographs 6, 7 and 11 show people on the sea wall. Photograph 8 (1955/56) is a view of what existed at that time of the western end of the sea wall and to the south of it. Photograph 9 (1955/56) is a view of what existed at that time at the western end of the sea wall. Photograph 12 is a postcard of Beach Cottage taken from the mound and dated 1936.
36. Mr. Simon Rodley purchased Castlehaven Caravan Park with his wife in 2005 but has knowledge of the area from the mid-1960s onwards. In the 1960s he recalls there being ground at the western end of the sea wall – it was dirt and grass with a number of wooden pylons being used to protect the area from sea damage. From that area there were a number of narrow runs/tracks terraced in the side of the cliff/coastal slope. He marked on a map (attached to the interview note) the approximate route that he and everyone used (red line). The green lines on the map show where a wall was built in the caravan park during the 1970s and the sea wall extension which the applicants have now incorporated

into their garden. When he purchased the caravan park in 2005 the public were using the route along the sea wall and then up by the stream to the caravan park, parallel to the western boundary of Beach Cottage. He considered this to be the route of NT46 and it was used as such until the applicants painted a white line at the western end of the sea wall saying "private" and later obstructed the route by extending their garden over the western return section of the sea wall and erecting a fence and gate. Post interview Mr Rodley provided photographs showing the white line and garden extension (attached to the interview note). He does not recall there being a walkable route along the beach during his lifetime. There were a number of groynes in front of the village green and sea wall (marked by him on the map). Occasionally sandy areas appeared but generally there were very large rocks as exist on the beach in front of the caravan park today.

## DOCUMENTARY EVIDENCE

37. The documentary evidence at Appendix 8 consists of maps, images and other documentation held, obtained, and prepared by the Council. Item 1: 1952 definitive statement; Item 2: Enlarged version of 1952 definitive map (approximately 1:500); Item 3: Historical OS maps 1866, 1898, 1908, 1939 (six inch), 1939 (25 inch) and 1977; Item 4: Historic (1908 and 1939 (25 inch)) and present OS maps and aerial images (2009, 2012 and 2015) with council's interpretation of the definitive map as to the route of NT46 plotted thereon; Item 5: Historical planning documents 1949 to 1961; Item 6: Postcards; Item 7: Conveyancing documents from 2006; Item 8: Table of public rights of way to and along beaches and copy definitive statements for public footpaths BB10, F5, F6, R89 and S3.
38. The early 1862 and 1896 OS maps show that land existed in front of the mound. The 1908 map shows that by that time coastal erosion had occurred but that a path existed (later to be recorded as NT46) heading down from NT38 in front of the mound to join the western end of the sea wall fronting Beach Cottage. The 1939 OS six inch map (being the base map for the 1952 definitive map) also shows the path on the coastal slope that was recorded as NT46. The 1939 OS 25 inch map shows further coastal erosion to the west of the mound and what appears to be a ridge line to the south of it heading diagonally down the coastal slope toward the western end of the sea wall. It is reasonable to conclude that this ridge line is the route of NT46. The next available OS map is 1977. By that time the western return extension to the sea wall had been formed and further erosion had occurred particularly in the nook between the northern end of the western return wall and the south east side of the mound.
39. At Appendix 8, Item 4 are a number of maps produced using GIS software and approximately shows, with a red line, NT46 as plotted from the 1952 definitive map (council's interpretation) namely: (1) 1908 OS map, (2) 1939 OS 25 inch map, (3) 2009 aerial photo, (4) 2012 aerial photo (5) 2015 aerial photo, (6) current OS master map data. The red line on these maps is an electronic GIS shapefile plotted from the line drawn on the 1952 definitive map (approximately) and then overlaid onto maps 1 to 6 ie there has been no alteration to the alignment or coordinates of the red line on each map.
40. Planning applications and decisions from 1949 and 1952 (Appendix 8, item 5) relating development at Castle Farm Cottage and overhead power lines in the area have maps attached to them but these appear to be either the 1939 OS map or maps drawn representing this. The next available planning documents are 1961 planning decisions relating to the caravan site (Ref. 7827 and 7827A). Planning decision 7827A has a map attached to it which appears to have been professionally drawn at a scale of 1:500. This shows the extent of land existing to the west of Beach Cottage at that time upon which caravans were proposed to be sited. It also clearly shows the path leading up to the caravan site running by the stream and parallel with the western boundary of Beach Cottage.



41. The two 1936 postcards (Appendix 8, Item 6) do not show the village green or sea wall but do provide a general indication of what the beach looked like at that time. The post card (number 62) contained in "The Undercliff of the Isle of Wight in old picture postcards" is undated but is considered to be from the same era. This shows the western end of the sea wall and the "sitting" area at the end of it. It also shows the state of the beach at that time and a number of groynes in front of the sea wall. At the western end of the sea wall there are timber sea defences and land in front of the mound. The final two postcards at Appendix 8, Item 6, again considered to be from the same era show the general condition of the beach at the end of Castlehaven Lane and in front of the village green. These images show large rocks on the beach and a number of groynes.
42. The conveyancing documents (Appendix 8, item 7) consist of a letter dated 12 June 2006 with attached plan from solicitors acting for owners of Beach Cottage (Mr and Mrs Harvey) to the solicitors acting for Mr. and Mrs. Thorne during the process of purchasing the property. The final paragraph of that letter refers to an attached plan being from a local land charges search from the time that Mr. and Mrs. Harvey purchased the property in 1984 and showing public footpaths with a purple line. A full copy of that local land charges search dated 4 June 1984 is included at Item 7 as is a residential property questionnaire dated 25 March 2006, completed by Mr. and Mrs. Harvey in connection with their sale of Beach Cottage. Section 21 of that form refers to the existence of rights of way "along sea wall outside the garden boundary".
43. At Appendix 8, item 8 is a table detailing public rights of way recorded on the definitive map which provide access to a beach and along a beach. There are 58 paths providing beach access. Accordingly, a public right of way providing access to the beach is very common. The table also shows that five paths were recorded in 1952 as running along a beach. This is therefore very uncommon. Further, in all five cases the respective definitive statements (Appendix 8, item 8) indicate that the route is along the beach either by specific reference or by implication (eg description of surface or by stating route being limited by the tide). The footnote to the table confirms that no public rights of way have ever been recorded as running along a beach in the parish of Niton or adjacent parishes of Ventnor and Chale.

## EVALUATION OF EVIDENCE AND CONCLUSION:

### The definitive statement

44. From its junction with NT38 and NT42 the definitive statement describes NT46 as "down metalled road to shore". The metalled road is clearly reference to Castlehaven Lane. The statement continues: "then westward along the top of the Sea Wall in front of Beach Cottage". There is no description of where the path runs between the word "shore" and the "Sea Wall". The only indication in the statement is that it headed westward. The claim is that due to NT46 being recorded in the statement as "to shore" then it must have continued westward along the shore from that point. However, no evidence has been provided to show that this was the case. Reference "to shore" in the statement could be regarded as clarification that there was public access to the shore i.e. to the beach, but not necessarily meaning that it then continued along the beach. It is common for a public right of way to provide access to a beach but it is uncommon for a path to be recorded along a beach (see paragraph 43 and table at Appendix 8, item 8). The following points also need to be considered: (1) When comparing the definitive map with the applicants' plan at Appendix 1, Application item 10 the definitive map shows the end point of NT46 on Castlehaven Lane being further inland than what is shown on the applicants plan ie the point at which NT46 turns west is further inland than what the applicants have shown; (2) From the point at which NT46 turns westward (referred to in paragraph (1) above) in accordance with the definitive map the route towards the eastern end of the sea wall is

much further north than what is shown on the applicants' plan (Appendix 1, application item 10); (3) Six of the eight witnesses indicated that not only was NT46 not along the beach but the beach itself did not lend itself to walking along ie the beach was strewn with large boulders which were very difficult, virtually impossible, to walk along, Witnesses also refer to groynes being present which would have obstructed the claimed route along the beach, although it should be borne in mind that only one of those witnesses have recollection of the situation in 1952, the others providing information from later in the 1950s and 1960s; (4) Photographs and postcards confirm that the beach did not lend itself to being a public footpath ie presence of large rocks and any route would have been obstructed by groynes; (5) It is unusual for a public right of way to be recorded on a beach and it is therefore likely that the parish surveyors would have referred to this exceptional occurrence in the statement rather than it remaining silent (6) the route would have been affected by the tide twice per day; points (5) and (6) are considered to be fundamental and unusual limitations affecting a public right of way and it could therefore be considered very unlikely for the surveyors not to have recorded such matters in the statement.

45. With regard to the wording on the public footpath sign at the parking area at the start of NT46, this is a directional and recreational sign only; its purpose to indicate to the public that NT46 is in the direction of the pointer and that by proceeding in that direction the public will gain access to the shore. The sign was not worded or erected with the intention of confirming, legally, that upon NT46 reaching "The Shore" it then continues along the shore.
46. With regard to the presence of a gate at the eastern end of the sea wall, this is not recorded in the definitive statement. This would have been an obvious limitation on the public right of way and it is reasonable to conclude that the surveyors would have recorded it had it been present. The gate shown in photograph 5 of Appendix 6, item 10 is dated in the late 1960s so is not evidence of what existed in 1952. Mr. Eldridge refers to a plaque on the gate with the word "private" on it but this is not visible on the photograph. Other witnesses refer to the path along the sea wall being public rather than private. It could therefore be concluded that no gate was present in 1952. When a gate was erected this constituted a nuisance at common law and therefore unlawful. If there was a sign on this gate stating "private" then this would have been unlawful (section 57 NPCA49).
47. With regard to the route of NT46 from the western end of the sea wall, evaluation of the witness evidence concludes that the path described in the definitive statement "turn right up the path beside a brook..." was a private path and not therefore the route of NT46. The definitive map shows the route of NT46 from this point heading in a north west direction as opposed to north beside the brook. The precise line of that path and whether it existed over land in 1952 is dealt with below.

#### The definitive map

48. Due to the scale of the 1952 definitive map and the width of the line representing NT46 drawn thereon it is acknowledged that the overlay maps (Appendix 8, item 4) can only be an approximation of the legal line of NT46. However, the drawn line on the 1952 definitive map has been plotted onto the overlay maps (red line). Accordingly the overlay maps are considered to be a reasonable representation of the line of NT46. The overlay maps show that from the end of Castlehaven Lane, NT46 runs across the village green and along the top of the sea wall and then heads north west on the southern side of the mound to join NT38 at the top of the coastal slope.
49. The route of NT46 shown on the map prepared by the applicants (Appendix 1, Item 10) bears no resemblance to the line of NT46 as recorded on the definitive map (in relation to the section along the village green and the sea wall). Even taking into account reasonable

tolerances and the width of the drawn line on the 1952 definitive map, it is not considered to show accurately the legal route of NT46. The applicants have also identified the top of the sea wall incorrectly on their maps. The aerial overlay maps 2009, 2012 and 2015 show the area indicated by the applicants as being the top of the sea wall is in their garden immediately behind the garden wall.

50. The evidence is clear that at the western end of the sea wall there was a small area of land which was used as a sitting area. From this area NT46 headed north west in front of the mound. Images from the mid-1950s show that this area at the western end of the sea wall was subject to damage by the sea due to the presence of timber sea defences (Appendix 7, item 4, photographs 8 and 9; Appendix 8, item 6, postcard 62). These images also show that in the mid-1950s the sea wall curved at the western end towards the mound and that there was land present on the southern side of the mound over which NT46 ran, albeit that this was likely to have been a track in the side of the mound rather than a clear and obvious path. Witness evidence also refers to being able to access NT38 from the area at the western end of the sea wall other than using the private path by the brook and western boundary of Beach Cottage. Both 1939 OS maps clearly show land at the western end of the sea wall and the six inch 1939 map, being the base map for the 1952 definitive map, shows two dashed lines indicating the route of NT46. As these maps were 11 years old at the time of the first parish council survey in 1950, it is reasonable to assume that there had been coastal erosion between 1939 and 1950 which may have affected NT46. However, the plan to the planning permission dated 1 November 1961 granted to the then owner of both Beach Cottage and the caravan park clearly shows that there was land to the west of the sea wall over which NT46 ran. This plan, the mid-1950s photographs and the witness evidence is considered, on the balance of probability, to be sufficient evidence that in 1952 the line of NT46 was still over land, albeit that the path was likely to have been a track in the side of the mound and up the coastal slope as opposed to being a clear and obvious footpath. This further supports the reason why the surveyors incorrectly recorded the path up by the brook and along the western boundary of Beach Cottage in the definitive statement – this path was mistaken as NT46 as it was a clear and well defined path but the actual route of NT46 (in the side of the mound) was less clear at that time.

#### Other evidence

51. With regard to the applicants' claim that previous owners of Beach Cottage and/or the caravan park believed the route of NT46 not to be along the top of the sea wall, neither of the owners held the land in 1952 and closer examination and investigation shows that this was not their belief in any event.
52. The applicants, by submission of the additional property information form as evidence that Mr and Mrs. Harvey did not consider NT46 to be along the sea wall (the implication being that because of this the applicants themselves were not aware of the existence of NT46 and its route) is misleading. The conveyancing documents obtained by the council are indisputable evidence that Mr. and Mrs. Harvey did consider NT46 to be along the sea wall. Section 21 of the residential property questionnaire refers to a public right of way along the sea wall. Further, a plan contained in the local land charges search showing the route of NT46 in accordance with the definitive map as being across the village green, along the sea wall and on land to the south of the mound was provided by Mr. and Mrs. Harvey's solicitors to the applicants' solicitors under cover of a letter dated 12 June 2006. The purple line on the plan clearly shows NT46 running along the front of the village green and along the top of the sea wall and then continuing west at the end of it.
53. The transcript of the planning hearing is claimed by the applicants as being evidence that a previous owner of Beach Cottage and the caravan park, Mr. Wayman-Hayles, did not consider NT46 to be along the sea wall and was private. However, examination of that

transcript reveals that this is incorrect. Page 134 of the transcript is the evidence of a Mr White stating that the route along the sea wall was a footpath but the path turning off up by the stream and western boundary of Beach Cottage was private access for a previous owner, Mr. Haynes, only. On page 135, Mr. Wayman-Hayles states that he endorses everything that Mr. White had said. There is no quote by Mr. Wayman-Hayles in the transcript that the route along the sea wall was private. Page 137 records the applicant (Mr. Thorne) referring to a ramp down to the foreshore in a 1960s photo (believed to be the photograph 5 and/or 6 at Appendix 6, Item 1). A ramp is not shown in these photographs and the applicants' witness, Mr. Adrian Eldridge, confirmed that this was not a ramp but sea defence works i.e. timbers filled with concrete.

#### DETERMINATION OF THE APPLICATION

54. The standard of proof when considering evidence for modifying the definitive map and statement is the balance of probability. On the balance of probability, the evidence is insufficient to show that NT46 is along the shore in front of the village green and sea wall and therefore no order should be made under section 53(3)(c)(iii) of WCA81 that there is no public right of way or to vary any particulars contained in the definitive map and statement. In summary:
55. The route of NT46 was recorded on the first definitive map for the Isle of Wight in 1952 and it survived the statutory opportunities to challenge it at that time. The principle of regularity applies and it is assumed in law that all necessary statutory processes for recording NT46 in accordance with NPCA49 were complied with.
56. The presumption in law is that the definitive map is correct in what it shows ("the Trevelyan presumption") and this will apply unless there is very cogent evidence that an error was made.
57. The first part of the application concerns deleting reference to NT46 being along the top of the sea wall from the definitive statement. The basis of this part of the application is that by removing this description the definitive map will record NT46 as being on the shore in front of the sea wall. As the applicants' previous 2009 application to delete NT46 along the top of the sea wall was unsuccessful this provides authority that both the definitive map and statement record NT46 as running along the top of the sea wall. Accordingly the legal tests in relation to deletions are relevant. In order to delete a right of way from 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. The applicants have provided little evidence to support their claim and the evidence that has been provided is not considered cogent or of sufficient substance to displace the presumption that the definitive map is correct. Conversely, the council, in fulfilling its duty to fully investigate applications for modification orders, has obtained considerable evidence to show that the definitive map is correct in what it shows: NT46 runs along the top of the sea wall but due to the effects of coastal erosion since 1952 it is no longer possible to continue west over land fronting the mound at the western end of the sea wall. However, this does not affect the legal route of NT46 along the top of the sea wall on the basis of the maxim "once a highway, always a highway". The fact that it is now a dead end is irrelevant. Where a highway has been stopped up or enclosed at one end, so as to make it a cul-de-sac, there is no alteration in its status (paragraph 1-24 Highway Law, Fifth Edition, Stephen Sauvain QC). Reference is often made by the applicants to a high drop from the top of the western end of the sea wall to the beach, this being the basis of their argument that no public right of way could ever have been possible or existed. The extent of the drop from the top of the sea wall depends entirely on the height of beach material deposited by the sea from time to time. Further, many of the photos showing a high drop to the beach are recent photographs and taken after considerable coastal erosion in the area and after the sea wall was extended in the 1970s and are not therefore a record of what existed in 1952. In any event, any drop to the beach from the wall that existed in 1952 is irrelevant. Evidence

obtained during the current application suggests that a path from the top of the sea wall in the side of the mound representing NT46 still existed in 1950s. Therefore, when applying the balance of probability test to the evidence it leads to a reasonable conclusion that any drop to the beach that existed in 1952 and which was used to gain access to the shore was not using NT46.

The second part of the application concerns varying the particulars (definitive statement) to provide that from the southern end of Castlehaven Lane, NT46 be recorded as running in a westerly direction for approximately 35 metres along the shore thus complying with the alignment shown on the definitive map. The applicants have afforded no evidence to support that NT46 ran along the shore. They refer to the definitive statement as describing NT46 “to shore” and have assumed (an assumption which is not supported by any evidence) that NT46 then continued west along the shore. However, the definitive statement is silent as to the route of NT46 from the end of Castlehaven Lane to the eastern end of the sea wall. The applicants refer to the definitive map showing the alignment of NT46 to be along the shore but this is their own interpretation with no evidence to support it. The council’s interpretation of the definitive map and statement is that NT46 heads down Castlehaven Lane to provide public access to the shore and then heads west over land (not the shore) to the eastern end of the sea wall and then continues west along the top of the sea wall to its western end. There is overwhelming evidence to support this interpretation as many photographs from the 1940s and 1950s show that the state of the shore was not capable of providing a public right of way on foot due to the shore consisting of large rocks and being obstructed by numerous groynes. The witness evidence, albeit mostly in the mid to late 1950s and 1960s also confirms the shore was in this condition and was not used as a public footpath. Applying the balance of probability test to the evidence leads to a reasonable conclusion that NT46 did not run along the shore but was on land, such land now being the village green.

#### LEGAL IMPLICATIONS

58. 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.
59. 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.
60. 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.
61. 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.

#### IMPLICATIONS UNDER THE HUMAN RIGHTS ACT

62. 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.

63. 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. If no order is made then there will be no change in the route or status of NT46 and therefore no impact on the owners of any property than what already exists.

#### IMPLICATIONS UNDER THE CRIME AND DISORDER ACT 1998

64. 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 recording and dedication of highways. Should an order be made, 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

65. Current Rights of Way revenue budget covers normal costs incurred in processing this application and any resulting order.

#### RISK MANAGEMENT

66. 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.
67. In the light of the legal and financial implications set out in paragraphs 58 to 65, the committee in making its decision is recommended to carefully follow the legal guidance set out in paragraphs 16 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.
68. The consequences of options 1 and 2 are set out in paragraphs 58 to 67 above. These consequences are all part of the normal statutory procedures provided by WCA81 for reviewing the definitive map and statement.

#### OPTIONS

69. The panel has a statutory duty to determine the application by making a decision. Depending on its conclusions on the evidence, the panel will decide on one of the following options.

##### Option 1

70. In response to the application, make an order which will have the effect of (1) deleting the section of NT46 running along the top of the sea wall and (2) varying the particulars of the map and statement to record NT46 as running along the beach in front of both the village green and the sea wall.

##### Option 2

71. Reject the application and make no order to delete any part of NT46 and/or to vary its particulars.

## RECOMMENDATION

Option 2 – In view of the conclusions at paragraphs 54 to 57 it is recommended that the application should be rejected and no order should be made.

## APPENDICES

### [Appendix 1: Application](#)

1. Application dated 29 October 2013 with supporting documents:
  - (1) Planning Inspectorate appeal decision dated 10 February 2012.
  - (2) Photographs 1 to 12.
  - (3) Photographs with notes.
  - (4) Photographs and notices.
  - (5) OS 2013 map with notes – superseded with item 10.
  - (6) OS 1939 map with notes – superseded with item 10.
  - (7) OS 1946 map with notes.
  - (8) OS 2013 and 1946 maps with notes.
  - (9) OS 2013 and 1946 maps with notes (2).
  - (10) OS 1946 map with notes.

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

1. Location map.
2. 1952 definitive map extract.
3. 1952 definitive map extract (enlarged).
4. 2000 definitive map extract.
5. 1952 definitive statement.
6. Site map.
7. Site photographs.

### [Appendix 3: Consultation](#)

1. Email of T Stillman dated 30 March 2017.
2. Letter of Niton and Whitwell Parish Council dated 26 April 2017.
3. Email of Councillor David Stewart dated 23<sup>rd</sup> January 2018.
4. Email of Councillor John Hobart dated 4<sup>th</sup> January 2018.

### [Appendix 4: Land ownership](#)

1. Land Registry map search IW51889.
2. Land Registry map search IW66194 and IW44722.
3. The Crown Estate briefing note.
4. Land Registry map search IW60377.
5. Land Registry map search IW61332.
6. Commons Registration Act 1965 decision dated 22 May 1981.

### [Appendix 5: Legal background](#)

1. Legal background and guidance.
2. Quasi-judicial role of the panel.
3. DEFRA Circular 1/09, sections 4.30 to 4.35.
4. Planning Inspectorate definitive map consistency guidelines, section 4.18 to 4.23.

#### Appendix 6: Applicants' evidence

1. Interview note, Mr. A Eldridge.
2. Additional property information form.
3. Definition of "shore" contained in Adhams dictionary.
4. Transcript of planning hearing dated 16 December 2009.
5. Applicants' emails dated 8 November, 5 December, and 16 December 2013; 16 December 2014; 14 July and 23 July 2016.

#### Appendix 7: Witness evidence

1. Interview note, Mr. P Mogg.
2. Interview note, Mrs. L Chessell.
3. Emails of Mrs. D Foulsham dated 2 and 15 December 2016.
4. Interview note, Mr. M Bowen, Mrs. P Filose and Mrs. E Bowen.
5. Interview note, Mr. Rodley.

#### Appendix 8: Documentary evidence

1. 1952 definitive statement.
2. 1952 definitive map extract (enlarged).
3. OS maps 1866, 1898, 1908, 1939 (six inch), 1939 (25 inch), 1977
4. Definitive line maps: OS maps 1908 and 1939; 2009, 2012 and 2015 aerial maps (with OSmaster map data)
5. Planning documentation 1949 to 1961.
6. Postcards.
7. Conveyancing documents 2006.
8. Table of public rights of way to and along a beach and definitive statements.

#### Appendix 9: Applicant and landowner comments on draft and final report

- 1 – 6 Applicants comments on report and council officer replies.
7. Niton and Whitwell Parish Council letter dated 3 October 2017.
8. Applicants comments on final report and Council Officer replies (emails of applicant dated 26<sup>th</sup> January 2018 (1) 14:27 (with attached High Point Rendel drawings), (2) 14:35 (with photograph), (3) 14:42 (with photograph), (4) 14:46 (with photograph), (5) 14:59 (with photograph), (6) 16:10; 31<sup>st</sup> January 2018; 4<sup>th</sup> February 2018 (1) with Officer replies, 4<sup>th</sup> February 2018 (2) with Officer replies; Officer emails: 26<sup>th</sup> January 2018 (with marked photo); 30<sup>th</sup> January 2018; 31<sup>st</sup> January 2018; 2<sup>nd</sup> February 2018 (attaching email dated 19<sup>th</sup> December 2017))

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