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| **Appeal Decisions**  Papers on file |
| **by Claire Tregembo BA(Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 April 2025** |

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| **Appeal References: ROW/3350613, ROW/3350614, ROW/3350615, ROW/3350616, ROW/3350617, ROW/3350619, ROW/3350622, ROW/3350623** |
| * The Appeals are made under section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Hampshire County Council not to make Orders under section 53(2) of that Act. * The applications dated 22 August 2009 were refused by Hampshire County Council on 11 July 2024. |
| * The appellant claims that the Definitive Map and Statement of public rights of way should be modified by a) Adding a bridleway from Bridleway 47 to Frensham Lane, and adding a width to Bridleway 47 and removing gates, b) Adding a bridleway from Broxhead Common to Picketts Hill Farm, c) Adding a restricted byway from Picketts Hill to B3004, and upgrading parts of Bridleways 4, 5, and 54 to restricted byways, d) Adding a bridleway from Bridleway 54 to Bridleway 46, e) Adding bridleways on Broxhead Common, f) Upgrading Footpath 3 to bridleway, g) Adding a bridleway from Common Cottage to Bridleway 54, h) Adding a width to Bridleway 4, and removing gates from Bridleway 4 and 54.   **Summary of Decision: The Appeals for ROW/3350614 and section A-B-C in ROW/3350615 are allowed. The Appeals for ROW/3350613, sections C-D, D-E-F, F-G-H, H-I-J, and I-K in ROW/3350615, ROW/3350616, ROW/3350617, ROW/3350622, and ROW/3350623 are dismissed.** |
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Procedural Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. The appeals have been determined on the papers submitted. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. I will refer to various sections of the application routes and points as shown on Hampshire County Council’s (HCC) application map. For ease of reference, I have appended a copy to the end of my decision.

Main Issues

1. The applications were made under section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (DMS) under continuous review, and to modify them upon occurrence of specific events cited in section 53(3).
2. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the DMS subsists is dealt with under section 53 of the 1981 Act. Section 53 (3)(c)(i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown subsists or is reasonably alleged to subsist over land in the area to which the map relates.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act and the findings of the Courts in the cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] (*Bagshaw and Norton*) and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367 (*Emery*).
4. As made clear by the High Court in *Bagshaw and Norton* this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities?

Test B - Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the Schedule 14 stage. In *Emery*, Roche LJ held that “…*The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.”*
2. Roche LJ also held that “*Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under section 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication*”.
3. At this stage, for the routes not currently recorded on the DMS, I need only to be satisfied that the evidence meets test B, the lesser test.
4. Section 53 (3)(c)(ii) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the DMS as a highway of a particular description ought to be shown as a highway of a different description. The evidential test to be applied for routes already shown in the DMS is on the balance of probabilities.
5. The case in support relies on historical documents and maps. I need to consider if the evidence provided is sufficient to infer the dedication of public rights over the claimed route at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as highway.

Reasons

1. HCC advise that some of the applications before me seek to reverse the effects of legal orders that have already modified the DMS. Other applications are resubmission of earlier applications submitted that were refused by HCC or the Secretary of State with no new evidence submitted. Therefore, they do not consider there is any new evidence that would justify the making of Orders in respect of these applications.
2. The Courts have held that for an Order to be made to modify the DMS, there must be a ‘discovery of evidence’. The reinterpretation of evidence previously before the authority is not grounds for modification and is not ‘discovery of evidence’. Therefore, I will also need to consider if new evidence has been submitted that has not been previously considered if I am to direct an Order to be made.
3. The appellant is relying on documentary evidence in support of their applications. I will outline the evidence below before considering each appeal route in turn.

*Headley Tithe Map and Award 1847*

1. On the Headley Tithe map a route largely corresponding with section A-B-C-to Picketts Hill Farm, but not through it to UU, is shown coloured brown with solid and dashed edges. HCC in paragraph 31 of their decision report state that this route is not numbered, but at paragraph 53 they state it is numbered 438a. It does appear to be numbered at the eastern end, but the copies provided are not clear enough for me to read the numbers. Another route is shown coloured brown between U-W-R-F, but this is on a different alignment to the appeal routes. This route continues along Bridleway No. 47 (BW47) between F and L, then along section L-VV coloured brown with solid edges and HCC also state that it is numbered 438a, then along section VV-N which is uncoloured with solid edges and unnumbered. I am advised that 438a is owned by John Petar and described as a *‘Lane’*.
2. HCC advise that main public roads appear to be unnumbered and coloured brown. I note the byway open to all traffic off Picketts Hill is also numbered. The Award has a section titled *‘Commons and Wastes’* at the end with 120 acres of land. Routes with parcel numbers are listed to individuals. HCC also consider the unnumbered routes from A to Picketts Hill Farm, U to F, and VV to N would be owned by the surrounding landowners but have not provided any reason for this. I have not been provided with a copy of the Award so am unable to consider if this is the case.
3. The purpose of tithe records was to identify titheable land that was capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of such routes.

*Binsted Inclosure Map 1852*

1. On the Binsted Inclosure map a route largely corresponding with section A-B-C-UU is shown as a largely unenclosed route and is coloured brown between A and Headley Park Cottages. BW47 between F and L is coloured brown and shown as an enclosed route. Bracing indicates that it is in the ownership of the adjoining enclosures, but the public road at Picketts Hill is also braced. Many of the known public roads are also shown coloured brown. I am advised that these parcels lie outside of the areas covered by the Award, so details of the parcels have not been provided.

*Parish of Headley Paths and Properties, A Provisional List and Map 1912*

1. On the List of Headley’s Paths and Properties 1912, paths were allocated numbers and properties letters. Path 3A is listed as *‘Birds Nest to Broxhead Common and through Free Piece’* and is labelled 3A on the map alongside BW47 between F and L. It corresponds with appeal route N-VV-L and F-E-D as well as BW47 and BW54. Path 3B is *‘Birds Nest to Trottsford and Frith End’* and is labelled 3B on the map between points ZZ and VV and alongside Bridleway No. 54 (BW54). It includes appeal routes N-VV, ZZ-D and BW54. The list does not indicate if these paths are public or private or their status. Only one path in the list is referred to a *‘Bridle Road’* and two as *‘Footpath’*.

*Finance Act Records 1910*

1. The appeal routes are within hereditament numbers 378, 396, and 1359. Hereditament 378 has a £300 deduction for *‘public rights of way or user’* with two routes being referred to: a *‘public footpath from Broxhead Common to Headley Wood Farm’* and *‘accommodation road from Broxhead Common towards Linford’*. The footpath is likely to be the recorded Footpath No. 3 (FP3), which includes section D-ZZ of the appeal routes, and the accommodation road is possibly section B-C-D.
2. Hereditament 396 has a £25 deduction for *‘public rights of way or user’* and hereditament 1359 a £635 deduction, but no details of the rights are provided. Both hereditaments contain other recorded public rights of way including Bridleway No. 4 (BW4), Bridleway No. 46 (BW46), BW47, BW54, as well as access tracks.
3. None of the appeal routes are excluded from the hereditaments, therefore, the Finance Act maps are not suggestive of public vehicular rights.

*Sales Particulars*

1. On the Headley Wood Farm sales particular 1962 several lots are *‘sold with the benefit of rights of way (in common with all others having or to whom there may have been granted the like rights) for all purposes over the track in Lot 14 between the points marked A to B and on the Sale Plan and over the track or roadway between the points marked B, C and D in Lot 9 and D and E in Lot 10 and for agricultural and forestry purposes only over the track or roadway over Pickets Hill Farm to the public road between the points marked J and H on the sale plan’*. Other rights of way are also referred in the sales documents, but these rights would appear to be private rights and often included a payment for maintaining and improving the route.
2. Points A, B, C, D, E, and the track over Picketts Hill Farm are along appeal routes A-B-C and C-UU. Section J to H is the eastern end of appeal route C-UU between the road at Picketts Hill Farm and what is now the western boundary of Hill Wood.
3. The lots were also subject to any public rights, although these were not specified.

*Commercial and Small Scale Maps*

1. On Taylors Map of Hampshire 1759, a route is shown coloured brown which roughly corresponds with section D-E-F-XX-H-I-J. Section I-K also appears as an uncoloured route. However, this is a small scale map with some areas being unclear.
2. A Geometric Survey of Alice Holt and Woolmer Forest 1787 (the Forest map), based upon a perambulation of the area taken in 1638, shows several of the appeal routes. Section B-C-D-E-F-XX and H-I-K are shown with a solid and dashed line. Section L-VV then south to the watercourse, and BW47 between F and L, are shown with double solid edges. B-O-R-Q is shown as a dashed line coloured yellow. Section U-V, V-W, part of section C-UU between Headley Park Cottages and the River Wey are shown with double dashed lines. The key indicates that parallel pecked lines are roads, and freehold properties are coloured and outlined in yellow, with solid or dashed lines underneath appearing to indicate if the land is enclosed or unenclosed. It is suggested that public roads are shown with double solid edges, but I consider this indicates the roads are enclosed rather than running across open land.
3. On Milne’s map of Hampshire 1791, most of the appeal routes are not shown. Section L-VV is shown with a solid and dashed line and the bridleway between F and L is shown with double solid lines.
4. Greenwoods Map of Hampshire 1826 shows section B-UU, C-D-E-F, I-K, and V-W as unenclosed routes and I-J as an enclosed route. BW47 between F and L, and section L-VV then south to the watercourse are shown as an enclosed route which then continues to N as an unenclosed route. An unenclosed route is also shown between F and I but on a different line to the appeal routes.
5. The commercial maps indicate the existence of some sections of the appeal routes, although their scale is too small to determine the exact alignment. They are suggestive of public rights, possibly higher than footpath, although they do not provide a reliable indication of status.

*Ordnance Survey Maps*

1. On the 1810 1 inch to the mile Ordnance Survey (OS) map section C-UU, C-D-F, I-J and G-F are shown as unenclosed routes. BW47 between F and L and section L-VV-N are shown as enclosed routes. An unenclosed route is also shown between F and I but on a different line to the appeal routes.
2. The 1869 25 inch to the mile OS map shows sections A-B-C-D-F-XX, F-G-H, C-UU, D-ZZ, and V-W as largely unenclosed routes, which sometimes run alongside a hedge. BW47 between F and L and section L-VV towards N is largely shown as a tree lined, enclosed route but a short section south of the watercourse is unenclosed. This is numbered 257 which the book of reference describes as an *’occupation road’*. Other roads are listed as *‘public road’*. These routes are shown in largely the same way on the 1895, 1909, and 1939 editions, although section A-B is shown on a slightly different alignment and trees are not shown. On the 1909 edition section B-O is shown and on the 1939 edition section B-O-R-Q is shown. Some routes are labelled *‘F.P.’* on the later editions, but only section D-ZZ of the appeal routes is labelled. There are also footbridges labelled *‘F.B.’* shown on the later maps, but the bridges on the appeal routes are not labelled.
3. The object name book for the 1909 (revised in 1939) OS map lists Broxhead Common as *‘a large common situated in N.W. Linford’* with the word *‘public’* inserted before common in smaller writing.
4. On the 1962 6 inch to the mile OS map sections B-C-D-E-F-XX-X-H-I-J, C-UU, F-ZZ, B-O-R-Q, F-G-H and V-W are shown as largely unenclosed routes, which sometimes runs alongside a hedge. BW47 between F and L, and section L-VV-N is shown as an enclosed route with a line across it at four points which are likely to indicate gates. An unenclosed route is also shown between Z and U but on a different line to the appeal routes.
5. The 1972/ 1974 1:2,500 edition shows a similar situation, but section A-C, S-AA-T, and Z-AA are also shown. Part of section D-E and section F-G-H are not shown. Some of the routes are labelled *‘track’* or *‘path’*.
6. On the 2004 1:25000 OS map most of the appeal routes are shown but not sections W-Y, T-U-V-X, and V-W. The recorded public footpaths and bridleways are also shown in green.
7. The OS maps provide evidence of the physical existence of the claimed bridleways. However, since the late 19th Century, OS maps have carried a disclaimer that tracks and paths shown provide no evidence of the existence of public rights.

*Definitive Map Records and Letters about paths*

1. The Definitive Maps (DM) published in 1951 and 1958 show section D-ZZ and VV-N as part of FP3, section D-F-XX-X-H-I-K as part of Public Footpath 4 (FP4), and section I-J as Public Footpath No. 5 (FP5). The rest of the appeal routes are not shown. On the 1964 DM sections D-F-XX-X-H-I-K, section I-J, and section L-VV-N are now shown as public bridleways.
2. On the draft 1964 DM sections D-F-XX-X-H-I-K and section I-J are still shown as public bridleways. However, section L-VV-N is shown as deleted BW47, section L-M is shown as BW47, and section ZZ-L is shown as a FP3.
3. Headley Parish Council (HPC) wrote to HCC on 2 October 1964 requesting that FP4, FP5, and part of FP3 be re-graded as bridleways because they have been used by people riding horses for a great number of years. It also requested the addition of a bridleway between the B3004 and C102 along what is now BW46 and section Q-E-F, then to L and along section L-VV-N. Another letter dated 28 February 1965 from HPC to the Clerk of HCC made the same request and also states that *‘the whole area of Broxhead Common is traversed by innumerable tracks, at least 23 of these may be counted on the Ordnance Map, which are used by both pedestrians and by people on horseback and have been so used for a great number of years’*. These requests were noted as objections to the Draft DM. Support was also received from seven people who used them or saw them being used.
4. A hearing was held on 1 March 1965 to consider these upgrades and addition. Mr Gardner, who held the hearing, was satisfied that the public had ridden the claimed bridleways for over twenty years and recommended that FP3 heading northwest from FP4, FP4, and FP5 be upgraded to bridleways and that the new bridleway be added. A later undated document refers to the revised Draft map of public rights of way and states that Bridleway 4 (BW4) is recommended to be reduced to Footpath.
5. On 9 November 1965, another hearing was held concerning FP4 due to objections to its upgrade. Mr Gardner recommended it should be retained as a footpath only. HPC were informed of this decision on 29 March 1966 and were advised of the right to appeal. A later letter suggests this also included FP3 northwest of BW54.
6. A letter dated 27 January 1989 from Hadley Wood Farm stated the track by Tree Nursery that has been used by riders to gain access to BW46 would be permanently closed on 1 February. This is likely to include section B-O.
7. The Hampshire (Alton Rural District No. 69) (Parish of Headley Part of Bridleway No. 47 and Footpath No. 3) Public Path Diversion Order 1973 extinguished BW47 along section L-VV-N and part of FP3 that ran between points ZZ and VV. The new alignment of BW47 runs along appeal route L-M then continues to Frensham Lane at point YY and has a width of 8 feet for most of the bridleway with one section south of the River Wey being 10 feet wide. Several gates were referred to in the Order including a field gate at point L and a bridle gate 195 yards from point L. The new route of FP3 is along section ZZ to L and has a width of 10 feet.
8. The Hampshire (East Hampshire District No. 116) (Parish of Headley Parts of Bridleways Nos. 4 and 46) Public Path Diversion Order 1990 diverted part of the original line of BW4 to section F-XX-X-I with a width of 3 metres and another short section between points I and K with a width of 2.5 metres. A field gate was included at point F on the appeal route. The Order was confirmed on 3 February 1992 by the Secretary of State for the Environment. In the Inspectors decision, reference was made to clearing vegetation on BW46 to a width of 4 metres but there were no comments about the width of BW4. The objection to the diversion of BW4 had been withdrawn subject to the provision of a gate on the appeal route at point XX. Earlier Orders for the same diversion had been cancelled or not confirmed due to drafting errors.
9. A copy of an Inspectors decision dated 25 September 1997 concerns a Modification Order to upgrade parts of FP3 and FP4 (between Pickett Hill near point S to point D) to Bridleway along with a Creation Order for the same route. The Modification Order was supported by user evidence between 1944 and 1993. The Inspector also considered documentary evidence including the Headley Tithe map, OS maps, the Finance Act records, aerial photographs, and DM records. The Inspector concluded a mistake had not been made in recording the route on the DMS as a footpath and the user evidence was insufficient to demonstrate the presumed dedication of a public bridleway. The decision letter also referred to several gates across FP3 and FP4 which had been in place since at least 1976. The Inspector concluded there was a need for a Bridleway and confirmed the Creation Order creating BW54.
10. An appeal was made to HCC’s decision to turn down an application to upgrade FP3 to bridleway in October 2001. This corresponds with section D-ZZ-L of the appeal route. The appellant also requested the consideration of the original line of FP3 between ZZ and N. Evidence considered included user evidence forms, correspondence, and the 1964 DM review. The Inspector did not consider there was evidence of an error in 1964, and found the user evidence was insufficient to demonstrate the dedication of public bridleway rights. The appeal was dismissed.
11. In August 2007, an appeal was made to HCC’s decision to turn down an application to add four bridleways to the DMS. These routes correspond with sections S-AA-T, U-V-X, T-W-V, and Z-AA of the appeal routes. Evidence considered included user evidence forms, aerial photographs, correspondence, and OS maps. The Inspector did not consider there was sufficient evidence of use to demonstrate the dedication of public bridleway rights. He also considered the lease of the land to HCC for use by the public for *‘air and exercise’* indicated its use was with permission and not as of right. The appeal was dismissed.
12. A Modification Order dated 8 October 2008 to add two public bridleways to the DMS was considered at a public Inquiry on 28 June 2011. The Order included section B-O of the appeal routes. The Inspector considered user evidence, the Forest map, OS maps, the Headley Tithe map, and the Finance Act records. The Inspector did not consider the documentary evidence was sufficient to demonstrate the existence of public bridleway rights. He also did not consider there was sufficient evidence of use to demonstrate the dedication of public bridleway rights. The Order was not confirmed.

*Commons Records*

1. The Manorial Records and Grooms Farm Pipe Rolls concern Grooms Farm’s claims of common rights of to the waste on Broxhead Common. There are no references to public rights of way or highways.
2. The Description of Commons within the Main Administrative Areas for Alton Urban District states that Broxhead Common was requisitioned by the War Department which is now owner and Lord of the Manor. There are a few grazing rights and rights of digging turf and cutting bracken, but these are rarely exercised.
3. On 17 June 1964 Headley Wood Farm wrote to the Clerk to HPC about proposed new fencing to tackle issues with littering, grazing, and creating a picnic area. It refers to public footpaths which *‘anyone wishing to ride or walk along… could continue to do so’*. The routes shown on the enclosed map are part of BW4, BW5, BW46, BW54, and appeal route R-Q-E-F.
4. A hearing was held in April 1974 concerning common rights to be registered over Broxhead Common. An earlier hearing had removed some small areas of land within CL147 from the Commons Register. It concerned rights for grazing, turbary, estovers, and digging and taking sand. The hearing did not concern public access or rights of way.
5. The report of the County Secretary dated 22 June 1978 stated the Recreation Committee had endorsed the terms of a settlement of dispute for Broxhead Common (East). An objection had been made to the provisional registration of Broxhead Common under the Commons Registration Act 1965 by one of the landowners who had ploughed 80 acres of the land. It referred to various hearings into the registering of the Common and rights over it, appeals, and legal action. Lengthy negotiations were entered into which resulted in an agreement approved by the Court of Appeal on 24 May 1978. The registration of Broxhead Common was to be confirmed with the exception of the ploughed section. HCC and the Commoners would support an application to retain existing fencing. HCC would be granted a 20 year lease for the unfenced and uncultivated common so they could manage it as a local nature reserve with appropriate public access. Five acres would be sub-let to cricket and sports clubs for recreation purposes.
6. Notices of Final Disposal of Disputed Registration from the Chief Commons Commissioner dated 19 December 1978 shows that part of CL147 became final on 24 May 1978. Another part of CL147 became void on 9 January 1975 and was not registered. The Register of Common Land for Unit No. CL147 records this at entry 4 and states the entry has been made in accordance with the Final Disposal Notice signed by the Chief Commons Commissioner.
7. A letter dated July 1981 from Broxhead Commoners’ Association noted that Commoners rights existed over Broxhead Common East, West, and North and were recorded in the Commons Register. It noted the commons were *‘legally accessible to the Public for ‘Air and Exercise’’*.

*Statutory Declaration of Michael Royden Porter*

1. The Estate Manager of Headley Wood Farm between 1962 and 2001 provided a statutory declaration concerning the extent of the farm on 6 December 2001. It provides information about the extent of the land, how it was managed, fishing rights, and land sales. It appears to have been produced to indicate the extend of the land owned when the landowner was seeking to register the land with Land Registry. One of the plans attached shows the extent of CL147 Broxhead Common, another shows the extent of the land and the named parcels, one is a historic OS map with a small parcel edged red and another is an HCC map showing the extent of the land leased to them. It does not refer to public rights of way.

*Notes on Land Registry Documents*

1. The appellant provided notes on Land Registry Documents. They refer to a letter dated 6 December 2006 from ALR1 to the solicitors which states *‘as regards road, a verbal entry along the following lines will be made: “the roads and footpaths in this title are subject to public rights of way”. The alternative would have been for us to serve notice on the local highway authority in respects of long lengths of road, with consequence further delay’*. It is not clear who ALR1 is or what land is being referred to. No copies of the letter or the Land Registry documents have been provided, therefore I cannot determine if an entry was made, the routes, or their status. Consequently, I can only give limited weight to this document. The plans attached to the statutory declaration of Michael Royden Porter are not Land Registry title plans, but plans they submitted to show the extent of the land.

*Conclusions on Each Appeal*

*ROW/3350613*

1. This appeal concerns the addition of a bridleway along section L-VV-N and the amending of a width and the removal of a gate along section L-M.
2. Section VV-N was shown on the 1951 and 1958 DM as FP3 but was upgraded during the production of the 1964 DM to become part of BW47 along with section L-VV. However, in 1973 an Order was made to divert BW47 along section L-VV-N to a new route along L-M-YY. This Order was confirmed and public bridleway rights over section L-VV-N were lawfully extinguished. Once a route has been extinguished it is not possible to re-record it on the basis of documentary or user evidence that pre-dates the Order. No evidence has been submitted to show the existence or dedication of bridleway rights after 1973.
3. The 1973 Order recorded a width of 8 feet for most of the new section of BW47 with a field gate and bridle gate along section L-M. The Definitive Statement (DS) records the width as 2.44 metres which is 8 feet. Therefore, the recorded width of section L-M in the DS is the same as the width in the 1973 Order. Although they were authorised by the Order, the DS does not record any structures along BW47. Even if they were recorded, they have been authorised by a legal Order so would not need to be removed from the DS.
4. Taken as a whole, the evidence shows that public rights no longer exist over section L-VV-N and the DS does not need modifying for section L-M.

*ROW/3350614*

1. This appeal concerns the addition of a bridleway along section C-UU. This section is shown on the Headley Tithe map between C and the western boundary of Pickett Hill Farm coloured brown in the same way as other public highways including roads. It appears to be numbered near its eastern end, although HCC contradict themselves on this point. A byway open to all traffic is also numbered. I consider this is suggestive of public rights of at least bridleway status, and possibly higher rights.
2. Section C-UU is also shown on the Inclosure map as an unenclosed route partly coloured brown and most of it is braced to indicate the same ownership as the surrounding parcels. Other public roads are also shown coloured brown. Without a copy of the Award, it is not possible to determine if any public or private rights were awarded or their status. However, I consider the Inclosure map is suggestive of public bridleway rights along section C-UU.
3. Section C-UU is not one of the two routes referred to in the Finance Act records within hereditament number 378, but that does not mean the deductions did not include other routes.
4. The sales particulars for Headley Wood Farm, refer to private rights along most of section C-UU. However, the very eastern end from U to the western boundary of Hill Wood is referred to as a public road. The law believes people do not lightly assert things against their interest.
5. Part of section C-UU is shown on the Forest map and Greenwoods map, and all of it is shown on the OS maps from 1810. They are suggestive of public rights but not their status.
6. This appeal route is not currently shown on the DMS, and there is nothing to indicate an application has previously been made or considered for this route. Therefore, the evidence in relation to this route is newly discovered and the test that needs to be satisfied is the reasonably alleged to subsist test.
7. Taken as a whole, I consider there is sufficient evidence to reasonably allege public rights of at least bridleway status over section C-UU. The alignment shown on the appeal map does not accurately reflect the route shown on the historic maps. I consider the route shown on the historic maps is the route that can be reasonably alleged to carry bridleway rights.

*Appeal ROW/3350615 and ROW/3350622*

1. Appeal ROW/3350615 concerns the addition of a restricted byway along sections A-B-C-D, and F-G-H, the upgrade of bridleways to restricted byways along sections D-E-F, H-I-J, and I-K. Appeal ROW/3350622 concerns the addition of a bridleway along section B-C-D.
2. Section A-B-C is shown on the Tithe map and Inclosure map as part of the route to Picketts Hill Farm. For the same reasons discussed in paragraphs 64 and 65, I consider these documents are suggestive of public rights of at least bridleway status.
3. Section F-E-D is part of a path listed in the List of Paths and Properties. However, it does not indicate its status, and this section is already recorded on the DMS as a bridleway.
4. These routes are within hereditaments 378 and 1359 on the Finance Act map. However, hereditament 378 possibly refers to section A-B-C as an accommodation road rather than a public right of way. The rest of these appeal routes are not listed in this hereditament and hereditament 1359 does not identify specific routes through it.
5. The sales particulars for Headley Wood Farm, refer to private rights along most of the routes within it. However, A-B-C continues along section C-UU and the eastern end of this route is referred to in the sales documents as a public road.
6. These appeal routes are largely not shown on the commercial maps, although sections B-C-D-F and H-I-J are shown on Greenwoods map and section I-K is shown on Taylors map. Sections B-C-D-E-F and H-I-K are shown on the Forest map as a road. However, roads can include bridle roads and foot roads. These appeal routes are also shown on the OS maps, although the alignment between F and I is different. They are suggestive of public rights, but I do not consider they are a reliable indication of status.
7. The DM records show sections D-E-F, H-I-K, and I-J have been recorded on the DMS as bridleways since 1964. Section F-I was originally on a different line but was diverted to its current line in 1990.
8. Sections A-B-C, H-I-J, I-K, and part of section G-H are within Broxhead Common. Under the Law and Property Act 1925 (the 1925 Act) there is a public right of access to metropolitan commons, manorial waste, or commons which are wholly or partly situated within a borough or urban district for air and recreation. However, the public using their rights to *‘air and exercise’* over a common would not give rise to a public highway. Only the use of a defined route to pass and repass in accordance with Section 31 of the 1980 Act, or under common law could do that. No user evidence has been provided to show use of the appeal routes. The Inspector who determined a Modification Order to record a different bridleway over Broxhead Common in 1997 also came to the same conclusion.
9. In accordance with *R v SSE ex parte Billson (1999)* QB 374the Inspector who determined the 2007 appeal considered the use of Broxhead Common by horse riders for *‘air and exercise’* amounted to permissive use due to the lease of the land for this purpose. Therefore, this use could not give rise to the dedication of public highway rights over the appeal routes. I also consider this to be the case.
10. Furthermore, it has been argued that the 1925 Act did not provide a right to air and exercise over Broxhead Common because it was in a Rural District not an Urban District. Therefore, the only rights to air and exercise granted over Broxhead Common are on foot under the Countryside and Rights of Way Act 2006. However, it is not for me to determine the rights to air and exercise over Broxhead Common. I can only consider if there are public highway rights over the appeal routes.
11. The Commons Records do not provide any information about public rights of way over Broxhead Common other than a 1964 letter suggesting some routes were used on horseback.
12. Sections A-B-C-D and F-G-H are not currently shown on the DMS, and there is nothing to indicate that an application has previously been made or considered for this route. Therefore, the evidence in relation to these routes is newly discovered and the test that needs to be satisfied is the reasonably alleged to subsist test.
13. I consider the evidence for section A-B-C is sufficient to reasonably alleged public bridleway rights over this section of the appeal route as part of a longer route with section C-U. The alignment shown on the appeal map does not accurately reflect the route shown on the historic maps between A and B. I consider the route shown on the Tithe map and Inclosure Award is the route that can be reasonably alleged to carry bridleway rights.
14. Sections C-D and F-G-H are shown on the OS maps and some commercial maps, but this is the only evidence in relation to these routes. I do not consider these maps are sufficient to show that public rights can be reasonably alleged to subsist over sections C-D and F-G-H.
15. Sections D-E-F, H-I-J, and I-K are recorded on the DMS as bridleways. The evidential test to be applied for routes already shown in the DMS is on the balance of probabilities.
16. The evidence suggests public rights over section D-E-F, H-I-J, and I-K. The DMS records bridleway rights over these sections but the other documents do not indicate a higher status. Therefore, I do not consider the evidence is sufficient, on the balance of probabilities, to show a restricted byway over these sections of the appeal routes.

*Appeal ROW/3350616*

1. Appeal ROW/3350616 concerns the addition of a bridleway over section B-O-R-Q. The land on the southeast and north sides of this route is the parcel of land known as Free Piece. No rights of way around it are listed in the List of Paths and Properties, only across it on the line of BW54.
2. This appeal route is within hereditament 1359 on the Finance Act map, but there is no indication as to which paths the deduction for public rights of way or user is for, or their status.
3. B-O-R-Q is shown as a dashed line coloured yellow on the Forest map, but this indicates the boundary of Free Piece rather than a public right of way. This route is not shown on the Tithe map, Inclosure map, or commercial maps, and it is not shown on the OS maps in full until 1939, although section B-O is shown on the 1909 OS map.
4. This route is not shown on the DMS and does not appear to have been claimed during its production. A 1989 letter indicates that section B-O was being used but it does not provide sufficient evidence of use, or indicate if use was public, private, or with permission.
5. A 2008 Modification Order to record section B-O as a public bridleway was determined by an Inspector on behalf of the Secretary of State but was not confirmed due to insufficient documentary and user evidence. The only new evidence appears to be the small scale commercial maps and the Inclosure Award which do not show this route.
6. Taken as a whole, I do not consider the evidence is not sufficient to reasonably allege any public rights of way exist over this appeal route.

*Appeal ROW/3350617*

1. This appeal concerns the addition of public bridleways along sections S-AA-T-U-V-X, T-W-Y, V-W, and Z-AA. An earlier application to record these routes as public bridleways was turned down and an Inspector dismissed a 2007 appeal because there was insufficient documentary or user evidence to show public rights.
2. The only ‘new’ evidence submitted in relation to this appeal appears to be a significant number of additional documents concerning the registration of Broxhead Common as common land. These appeal routes are within Broxhead Common, but for the same reasons discussed in paragraph 78 to 81 the *‘right to air and exercise’* over a common does not give rise to a public highway and the Commons Records do not provide any evidence in relation to public rights of way. The Inspector in the 2007 appeal also considered if a *‘right to air and exercise’* over Broxhead Common led to the dedication of public highways and also found it did not.
3. Consideration was also given to multiple routes over Broxhead Common during the production of the DMS, but these routes were not recorded. Those determining the claims in the 1960s would have been better placed to determine if these routes were being used than I am today, particularly as no user evidence has been submitted.
4. These appeal routes are not shown on the Tithe or Inclosure map. They are largely not shown on the commercial maps or the Forest map and the sections that are shown are part of substantially different routes. Section V-W is shown on most of the OS maps, but the rest of these appeal routes are not shown until 1974.
5. In my view, the evidence before me appears to be a reinterpretation of documents and arguments previously considered in relation to the appeal routes. I do not consider there has been a ‘discovery of evidence’ to show that public rights can be reasonably alleged to subsist over these appeal routes. Furthermore, for the avoidance of doubt, I do not consider any of the evidence in relation to these appeal routes is sufficient to reasonably allege public rights over the appeal routes.

*ROW/3350619*

1. Appeal ROW/3350619 is for the upgrade of FP3 to bridleway along section D-ZZ-L. It is not shown on the Tithe, Inclosure, commercial, Forest, or 1810 OS maps.
2. Section D-ZZ is shown on OS maps between 1869 and 1962. It then continues in a south easterly direction to VV. Section ZZ-L is not shown. On some of the OS maps it is labelled *‘F.P.’* On the 2004 OS map D-ZZ-L is shown as a public footpath.
3. Section D-ZZ is part of Path 3B in the List of Paths and Properties but there is no indication as to its status.
4. The Finance Act records indicate that section D-ZZ is part of the *‘public footpath from Broxhead Common to Headley Wood Farm’*.
5. Section D-ZZ is shown on the 1951, 1958, and 1964 DM’s as part of FP3 and it continued southeast to point VV. In 1973 an Order was made to divert the original line of FP3 between ZZ and VV to a new line along section ZZ-L. Therefore, prior to 1973 there is no evidence of any public rights over ZZ-L and the Order only created footpath rights over this section.
6. In 1997 a Modification Order to upgrade FP3 northwest of FP4 to bridleway was not confirmed as there was insufficient documentary or user evidence to show public bridleway rights existed.
7. An earlier application to upgrade to bridleway section D-ZZ-L was turned down by HCC in 2001. This decision was appealed but dismissed by the Inspector because there was insufficient documentary or user evidence to show public rights.
8. I consider the evidence before me consistently shows section D-ZZ-L as a public footpath. Taken as a whole, I do not consider there is sufficient evidence to show, on the balance of probabilities, that bridleway rights exist over this appeal route.

*ROW/333350623*

1. This appeal concerns amending the width of BW4 along section F-XX and the removal of gates on BW4 and BW54 at points F, E, and O.
2. Section F-XX originally ran on a different line until it was diverted in 1990. The width in the Diversion Order is 3 metres. The Order also referred to field gates at points D and F. The DS records the width of this section as 3 metres, although it does not record any structures. Therefore, the DS records the correct width of section F-XX. The DS does not record structures at points D and F, but if they were recorded, they were authorised by the 1990 Order so they would not need to be deleted from the DS.
3. There is nothing in the documents to indicate the width of the original line of BW4. It may have been wider, but it was legally extinguished by the 1990 Order.
4. The structures at points E and O are also not recorded in the DS, so it does not require modifying. The 1994 Creation Order for BW54 has not been provided. However, the Inspectors decision for the 1994 Orders refers to gates that already existed across this route since at least 1976 prior to the confirmation of the Creation Order. HCC also states the Order refers to gates at point E and F and the gate at point O was recorded in the first DS.
5. I do not consider there is any evidence to indicate, on the balance of probabilities, that the DS for section F-XX, BW4, or BW54 needs amending.

###### Overall Conclusions

1. Having regard to these and all other matters raised in the written representations, I conclude the appeals for ROW/3350614 and section A-B-C in appeal ROW/3350615 should be allowed on the alignment shown on the Binsted Inclosure Award map and Headley Tithe map.
2. Having regard to these and all other matters raised in the written representations, I conclude that the appeals for ROW/3350613, sections C-D, D-E-F, F-G-H, H-I-J, and I-K in ROW/3350615, ROW/3350616, ROW/3350622, and ROW/3350623 should be dismissed.

**Other Matters**

1. The appellant refers to difficulties with gates on the existing public bridleways, gates that they do not consider should be there, and widths they believe are too narrow. These are not matters for me to determine. There are other measures in place to deal with obstructions across, and encroachments onto the legal width of public rights of way.
2. The appellant also refers to fences which they consider have not lawfully been erected on Broxhead Common. Any person, including members of the public, who considers unlawful works have occurred on a common can make an application to the County Court under section 41 of the Commons Act 2006.

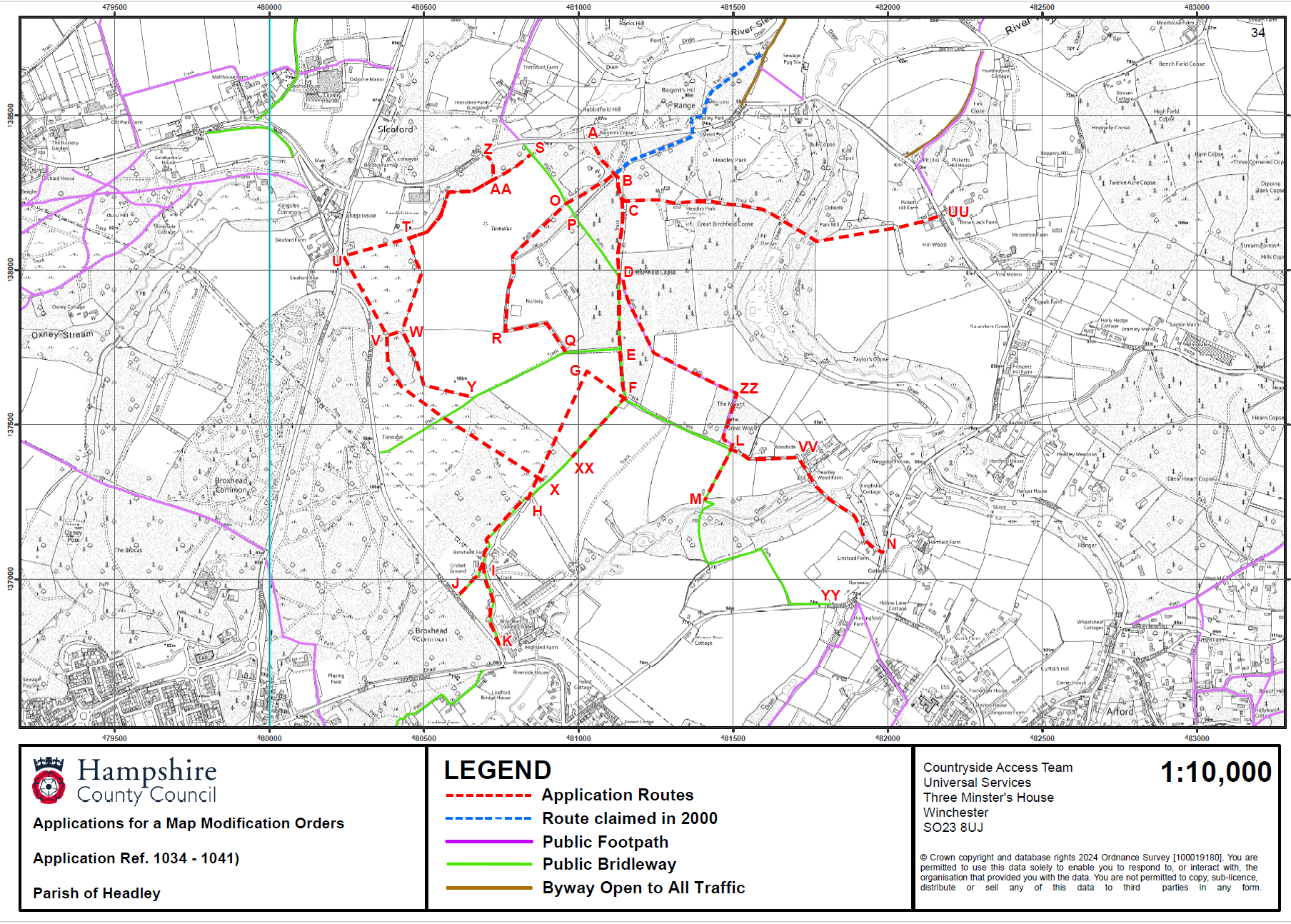
###### Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act, Hampshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add a public bridleway, as proposed in two of the applications dated 22 August 2009 and shown approximately on the plan appended to this decision between points A-B-C-UU on the alignment shown on the Binsted Inclosure Award and Headley Tithe map.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.
3. I dismiss the appeals for all the other appeal routes shown on the plan appended to this decision.

Claire Tregembo

INSPECTOR

**Plan of Appeal Routes**

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