

## Officer Delegated Decision

### Application to add a footpath from Holton Heath Trading Park to Rockley Jetty, Wareham St Martin

<b>Date:</b> 22 December 2020
<b>Decision:</b>  That the application to add a footpath from Holton Heath Trading Park to Rockley Jetty, Wareham St Martin be refused.  (Delegation is detailed within the Scheme of Delegation in the Council's Constitution.)
<b>Key Decision:</b>  <p style="text-align: center;"><b>No</b></p> Please see definition below.
<b>Reason(s) for Decisions:</b> The available evidence shows, on balance, that the claimed right of way does not subsist nor can be reasonably alleged to subsist.
<b>Decision Maker</b> (Name and Title): Vanessa Penny Definitive Map Team Manager
<b>Alternative options considered and rejected:</b> None
<b>Any conflict of interest declared by any member consulted:</b> None
<b>Any dispensation granted in respect of any declared conflict of interest:</b> None

### **Definition of Key Decisions**

Key decisions are defined in the Constitution as decisions of the Cabinet which are likely to -

- "(a) result in Dorset Council incurring expenditure which is, or the making of savings which are, significant having regard to the Council's budget for the service or function to which the decision relates namely where the sum involved would exceed £500,000; or
- (b) to be significant in terms of its effects on communities living or working in an area comprising two or more electoral wards in Dorset."

### **How to complete this pro forma:-**

- (1) The date of the decision.
- (2) A brief description of the decision.
- (3) The reasons for the decision.
- (4) Officer title.
- (5) Details of any alternative options considered and rejected by the officer when making he decision.
- (6) Any conflict of interest declared by any member who had been consulted by the officer which relates to the decision.
- (7) Any dispensation granted by the Head of Paid Service in respect of any declared conflict of interest.

**N.B Please avoid using acronyms**

## **Report to the Executive Director of Place Date**

**Report Title**            **Application to add a footpath from Holton Heath Trading Park to Rockley Jetty, Wareham St Martin**

**Portfolio Holder:**            Cllr D Walsh, Planning

**Local Councillor(s):**        Cllr B Ezzard – Lead Member for Wareham Ward

**Executive Director:**        J Sellgren, Executive Director of Place

Report Author:                Anne Brown  
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**Report Status:**                Public

**Recommendation:**  
That:

The application be refused

**Reason for Recommendation:**

The available evidence shows, on balance, that the claimed right of way does not subsist nor can be reasonably alleged to subsist;

### **1. Executive Summary**

In response to an application to add a footpath from Holton Heath Trading Park to Rockley Jetty, Wareham St Martin, this report considers the evidence relating to the status of the route.

### **2. Financial Implications**

Any financial implications arising from this application are not material considerations and should not be taken into account in determining the matter.

### **3. Well-being and Health Implications**

Any well-being and health implications arising from this application are not material considerations and should not be taken into account in determining the matter.

### **4. Climate implications**

Any climate implications arising from this application are not material considerations and should not be taken into account in determining the matter.

### **5. Other Implications**

None

### **6. Risk Assessment**

Having considered the risks associated with this decision, the level of risk has been identified as:

Current Risk: LOW

Residual Risk LOW

### **7. Equalities Impact Assessment**

An Equalities Impact Assessment is not a material consideration in considering this application.

### **8. Appendices**

1 Drawing T498/20/1

2 Law

3 Documentary evidence

- Ordnance Survey Map (1925) at a scale of 1 : 2,500
- Ordnance Survey Map (1990) at a scale of 1 : 10,000
- Aerial photographs (1947)
- Aerial photograph (1997)

4 User evidence - charts to show number of users and frequency of use

### **9. Background Papers**

The file of the Executive Director, Place (ref. RW/T498).

## 1 Background

### Applicant

- 1.1. An application to add a footpath as shown A – B – C – D – E – F – G on Drawing T498/20/1 (Appendix 1) was made by Cllr Beryl Ezzard on 11 March 2010.

### Description of the route

- 1.2. The route claimed commences at Point A on the northerly roundabout on Holton Heath Trading Estate where there is a lockable steel gate, 8.15 metres wide. It then follows the estate road and footway (7.5 metres wide in total) in a south easterly direction to point B.
- 1.3. The estate road ends at Point B and the claimed route continues as a gravel path 4 metres wide beside a building and car park. In 2014 before the building was erected, this section was 7 metres wide. On reaching the mainline railway the claimed route travels in a generally easterly direction, as an overgrown and frequently flooded track through woodland, approximately 5 metres wide, following the northern boundary of the railway to Point C.
- 1.4. At Point C there is a pair of old gate posts 3.6 metres apart. The route continues in an easterly direction on a slight embankment through woodland. There is an unlocked gate in the northern boundary fence at point C1. The route is approximately 5 metres wide to point D but in places the it is partly obstructed by fallen trees and is overgrown, particularly on the approach to Point D.
- 1.5. At point D there is a field gate in the field boundary to the north giving access to Holton Lee. The route turns south easterly to point E where there is a bridge, 4.1 metres wide, over the mainline railway. The bridge is barricaded on both sides (In November 2019 the bridge was in an advanced state of decay and due for removal by Network Rail in April 2020 due to its unsafe nature).
- 1.6. At Point E the route then crosses the bridge, turns eastwards and follows the southern boundary of the railway on a reducing embankment to Point F. The width is approximately 5 metres although overgrown in places. There are also areas where no plants are growing.
- 1.7. At Point F there are some ruined buildings in the woodland. The route turns south eastwards to Point G where it ends on an overgrown land spit in Poole Harbour known as Rockley Jetty.

### **Background to the application**

- 1.8. The application route was once a subsidiary railway line which was built towards the end of the First World War to carry raw materials and products between the Royal Naval Cordite Factory at Holt Heath and Rockley Jetty on Poole Harbour. The bridge over the mainline railway was built for this purpose.
- 1.9. Production ceased at the site in 1956 and decommissioning followed soon after. Although the land was sold, the bridge over the mainline railway remained the property of the Ministry of Defence at the time the claim for a right of way was submitted.
- 1.10. The land to the west of Point C, over which the application route passes, is registered with Land Registry as DT346080 and the freehold is held by Jade-Aden Services Ltd.
- 1.11. The land to the east of Point C, over which the application route passes, is registered with Land Registry as DT356627 and is owned by a private owner, administered by the Trustees of the Lees Estate. It is also registered leasehold as DT346081 and the 999 year lease is held by Jade-Aden Services Ltd and was formerly held by Moorish Builders.
- 1.12. The land adjacent to the claim route from points A – B – C is owned by Natural England and has been identified by the Council's Environmental Protection Team as potentially contaminated land, due to its historic land use. Because there is no public access to this area, the land does not need to be determined as contaminated or be placed onto the Contaminated Land Register. Environmental Protection is unable to support this application due to public health risks from the historic land use, as the proposed right of way would introduce members of the public to the boundary of this land – possibly then causing both the Natural England parcel of land, and the right of way to be designated as contaminated.
- 1.13. The land from Point C – D – E has no record of contamination.
- 1.14. The land from Point E – F – G is not currently designated as contaminated land. If a right of way were to be recorded the land would need to be placed on the Contaminated Land Register due to historic land use. As the proposed right of way would introduce members of the public to the boundary of both parcels of land listed above, this could cause both the Natural England parcel of land, and the right of way to be designated as contaminated.

## 2 **Law**

A summary of the law is contained in Appendix 2.

## 3 **Issue to be decided**

- 3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on the route claimed and if so, at what status the route should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.
- 3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.
- 3.3 Historical documentary evidence and user evidence has been examined to see whether depictions of the route point to it having acquired public rights as a result of deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist even if they are no longer used or needed. It is unlikely that a single map or document will provide sufficient evidence to justify a change to the Definitive Map, the evidence must be assessed holistically. The Council has a duty to record any rights that are found to exist even if they are not those claimed by the applicant.

## 4 **Documentary evidence (Appendix 3) (copies available in the case file RW/T498)**

- 4.1 A table of all the documentary evidence considered during this investigation is contained in the case file. All documents considered relevant are discussed below. Information on the background and evidential weight which should be attached to particular historical sources is included at Appendix 3 which should be read in conjunction with this section.

### **Inclosure Award**

- 4.2 There is no Inclosure Award for this area.

### **Tithe Map and Award St Martin Wareham (1843)**

- 4.3 There is a route shown on the Tithe map of 1843 which roughly corresponds to that part of the application route from points B – C. It is shown with parallel dashed lines suggesting it was unfenced from the surrounding land (apportionment number 196).
- 4.4 The un-named route on the tithe map continues in a north-easterly direction to East Holton Farm (now Holton Lee), and in a westerly direction to a road and settlement which was near the current Holton Heath station.
- 4.5 The corresponding Award makes no reference to the route.
- 4.6 Officer Comment: Although the Tithe suggests a route was in existence in 1843 and this roughly corresponded to part of the application route, there is no indication that this route had any public status.

### **Southampton & Dorsetshire Railway Plan (1844)**

- 4.7 The plan was drawn up when the mainline railway was proposed, and the documents were open to full public scrutiny. The plan would have been well researched because mistakes would be costly and may have resulted in the failure of the scheme.
- 4.8 The plan shows a route roughly corresponding to the application route between points B – C. It is shown with parallel pecked lines suggesting it was unfenced. Over some of this length the route corresponds with the planned route of the railway, but no alternative arrangements for the road are illustrated. Elsewhere where public roads correspond with the planned railway, the plan shows an alternative layout.
- 4.9 The accompanying Book of Reference is not available
- 4.10 Officer comments:
  - a) The fact that no alternative layout is provided for the route corresponding to the application route may suggest that it was not considered to be a public road. Without the Book of Reference this cannot be confirmed.
  - b) The railway plan offers no support to the application.



### **Finance Act (1910)**

- 4.11 The application route lies within the area of valuation sheet IR125/2/463 and would have passed through three of the Hereditaments; 360, 363(2) and 2156(17). None of the route is excluded from valuation.
- 4.12 Officer comment: The Finance Act documents offer no support to the application.

### **Ordnance Survey Drawings 1805**

- 4.13 The Ordnance Survey Drawing of 1805 which was made in preparation of the First Edition Map at a scale of 1 inch : 1 mile shows an unfenced track which roughly corresponds to the application route in the region of points B – C.

### **Ordnance Survey Maps**

- 4.14 The Ordnance Survey First Edition 1 inch : 1 mile map of 1856 shows an 'unfenced minor road' roughly corresponding to the application route between points B – C.
- 4.15 On the OS maps of 1887 and 1900 (1:2,500 scale), there are tracks corresponding approximately to the application route between points B – C. These are not annotated 'F.P.' or 'B.R.'. There is no bridge at point E.
- 4.16 On the OS map of 1925 (1:2,500 scale) the application route in its entirety from A – B – C – D – E – F – G is shown as a railway line with a bridge at point E.
- 4.17 On the OS plan of 1954 (1:2,500 scale) a railway line is shown from C – D – E – F - G. That part of the route from A – B – C is not shown at all and is depicted as heath, but this is most likely a security measure adopted during World War II.
- 4.18 On the OS plan of 1990 (1:10,000 scale) the application route between point A – B is shown as a path, the remainder of the application route is not shown despite the map covering the whole area. Boundary fences to the application route are shown E – F.

- 4.19 The Ordnance Survey maps and plans provide some limited evidence that a route was in existence between points B – C prior to the building of a private railway pre 1925. The bridge at point E was not in existence before the building of the private railway. The maps do not provide any evidence of status of the route shown.
- 4.20 The Ordnance Survey maps and plans from 1990 provide some evidence that a path was in existence between points A – B – C at various times, and the private railway tracks had been removed, leaving the bridge at point E. The maps do not provide any evidence of status of the route shown.
- 4.21 Officer comment: The Ordnance Survey maps and plans do not provide any support for a through route from point A – B – C – D – E – F – G.

#### **Dorset Council Records**

- 4.22 The application route was not claimed at the time of the parish survey (1950's) or during the Special Review of the Definitive Map (1970's). It has not been shown on a definitive map, or any of the draft or provisional maps to date.

#### **Landowner Deposits under Highways Act 1980 s31(6)**

- 4.23 The landowner for that section of the application route from Point C – D – E – F – G deposited a Statement on 19 February 1991 stating that they did not intend to dedicate further rights of way on their land.
- 4.24 Officer comment: This would have been valid for 6 years.
- 4.25 The landowner backed this statement up with Declaration on 13 February 1997, declaring that they had not dedicated any rights of way since the earlier statement.
- 4.26 Officer comment: This document secures the full protection from any claim for rights of way based on public use between 1991 and 1997, and would potentially extend the protection of the statement for a further 6 years.
- 4.27 A further declaration was not received within the 6 year time limit.
- 4.28 A fresh Statement was deposited on 17 November 2006 stating that the landowner did not intend to dedicate further rights of way on their land.

- 4.29 Officer comment: This would have been valid for 10 years following an extension of protection under Countryside and Rights of Way Act 2000.
- 4.30 The statement was backed up with a declaration bearing several dates, but the most recent one was 26 August 2007.
- 4.31 Officer comment: This would confirm the earlier statement and extend potential protection for a further 10 years.
- 4.32 A further declaration was sent dated 29 August 2017.

### **Aerial photographs**

- 4.33 The aerial photographs from 1947 show the cordite factory still in existence and the application route has the appearance of a railway line, although the definition of the images is not sufficient to make out track along much of the length. The bridge over the mainline railway can be seen at point E and there is a jetty extending south-east from point G with a crane on it.
- 4.34 The aerial photographs from 1972 show that much of the cordite factory has been removed. The application route shows sign of growing over with undergrowth, but where the route is not obscured by trees there are some signs of wear as judged by lighter colour. There is still a bridge over the mainline railway at point E, and the jetty is still in evidence at point G, but the crane has been removed.
- 4.35 The aerial photograph from 1997 indicates that the roundabout at point A has been laid out. The application route appears to have considerable wear as judged by lighter colour bare of vegetation on all parts that aren't obscured by trees. The jetty is no longer present at point G but the worn path extends to the end of the land spit.
- 4.36 The aerial photographs from 2002 indicates that the Holton Heath Trading Park was being laid out and an estate road was following the application route from point A to point B. The rest of the route, if not obscured by trees, appears less well used than in 1997 as judged by the greener surface, however, it still appears to be a discernible path through to point G.
- 4.37 The aerial photographs from 2005 reveal a similar situation, but the route seems to show increased levels of wear as judged by a lighter colour. There is also evidence of large objects close to the application route around point F, possibly tents.

- 4.38 The aerial photos from 2009, 2014 and 2017 yield less and less information as the years pass because the level of tree cover increases to obscure greater areas of the route. However, in all of them there appears to be some level of wear on the sections that are visible. In both 2014 and 2017 there appears to be some kind of barrier at the bridge at point E.
- 4.39 All aerial photographs from 1947 onwards reveal a section of the former railway embankment which has a different soil colour from the surrounding land. This soil appears to be unable to support plant growth and may be indicative of some form of environmental contamination.
- 4.40 Officer comment: Environmental contamination cannot be taken into consideration in deciding if public rights exist. However, if a right of way were to be recorded, then precautions may be needed to mitigate any risk to the public. This would be at the landowners' expense and would involve a protracted investigation and remediation process.

#### **Summary of aerial photograph evidence**

- 4.41 The aerial photographs provide some evidence of use of the route between the years 1972 – 2017. However, it is not possible to tell if this use was by the public or by what means (foot / cycle etc.).

#### **Summary of documentary evidence**

- 4.42 There is limited documentary evidence that an historic route existed between points B – C between the years 1805 – 1843 but there is no evidence that this route carried public rights.
- 4.43 This first evidence of a through route A – B – C – D – E – F – G was an ordnance survey map in 1925, but this was illustrating it as a railway line.
- 4.44 The first evidence that the through route A – B – C – D – E – F – G could have been used by the public was an aerial photograph of 1972, but this only indicated possible wear on the ground and cannot be taken to indicate use by the public.
- 4.45 Thus, documentary evidence provides no support for public rights along the application route.

**5 User evidence (Appendix 4) (copies available in the case file RW/T498)**

- 5.1 User evidence was submitted with the application and full public consultations were carried out in December 2014 and March 2020.
- 5.2 Charts showing number of users each year, and frequency of use form Appendix 4 and detailed witness evidence forms are available in the case file T498.
- 5.3 A total of 52 witnesses submitted evidence of use of the application route, and of these, two witnesses were discounted because they did not sign their evidence forms and a further witness was discounted because they described their use as with the permission of the landowner. Thus, the evidence from 49 witnesses was analysed.
- 5.4 The first date of recorded use was 1955 and claimed use continued after the application to record the route was made in 2010.
- 5.5 48 of the 49 witnesses used the route always or sometimes on foot, and 13 of the witnesses used the route on pedal cycle. There were no users on horseback or with vehicles other than pedal cycles.
- 5.6 46 of the witnesses had used the whole application route A – B – C – D – E – F – G at least some of the time. Three witnesses had only ever accessed the application route from Holton Lee and had thus only used that section E – F – G.
- 5.7 Seven of the witnesses used the route in connection with outings for the local Scout group, and a further 7 witnesses used it for fishing. All witnesses except two described their use as for 'Pleasure'; one did not reply, and one said it was for surveying birds.
- 5.8 21 witnesses recalled seeing a gate on the route, of which 9 witnesses described it as locked at least some of the time. Six witnesses described a gate at Point A, 5 witnesses described a gate at Point E and 1 witness described both locations. Three further witnesses described gates to control cattle which were not locked, but did not specify the location.
- 5.9 Five witnesses described a fence or other obstruction at point E and one described a fence at point A.
- 5.10 Thirteen witnesses described the locked gates / other obstructions as first appearing in 2009, one in 2008, one in 2010 and two in 2012.

- 5.11 The first recorded use of the claimed route on foot was 1955, but it was not until 1965 that more than two people claimed to have use the route. Use rose steadily for a few years, then more steeply from 1999 reaching a peak of 39 different users during 2007-2008. After 2009 the number of users declined sharply.
- 5.12 During the 20 years leading up to the locking of the gate at Point E in 2009, the minimum number of different users on foot each year was 17.
- 5.13 Officer comment: This is a sufficient number of different users that it would be considered to be use by the public on foot, given the remote location.
- 5.14 During the 20 years leading up to the first landowner deposit for that section of the route C – D – E – F – G in 1991, the minimum number of different users on foot each year was 12. Considering the whole 20 year period 1971 – 1991, there were only 21 witnesses who claimed to have used the route at some point in this time span.
- 5.15 Officer comment: This is a limited number of people even given the problems with gathering evidence from so long ago. It is believed this number is insufficient to be considered as use by the public.
- 5.16 The frequency with which the route was used on foot rose steadily from less than once a fortnight in 1965, to more than twice a week in the 1980's. Frequency then declined to 1.6 times a week in the 1990's and rose again to a peak of 7 times a week in 2006-2007.
- 5.17 During the 20 years leading up to the locking of the gate at Point E in 2009, the minimum frequency of use of the route by someone on foot was on average 1.6 times a week.
- 5.18 Officer comment: It is believed that this frequency of use is sufficient that a reasonable landowner would have been aware of the use.
- 5.19 During the 20 years leading up to the first landowner deposit for that section of the route C – D – E – F – G in 1991, the minimum frequency of use of the route by someone on foot was on average 1.3 times a week.
- 5.20 Officer comment: It is believed that this frequency of use is at the lower end of what would be sufficient for a reasonable landowner would have been aware of the use.

- 5.21 The first recorded use of the application route on pedal cycle was 1968 with 3 users, and rose to a peak of 11 users in 2003-2005 and 2008. After 2009 the number of users declined sharply.
- 5.22 During the 20 years leading up to the locking of the gate at Point E in 2009, the minimum number of different users each year on pedal cycle was five.
- 5.23 Officer comment: It is believed that this is an insufficient number of different users to be considered to be use by the public on pedal cycle during this time period.
- 5.24 During the 20 years leading up to the first landowner deposit for that section of the route C – D – E – F – G in 1991, the minimum number of different users each year on pedal cycle was 3.
- 5.25 Officer comment: It is believed that this is an insufficient number of different users to be considered to be use by the public on pedal cycle during this time period.
- 5.26 The frequency with which the application route was used by someone on pedal cycle rose from once a fortnight in 1968 to a maximum on 1.8 times a week on average from 2003 – 2008.
- 5.27 During the 20 years leading up to the locking of the gate at Point E in 2009, the minimum frequency of use of the route by someone on pedal cycle was on average 0.8 times a week.
- 5.28 Officer comment: This frequency of use on pedal cycle is believed to be insufficient to have been brought to the attention of the landowner.
- 5.29 During the 20 years leading up to the first landowner deposit for that section of the route C – D – E – F – G in 1991, the minimum frequency of use of the route by someone on pedal cycle was on average 0.5 times a week.
- 5.30 Officer comment: This frequency of use on pedal cycle is believed to be insufficient to have been brought to the attention of the landowner.
- 5.31 None of the users was employed by the landowner / a tenant of the landowner. None had been told it was not a public right of way or that they should not use the route.

- 5.32 Only five of the witnesses recall seeing signs / notices on the route; three recalled signs reading "Close the gates", one a sign at Point E reading "Danger keep off" and one a sign saying that the railway bridge was unsafe.

### **Summary of user evidence**

- 5.33 Evidence of use on foot between 1989 and 2009 is of sufficient number of users and frequency of use for public rights on foot to have been acquired.
- 5.34 There is little evidence that the users were challenged during this period either by locked gates / notices or by direct challenge by the landowner.
- 5.35 The available evidence suggests that use during the period 1989 - 2009 was without force, without secrecy and without permission i.e. it was use as of right.
- 5.36 Evidence of use on foot between 1971 and 1991 is considered not to be of sufficient number or frequency of use for public rights on foot to have been acquired.
- 5.37 In neither the period 1971-1991 nor 1989 - 2009 was there sufficient evidence of use with pedal cycle for higher rights to have been acquired.

## **6 Landowner correspondence (copies available in the case file RW/T498)**

### **Response from Moorish Builders (March 2010)**

- 6.1 Moorish Builders declared that they had been the owners of the land at Holton Heath Trading Park for 3 years (i.e. since 2007) and the leaseholders of the remainder of the land also for 3 years.
- 6.2 They did not believe the application route was public and had held this belief for the full 3 years. They had not seen, nor were they aware that members of the public were using the route but "we imagined that persons may be using it, hence padlocking the gate over the bridge".
- 6.3 They stated that the gate over the bridge (at Point E) was padlocked on 16 February 2009 and "the lock was cropped two weeks later, it was replaced and cropped again two weeks later and not replaced". In 2013 Network Rail declared the bridge unsafe and fenced it and erected a sign stating "No Public Access".



- 6.4 They stated that the main security gate to the development (at Point A) was erected on 19 August 2009 “which has prevented all access to the industrial land and the narrow strip since”.
- 6.5 Officer comment: Whilst not acknowledging that they were aware of public use of the route the actions of the owners / tenants to lock a gate effectively challenged users in their use. The date the owners state that they locked the gate tallies well with witness accounts of the locked gate.

**Response from Trustees of the Lees Estate Settlement (March 2010)**

- 6.6 Mr Lees, agent for The Trustees of the Lees Estate, stated that the estate owned the land on which that part of the application route from Point C – D – E - F – G lies and this land had been in the family’s or the trustees ownership for over 150 years and was returned to them following the closure of the cordite works.
- 6.7 The estate did not believe the route was a public right of way, but was aware of occasional use by the public on foot.
- 6.8 The estate did require people to obtain permission before using the route but had no records of this. Some people had been given permission to access the beach.
- 6.9 No signs had been erected. A gate was “infrequently locked” at point E, but the estate did not reveal dates when the gate was locked.
- 6.10 The estate had asked a volunteer warden to tell people found on the land that it was private, but no records were kept.
- 6.11 The estate deposited landowner statements / declarations under the Highways Act 1980 s 31(6) in 1991, 1997, 2006, 2007 and 2017 (see paragraphs 4.23 – 4.32 above).
- 6.12 Officer comments:
- (a) The landowner has not taken sufficient steps to make the public aware that they had no right to use the claimed route.
  - (b) Other evidence suggests that the gate was not installed at point E until 2009 so locking this gate infrequently could only have provided a deterrent from this date onwards.

(c) The deposited landowner statements and declarations provide some protection from acquisition of public rights and this is discussed in paragraph 4.26 and 4.28 – 4.31 above.

### **6.13 Response from Trustees of the Lees Estate Settlement – August 2018**

6.14 The agent for the trustees expressed a desire to dedicate a right of way over that section of the application route from Point C – D – E – F.

6.15 Officer comment: Such a dedication can only be accepted if a solution can be found to replacing the now dangerous bridge over the mainline railway, which is still in the ownership of the Ministry of Defence.

### **Response from Holton Lee Charity – sent evidence in March 2010 as Landowners but now describe themselves as adjoining leaseholders**

6.16 A representative stated that the application route was not a right of way but was used regularly by scrambler motorbikes and fishermen. The motorbike riders caused noise pollution and had damaged fences bounding the application route, causing livestock to escape.

6.17 The charity has not given people permission to use the application route but does sell 'Friends Permits' to enable people to visit their land. On occasion they have told such people that the application route is not public.

6.18 A map was sent that showed an unlocked gate in the field boundary north of point D (between the farmland and the application route) and a stile at point C1 (between the heath and the application route. This is now an unlocked gate). The map also showed a locked gate at point E and stated that fences had been cut north of point C.

6.19 Officer comment: As adjoining leaseholders this information does not give any information on the status of the application route, other than bystander evidence of use. The presence of unlocked gates / stiles between the land with 'permitted access' and the application route may be seen as inviting access to the application route.

### **Response from the renamed Environment Holton Lea Charity January 2015 – adjoining leaseholder**

6.20 A representative of the charity stated that visitors to Holton Lea had been gaining access to the application route "via two gates, on a casual basis, over the years".

- 6.21 Officer comment: This acknowledges that the adjoining landowner was aware of their visitors using the application route and no mention was made that they had been given permission.

**Response from Jade-Aden Services Ltd, new landowner for that part of the application route from Point A – B – C, January 2015**

- 6.22 Expressed strong objections to the public using the application route through what is still a construction site in progress. They wished to disclaim any responsibility for the safety of the general public should public access be allowed.
- 6.23 Later in 2020 during a verbal communication a representative of Jade Aden Service Ltd suggested that they did not object to the public using the route and, since the completion of building works, had done nothing to stop public use.
- 6.24 Officer comment: The ownership of the land and the lease by Jade Aden Services Ltd occurred after the application for a definitive map modification order had been made so would not affect whether public rights had been acquired. However, their acceptance of public use could be relevant in the case of any landowner dedication.

**7 Consultation responses and other correspondence (copies available in the case file RW/T498)**

- 7.1 Copies of various communications and meeting notes were sent in relating to a proposal to modify the Poole Harbour Trail to go along the application route and cross the Rock Lea River to Rockley Sands. The Trustees of the Lees Estate expressed that they may be prepared to dedicate the application route for this purpose, but only if it were to form a through route, and this would be subject to agreement of the leaseholders. The leaseholder at the time expressed that they would consider the proposal only once a “continuous all pedestrian harbour walkway was established”.
- 7.2 Officer comment: The desirability of the application route is not a matter that can be taken into consideration.
- 7.3 In 2014 Network Rail began raising concerns about the safety of the bridge over the mainline railway at point E.
- 7.4 Officer comment: Safety is not a matter that can be taken into consideration in determining the application.

- 7.5 Internal emails within Dorset County Council expressed interest in improving cycle access to railway stations, the application route being a part of one potential route.
- 7.6 Officer comment: The desirability and community benefit of the application route are not matters that can be taken into consideration.
- 7.7 Support for the application was offered by Annette Brooke MP, Wareham St Martin Parish Council, Purbeck District Council, Borough of Poole Transportation Services and Dorset Local Access Forum.
- 7.8 Officer comment: The popularity of the application route is not a matter that can be taken into consideration.
- 7.9 Other submissions and communications all concerned matters that cannot be taken into consideration.

## 8 **Analysis of the evidence**

- 8.1 There is evidence of use of the claimed route on foot since 1955 but it was only used consistently by more than two people from 1965 onwards. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.
- 8.2 Analysis of the evidence under Section 31, Highways Act 1980

For Section 31 of the Highways Act to give rise to a presumption of dedication, the following criteria must be satisfied:

- The physical nature of the path must be such as is capable of being a right of way at common law
- The use must be brought into question i.e. disputed or challenged in some way
- Use must have taken place without interruption for a period of 20 years immediately prior to the date the right was brought into question
- Use must be 'as of right' i.e. without force, without secrecy and without permission
- Use must be by the public at large
- There must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

### **Physical nature of the route**

- 8.3 The route claimed is capable of being a public right of way at common law, given that it follows a well-defined, linear route.

### **Bringing into question the right of the public to use the path**

- 8.4 It is considered that there are three potential dates when it may be considered that the right of the public to use the path was brought into question:

- the locking of a gate at point E in February 2009 giving a relevant period of 1989 – 2009
- the deposition of a Landowner Statement under the Highways Act 1980 s31(6) in November 2006 giving a relevant period of 1986 – 2006
- the deposition of a Landowner Statement under the Highways Act 1980 s31(6) in February 1991 giving a relevant period of 1971 - 1991

- 8.5 The locking of the gate in 2009 satisfies the requirements of an act that brought the public's use of the route into question; it was mentioned by several witnesses.

- 8.6 The other two dates in 1991 and 2006 are not believed to satisfy the requirements of an act that brought the public's use of the route into question because, at the time, there was no requirement to advertise landowner deposits under the Highways Act 1980, so the public would not have been aware of the deposition.

### **Twenty years use without interruption**

- 8.7 Based on the documentary and user evidence, it would appear that there has not been an uninterrupted twenty year period of public use leading up to an event which brought the public's use of the route into question. The only qualifying 20 year period, 1989 – 2009, was interrupted four times by acts that demonstrated that the landowner did not intend to dedicate a right of way, namely Landowner Statements in 1991 and 2006 and Landowner Declarations in 1997 and 2007.

### **Without force, secrecy or permission**

- 8.8 There is no evidence to suggest that the route, prior to 2009, has been used by force. Use of the route has been open. There is no evidence to suggest that use of the route has ever been because of a landowner's permission.

### **Use by the public**

- 8.9 Use must be of a volume that is capable of coming to the attention of the landowner, and should be public and not, for example, solely by the tenants or employees of a particular landowner or business. The evidence put forward in support of the application indicates that during the early years of use, the number of users and frequency of use were insufficient to have resulted in a deemed dedication. During more recent years the number of users and frequency of use was sufficient to be considered to be use by the public that must have come to the attention of the landowner.

### **Conclusions under Section 31, Highways Act 1980**

- 8.10 It is considered that the requirements of Section 31 have not been satisfied in this case because there is no uninterrupted period of use of twenty years ending in an event that brought the public's use of the route into question.

### **Analysis of the evidence under common law**

- 8.11 This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.

### **Conclusions under common law**

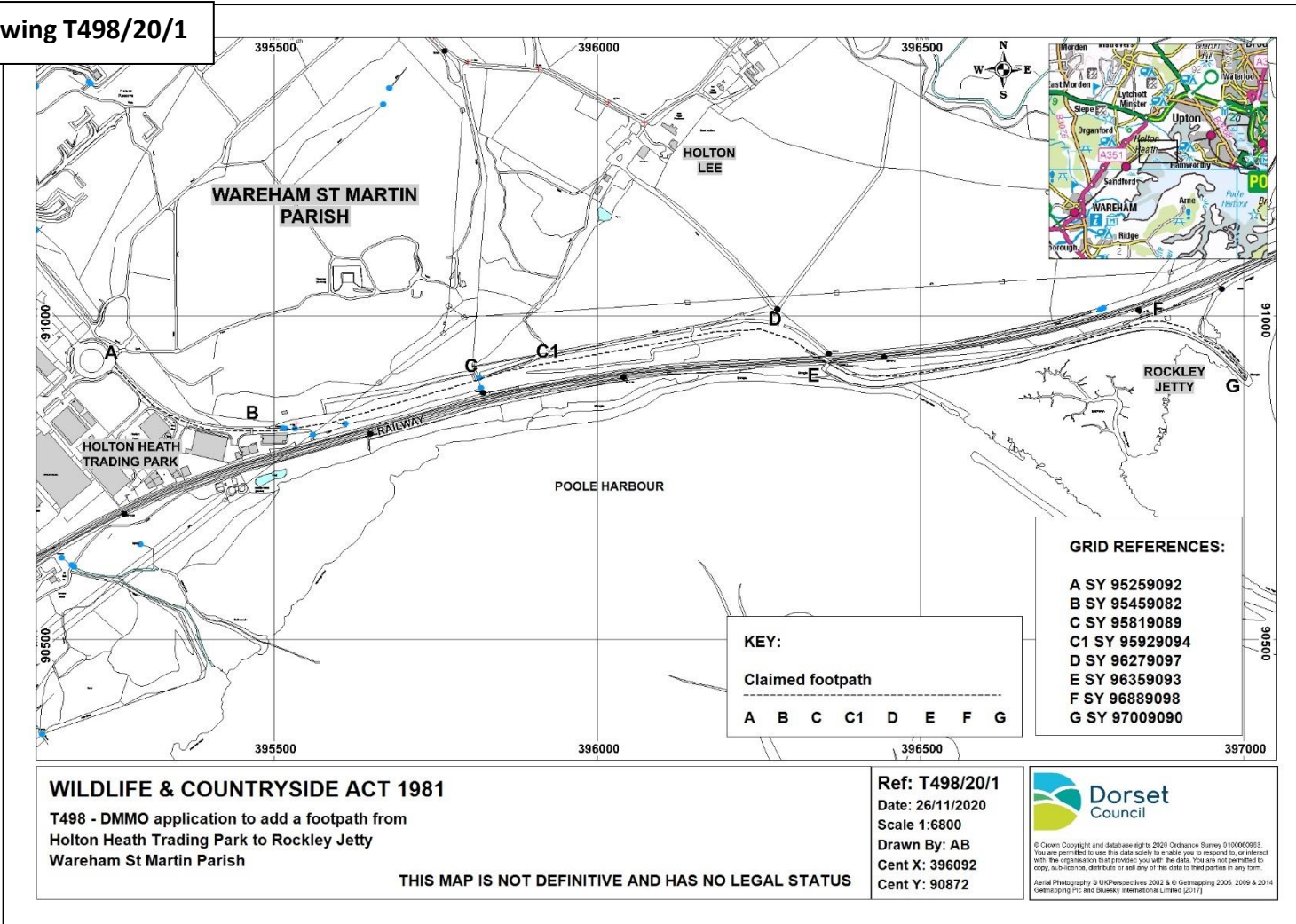
- 8.12 There is insufficient evidence from which a deemed dedication at common law can be inferred. Although there is no evidence that prior to 1991 the landowners had no intention to dedicate, the number of different users and the frequency of use of the route during this period was insufficient to infer a deemed dedication.

## **9 Conclusions**

- 9.1 In deciding whether or not it is appropriate to make an order, it is necessary to consider whether public rights subsist or are reasonably alleged to subsist on this route and/or the balance of evidence shows that the route ought to be recorded with a different status. On balance it is considered that there is insufficient evidence for the “reasonable alleged” test to be met.
- 9.2 The documentary evidence offers no support for the application.
- 9.3 The user evidence leading up to the application is strong but the landowner had, on several occasions, indicated that he had no intention to dedicate a right of way. There is no uninterrupted period of twenty years leading up to a date when public use of the route was brought into question.
- 9.4 The available user evidence is also insufficient for a common law presumption to be inferred.
- 9.5 Therefore, the recommendation is that the application be refused.

December 2020

**Drawing T498/20/1**





## LAW

### General

#### Wildlife and Countryside Act 1981

- 1.1 Section 53 of the Wildlife and Countryside Act 1981 requires that the Council keep the definitive map and statement under continuous review and in certain circumstances to modify them. These circumstances include the discovery of evidence which shows that a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
- 1.2 Section 53 of the Act also allows any person to apply to the Council for an order to modify the definitive map and statement of public rights of way in consequence of the occurrence of certain events. One such event would be the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way not shown on the definitive map and statement subsists.
- 1.3 The Council must take into account all relevant evidence. They cannot take into account any irrelevant considerations such as desirability, suitability and safety.
- 1.4 For an application to add a right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows either:
  - (a) that a right of way subsists or
  - (b) that it is reasonably alleged to subsist.

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).
- 1.5 An order to add a route can be confirmed only if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 For an application to change the status of an existing right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows that it ought to be recorded with that different status.
- 1.7 The confirmation test for an order to change the status of an existing right of way is that same as the test to make that order.
- 1.8 An order to add a right of way and change the status of an existing

right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.

- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.

## 2 Highways Act 1980

- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought in to question.

- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
- (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
- (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.

- 2.3 Section 31(3) of the Highways Act 1980 says that where a land owner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.

- 2.4 Section 31 (6) of the Highways Act 1980 permits landowners to deposit

with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.

- 2.5 Section 32 of the Highways Act 1980 says that the Council must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

### 3 Human Rights Act 1998

- 3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.

- 3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

### **Case specific law**

#### 4 Finance Act 1910

- 4.1 The Finance Act 1910 required the Commissioners of Inland Revenue to cause a valuation of "all land in the United Kingdom" and plans were prepared identifying the different areas of valuation. In arriving at these valuations certain deductions were allowed, including deductions for the existence of public rights of way.
- 4.2 Public 'fenced' roads were generally excluded from the valuation.

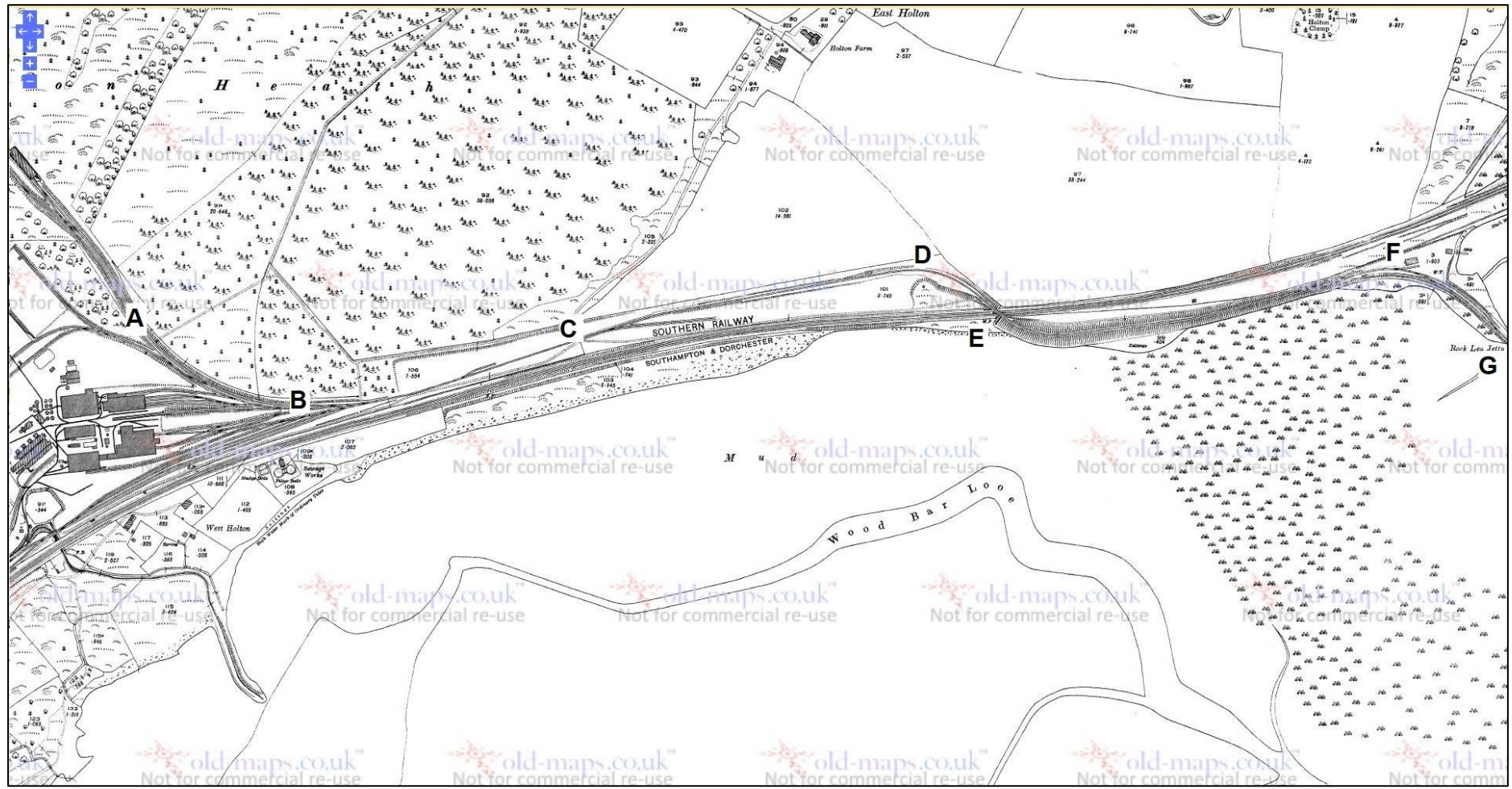
Where public rights passed through, for example a large field and were unfenced, they would be included in the valuation and a deduction would be made in respect of the public right of way.

5 National Parks and Access to the Countryside Act 1949

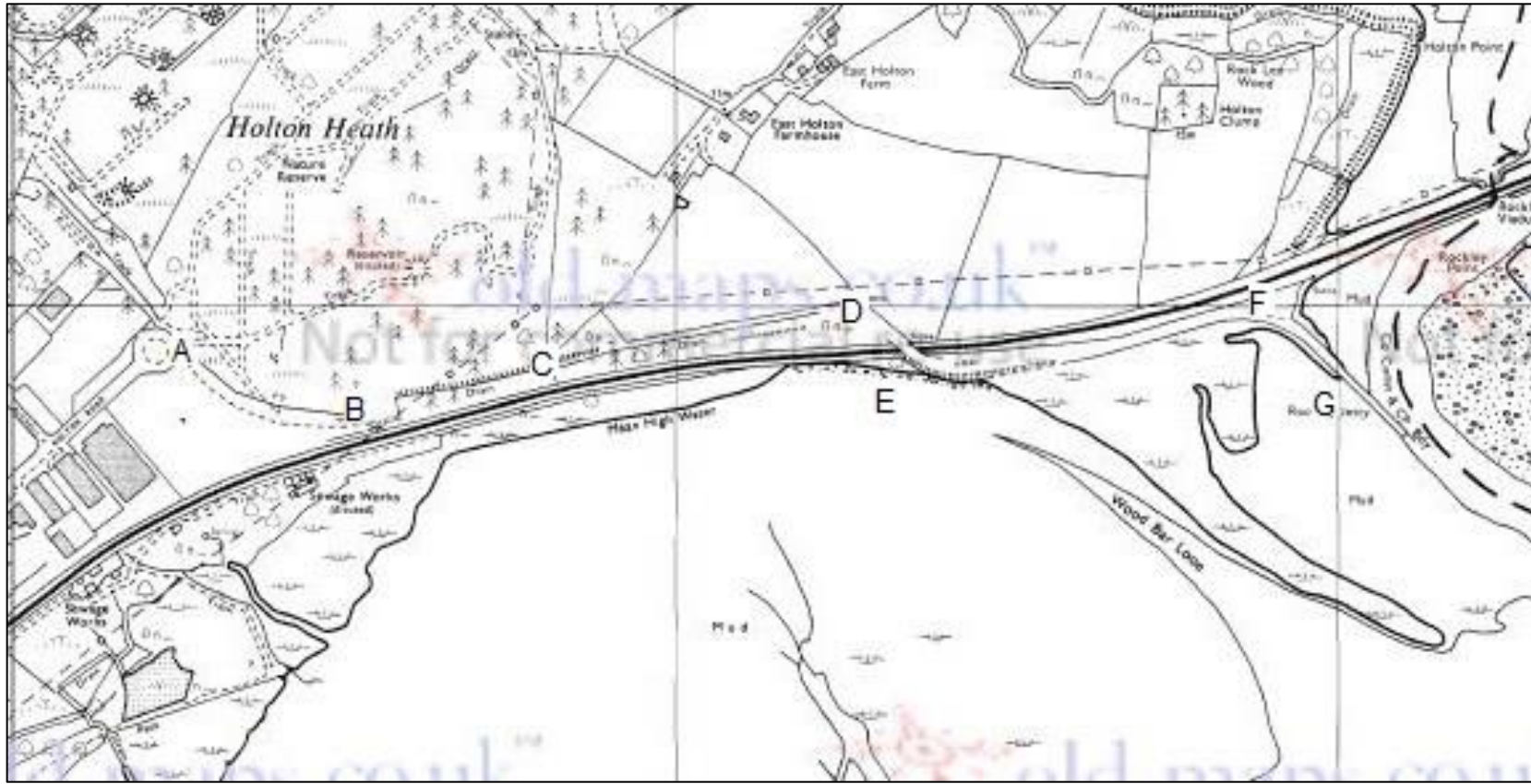
- 5.1 The National Parks and Access to the Countryside Act 1949 required the County Council as “Surveying Authority” to compile the record of the public rights of way network and the District and Parish Councils were consulted to provide the County Council with information for the purposes of the survey.

APPENDIX 3

**Ordnance Survey Map (1925) 1 : 2,500 scale**



**Ordnance Survey Map (1990) 1 : 10,000 scale**





**Aerial Photograph 1947 (western section)**

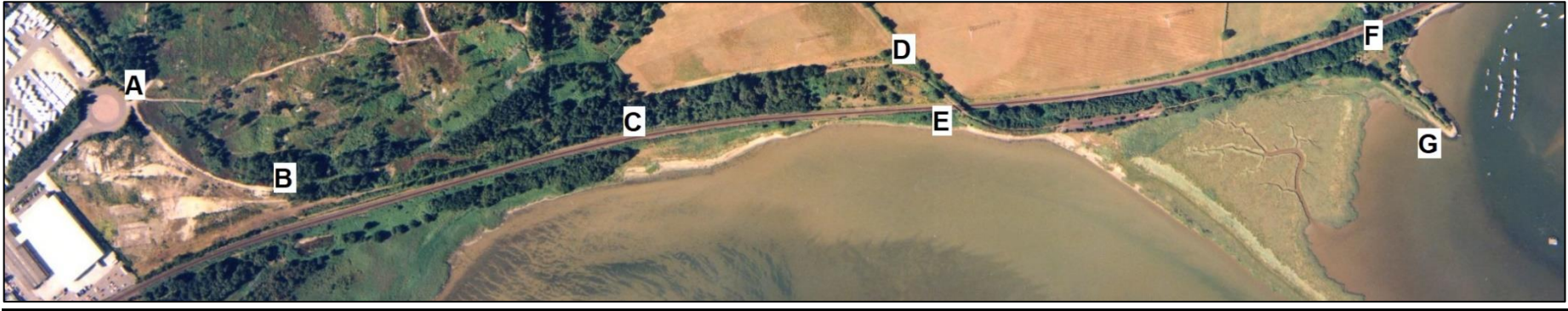


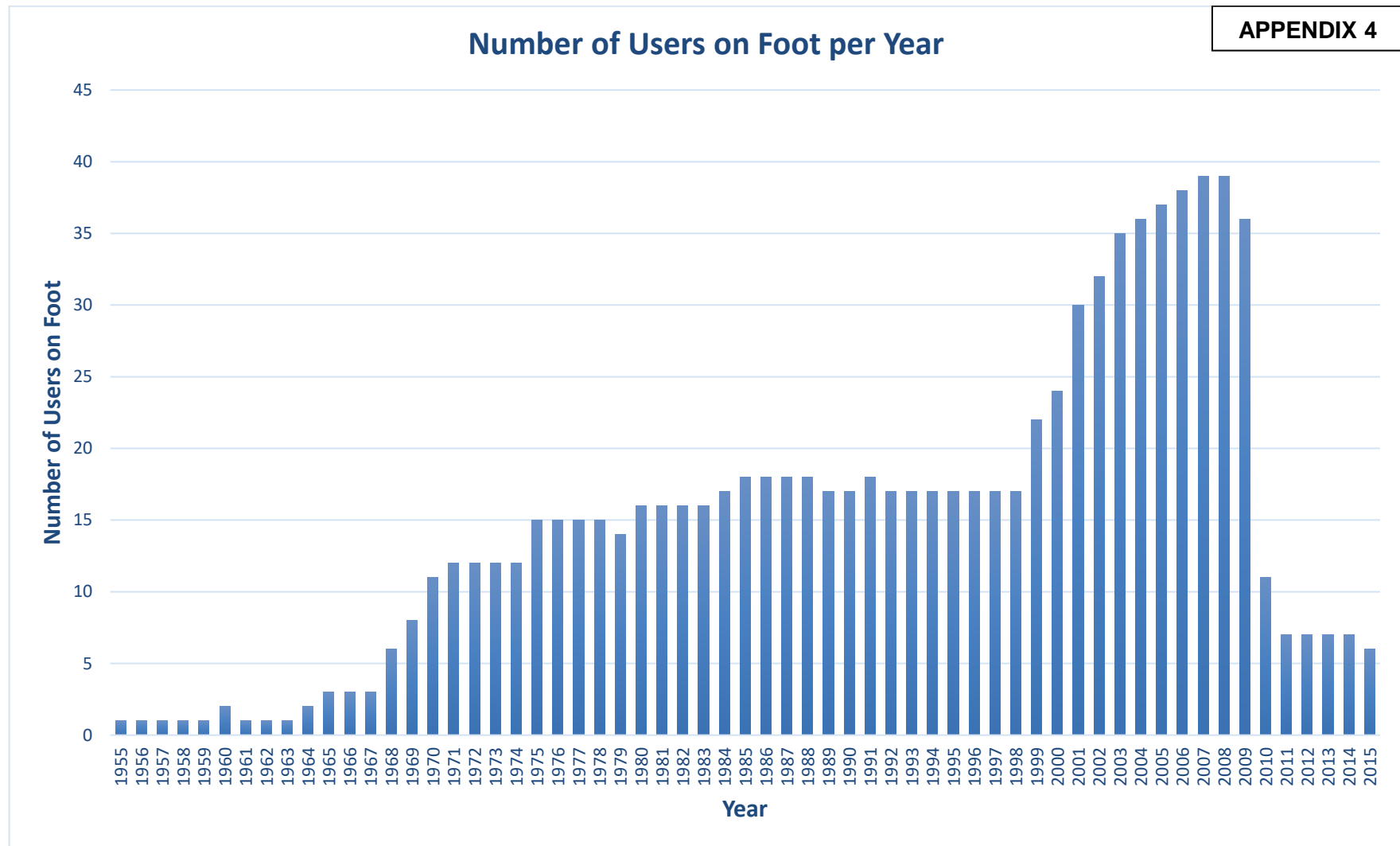
**Aerial Photograph 1947 (Eastern section)**

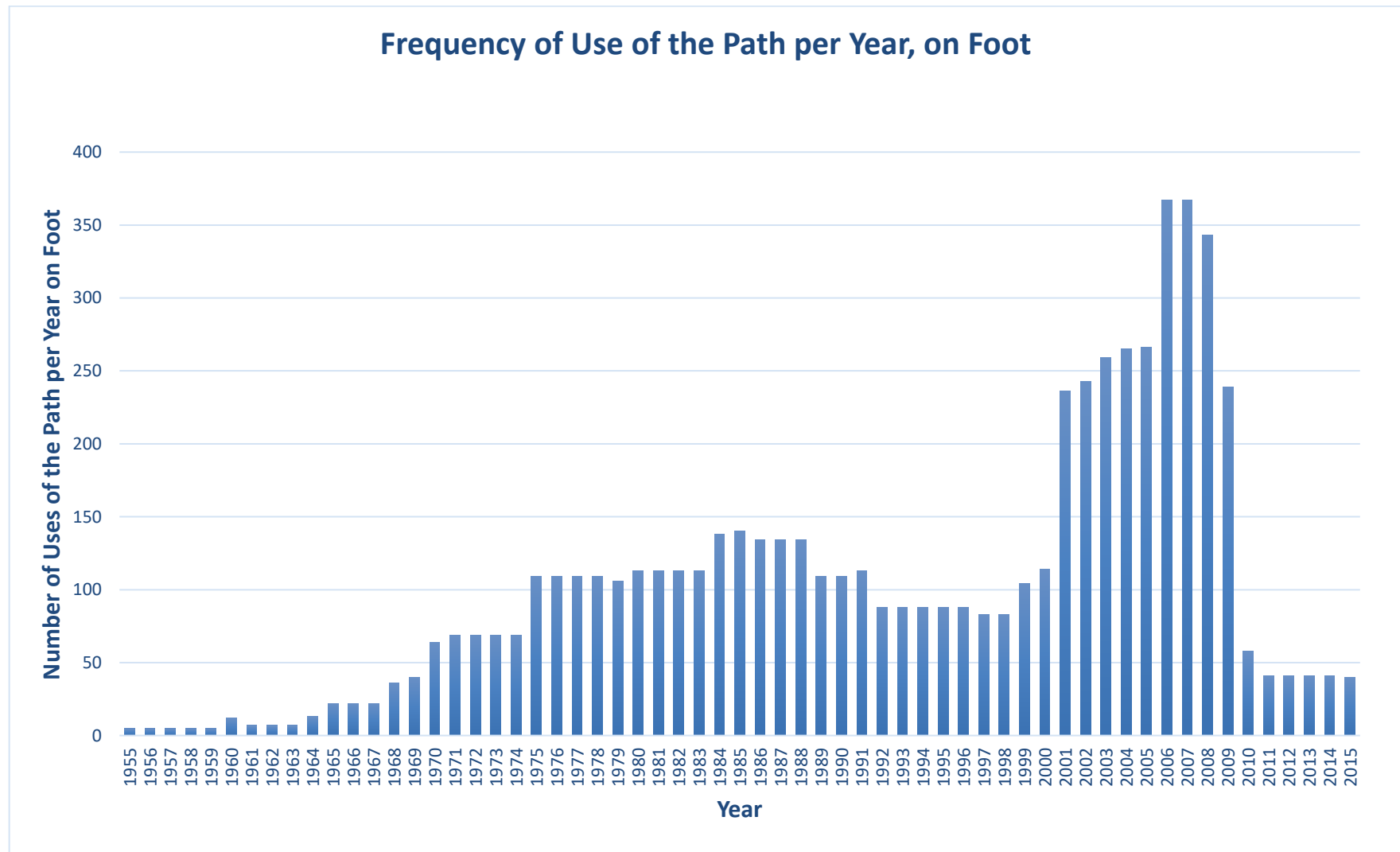


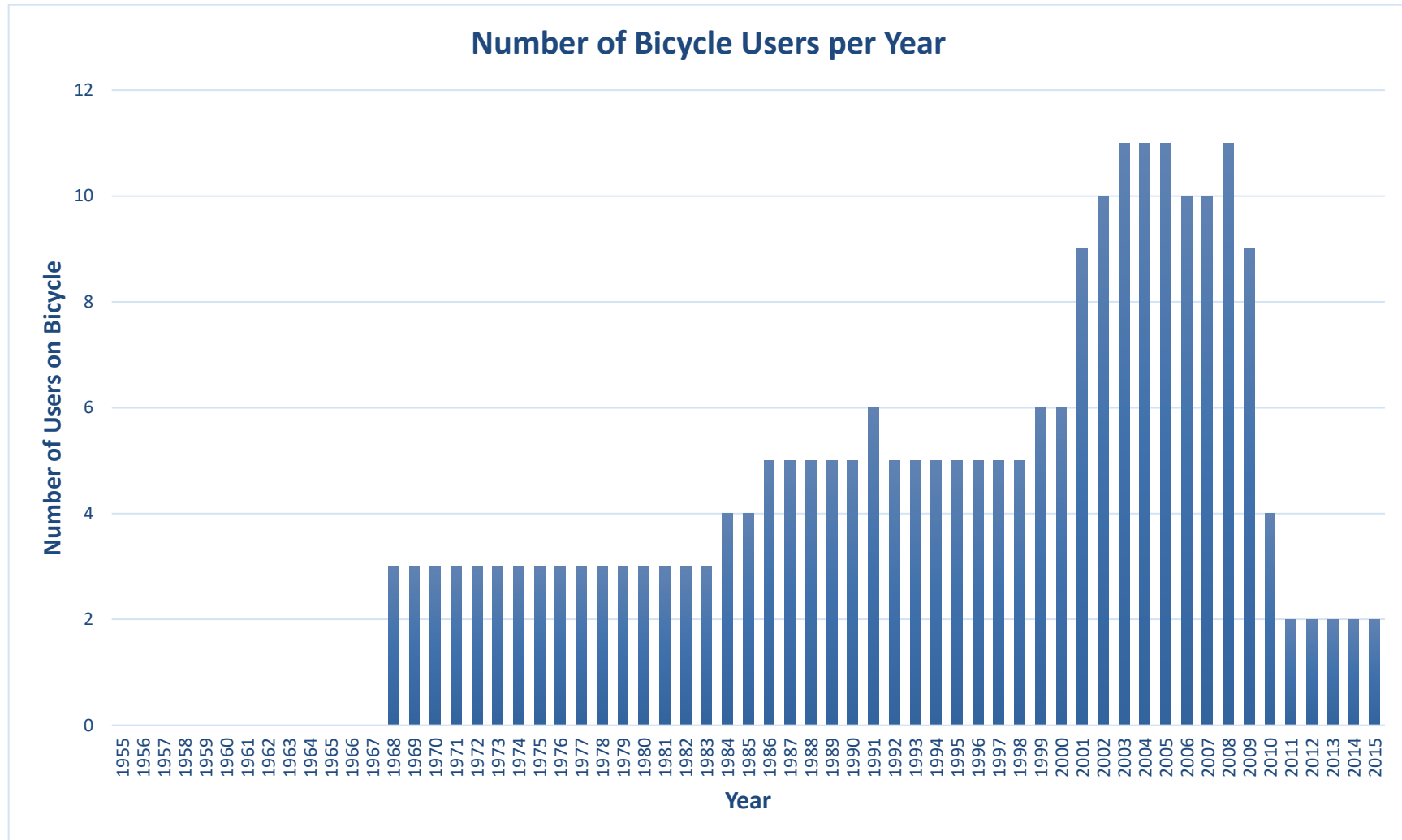


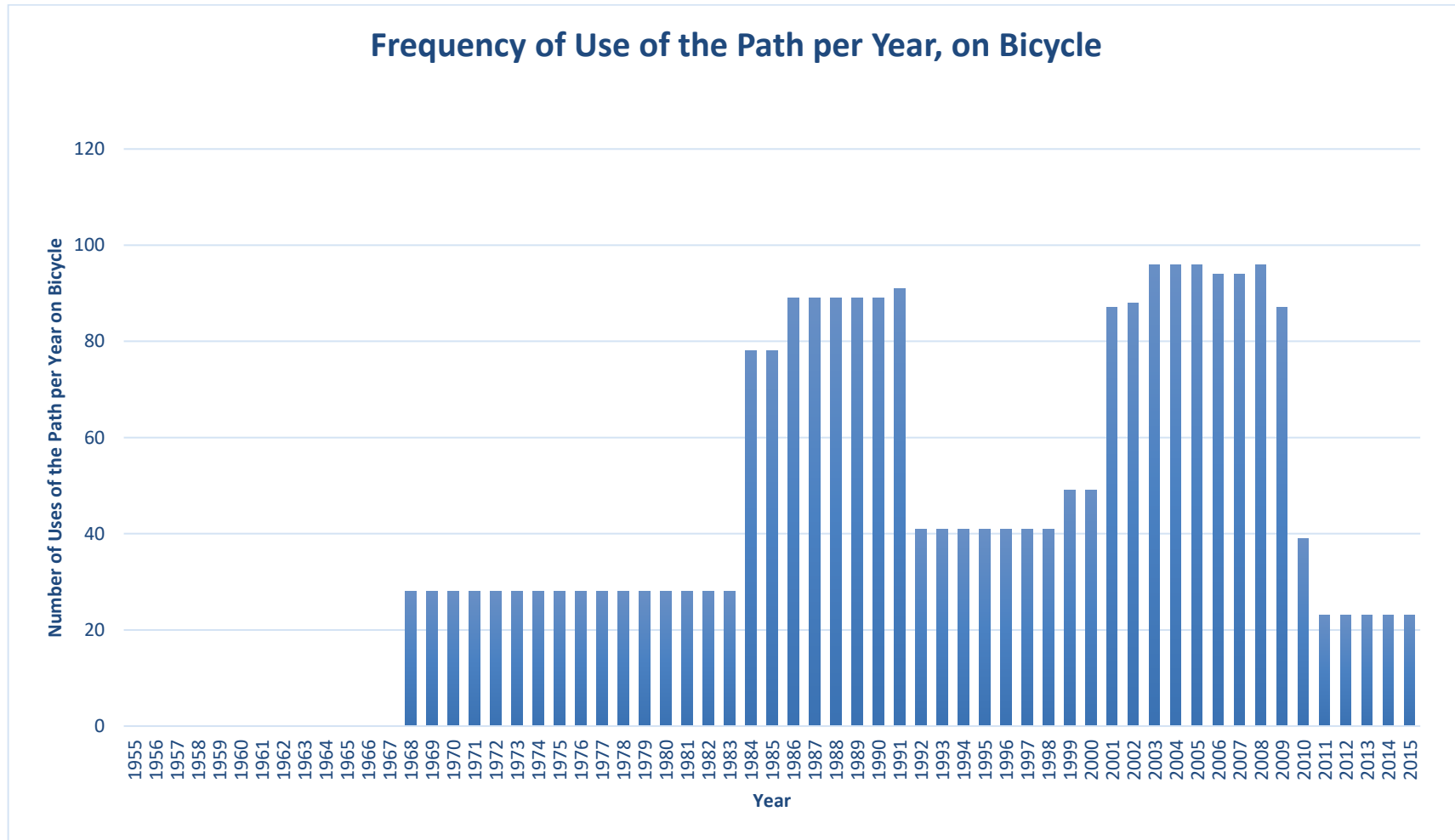
**Aerial Photograph 1997**











**Recommendations accepted:**

That the application to add a footpath from Holton Heath Trading Park to Rockley  
Jetty, Wareham St Martin be refused.

**Signed:**

.. REDACTED ..  
REDACTED

Date: ...22 December 2020.....

**Vanessa Penny**

Definitive Map Team Manager

Spatial Planning