


SURREY COUNTY COUNCIL
LOCAL COMMITTEE (WAVERLEY)
DATE: 13 MARCH 2020
LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER
SUBJECT: ALLEGED PUBLIC FOOTPATH OFF WOODSIDE ROAD, CHIDDINGFOLD
DIVISION: WAVERLEY EASTERN VILLAGES
1 SUMMARY OF ISSUE

1.1 The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which can be reasonably alleged to support a modification. An application has been received for a Map Modification Order (MMO) to add a public footpath on land between Woodside Road and Public Footpath no. 211, Chiddingfold to the Surrey County Council DMS as shown on the attached drawing 3/1/4/H27 (**Annex A**)

1.2 It is considered that the evidence is sufficient to allege that a public footpath subsists over the claimed route. As such a legal order to modify the DMS should be made.

RECOMMENDATIONS:

1.3 **The Local Committee (Waverley) is asked to agree that:**

- i) Public Footpath rights are recognised over the route shown on drawing no. 3/1/4/H27 as alleged Public Footpath no. 557, Chiddingfold between points A – B – C – D – E and that a Map Modification Order under sections 53 and 57 of the Wildlife and Countryside Act 1981 be made to modify the Definitive Map and Statement for Surrey.
- ii) In the event of the County Council being directed to make a Map Modification Order by the Secretary of State following an appeal by the claimant, the County Council as surveying authority will adopt a neutral stance at any Public Inquiry or Hearing, making all the evidence available to help the Inspector determine the case.

REASONS FOR RECOMMENDATIONS:

1.4 The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which on balance supports a modification.

1.5 In this instance the evidence submitted in support of the application is considered sufficient to establish that public footpath rights are reasonably alleged to subsist over the claimed route, having been acquired by virtue of use by the public on foot under statutory deemed dedication (under s.31(1)) of the Highways Act 1980). Evidence suggests that landowners have not challenged

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users or taken any actions to demonstrate their lack of intention to dedicate during the relevant period.

2. INTRODUCTION AND BACKGROUND

- 2.1 The County Council received an application, dated 7 June 2017, under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the addition of a public footpath on land between Woodside Road and Public Footpath no. 211, Chiddingfold. The application was supported by 23 user evidence forms (UEFs). One of the claimants (UEF 13) also used the path on bicycle. This use is not considered sufficient to acquire any higher right than footpath. The footpath claimed is shown between points A – B – C – D – E on drawing no. 3/1/4/H27 at **Annex A**.
- 2.2 The path commences at point A on Woodside Road and runs in a northerly direction along a track to a gate and gap at point B. It then continues diagonally across a field to a footbridge at point D and then meets the route of Public Footpath no. 211 at point E. The total distance A – B – C – D – E is 355 metres.

3. ANALYSIS

- 3.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. For a public right of way to become established at common law it is necessary for there to have been a dedication by the landowner and acceptance by the public. A dedication may be inferred if either: a) landowners show acquiescence by knowing about and ignoring use by the public or b) the use is so great that the landowners (whoever they are) must have known and taken no action. There is no minimum time period over which use must have occurred for rights to be established at common law. Alternatively, documentary or historical sources may be sufficient evidence to show that the map should be modified.
- 3.2 No evidence has been given either by the claimants or the landowners that at any time the alleged footpath was ever obstructed or had signs prohibiting use. Therefore the relevant 20-year period for the purposes of the Act is 1997 – 2017 following the making of the Schedule 14 application in 2017.
- 3.3 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a "sufficient number of people who together may sensibly be taken to represent the people as a whole/ the community in general". The House of Lords has ruled that the amount of user must be such as might have been reasonably expected if the route in dispute was an undoubted public highway. The necessary level of use must therefore be considered on a case by case basis. In this instance the people that have completed UEFs and given evidence are residents from the local area and it is appropriate therefore to consider that they represent the people as a whole/the community in general. The background to the legislation relating to Map Modification Orders is attached at **Annex B**.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 3.4 Twenty-three user evidence forms have been completed showing use of the route on foot between 1940 and the present day. Eleven of the claimants have used the route for the full 20-year period (1997 - 2017). A bar chart showing a summary of the years of use is attached at **Annex C**.
- 3.5 Frequency of use and reason for use
Use by walkers varies from every day to every few months. By using the actual numbers stated in the UEFs it is possible to quantify the number of times the path has been walked. The total use in a year adds up to 2685 times with an average of 117 times a year. Thirteen users walk the path fifty or more times a year. The reasons for using the alleged footpath have been stated as: dog walking, fresh air and exercise, walking with children and friends, playing, running, pleasure, recreational walking, harvesting sloes and blackberries from the hedgerows, walking occasionally to Winterton Arms PH on the A283, part of various circular walks and for a walk over the field to FP 211 and woodland.
- 3.6 Width of alleged path
Alleged paths will have differing widths depending on whether they are enclosed by boundaries, run across open land or along field edges. The physical width of the footpath on the ground varies along its length. Users have described a greater width (3.0m or one car width) where it follows the access track between points A – B. It then follows a narrow track between points B - C, described as ranging between a 1.0 and 3.0 metre width and then goes across an open field between points C – D. There is a footbridge at point D and then the path is enclosed between points D – E. In this instance, from the widths stated it is considered appropriate to record the following widths: A – B 3.0m, B – C 2.0m, C – D 2.0m, footbridge at point D 0.85m and D – E 2.0m.

User Interviews

- 3.7 Some of the users, generally those that had used the paths for the greatest number of years, were contacted and offered the opportunity to take part in an interview to learn more about their knowledge and use of the claimed paths. Seven of those users have been interviewed providing more detailed evidence:
- 3.8 Mrs J Devlin (UEF 8): “I have lived in Chiddingfold since 1994. When our children were growing up we walked the alleged footpath all the time...I still use it occasionally, sometimes with friends to go to the pub...I didn't even know it wasn't a public footpath...I have used the path every year during the last 25 years, and consider it part of the network of green open space and amenities for walking for residents of Chiddingfold...At the path's junction with Public FP 211 there used to be wobbly planks over the stream before the bridge was installed. I wasn't aware of people driving to the garages but someone I knew used to have one. The gate has not always been like this and it was originally open. When my children were young the gate wasn't there.”
- 3.9 Mrs C Priggin (UEF 16): “We moved into this house over 30 years ago in December 1988. I didn't have a dog at that point but we used to put our 6-month old son in a carrier and walk to the Winterton Arms in the summer months. In the early 1990's we got a dog and I began to use the footpath more regularly. Depending on what type of walk I want to do, I like to use it either as part of a short circuit or a circular route either going to the north or south of the village. It

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has always been a fairly obvious path. The straight line across the middle is the more obvious line than the ones around the edge of the field...I used to walk around the field with a friend of mine who was in a mobility off-road scooter. She moved away about 2 years ago so up to that point the gate can't have been locked. If there was a gate it was always wedged open. The current metal gate when closed could be opened or walked around. It has only been padlocked within the last 2 years. In the past, the field would get mown once a year but that has not happened for a few years and a lot of sapling trees have started to grow up...The path gets very muddy either side of the footbridge. There has always been a crossing point over the stream and the sleeper bridge was improved a few years ago."

- 3.10 Mrs K Young (UEF 23): "I have lived here since 2003 and before that I lived in Woodside Road. I have always had a dog. One of my friends showed me the path as a place to walk the dog and/or the children. I have always presumed it was a public footpath – I took that for granted. I have never seen any signs or fences across the path. I use the path approximately twice a week. I walk across the field and use it as part of a circular route. I remember the new gate going in recently. There has always been a gap beside the gates so that I could get through...My use of the path has never been restricted. I generally always see at least one other person using it when I am out walking."
- 3.11 Mr C Pollington (UEF 15): "In 1970, after about a month of living in Chiddingfold, some friends told us about the various paths across the fields. I have always had a dog...I have used the alleged footpath for dog walking and sloe and blackberry picking. I use the path across the middle of the field more frequently because it goes to 'The Laggs'. If it is very wet I may go around the edge of the field...There have been gates there for a long while. There is a metal one there now. As far as I can remember, in the early years you could just walk through the gateway...There have never been any restrictions on access to the path including never any signs...This side of the village is the vet, village hall and football pavilion, which people need access to. It is important to have access to the facilities without having to drive on the road...I am still a member of the Ex-Servicemen's Club and nothing has ever been said about the use of the path when weekend events have been held there e.g. a dog agility show and the caravan club."
- 3.12 Dr J and Mrs N Salway (UEFs 19 & 20): "We moved here in 1977 and have always been walkers. We got a map and saw that the route was marked as a path. Somebody must have told us about the path or we may have seen someone else walking it and then started to use it ourselves. We started walking it to just go for a walk. We are both members of the Godalming and Haslemere Ramblers and the Chiddingfold village walking group. There are 2 village groups – one for men and one for women. We have led lots of walks along the path going towards Hambledon Hurst or Witley station and the Greensand Way. There has always been a gap beside the gate so there has never been any difficulty getting through. Footpath No. 211 can get very muddy so we use the alleged footpath as an alternative. The 2 sleeper bridges where the path meets Footpath No. 211 were put in by a Ramblers working party between 5 and 10 years ago. Prior to that there were logs and bits of wood over the stream and it was difficult to use when it got flooded. We have never seen a sign saying 'Keep Out' or 'Private' and have never met a landowner. The field has never been cultivated and there have never been any animals kept in it as they would have been able to get out. The field has been mown occasionally for events. We have

always walked across the middle of the field on the trodden path. We have used it either individually, with friends or as part of a group.”

- 3.13 Mrs E Denyer (UEF 6) “I was born in Chiddingfold in 1936 and have lived in several places around the village all my life...My family has lived in Chiddingfold for a few generations and my gran and grandad lived in Woodside Road 2 doors away from the alleged footpath...The fire engine used to be parked in front of the firemen’s houses (now ‘Keenan’ and ‘Westhouse’) and didn’t use the access track to the side. Where the new houses are and the Working Men’s Club used to be, there were allotments on the right hand side until at least after the War. There was a separate entrance to the allotments from the road. The track has always been like it is now, wide at the bottom and narrower at the top. As a family we have walked from Woodside Road straight across the field and on to The Laggs and sometimes onto the Winterton Arms. As a child during the war I used to play in the field and we also had picnics there. I know all of the footpaths in the village. When I was younger I used the path several times a week, now I use it monthly. I still walk it with the local walking group.”
- 3.14 “There was originally no gate on the path. When it was put in, a gap was left at the side. The gate could have been put in when the Club bought the field. It was an earth path originally and I don’t recall when the stone surface was put down or the gate put in. About 40 years ago cattle were kept in the field. There was a fence by the bridge, which we climbed over. The field has become much more overgrown over the years and trees have grown up...The path has always been muddy where it crosses the stream. There has always been a bridge of sort, usually a plank...No one has ever told me not to use the path. I never saw any landowner and there were no signs up. There were never any structures across the path apart from the cattle fence in the past. It was just a footpath that we used and we thought it was public...It has always been there and been used by local people. I have always seen other people on the path.”

LANDOWNERS’ EVIDENCE

- 3.15 The land between points A – B is unregistered. A caution has been lodged with the Land Registry against first registration of the freehold estate by Alan Peter Matthews, Colin Steven Matthews, David John Faux and Jennifer Anne Turner care of 42 West Street, Haslemere, Surrey GU27 2AN. The statutory declaration accompanying the caution claims an interest in the estate of the late Ivor Matthews deceased in respect of adjoining land (to the north-west) which for many years has enjoyed a right of way at all times and for all purposes over the land in question. Their solicitor’s comment is that the Application is invalid such that SCC ought not to have investigated it. He has queried the procedural requirements relating to the serving of notice on the landowners by the applicant.
- 3.16 These have now been addressed by the applicant and the application is considered valid. Nevertheless, the County Council is under a statutory duty to investigate when presented with evidence for public rights whether a Schedule 14 application under the WCA has been received or not.
- 3.17 Between points B – C – D the land is registered to Ernest James Gawlik and Christine Dixon being the Trustees of the Chiddingfold Ex-Servicemen’s Club, Woodside Road, Chiddingfold. The land was purchased by the Club in 1985. Mrs Dixon has moved away from the village and given authority to Mr Gawlik as co-trustee to deal with the matter. Mr Gawlik has completed a ‘Public Right of

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Way Landowner/Occupier Evidence Form' on behalf of the Club. In it he states that "No-one has ever been stopped from using the route but upon purchase a gate was erected across the entrance and a sign reading 'Private. Chiddingfold Club. No unauthorised entry.' However, a gap was left at the side of the gate for pedestrian entry." Mr Gawlik confirms that the 5 bar steel gate was locked with padlock and chain. Regarding the sign Mr Gawlik states that it was placed "On tree at entry to land". He "Believes replaced on occasion but uncertain".

- 3.18 A site meeting was held on 16 August 2019 with Mr Gawlik, Christopher Winder (Club Chairman), Jerry Coombes (former Club President and committee member) and Ian Rhodes (planning consultant). At the meeting those representing the Club stated they had no objections to the public using the footpath and acknowledged that they had not taken any steps to prevent public use of the path. The possibility of the Club dedicating the section of path on their land as a public footpath was discussed. Mr Gawlik said he would discuss the matter with other committee members. Since then he has emailed saying "After much discussion and consideration of the various issues involved in the Map Modification Order application, it is felt that the best interests of the Club membership would not be served by positive dedication of the alleged public footpath in question and that the statutory process should proceed as you have now indicated." Mr Gawlik had been notified that the report was going to be considered by this committee. He continued "I can say however, that having regard to the grounds in law upon which any challenge can be made to the application, it is not currently the intention of the Trustee Proprietors of the land to raise any objection to the Map Modification Order being made."
- 3.19 Mr and Mrs Myers of Boundless Farm, Park Lane, Brook own the section between points D – E. They have been written to but no response has been received to date.

DOCUMENTARY EVIDENCE

- 3.18 *Definitive Map*: No public rights appear on the Definitive Map or in the Definitive Statement. It does not appear on any earlier versions of the Definitive Map dating back to 1952 nor has it ever been put forward for inclusion on any of these maps.
- 3.19 The section of path between A – C is shown on the Chiddingfold Tithe Map (1842) and described in the accompanying Apportionment and Summary as a 'Lane'. The 'lane' continues in a northerly direction along the edge of the field. On an Ordnance Survey map dated 1977/78 the path is shown as a double pecked line from point C in a northerly direction, along the line of the alleged footpath. This map has no legal status but is an indication that the Ordnance Survey at the time of their survey picked up a trodden path on the ground. The aerial photographs dated 1998/99, 2006 and 2012/13 clearly show a trodden line across the field between points C – D.

OTHER DOCUMENTS

- 3.20 Chiddingfold Neighbourhood Plan 2017
The field between points C – D is identified as site reference 6 for proposed residential use. It is described as "Site currently inaccessible by car but is accessible by (poor quality) pedestrian path. Only potential for car access to be provided is if site 7 were to be developed." Site 7 is the plot of land to the west.

3.21 Inspector's report dated 7 March 2018 on land to the west

A Public Inquiry was held by Mr Alun Aylesbury, an Inspector appointed by Surrey County Council, to consider and report on an application for a Town or Village Green on the land to the west of the site crossed by the alleged footpath. A number of people who gave evidence at the Public Inquiry referred to accessing the land along "the track by the side of the cottages from Woodside Road". This is the section of the alleged footpath between points A – B. In the report it states "The Parish Council also agrees with and acknowledges the historical use of the access track to the application site. The track has never been gated at its entrance point. Nor have there been any signs prohibiting access." This is important evidence of the use of the track between points A – B.

4. **OPTIONS:**

4.1 The Committee may agree or disagree with the officer's recommendation that footpath rights have been acquired. Alternatively, they may decide that the evidence submitted shows that the routes should be of different status to that recommended or along different lines. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence discovered and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see **Annex C**)

4.2 Where the County Council decides not to make an order, the decision can be appealed to the Secretary of State. If such an appeal resulted in a Public Inquiry or Hearing the County Council would normally take a neutral stance.

5. **CONSULTATIONS:**

5.1 Waverley Borough Council, Chiddingfold Parish Council, the Open Spaces Society, the Ramblers, Cycling UK, the British Horse Society, British Driving Society, Victoria Young County Councillor and John Gray Borough Councillor.

5.2 The Ramblers' representative, David Hutton, confirmed he had no personal knowledge of the pathway but would support the creation of a footpath if sufficient evidence could be obtained. No other responses have been received.

6. **FINANCIAL AND VALUE FOR MONEY IMPLICATIONS**

6.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, taken as a whole, is sufficient to reasonably allege the existence of a right of way.

6.2 The cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council's Countryside Access budget. If objections are received and a Public Inquiry held, additional costs of around £4000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

7. **EQUALITIES AND DIVERSITY IMPLICATIONS**

7.1 There are no equalities and diversity implications. In any event these are irrelevant factors under the current legislation.

8. **LOCALISM**

8.1 This issue is not relevant and cannot be considered under the current legislation.

9. OTHER IMPLICATIONS

Area assessed:	Direct Implications:
Crime and Disorder	None of these are relevant considerations under the current legislation
Sustainability (including Climate Change and Carbon Emissions)	
Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	
Public Health	

10. HUMAN RIGHTS ACT 1988

10.1 Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1988. Primary legislation, of which the WCA 1981 is an example, may require the County Council to act in a different way. While the Council must interpret primary legislation in a way that is compatible with Convention rights that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended to members touches on a Convention right. The making of this order may affect the rights of the landowner/ occupier under Article 8 of the Convention, the right to a peaceful enjoyment of one's possessions. The Act makes it clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law as described in Annex C of this report. As such the recommendation to Members is not considered to be in breach of the Act.

11. CONCLUSION AND RECOMMENDATIONS

- 11.1 Any decision must be made on the legal basis set out in **Annex B** to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way exists. Other issues such as security, privacy, safety or convenience are irrelevant.
- 11.2 Under Section 53 of the WCA 1981 the "authority shall make such modifications to the Definitive Map and Statement as appear to them to be requisite in consequence of the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way not shown on the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates".

STATUTORY TEST

- 11.3 Section 31 of the Highways Act 1980 states that "Where a way over any land other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years referred to in sub-section (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice...or otherwise".

- 11.4 Calling into question: It is necessary to establish under Section 31 when the public's use was first brought into question. A period of 20 years must be calculated retrospectively from the date when the right of the public to use the way was brought into question whether this was by a notice, by the making of a Schedule 14 application, by blocking the route or otherwise. Mr Gawlik has stated that when the Club bought the field in 1985 they erected a gate and notice at point B. He confirmed that "No-one has ever been stopped from using the route..." and that "a gap was left at the side of the gate for pedestrian entry." It is not known how long these signs stayed on site. Mr Gawlik has said he "Believes replaced on occasion but uncertain". None of the claimants say they have ever seen any signs preventing use. Regarding the gate, although this appears to have been locked at times use was not prevented as there has always been a gap to walk through at the side. Therefore, in the absence of any physical obstruction of the path the relevant calling into question is the date of the making of the Schedule 14 application. The relevant 20-year period has therefore been calculated as 1997 – 2017.
- 11.5 Public Use: Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a sufficient "number of people who together may sensibly be taken to represent the people as a whole/the community in general". It is not necessary for all, or indeed any, of the claimants to have used the route for the whole 20-year period but the cumulative effect must be considered. All of the claimants live in the Chiddingfold area and it is appropriate therefore to consider that they represent the people as a whole/ the community in general.
- 11.6 Use 'As of Right': Under the legislation use of the way must have been 'as of right', which means without force, secrecy or permission. It is not necessary for the user to have a belief that their use is 'as of right'. Neither the landowner nor any user have stated that anybody was individually granted specific permission or that their use of the path was with force or secrecy.
- 11.7 Lack of intention to dedicate: A landowner wanting to rebut a claim for a public right of way through long use must be able to demonstrate that they have done something that has brought their lack of intention to dedicate home to the users. On the evidence in the UEFs and from speaking to representatives of the Working Men's Club there does not appear to have been any action that would have made it clear to the public that the landowner was taking any steps to prevent public access during the relevant 20-year period.
- 11.8 Sufficiency of use: statutory deemed dedication. It is considered that there is sufficient evidence of the volume and frequency of use during the relevant 20 year period to reasonably allege that there has been a deemed dedication of the alleged footpaths.
- 11.9 Common law: An inference that a way has been dedicated for public use may also be drawn at common law where the actions (or lack of) by the landowner indicate they intended a way to be dedicated as a highway and where the public have accepted it. Dedication may be express or implied from evidence of use by the public and of acquiescence to that use by the landowner. The period of use required to give rise to dedication at common law has never been defined and will depend upon its own facts.

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- 11.10 Notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, due to the period and frequency of use officers would also submit that the facts imply that the landowner has dedicated the route as a public footpath under common law.

12. CONCLUSION

- 12.1 In light of the above, it is the Officer's view that public footpath rights have been acquired over the route under section 31 of the Highways Act 1980. Notwithstanding this it is also argued that rights have also been acquired at common law. Even if the registered landowners, between points B – C – D – E, agreed to dedicate public footpath rights on their land a MIMO would still need to be made for the section A – B as there is no freehold owner capable of dedicating rights.
- 12.2 This being the case, the Officer would submit that it can be reasonably alleged that rights have been acquired and that a MIMO should be made to record the route on the Definitive Map and Statement for Surrey as a public footpath.

13. WHAT HAPPENS NEXT:

- 13.1 If Committee decide that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 13.2 If Committee decides that no order be made, the applicant will have the opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 13.3 If the Committee resolution is different to the officer's recommendation the reasons and evidence for the decision should be recorded. This will explain the Council's actions should the matter proceed to Public Inquiry or appeal.
- 13.4 All interested parties will be informed about the decision.

Lead & Contact Officer:

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Consulted:

See Section 5

Annexes:

- A Drawing No. 3/1/4/H27
- B DMMO Background information
- C UEF bar chart

Sources/background papers:

File 'CP 578 Chiddingfold' including all relevant correspondence and documents can be viewed by appointment at SCC Countryside Access Merrow Office