

SURREY COUNTY COUNCIL**LOCAL COMMITTEE** (Mole Valley)**DATE:** 2 December 2015**LEAD OFFICER:** DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER**SUBJECT:** ALLEGED PUBLIC FOOTPATH BETWEEN BYWAY OPEN TO ALL TRAFFIC No. 15 (MICKLEHAM) AND BRIDLEWAY No. 16 (MICKLEHAM)**DIVISION:** Dorking Hills

<p><u>SUMMARY OF ISSUE:</u></p> <p>An application was received for a Map Modification Order (MMO) to add a public footpath between byway open to all traffic (BOAT) No. 15 and bridleway (BW) No. 16 (Mickleham), Mole Valley to the Surrey County Council Definitive Map and Statement (DMS).</p> <p>It is considered that the evidence shows that a public footpath can reasonably be alleged to subsist over the route. As such a legal order to modify the definitive map and statement should be made.</p>
<p><u>RECOMMENDATIONS:</u></p> <p>The Local Committee (Mole Valley) is asked to agree that:</p> <p>(i) Public footpath rights are recognised over A-B-C on Drg. No. 3/1/40/H4 and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is approved. The route will be known as Public Footpath No. 597 (Mickleham).</p> <p>(ii) A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation</p>
<p><u>REASONS FOR RECOMMENDATIONS:</u></p> <p>The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which on balance supports a modification. In this instance the evidence of long use supports the making of an MMO.</p>

1. INTRODUCTION AND BACKGROUND:

- 1.1 The late Mr Alan David Lewis submitted an application in October 2011 for a Map Modification Order (MMO) to add a footpath between BOAT 15 and BW 15 (Mickleham) to the Surrey County Council DMS. The claimed route runs between points A-B-C as shown on Drg. No. 3/1/40/H4 (**Annex A**).
- 1.2 This application was prompted following enquiries to 'The Ramblers' and the Council from a Mrs Juliet Hornby, who noted in May 2011 that the route had been walked for many years (>20); was not a right of way; had a gate and barbed wire at each end and that the public would like to continue walking it. Mrs Hornby did not complete a user evidence form however.
- 1.3 It is considered that the evidence shows that a public footpath can reasonably be alleged to subsist over the route. A legal order to modify the DMS should be made.

2. ANALYSIS:

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 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. In such cases the use must have been sufficient to raise a presumption that the landowner had intended to dedicate the route. A legal background to Map Modification Orders is attached at Annex B.
- 2.2 23 people completed public user evidence forms, spanning a period of 47 years from 1967 to 2014. Individual use on foot varied twice per year to 150 times per year. On average the evidence suggests about 792 uses per year which is around 15 per week or about twice per day. One user had also used it on a bicycle up to 15 times per year between 2000 and 2012.
- 2.3 The width of the way was deemed to vary between 0.5m to 4.0m. Most claimed a width of around 1-3m. Others (6 and 9) stated more generally that it was a 'footpath width'. Mr Edwards (6) noted that it was 'rather narrow at this end [western] so you have to walk single file. Further along [to the east] you could walk as two or three people side by side'.
- 2.4 Of the 23 users, 10 (forms 1, 3, 6, 9, 12, 14, 15, 16, 17, and 21) gave evidence of use in excess of 20 years. All of those who had completed forms had used the route on foot. 1 had also ridden a bicycle over it between 2000-2012. The majority had used the route to walk the dog and for general recreational walking; for the views and to see Churchill's Yew¹. It was particularly used as an access to and from Mickleham Downs and the Gallops and as part of a circular route. On the whole users had been told about the route by other villagers or had discovered it on their own walks about the Downs. It was well known in the area for its views and for Churchill's Yew. Officers interviewed 13 of the claimants.

¹ One of several ancient large yew trees along the path which has various Churchill related stories attached to it. The age of the tree is not known.

- 2.5 All users stated that there were any gates and/or stiles Ten said there was always a gate whilst others merely stated there was a gate or gave specific years. All of those interviewed said there were gates and some claim to have climbed over a gate at one end or other (e.g. 4, 10, 17).
- 2.6 21 of the 23 users mentioned that there were notices at some time. Of these 14 said on their forms that these did not appear until 2011; two others said 'recently'. Many suggested that there were no earlier notices. Only two users suggested strongly that there may have been older notices, but they could not remember what they said.
- 2.7 19 of the 23 forms mention the presence of fencing. Most commonly it was referred to as old, trodden down barbed wire. Two noted that this was reconstructed in 2011. Most implied that the fence was usually in a poor state of repair and consisted only of a strand or two at either end. It seems that this never made use of the route difficult or prevented it completely. None of the users claim to have physically broken down the fence or damaged it in any way.
- 2.8 It appears therefore that use may have historically been with some force, but that the fences and gates were not necessarily perceived to be challenges to use 'as if' it were already a public footpath. It is not entirely clear when fences appeared next to the gates if indeed they were not always there. None recall that the gates were closed by padlock and it seems clear that the route 'felt' like and was 'used' like other public rights of way in the area despite the widespread acknowledgement of the presence of the gates and (at various times) fences. It is significant that users said it did not feel like trespass, and this feeling seems to be common. Where fences or gates created any problems to access they were treated by users in the same way that they would have had this already been a recorded public right of way.
- 2.9 A summary of the user evidence received can be found at Annex C.

LANDOWNERS EVIDENCE

- 2.10 The land between A-B is owned by the National Trust. They note that the land in question is already 'open access land²' and that it is freely available for the public to walk over. They confirmed that they would not oppose any order made over this land and would be pleased to see extra formal access secured in this location.
- 2.11 The land between B-C is currently owned by Longshot Cherkley Court Limited. Despite several requests to the landowner directly, their bank, their planning consultant and conversations with the Estate Manager of Cherkley Court, no response was received until August 2014. They stated that they:
- i. Consider the current use to be trespass
 - ii. Have made repeated attempts during their ownership to repair fences and put up signs ("private do not trespass"). These have been repeatedly pulled down.
 - iii. The estate has been in multiple ownerships over past 20 years during which the claim is alleged and there is no way of demonstrating that previous

² Countryside and Rights of Way Act 2000.

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- owners applied the same rigour except to say that fence lines were in place, albeit pulled to the ground, when the current landowner took on the estate.
- iv. The claim is not legitimate and should be rejected but their evidence is insufficient to formally object.
 - v. Whilst it is a separate matter the landowners note that they have committed to offer a designated footpath connecting BOAT 15 with bridleway 16 albeit not along exactly the same line as the claim. This is tied to the current planning consent for the golf course at Cherkley Court.
 - vi. The gates have been in place for over 25 years as evidenced by their age/condition. These have always been in place and securely fastened.
 - vii. On 25th March 2012 a walk organised by The Cherkley Campaign were apprehended on the path and reminded that this was not a public footpath. This included four of those who had completed evidence forms.
 - viii. In order to use this way trespassers either had to climb a gate or pass a barbed wire fence, which should adequately indicate that access was not permitted.

2.12 Following a meeting with the landowner on site in December 2014 more evidence supporting their objection was promised. None has yet been received despite requests since then.

2.13 Longshot have been the landowners since April 2011. Prior to this the Estate had been owned by the Beaverbrook Foundation since 1998; by a Singapore based company called Rosebay from 1983 to 1998 and by Lord Beaverbrook before this since 1911. The current landowners confirm that they have no evidence of previous owners attempting to curtail trespass. They have not confirmed whether they have succeeded in contacting previous landowners or not.

PLANNING MATTERS

2.14 In May 2012 permission was granted by Mole Valley District Council for the proposed redevelopment of Cherkley Court into a five star hotel; private members 18 hole golf course and club house. Planning permission to proceed was issued in September 2012. A campaign against this proposal was set up which pursued judicial review of this decision in the High Court in December 2012 and the decision was quashed in August 2013. An appeal against this was mounted resulting in the quashing of the order being 'set aside' and the planning permission being reinstated in May 2014. Whilst this is not relevant to deciding this matter it is clear that this proposed development has had much impact upon access to the claimed path and has prompted greater interest in this claim than might otherwise have occurred. As part of their planning application Longshot undertook to dedicate a way following a route similar but not identical to that claimed should the application to develop be successful. This does not remove the Council's duty to consider the route claimed on the basis of the evidence submitted.

DEFINITIVE MAP

2.15 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 previously for inclusion on any of these maps.

HISTORIC EVIDENCE

Historic Maps

2.16 The route cannot be seen on any historic maps prior to those produced by the Ordnance Survey from 1886 onwards.

Ordnance Survey Maps:

2.17 The path is not indicated with a pecked line on Ordnance Survey County Series mapping of 1886, 1914 or 1934, but there is a continuous space between clumps of trees where it might have run. The route is clearly visible however on the National grid maps of 1970 by a double pecked line marked 'path'. This follows the same line to that visible on the ground today and marked on current Ordnance Survey maps. No conclusions can be drawn regarding the status of the way from these maps.

Aerial photographs

2.18 The route is clearly visible as a beaten path between clumps of trees on an aerial photograph from 1948. The land around it is generally less wooded at that time. The route is very clearly visible on an aerial photograph from 1971. There has been some afforestation on each side of it, focusing use along a single route which might account for the more clearly beaten path. Several other beaten paths join it. The route continues to be visible along the same line on aerial photographs of 1998 and 2006. It is clear on these later shots that walkers have also circuited around what is known as Churchill's Yew and the land which appeared forested around this and other ancient yews in 1971 now appears more open again. The photos do not give any indication of whether there are gates or fences across the route or not.

Site photographs

2.19 Photographs of the site are available from the dates 28 May 2011, 20 June 2011 and 21 January 2014.

2.20 The gate at point B is visible on all sets and has clearly not been opened for a long time, being very rusty and overgrown. The photos from 2011 also indicate a sign on the gate stating: "Private property. Please do not trespass", although this had been removed by 2014. Two strands of barbed wire were present on the left hand side of the gate, the top of which is clearly cut in both May and June 2011 whilst the bottom remains intact. There is nevertheless a clear beaten path to the left of the gate. No access past the gate on its right side was visible in 2011 although by 2014 an access had been made and a beaten track visible.

2.21 The routes between A and B and B and C are shown as clear, open, beaten tracks of variable width on all of the photographs. The only structures referred to by users or visible at the time of site visits are at B and C.

2.22 The gate at C is clearly visible on all sets, appearing rusty and chained, or tied shut and rather overgrown. The 2011 sets show barbed wire strands on its northern side although there is also a clear beaten path. The wire strands look quite old and rusty and were clearly not recently erected. On the south side of the gate there were several wire strands and a wooden beam preventing passage in June 2011. It does not appear that access was gained to the path in recent times from this side. The situation remained similar by 2014.

3. OPTIONS:

- 3.1 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 a different status to that recommended. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see Annexe B).
- 3.2 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 the County Council would normally take a neutral stance

4. CONSULTATIONS:

- 4.1 The Open Spaces Society did not respond to consultations on this matter. Borough Councillor Rebecca McCheyne and County Councillor Hazel Watson were consulted in November 2011 and made no comment. Mole Valley District Council consulted amongst various colleagues and considered that there was nothing which would affect the Council and that they held no relevant historic information. They did note that the land was part of Cherkley Estate and subject to planning applications. Mickleham Parish Council have not expressed a specific opinion but had some concerns over access to 'Churchill's Yew' and the path in general.
- 4.2 Legal Services have been consulted and have approved this report.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 5.1 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.
- 5.2 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.
- 5.3

6. EQUALITIES AND DIVERSITY IMPLICATIONS:

There are no equalities and diversity implications. These are irrelevant factors under the current legislation.

7. LOCALISM:

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

8. 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	

HUMAN RIGHTS ACT 1998

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 1998. Primary Legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular 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 (paragraph 2.12) under Article 8 of the Convention, the right to a private and family life and Article 1 of Protocol 1, the right to 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 detailed in paragraph 9.2-9.6 and Annex A of this report. As such the recommendation to the Members is not considered to be in breach of the 1998 Act

9. CONCLUSION AND RECOMMENDATIONS:

- 9.1 Any decision must be made on the legal basis set out in Annexe 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.
- 9.2 Under Section 53 of the Wildlife and Countryside Act 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 which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates".
- 9.3 This involves two tests:
- TEST A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.
- Test B. Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be

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reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

For the purpose of making an Order it is only necessary to meet the second (lesser) test

STATUTORY TEST

9.4 Section 31 (1) 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".

9.5 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 that is by a notice, by the making of a schedule 14 application, by blocking the route or otherwise.

CALLING INTO QUESTION AND LANDOWNERS INTENTION

9.6 The user evidence suggests that the first time users felt challenged was when notices and new fencing were erected by Longshot, shortly after their purchase of the land in Spring 2011³. This preceded and prompted the Schedule 14 application made in October 2011. Prior to this date some users recall climbing over the gate or stepping over barbed wire to access the path. The evidence does not make clear how long the barbed wire had been there for, whether it was always there, or how often it was broken down. Nor is it clear that this was recognised by all users. User 14 suggests that it was there when he accessed the path with a Scout's group between 1974 and 1982. The site photographs from 2011 also show that the barbed wire was very rusty and had probably been there for some time. Whilst there is undoubted evidence of use over and past the wire and gate over time, it is not clear that this can be considered 'use by force' given that no users claim to have broken down the fence or perceived the gate as a challenge to use. No evidence is available from landowners prior to 2011 regarding their intention. Given that no dates can be fixed regarding any earlier events of fencing or gate locking, the relevant 20 year period is therefore considered to be Spring 1991-Spring 2011.

PUBLIC USE

9.7 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 general⁴". 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. In this instance 10 claimants used the route for the whole of the 20 year period, the remaining 13 for some of the period. This level of use during this 20 year period meets the statutory test that the route can be reasonably alleged to have been dedicated as a public footpath.

COMMON LAW

³ An exact date is not known. Users 3, 4, 11, 12 suggest May 2011, although users 12 and 15 suggest August 2011.

⁴ Paragraph 5.12 Planning Inspectorate's Definitive Map Orders: Consistency Guidelines. April 2003.

- 9.8 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.
- 9.9 The historical use of the track by pedestrians for recreational purposes such as walking, talking in the view or visiting 'Churchill's yew' would have given rise to common law dedication. No evidence has been submitted to explain the actions and intentions (or otherwise) of the landowner prior to 2011.
- 9.10 The County Council would submit that, taken together, the facts imply that the landowners have been willing to dedicate the route as a public right of way under common law as well as statute law.

NATURE OF USE

- 9.11 For a right to be established the evidence must show that the way has been used without force, secrecy or permission and that the public have actually enjoyed use of it. The evidence above indicates that prior to the erection of notices and fences by the current landowner; some use had either been made by scaling the gates at either end of by stepping over or negotiating (usually broken) barbed wire fences. Whilst no suggestion is made that these users damaged the fences, such actions might be interpreted as being 'by force'. In their defence, no users claim to have actually personally used 'force' in order to use the route or go to any otherwise extreme means such as using it in secret or seeking permission. A few of the users claim to have met landowners or their agents and neither asked permission, nor were given it. They used it in the belief that it was a right of way. Whilst the issue of belief is not of relevance to making a decision here it does indicate the established and accepted principle that this was already a 'right of way'. Its use locally was notorious and long running.
- 9.12 Whilst there is clearly some conflict of evidence in relation to claimed use and the actions of landowners, there is no clear evidence to show that rights cannot be reasonably alleged to exist. It therefore follows that rights can be reasonably alleged to exist under section 31 of the Highways Act 1980 or at common law.
- 9.13 The Mole Valley Local Committee is asked to agree that:
- (iii) Public footpath rights are recognised over A-B-C on Drg. No. 3/1/40/H4 and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is approved. The route will be known as Public Footpath No. 597 (Mickleham).
 - (iv) A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation

10. WHAT HAPPENS NEXT:

- 10.1 If Committee decides that an order be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.

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- 10.2 If Committee decides that no order be made the applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 10.3 If the Committee resolution is against Officer's recommendations then they should record the reasons and cite evidence for the decision. This will make it easier to explain the decision should the matter proceed to public inquiry or appeal.
- 10.4 All interested parties will be informed about the decision.

Contact Officer:

Daniel Williams, Countryside Access Officer Tel. 020 8541 9245

Consulted:

See section 4

Annexes:

A Drawing No. 3/1/40/H4

B Legal background

C User evidence summary

Sources/background papers:

File 'CP548' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, user evidence, legal cases, assorted mapping documents can be viewed by appointment.
