



**OFFICER REPORT TO LOCAL COMMITTEE
(ELMBRIDGE)**

**APPLICATION FOR A MAP MODIFICATION ORDER
TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND
STATEMENT FOR SURREY ALONG LEIGH PLACE FROM
STOKE ROAD (A245) TO TILT COMMON, COBHAM**

28 FEBRUARY 2011

KEY ISSUE

This report seeks approval to make a Map Modification Order to add a public pathway from Stoke Road along Leigh Place to its junction with Tilt Common, Cobham to the definitive map and statement for Surrey.

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to maintain a definitive map and statement (DMS) of public rights of way within Surrey. It also has a duty to modify the DMS if it discovers evidence which, on balance, supports a modification, and where there arises under section 31(1) and (2) of the Highways Act 1980 (HA 1980), an unrebutted presumption of dedication of a way as a public footpath as a result of 20 years public use of a way as of right and without interruption, the 20 years ending with the date when the right of the public to use it was brought into question.

SUMMARY

An application for a Map Modification Order (MMO) to add a public footpath from Stoke Road along Leigh Place to its junction with Tilt Common, Cobham to the definitive map and statement for Surrey was received in September 2009. That part of the route shown 'C' – 'D' and 'C' – 'E' is common land and already available to the public for the purposes of air and recreation. The claimed route is therefore shown 'A' – 'B' - 'C' on Drawing No. 3/1/77/H17A.

It is for a party who asserts that a highway exists to prove its existence and extent. Land can become a highway either by statutory process (not applicable in this case) or by dedication by the landowner and acceptance by the public. Dedication and acceptance can be express or implied. To find implied dedication there must be evidence from which an intention to dedicate can reasonably be inferred. Acceptance of dedication by or on behalf of the public can be established by use, or in appropriate circumstances by other

evidence. Evidence can be documentary and /or user evidence. The evidence submitted in support of the application is considered sufficient on the balance of probability to establish that public rights subsist or are reasonably alleged to subsist and to warrant making a map modification order under s.53 WCA 1981.

OFFICER RECOMMENDATIONS

The Local Committee (Elmbridge) is asked to agree that:

- i. A Map Modification Order be made to add a public footpath from Stoke Road along Leigh Place to its junction with Tilt Common, Cobham to the definitive map and statement for Surrey. The route will be known as public footpath no. 93 (Esher).
- ii. In the event that one or more objection is received and maintained, that the order and supporting documentation be forwarded to the Secretary of State for the Environment, Food and Rural Affairs to decide the matter.

1. INTRODUCTION AND BACKGROUND

- 1.1 The claimed route (shown 'A' – 'B' – 'C' on Drawing No. 3/1/77/H17A see Annex 1), commences at the junction of Stoke Road and Leigh

Place, Cobham and proceeds along Leigh Place in a generally north easterly direction to the strip of common land to the west of Leigh Hill Road, known as Tilt Common, Cobham at grid reference 11295 east 60082 north. The applicants have since requested that their application be withdrawn. Under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) the council has a duty to modify the DMS if it discovers evidence which, on balance, supports a modification and once evidence has been submitted, the council must investigate, as required by the legislation and bring the matter to its conclusion (see flow charts in Annex 4). The council does not have the power to allow an applicant to withdraw the evidence.

- 1.2 In the early part of the 18th century, a large house called Brickhouse was sited on what is now the private residential estate known as Leigh Place. The property was copyhold of the Manor Cobham. The property was renamed Leigh Hill House at some time before 1849. In 1879, Leigh Hill House was purchased by Jasper Macaulay of Stillington Hall, Easingwold in Yorkshire and during their occupancy, the grounds were used for the Cobham Flower Show. In 1911 Leigh Hill House was purchased by George and Harriet Stump and became a hotel. At some stage its name was changed to Leigh Place and the OS maps dated 1914 and 1947 record the house as Leigh Place. In 1936 the property was demolished and replaced by a residential estate. The estate has developed since 1936 with more houses being added to it. The property known as Leigh Place 'originally had access through to Leigh Hill Road'.¹
- 1.3 County Councils were established in 1888 and District Councils in 1895. Cobham was initially in the Epsom Rural District but in 1933 it was annexed to Esher Urban District. Mill Road and Stoke Road are classified as the A245. Mill Road joins Stoke Road opposite Cedar House but for the purposes of this report any reference to Mill Road and or Stoke Road is interpreted as being the same road and the A245. Leigh Hill Road was adopted prior to 1936 and has been allocated number D6880. Leigh Place is listed as a private street and has not been adopted. As Leigh Place was never adopted and recorded as a road by the highway authority there will be no legal order stopping up the access to Leigh Hill Road.
- 1.4 Leigh Place is registered at the Land Registry under Title Number SY700890 and has been owned by the Leigh Place Cobham Residents Association Limited (LPCRA), of Linden Leigh, Leigh Place, Cobham since 1955. The land is subject to a right of way with or without vehicles over Leigh Place leading from Mole House to Mill Road and from Cobleigh to Mill Road. Both rights of way have been acquired by long user and are supported by statutory declarations. The statutory declarations have not been submitted to the council.

¹ (Cobham Houses and their Occupants David C Taylor 1999 Appleton Publications).

The council has not received a statutory declaration from the landowner concerning Leigh Place.

- 1.5 Tilt Common, is owned by Elmbridge Borough Council (EBC) and registered at the Land Registry under Title Number SY 783558. The public have a right of access 'for air and exercise' over this common land.

2. ANALYSIS

Statutory Test

- 2.1 In order to establish the rebuttable presumption, a claimant must show 20 years of use, 'as of right', that is, not by force, secrecy or with revocable permission, actual or implied, and that the use was 'without interruption' (i.e. without interference from the landowner by overt or identifiable acts preventing or significantly deterring passage). If this test is satisfied, the council must then decide whether deemed dedication is rebutted by sufficient evidence that there was no intention on the part of the landowner during the 20 year period that the route should be dedicated.

Date of Calling into Question

- 2.2 Vehicular Rights and Other Rights (excluding Footpath Rights)
EBC have not identified when or why access to vehicles at the Leigh Hill Road end was closed. The route from Leigh Hill Road to Stoke Road is closed at the northern end of Leigh Place on the handover map provided by EBC when Surrey County Council took over as highway authority and access across the common is marked in hand as an unmetalled footpath. The date of calling into question is therefore taken as 1973, the date of this map. The period of 20 years use required before dedication of the route can be presumed under HA 1980 therefore runs from 1953 to 1973.
- 2.3 Footpath Rights
The applicants state that 'there has been a road gate, usually open, at the Mill Road end of Leigh Place for some years as well as the road name signs on the grass verges on either side with the "no through road" vehicle sign'. They go on to say that 'the locked vehicle and pedestrian gates and associated signs together with the locked gate and access pad at the Leigh Hill Road end are new and were probably constructed in April/May 2009. Evidence produced by the LPCRA states that two wooden gates were installed in the 1980s and a 'Private Estate' sign was attached to each gate. In 1999, the 'Private Estate' signs were replaced with signs stating 'Residents Only' (see Annex 2). The wooden gates were replaced in 2008 and signs stating 'Private Estate', 'No Access to Leigh Hill Road', 'CCTV in Operation' were fixed to the new white metal gates. A pedestrian gate was also added in 2008 with a sign 'No Pedestrian Access to Leigh Hill Road'. The gate

at the Tilt Common end was installed in October 2008 and the keypad added in January 2009. The user evidence forms submitted suggest that the public have used the route on foot from 1960 to 2009. The users say they did not see any signs to suggest that pedestrian access was not permitted and used the route throughout the relevant period, even though the signs, as described above were in place. The period of 20 years use required before dedication of the route as a footpath can be presumed under HA 1980 could be taken as 1989 to 2009 (when the route was closed by the installation of the keypad at the Leigh Hill Road/Tilt Common end) or alternatively, 1988 to 2008 (when the 'No Pedestrian Access to Leigh Hill Road' sign was erected), although, from the evidence forms, the public continued to use the route despite the sign. There is sufficient evidence to meet the statutory test for both dates (see Annex 3).

Burden of Proof

- 2.4 The burden of proof in establishing that intention to dedicate in the landowner is on the person who asserts that there has been a dedication.

Documentary Evidence

2.5 Map Evidence

A number of maps including, Rocque's map 1770, Lindley Crossley's map 1793, and Colonel Mudges' map 1816, the Inclosure Map of 1795, and the Ordnance Survey Sheet XVIII:05 dated 1860, 1880, 1914 and 1947 were considered. Rocque's map 1770, Lindley Crossley's map 1793, and Colonel Mudges' map 1816 show Leigh Hill Road and Stoke (or Mill) Road. The route connecting Leigh Hill Road and Stoke (or Mill) Road is not shown on the early commercial maps but it is shown on the OS maps. The claimed route is also shown on the draft definitive map dated 1952 but is not designated as a public right of way. It may initially have been constructed as a means of access to Leigh Hill House (which later became known as Leigh Place) (see above). OS maps provide good evidence of what existed on the ground at the time of the survey. They are not however, indicative of the status of the route.

2.6 Highways Documentation and Maps

Leigh Hill Road (part) is included in the Old Roads Register – Adopted Roads (undated) but there is no mention of Leigh Place. Leigh Hill Road (from Stoke Road to Fairmile Lane), is designated the number D6880 and included in the document 'Elmbridge Borough Council Foot Highways Maintainable at the Public Expense having been adopted by the Council (not included in the rights of way list)'. Leigh Place is included in the same list but no number has been designated and there is no date in the date adopted column. The 1934 OS County Series map shows a route from the A245 to Leigh Hill Place. The properties known as 'The Lodge', 'Major's Mead' and 'Leigh Place' are shown on the same map. The 1968 National Grid map also shows a route from the A245 to Leigh Hill Place but the route differs slightly at

the Stoke Road end. The 1968 map shows that a number of other houses have been added to the estate. The 1973 Elmbridge Highway Boundary overlay provided by EBC when the council took over as highway authority shows Leigh Place closed to vehicular traffic at the Leigh Hill Road end and an unmetalled footpath running over the common land. Leigh Hill Road and Stoke Road are coloured blue indicating they are public highways.

2.7 Regulation Scheme

On 23 September 1950 the Urban District Council of Esher made a regulation scheme under the Commons Act 1899 and an exemption order was made by the Ministry of Land and Natural Resources on 20 December 1966. The application for the exemption order states that this common land 'was allocated by the Cobham Inclosure Award dated 13 July 1795 made pursuant to the Cobham Inclosure Act 1793' and that 'the occupiers of certain small houses and cottages within the manor of Cobham which are described in the Award should have the right of using in common in equal shares the allocated parts of the wastes of the manor for the purposes of pasture and of cutting turf and heath for fuel'. Under the Regulation Scheme, the 'inhabitants of the district and neighbourhood shall have a right of free access to every part of the Commons and a privilege of playing games and of enjoying other species of recreation thereon, subject to any by laws made by the council' under the scheme. 'Where a local or private act or a scheme under the 1899 act confers a right of access on the inhabitants of a particular district or neighbourhood (however described) for the purposes of open-air recreation (however described), the right of access is exercisable by the public generally as well as those inhabitants (s.15(2))². Subject to any bylaws (not provided by Elmbridge Borough Council), the public have therefore, by virtue of s.15(2) Countryside and Rights of Way Act 2000 (CRWA 2000), a right to free access to every part of the common for playing games and other recreational activities.

2.8 Aerial Photographs

Aerial photographs taken in 1948 and 1971 were examined. There does not appear to be a gate at the Stoke Road end in the photographs. Due to the vegetation it is difficult to see what was on the ground at the Leigh Hill Road end.

2.9 Planning Documentation

Planning permission for gates at the Stoke Road end of the route was granted on 22 June 1990. The permission states that a footpath not less than (3'3") in width shall be maintained adjoining the western gate in order 'to maintain a footpath of suitable adequate width for pedestrians', (Planning permission EL/90/0914 refers). The drawing attached to planning permission T.P.3/No. ESH.14975 (dated 1958)

² Countryside and Rights of Way Act 2000' (Our Common Land 6th edition, Paul Clayden, Open Spaces Society)

and Drawing No. 350/2 ESH.69/459 (dated September 1968), shows a through route to Leigh Hill Road from Leigh Place. However, the Drawing No. C74/1 dated 19 June 1979 shows a solid line at the end of Leigh Place suggesting that there was no through route to Leigh Hill Road at that time.

2.10 Evidence provided by the residents of Leigh Place and LPCRA Limited Representations have been received from a number of residents of Leigh Place as follows:

2.10.1 Mr Templer says that a sign was placed at the bridge over the brook at the northern end of the estate which said 'something like' "while we are happy for visitors to traverse our road, this is not a public right of way". Mr Templer says this sign was visible during the 1990s and it was located there for many years.

2.10.2 Mr Ballard of Rushmead, Leigh Place objects to the claim. He says that 'there has never formally been a public right of way through the Leigh Place estate'. He also states that 'prior to the installation of the gates there were a number of occasions when young men riding motor scooters cut through the estate from Leigh Hill Road'. He refers to problems of security and says the gate was installed on the advice of Surrey Police.

2.10.3 Mr and Mrs Thurston of Leigh House object to the claim on security, health and legal grounds. They say that the fence and gate at the Leigh Hill Road end was installed on the recommendation of the police. They also refer to use of Leigh Place by motorcycles travelling from Leigh Hill Road to Stoke Road.

2.10.4 Mr Flashman of The Lodge, Leigh Place objects to the claim. He refers to a break-in at his property and the police recommendation to make the entrance at the Leigh Hill Road end more secure. Mr Flashman refers to mopeds using the route from Leigh Hill Road to Stoke Road via Leigh Place.

2.10.5 Mrs Moberly of Old Tiles, Leigh Place objects to the claim. She says there is already a footpath running between Stoke Road and Leigh Hill Road (Footpath Nos 59 & 61 (Esher)). She also says that Leigh Place is a private estate and a public path is not appropriate through the estate.

2.10.6 Mr and Mrs Reay of Moles House, Leigh Place object to the claim on the following grounds:

- Leigh Place is privately owned and maintained by the residents;
- there is no separate pavement;

- no public rights of way currently exist;
- the applicants have not consulted Leigh Place Residents Association;
- the applicants have been offered access through Leigh Place;
- a public footpath would increase the risk of crime in Leigh Place;
- an alternative public footpath circumventing Leigh Place, already exists.

2.10.7 Mr Goodfellow objects to the claim on the following grounds:

- Leigh Place is privately owned and maintained by the residents;
- no public rights of way currently exist and no rights of way can be said to exist by dint of usage;
- a alternative public footpath circumventing Leigh Place, already exists.

2.10.8 Mr and Mrs Dolman say Leigh Place is privately owned and maintained by the residents, the land at the northern end of Leigh Place is common land, and a public footpath circumventing Leigh Place already exists. They refer to the burglaries in Leigh Place and the advice provided by Surrey Police to fence off the Leigh Hill Road end. They go on to say that ‘the second reason for installing the gate was to prevent people illegally riding mopeds and motor bikes across the land between Leigh Place and Leigh Hill Road and into Leigh Place’. They say that the code to the gate has been provided to Mr Bartley (one of the applicants).

2.10.9 The LPCRA has provided a statement and photographs of signs installed at the Stoke Road end of the claimed route (see Annex 2). They say that EBC installed ‘Leigh Place Private Road’ signs (plus a no through road symbol) in 1999. The minutes of the meeting held on 2 October 1999 record that signs stating ‘Residents’ Only’ were ‘put onto each gate’ and a ‘No Turning’ sign was added to the EBC sign. The installation of signs appears to have been promoted by a desire to stop motorists turning in the entrance to Leigh Place. The wooden gates were replaced in 2008 with white metal gates and a pedestrian gate was added. Signs stating ‘Private Estate’ ‘No access to Leigh Hill Road’ and ‘CCTV’ in operation’, are attached to the large white gates and a sign stating ‘No pedestrian access to Leigh Hill Road’ is attached to the pedestrian gate. Whilst the signs stating ‘Private Road/Estate’ are not sufficient to demonstrate a lack of intention to dedicate, the sign stating ‘No pedestrian access to Leigh Hill Road’ may indicate a lack of intention to dedicate. Evidence suggests that the public continued to use the route even though these signs were displayed. (Please note in paragraph number 1 where

Mr Dolman refers to the Definitive Map, he has agreed that he is referring to the OS base map on which the definitive map and statement is printed. The definitive map and statement for Surrey records the public rights of way and was not changed when access to Leigh Place was denied).

2.11 Statutory Declarations

Section 31 Highways Act 1980 (HA 1980) provides landowners with the ability to lodge statutory declaration with the council to prevent rights being acquired by the public over their land. The Leigh Place Cobham Residents Association has not lodged a statutory declaration for Leigh Place with the council.

Conclusion regarding Documentary Evidence

2.12 The map evidence shows that Leigh Hill Road and Stoke Road were set out as public roads in the Inclosure Act dated 1795. Map evidence also shows that a route existed from Leigh Hill Road, across Tilt Common to Leigh House since the 1860s. Although the route has changed slightly at the Stoke Road end since the 1947 OS map and now cuts through what is shown on the 1947 map as a small plantation of trees, the change in the route is considered de minimis.

2.13 The representations made by the residents concerning security, the existence of other public footpaths, consultation, private ownership and the absence of a pavement may not be considered under the WCA 1981. Mr Templer refers to a sign at the northern corner of the estate which he says was visible during the 1990s. He goes on to say he is not sure what happened to the sign and says it may have been removed or grown over by plants. Signs were also installed by EBC and LPRA. Whilst the signs stating 'Private Road/Estate' are not sufficient to demonstrate a lack of intention to dedicate, the sign stating 'No pedestrian access to Leigh Hill Road' may indicate a lack of intention to dedicate. Evidence suggests that the public continued to use the route on foot even though these signs were displayed.

Vehicular Rights and Other Rights (excluding Footpath Rights)

2.14 It is accepted that 'if a track across a common is not used for the purposes of taking air and exercise but is being used by the public for some other purpose: as a route between points A and B, for example, from the village across a common to a nearby school, church or railway station, then, in principle, such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act'³. The users claiming vehicular rights clearly indicate that the claimed route was a route to a different part of the borough but the usage claimed (1960 – 1973) falls short of the 20 years required by section 31(1) and (2) of the Highways Act 1980 (HA 1980). The users do not claim use on horseback but a number claim use on a bicycle. Again

³ R v Secretary of State for Environment ex parte Robert D Billson [1998] EWHC Admin 189

the period of use claimed falls short of the 20 years required by section 31(1) and (2) of the HA 1980. Although EBC has not provided information on when or why access to vehicles at point 'C' was denied, the closure of the route to vehicular traffic might be indicative of a lack of intention to dedicate. Under s.20 Commons Act 1876 (CA 1876), 'the owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of commoners'⁴. Although EBC has not provided a reason for closing the route at point 'C' it may be that 'authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful' (as 4 above).

Footpath Rights

- 2.15 The map evidence shows the route in existence from 1860 but is not conclusive as to its use.
- 2.16 The documentary evidence is not, on its own, conclusive but when combined with the user evidence, may assist in deciding whether the claim meets the statutory and/or the common law tests. All the documents referred to in this report are available to view on request.

User Evidence

- 2.16 Dedication of public footpath rights may be presumed under the statutory test set out in Section 31 HA 1980 or under common law.
- 2.17 The applicant submitted 28 user evidence forms. Taken together, their usage covers a period from 1960 to 2009. A summary of these forms is provided in Annex 3. Mr Austin has used the route throughout the whole period. Ms Bore has used the route since 1963 and Mr Cowan since 1964. All those submitting forms claim use on foot. Ms Bore, Mr Cowan and Mr Austin say they have used it in a vehicle. Mr Austin says he used it in a vehicle between 1960 and 1970. He has also used the route on a bicycle. Mr Cowan used the route in a motor vehicle every week from 1964 until it was closed to traffic. Ms Bore used the route in a vehicle between 1963 and 1970. Of the 13 people claiming use of the route on foot until 2009, 9 of these have used the route for over 20 years. Similarly, of the 27 people claiming use on foot until 2008, 19 have used the route for over 20 years. None reported having been challenged or obstructed in their use or having received permission to use the route. No users recall having seen any signs prohibiting use. Eight of those who submitted forms were interviewed. The evidence presented when interviewed is consistent with that on their user evidence forms.

Conclusions regarding User Evidence

⁴ Bakewell Management Ltd v Brandwood & Ors [2004] UKHL 14

- 2.18 Under the statutory test, the claimants have submitted evidence forms showing over 20 years use on foot, 'as of right' and 'without interruption' and the evidence submitted by the landowner that they had no intention to dedicate the route during the relevant period is not sufficient to rebut this.
- 2.19 Under common law, dedication may be implied, as the lack of action by the landowner to prevent the public using the route and the public's acceptance of the route by using it, infer that the route has been dedicated for public use. In *Mann v Brodie* (1885) 10 AC 378 it was held that it was possible to infer an intention to dedicate from evidence that the owner must have known of the user but took no steps to disabuse users of any belief that the way had been dedicated.
- 2.20 For completeness both tests have been considered but if the committee agrees that the statutory test has been met there is no need to consider the test at common law.
- 2.21 In the circumstances it is the officer's view that:
- there is insufficient evidence to support the claim for rights higher than footpath rights over the claimed route; and
 - the claimed route was used by the public during the period from 1989 to 2009 and/or 1988 to 2008 in such a manner as to raise a presumption that it had been dedicated as a public footpath, unless there is sufficient evidence that there was no intention to dedicate it.

Common Law

- 2.22 An inference that a way has been dedicated for public use may be drawn at common law where the actions of the landowner (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
- 2.23 Dedication may be express or implied from evidence of user by the public and of acquiescence in that user by the landowner. Unlike the statutory presumption of dedication contained in section 31 HA 1980, the period of user which is necessary at common law to establish or prove a dedication to the public has never been defined. Every case must depend on its own facts.

3 OPTIONS

- 3.1 The committee may agree or disagree with the officer's recommendations that footpath rights have been acquired. Decisions can only be made on the basis of the evidence submitted and interpreted under current legislation. Matters such as convenience, amenity or safety cannot be taken into account. (see Annex 4).

4 CONSULTATIONS

- 4.1 Elmsbridge Borough Council has no comment on the claimed route and have no objection to public footpath rights on Tilt Common but they object to vehicular use between Stoke Road and Leigh Hill Road. The Ramblers and the Open Spaces Society are 'keen to keep open and record paths which have been long used'. No response was received from the British Horse Society.

5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 5.1 The cost of advertising a Map Modification Order would be approximately £1,200, and would be met from the County Council's Countryside Access budget. If objections are received and a public inquiry is held, additional costs of around £1,000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the Wildlife and Countryside Act 1981.

6 EQUALITIES AND DIVERSITY IMPLICATIONS

- 6.1 The Council must act within current legislation. The Leigh Place Cobham Residents Association Limited have expressed their concern that burglaries may increase if the gate at point 'C' is removed and motorcycles cutting through the estate to access Leigh Hill Road may endanger residents and their children. Under current legislation, if a footpath is added to the definitive map a gate will not be permitted but, subject to the legislative requirements, the council will negotiate with the landowner with the aim of ensuring that a suitable barrier, (fulfilling the requirement to be the least restrictive option), is employed at point 'C' to prevent access by motorcycles and other vehicular traffic.

7 CRIME AND DISORDER IMPLICATIONS

- 7.1 The public has used the route as a footpath for a substantial period of time. Although the LPCRA claim that a change in status will have an impact on crime and disorder, current legislation does not allow such issues to be taken into account in the decision making process.

8 THE HUMAN RIGHTS ACT 1998

- 8.1 The Map Modification Order process is concerned with keeping the Definitive Map up to date. This might involve formalising rights, which already exist but have not been recorded or deleting rights included on the definitive map in error. Whilst the impact of this process on the above issues is usually negligible it is recognised that Human Rights legislation must be considered.
- 8.2 The Human Rights Act 1998 does not incorporate the European Convention on Human Rights into English law. It does, however, impose an obligation on public authorities not to act incompatibly with those Convention rights specified in Schedule 1 of that Act. As such, those persons directly affected by the adverse effects of decisions of

public authorities may be able to claim a breach of their human rights. When making a decision under s.53 WCA 1981, the only relevant consideration is whether the evidence is sufficient to raise a presumption that the public have acquired rights over the claimed route. Under the WCA 1981, other issues such as amenity, safety or convenience are not relevant.

- 8.3 The most commonly relied upon Articles of the European Convention are Articles 6, 8 and Article 1 of Protocol 1. These are specified in Schedule 1 of the Act.
- 8.4 Article 6 provides the right to a fair and public hearing. Officers must be satisfied that the application had been subject to a proper public consultation and that the public have had an opportunity to make representations in a normal way and that any representations received have been properly covered in the report.
- 8.5 Article 8 of the Convention provides the right to respect for private and family life and the home. This has been interpreted as the right to live one's personal life without unjustified interference. Officers must consider whether the recommendation will constitute such interference and thus engage Article 8.
- 8.6 Article 1 of Protocol 1 provides that a person is entitled to the peaceful enjoyment of their possessions and that no one shall be deprived of their possessions except in the public interest. Possessions will include material possessions, such as property and also user rights. Officers must consider whether the recommendation will affect the peaceful enjoyment of such possessions.
- 8.7 These are qualified rights, which means that interference with them may be justified if deemed necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Any interference with a convention right must be proportionate to the intended objective. This means that such interference should be carefully designed to meet the objective in question and not be arbitrary, unfair or overly severe.
- 8.8 The recommendation in this case is not considered to engage Article 8 or Article 1 of Protocol 1 of the Convention. As such, the recommendation is not in breach of the 1998 Act and does not have any Human Rights implications.

9 CONCLUSIONS AND RECOMMENDATIONS

- 9.1 A decision on this application must be made on the legal basis and the guidance laid out in Annex 4. Under section 53 WCA 1981 the only relevant consideration is whether the evidence is sufficient to raise a presumption that footpath rights exist. Other issues such as amenity, safety or convenience may not be considered.
- 9.2 The documentary evidence shows the existence of the claimed route from at least 1860, but is not definitive in establishing its status. The claim must rely on user evidence.
- 9.3 The decision is made on the balance of probability,⁵ that is, whether or not, on balance, public rights subsist or are reasonably alleged to subsist. If they do, the status, the width of the path and any limitations must also be determined.
- 9.4 Where there is conflicting evidence, as in this case, the council 'must bear in mind that an order made under s.53 (2) following a Schedule 14 procedure still leaves both the applicant and the objectors with the ability to object to the order under Schedule 15' and that 'conflicting evidence can be heard and those issues determined following a public inquiry'.⁶
- 9.5 Taking the evidence as a whole the officer considers that there is sufficient evidence, on the balance of probability, to warrant making a map modification order under s. 53 (2)(b) and (3)(b) and (c)(i) to establish that public rights subsist or are reasonably alleged to subsist over the claimed route and to add a footpath to the definitive map and statement for Surrey.

10 WHAT HAPPENS NEXT

- 10.1 The Committee may agree or not agree with the officer's recommendation. If the recommendations are agreed a MMO will be made. If objections to the order are made and maintained, the order will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.
- 10.2 If the Committee do not agree with the officer's recommendation and consider that, taking the evidence as a whole, there is not sufficient evidence, on the balance of probability, to make a MMO, they will record the reasons for their decision and be able to support their decision should the matter go to public inquiry.
- 10.3 All interested parties will be informed about the decision.

⁵ R. v Secretary of State for the Environment, ex parte Bagshaw and Norton [1994] and R. v Secretary of State for Wales, ex parte Gordon Emery [1997]

⁶ R v Isle of White CR v O'Keefe [1990] 59 P. & C.R. 283

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**BACKGROUND
PAPERS:** All documents quoted in the report. File may be
viewed upon request.

