



**ALLEGED PUBLIC FOOTPATH FROM
HORSHAM ROAD, HOLMBURY ST. MARY
TO BRIDLEWAY No. 20, ABINGER**

**SURREY COUNTY COUNCIL
LOCAL COMMITTEE (GUILDFORD)**

13th DECEMBER 2007

KEY ISSUE

This report considers whether or not public footpath rights should be recognised over a public footpath in Holmbury St. Mary. The report recommends that the route should be recognised and an order be made.

SUMMARY

Shere Parish Council has submitted an application for a Map Modification Order (MMO) to add a public footpath between the Horsham Road, Holmbury St. Mary and Public Bridleway No. 20, Abinger to the Surrey County Council DMS. It is considered that the evidence shows that a public footpath exists over the route and therefore a legal order to modify the Definitive Map and Statement should be made.

Report by

HEAD OF ENVIRONMENT &
REGULATION SERVICE

Surrey Atlas Ref.

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GUILDFORD B.C. WARD(S)

TILLINGBOURNE

COUNTY ELECTORAL DIVISION(S)

SHERE

OFFICER RECOMMENDATIONS

The Committee is asked to agree:

- (i) that public footpath rights are recognised over the route A – B – C – D – E on drawing 3/1/68/H26, attached as **ANNEXE B**, and that the 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. 600, Shere and Abinger.
- (ii) that a legal order should be made and advertised and if objections are received it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation

INTRODUCTION AND BACKGROUND

- 1 In January 2007, Shere Parish Council submitted an application under the Wildlife and Countryside Act 1981 (WCA) for a Map Modification Order (MMO) to add a footpath to the Definitive Map and Statement (DMS). The application was accompanied by 56 user evidence forms (2 have since been withdrawn). For legal background see **ANNEXE A** to this report.
- 2 The route (shown on Drawing No. 3/1/68/H26, attached as **ANNEXE B**) is located in Holmbury St. Mary and runs from point A at the Horsham Road opposite the village green, in a north-easterly direction along the driveway to Nos. 3 – 5 Feldemore Cottages. It continues south-easterly then north-easterly around the edge of a car parking area to a gate (installed August 2006) at point C, and then runs between garden boundary fences on the northern side and a ditch and hedge on the southern side to a gate (installed August 2006) and footbridge at point D. The path continues through woodland with a boundary fence on the northern side to point E, to meet bridleway no. 20. The width varies between 2.0 and 3.0 metres.

ANALYSIS

Public user evidence for the route

- 3 Fifty four people have completed public user evidence forms, collectively showing use of the routes from 1939 to 2006 with 33 showing 20 years or more of personal use, as shown on the bar charts **ANNEXES C1 and C2**. Officers interviewed 13 claimants to clarify their personal use of the route.
- 4 All claimants used the route on foot mainly for dog walking and pleasure as well as walking children to school and visiting the pub and friends. No claimants saw any obstructions or notices throughout their use until August 2006 when the current owners of the western section of the route put up locked gates and notices at points C and D. Nobody claims to have been stopped or told the route was not public. Most claimants say they found out about the path from other people and they always thought the route was public.

- 5 It appears that the route running along the bottom of the gardens for nos. 3 –5 Feldemore Cottages has always been separate from the gardens. A footbridge is indicated at point D on Ordnance Survey maps and several claimants refer to wooden planks across the stream.

Landowners' Evidence

- 6 Mrs S Powell of 3 - 4 Feldemore Cottages owns the land crossed by the footpath between points A – B – C – D and Mrs G Hill of no. 2 Feldemore Cottages, formerly of Bulmer Farm, owns the land between points D – E.
- 7 Mrs Hill (nee Waterhouse) has no objection to the footpath on her land. Her grandfather, Edwin Waterhouse originally owned all of the land under the claimed path, which he purchased circa 1876 along with 60 acres of land in Holmbury St. Mary. He built 'Feldemore House' (now Belmont School) and cottages for the estate workers, including nos. 1 – 5 Feldemore Cottages. Nos. 3, 4 and 5 were built to face the footpath, i.e. the southeast, so that Mr Waterhouse would not be looking at the backs of the cottages when he walked past. He also had a brickyard in the woodland just south of the path between points D – E, east of the stream, which closed in 1889. When her grandfather died the land passed to the Waterhouse Trust. Mrs Hill's father, Theodore Waterhouse was one of the trustees. To her knowledge he and the other trustees had no objection to people using the footpath. He was a previous Chairman of Shere Parish Council.
- 8 At the end of the Second World War Mrs Hill's aunt, Miss North bought nos. 1 and 2 Feldemore Cottages from the Trust. She lived in no. 1 and rented out no. 2. At that time some people used a route along the edge of the gardens of nos. 1 and 2 before continuing eastwards. In approximately 1952 Miss North constructed the wall and installed a gateway in it for access (current green door). When Dr and Mrs Harvey (claimants nos. 26 & 27) purchased no.1 Feldemore Cottages in 1982 they put up a fence between the two cottages to stop their young child having access to a bog garden in no. 2. Mrs Hill believes that people stopped using the route through the gardens when the wall and doorway were constructed.
- 9 Mrs Hill says it was never considered necessary to put private rights to use the footpath in the deeds of Feldemore Cottages, because nobody would ever have been stopped from using it. The footpath was for general use and to her knowledge no one has ever been given specific permission to use the route. Mrs Hill doesn't know who originally put the sleepers over the stream but some have always been there. The path was always fenced off from the gardens of nos. 3 – 5 by posts and wire. When no. 3 was sold to Ben Winsor approximately 9.5 years ago he erected a low lapboard fence along the garden boundary. At that time the current car park area had always been part of no. 3's garden and people had walked around the edge of it. When cottage no. 3 was sold, the car park area and land under the footpath was kept by the Trust and later sold to Mrs Powell of nos. 3 and 4 Feldemore Cottages in June 2005.

- 10 The Trustees for the Waterhouse Trust have responded saying that the driveway between points A – B has always been open for public use. The section through the car park area they say was very overgrown before the car park was constructed. They are aware of a rough track from C – D, which they thought was used by tenants and were not aware of widespread public usage. The Trustees confirm the title deeds are silent and there is no mention of a public footpath. They say it is likely that former tenants or their families would provide the best evidence as to whether the public have been exercising rights of way between points C - D.
- 11 Mr Barfoot has owned the land north of points D – E for 18 years. He has seen people (usually villagers) on various occasions, at weekends when he wasn't at work, walking along the path between D – E in both directions. He has always been under the impression that a footpath runs between points D and E and those he had spoken to were using it as a short cut from bridleway no. 20 to the Horsham Road and vice versa, and had done so for many years.
- 12 Mrs Powell objects to the use of the footpath by the public on her land. The claim initially arose on the installation of locked gates and notices by Mr and Mrs Powell in August 2006. They erected locked gates and notices at point D, saying 'PRIVATE Legal action may be taken against unauthorised persons found on this property' and at point C saying 'PRIVATE no public right of way'. Mrs Powell in her letter dated 19 June 2007 enclosed copies of the seller's property information form for when they purchased No. 3 Feldemore Cottages. She says they show the landlord did not intend to dedicate the way to the general public, but wished to keep it as a path for the use by neighbours. She also enclosed an aerial photo of the area, before the car park was built (between points B – C) in the summer of 1999, which she says shows that the whole area was very overgrown and pretty inaccessible.
- 13 Mrs Powell claims the path was not used very much but she did notice an increase in use during foot and mouth closures in 2001. She had also seen groups and teenage night hikes going through. Mrs Powell said they were fed up with the litter and dog mess left in the car park area, vandalism of their cars and dogs coming into their garden, which is why they erected the gates and notices in August 2006. They erected the gates on the understanding they would give keys to other local residents to continue using the route. Mrs Powell lodged a statement and plan, together with a statutory declaration under section 31(6) of the Highways Act 1980, with the County Council in September and October 2006 declaring that she did not recognise rights over her land. This is dated after the 20 year claimed period.
- 14 Mr and Mrs Winser who lived at no 3, Feldemore Cottages prior to Mr and Mrs Powell have stated in their letter dated 3 October 2007 "we were not aware of any steps taken by the landowner to prevent people using the path". When they bought the cottage the seller's representatives reminded them that the footpath existed, being mainly used by villagers, and they wanted the right to remain in place.

Definitive Map

- 15 No public rights are recorded on the DMS. When the first Draft Definitive Map was being prepared in 1952 the eastern section of the path had been recorded by Abinger Parish Council but was not included by the County Council on the draft map. The Dorking and Horley District Council objected to its exclusion and a Public Inquiry was held. It appears that Shere Parish Council were consulted but because they did not object the District Council decided to not uphold their objection and the path was not added to the Definitive Map.

Historic Evidence

- 16 Maps prepared under the 1932 Rights of Way Act do not record a route over the path in question. There is no Enclosure Award for this part of Surrey and the relevant Tithe and 1910 Finance Act maps do not provide any useful information in this case.
- 17 Part of the driveway between points A – B is shown on the county series maps of 1870, 1872 and 1897. On the 1915 edition a footpath is indicated through the gardens of nos. 1 and 2 Feldemore Cottages and continuing eastwards along the boundary. A footbridge is marked over the stream. The eastern section of the footpath is shown on the 1974 O.S. Sheet.

OPTIONS

- 18 The committee may agree or disagree with the officer's recommendations that rights have been acquired. The above recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity or safety are irrelevant (see **ANNEXE A**).

CONSULTATIONS

- 19 Mole Valley District Council have confirmed they have no first hand knowledge of the footpath or its usage and therefore cannot help in the matter. One of the Guildford Borough Council ward Members, Councillor David Wright, has stated "There is strong evidence that this footpath has existed since before the War. I firmly support the application." Abinger Parish Council supports the application for the addition of the route as a public footpath in their parish.
- 20 The Ramblers' Association secretary for Mole Valley fully supports the claim for "this long standing footpath as a public right of way."
- 21 This report will be considered by the SCC Local Committee (Mole Valley) on 5 December 2007, recognising that part of the route (roughly between D and E on the drawing attached as **ANNEXE B**) is in that borough. Officers will report verbally on the decisions made.

FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 22 The cost of advertising a Map Modification Order would be approximately £1000, which would be met from the County Council's Countryside Legal budget. Most costs are fixed by our duties under schedule 15 of the Wildlife and Countryside Act 1981.

EQUALITIES AND DIVERSITY IMPLICATIONS

- 23 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 under 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 **ANNEXE A** of this report. As such the recommendation to Members is not considered to be in breach of the 1998 Act.

CRIME AND DISORDER IMPLICATIONS

- 24 The route has been in use for a substantial period of time. It is unlikely that recording them on the Definitive Map will have significant crime and disorder implications. Such issues cannot be taken into account when making a decision whether the public have acquired rights or not.

CONCLUSIONS AND REASONS FOR RECOMMENDATIONS

- 25 A decision on this claim must be made on the legal basis set out in **ANNEXE A** to this report and the only relevant consideration is whether the evidence is sufficient to raise a presumption that public footpath rights exist. Other issues such as amenity, safety or convenience are irrelevant.
- 26 Under Section 53 of the Wildlife and Countryside Act 981, *"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."*

- 27 There is little documentary evidence to indicate that public rights exist over the route, hence the claim must rely on user and landowner evidence either by statute or common law.
- 28 Section 31 (1) of the Highways 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.”*
- 29 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 for example by a notice, by the making of a schedule 14 application, by blocking the route...or otherwise. In this case this must coincide with the erection of notices and locked gates in August 2006. The user evidence appears to show regular unhindered use from 1939 to 2006. Thirty three show evidence of 20 years use within the relevant period.
- 30 The officer’s conclusion is that the public has acquired footpath rights over the route shown A - B - C - D – E on plan 3/1/68/H26 and the definitive map and statement should be modified accordingly.

WHAT HAPPENS NEXT

- 31 All interested parties will be informed about the decision. If the recommendations are agreed a legal order will be made and advertised to implement the changes. If objections are maintained to the order, it will be submitted to the Secretary of state for the Environment, Food and Rural Affairs for confirmation. If no order is to be made the claimant will be informed and will have an opportunity to appeal to the Secretary of State.

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

Map Modification Orders - General

The National Parks and Access to the Countryside Act 1949 placed a duty on all Surveying Authorities in England and Wales to produce a definitive map and statement, indicating and describing public rights of way within their areas.

The '49 Act also required Surveying Authorities i.e. County Councils, to keep their definitive map and statement under periodic revision. The Wildlife and Countryside Act 1981 completely changed the way in which the definitive map and statement is updated. Under this Act Surveying Authorities have a duty to keep their map and statement under continuous review.

Certain specified events can trigger that process and one of these is an application under Section 53 of the Act for a map modification order (MMO). Section 53(5) enables any landowner, occupier or user to apply for a Map Modification Order to modify the definitive map. Landowners and occupiers may believe for example that a right of way should never have been shown on the definitive map at all, or is shown on the wrong line or that its status is incorrectly shown, for example, as a bridleway instead of a footpath.

Claims may also be made for routes to be added on the basis of evidence from historical documents or of evidence of public use, either for a continuous period of 20 years, as provided for by the Highways Act 1980 (s31) or for a shorter period under Common Law.

Both at common law and under Section 31 of the Highways Act 1980 the public's enjoyment of the way must have been "as of right" in order to form the basis of implied dedication. "As of right" was interpreted in Merstham Manor v Coulsdon and Purley UDC (1937) as acts done openly, not secretly, not by force and not by permission from time to time given. The House of Lords has held in R v Oxfordshire CC ex p Sunningwell Parish Council (1999) that subjective state of mind of the user does not have to be proved. Users over a long period may have been "subjectively indifferent as to whether a right existed".

Deciding who "the public" are can sometimes be difficult. In general it should be people other than those working for the landowner(s) concerned or who had the permission or licence of the landowner(s) to use the route. The period of 20 years is counted back from the date on which the public's right to use the way was first brought into question or from the date at which an application is made to modify the Definitive Map and Statement. In order to bring the public's right into question, the landowner must challenge it by some means sufficient to bring it home to the public, for example, through the erection of a fence or locking of a gate across the way, however long ago that date was.

Statute Law

"Section 31 of the Highways Act 1980 provides that the claimants' evidence must show that the route has been actually enjoyed for a 20-year period. The use must be without force, without secrecy and without permission".

Although 20 years uninterrupted use by the public establishes a presumption that the way has been dedicated to the public, this can be contradicted by evidence showing that the landowner did not intend to dedicate public rights during that time. Evidence of interruption of the public's use of the way, would have to be shown to have been both effective in preventing public use and clearly known to the public. The turning back of the occasional stranger will not be a sufficiently positive act - at least where the way continues to be used by locals. Notices clearly displayed and maintained on the way, indicating that it was private, or plans deposited with the surveying authority or its predecessors can prove sufficient evidence of an intention by an owner not to dedicate. Section 31(6) of the Highways Act 1980 enables landowners to protect themselves against claims based solely on use by depositing a map, statement and statutory declaration with the surveying authority showing which rights of way they acknowledge to be public on their land.

It is not possible to claim a route by presumed dedication over Crown Land such land being exempt from the provisions of the Highways Act 1980. Byelaws for some National Trust Land and other open spaces may also prevent the acquisition of rights.

Under Section 53c (i-iii), documentary evidence alone, may be sufficient to establish the existence of public rights and however old the document, the rights recorded will still exist unless there is evidence of a subsequent legally authorised change.

In May 2006, the Natural Environment and Rural Communities Act was brought into commencement. The main effect of sections 66 and 67 of this act was to significantly curtail the scope for recording further public rights of way for mechanically propelled vehicles (MPVs) on the definitive map and statement. This was done in two ways. Firstly, any existing unrecorded public rights of way for MPVs (with certain exceptions) were extinguished, so that they cannot then be added to the definitive map and statement as byways open to all traffic (BOATs). Secondly, the act also ensures that no further public rights of way for MPVs can be acquired unless expressly created or constructed. Typically, where such rights had been acquired but were thereafter extinguished, this results in a restricted byway.

Common Law

A highway is created at Common Law by the dedication by the owner of a right of passage across his land for the use by the public at large coupled with acceptance and use by the public as of right. Dedication may also be inferred at Common Law where the acts of the owner conclusively point to an intention to dedicate. In Poole v Huskinson (1843) it was held that "2 things to be made good, that the user has been sufficient in its duration and character and that the presumption then arising has not been rebutted. The length of user evidence is also important but there is no fixed minimum or maximum period of use which must be proved in order to justify an inference of dedication. Under Common Law it is possible to claim a route by presumed dedication over Crown Land.

Schedule 14 Applications For Definitive Map Orders

The procedures for the making and determination of an application are set out in Schedule 14 of the 1981 Act. Anyone making an application must serve notice on every owner and occupier of land affected by the application. In cases of difficulty in tracing the owner or occupier, the authority has the power to direct that a notice be placed on the land instead. The procedures include the right for applicants to appeal to the Secretary of State for the Environment against the surveying authority's refusal to make an Order. In such cases the Secretary of State can direct the authority to make the Order even when the authority considers the evidence does not support the making of the Order.

Once the authority has received the certificate of service of notice it has a duty to investigate the application and consult with every local authority concerned, i.e. District, Parish/Town Council. The authority should make a decision on the application as soon as reasonably practicable. Where the authority has not come to a decision within 12 months of receiving an application, the applicant can appeal to the Secretary of State for the Environment, Transport and the Regions who can direct the authority to determine it within a specified time.

An authority can act on evidence without a Schedule 14 application being made and should do so on discovery of relevant evidence. There is no requirement to investigate the claim within 12 months and no right of appeal to the Secretary of State for the Environment, Transport and the Regions in these cases.

Order-making procedure

If it is established that, on the balance of probabilities, public rights have been acquired, a MMO is published and advertised on site and in a local newspaper. If no objections are received the Order can be confirmed by the County Council. If there are unresolved objections it must be referred to the Secretary of State who will probably decide to hold a Public Inquiry to resolve the matter.

If the authority has been directed by the Secretary of State to make a MMO after it has determined not to do so and objections are made which result in a Public Inquiry being held, the authority may adopt a neutral stance or oppose the Order.