



**ALLEGED PUBLIC RIGHTS OVER LAY-BY
FRONTING THE OLD MILL, ALBURY**

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

11th MARCH 2009

KEY ISSUE

Members are asked to consider on the evidence before them whether highway rights have been established over the lay-by fronting The Old Mill, Albury.

SUMMARY

Local residents have submitted evidence indicating the acquisition of public highway rights over the lay-by fronting The Old Mill, The Street, Albury. The Committee is asked to consider the evidence provided and decide whether it considers the lay-by to form part of the highway.

Report by

LOCAL HIGHWAYS MANAGER

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 highway rights have been established over the lay-by adjoining the carriageway of The Street along the frontage of The Old Mill, as shown hatched on the plan attached as **ANNEXE 1**.
- (ii) that in view of recommendation (i) officers be authorised to approach the developer with a view to securing the removal of the obstruction and the reinstatement of the lay-by.
- (iii) that in the event that this approach is unsuccessful, that officers be authorised to seek Counsel's advice on the matter, and to act on that advice.

INTRODUCTION and BACKGROUND

- 1 The Old Mill, Albury is being redeveloped for residential use under Guildford Borough Council planning permission 06-P-02447. The approved development includes erecting a wall along the edge of the carriageway of The Street, thereby incorporating the lay-by within the site.
- 2 Past users of the lay-by are claiming that it had become part of the public highway by virtue of long public use, and have provided 27 witness statements to that effect. The witness statements indicate public use dating back to the 1950's. The location of the lay-by is shown on the plan at **ANNEXE 1**.
- 3 Under section 31 of the Highways Act 1980 a way that has been used by the public as of right, and without interruption, for a full period of 20 years 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. Section 130 of the Act imposes a duty upon the highway authority "to assert and protect the rights of the public to the use of any highway for which they are the highway authority, including any roadside waste which forms part of it".

ANALYSIS AND COMMENTARY

- 4 Until the commencement of the redevelopment the forecourt of The Old Mill had been open to the road for many years. According to witness statements there has been a bus stop at this location for over 50 years.
- 5 The tarmac area that was adjacent to the carriageway of The Street, as shown on the existing site plan submitted with the planning application (drawing no. 2841 D 01), has in the past been repaired as part of the highway. The area in question is shown hatched on the plan attached as **ANNEXE 1**, and is irregular in shape, but at least 2m wide and some 20 to 25m long.

- 6 Although Guildford Borough Council granted the owners of The Old Mill planning permission to construct a wall along the edge of the carriageway, this has no bearing on the claim that highway rights exist over the lay-by.

LEGAL BACKGROUND

Statutory Dedication

- 7 Section 31(1) of The Highways Act 1980 provides:

"where a way over any land has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it".

- 8 Any 20 year period is relevant, calculated retrospectively from a date on which the public right is brought into question. At that date *"the landowner must challenge it by some means sufficient to bring home to the public that he is challenging their right to use the way, so that they may be appraised of the challenge and have a reasonable opportunity of meeting it"*.

- 9 The meaning of *"as of right"* has been clarified in *R v Oxfordshire County Council ex p. Sunningwell Parish Council*. Giving the leading speech, Lord Hoffman described previous authorities' view that users must have the belief that their use is under a public right to be *"contrary to the principles of English prescription"* and that a

"..... user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had a knowledge that it did not".

- 10 As of right therefore means that the use has been without force, secrecy or licence i.e. permission.

- 11 The public right must also have been exercised without interruption. This appears to require some positive and physical act preventing the actual exercise of the alleged right of way thus:

- (i) "Interruption" means "interruption in fact".
- (ii) The presence or absence of a challenge may well be a relevant circumstance in determining whether truthfully there has been an interruption in fact;
- (iii) The circumstances in which the barring of the way takes place and the absence of any intention to stop anybody going along will be a relevant circumstance;
- (iv) A deliberate barring of the way for an appreciable period will not necessarily lose its effect merely because no one happened to try to use the way during that period.

- 12 For a landowner to rebut the presumption of deemed dedication he must provide evidence of overt acts to show the public at large that he has no intention to dedicate the way. There is authority to suggest that where a landowner has shown an intention not to dedicate by overt acts directed to potential users of the way he will have satisfied this requirement, notwithstanding the fact that these acts have, in fact, failed to cause the public to cease the use of the alleged way and have failed to make those members of the public realise that their user is not as of right.
- 13 Otherwise Section 31 sets out specific acts of the owner which are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention to dedicate:
- (i) *Erecting a notice inconsistent with the intention to dedicate which is visible to persons using the way and maintaining it;*
 - (ii) *If the notice mentioned above is torn down or defaced, giving notice to the "appropriate council" that the way is not dedicated as a highway;*
 - (iii) *Depositing with the appropriate council a map and statement of highways admitted on the land and after this deposit making a statutory declaration within 6 years saying there has been no declaration since the deposit or subsequent declaration.*

Common Law Dedication

- 14 Whilst most dedication is inferred under the statutory rules dedication as a right of way can be found at common law. Such dedication may be by express act or declaration of the landowner or in the absence of clear evidence of his express intention, it may be implied from evidence of user by the public or acquiescence in that user by the landowner. It does not necessarily require a period of 20 years' user.

Protection of Public Rights

- 15 Section 130 of the Highways Act 1980 imposes a duty upon the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they the highway authority, including any roadside waste which forms part of it. This section also imposes a duty on the local highway authority to prevent any unlawful encroachment on any roadside waste that forms part of a highway for which they are responsible.

ASSESSMENT OF REPRESENTATIONS MADE

- 16 When the consequences of the planning permission became apparent to the Parish Council they sought to take action to secure the retention of the lay-by and bus stop in front of The Old Mill.

- 17 The right was brought into question in 2008 and there is evidence of public usage for the 20 year period (and indeed beyond) before that time. Where an owner claims an intention not to dedicate, this must be shown in a way that the public know they are being challenged i.e. overtly. In this case no signs were displayed (although it would have been practical to do so) and the route was not obstructed until 2008.
- 18 A chart summarising the witness statements provided in support of the claimed public rights over the verge is contained in **ANNEXE 2**.

PROCEDURE IF HIGHWAY RIGHTS ARE PROVED

- 19 If highway rights are proved the landowner will be required to reinstate the lay-by. This would involve the removal/relocation of the wall and the surfacing of a strip adjacent to the carriageway at least 2m wide.

GUIDELINES

- 20 There are no specific guidelines for dealing with highway encroachments.

CONSULTATIONS

- 21 Albury Parish Council, aggrieved by the loss of the lay-by, have gathered statements from 27 witnesses in support of their claim that it forms part of the public highway.

FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 22 There are no direct financial implications arising from this report.

SUSTAINABLE DEVELOPMENT IMPLICATIONS

- 23 The redevelopment of The Old Mill has created a situation where pedestrians must now walk in the carriageway when they were once able to make use of the lay-by. This development has therefore caused a hazard to road users, although safety issues are not a matter for consideration in this report.

CRIME & DISORDER IMPLICATIONS

- 24 There are no crime and disorder implications arising from this report.

EQUALITIES AND DIVERSITY IMPLICATIONS

- 25 There are believed to be no equalities implications arising from this report.

HUMAN RIGHTS

- 26 Public Authorities are required to act as far as possible compatibly with the European Convention on Human Rights now enforceable in English Courts by way of the Human Rights Act 1998. Article 6 of the Convention safeguards the right to a fair and public hearing. In view of this it is recommended that the landowners be contacted by officers in the light of the Committee's decision with a view to giving them a proper and reasonable opportunity to put their views across. In the event that this approach is unsuccessful, it is further recommended that Counsel's advice be sought and acted upon.
- 27 Article 8 of the Convention safeguards the right to respect for private and family life. Article 1 of the First Protocol concerns the protection of property and provides that every person is entitled to the peaceful enjoyment of his possessions. The landowners may claim a breach of their human rights in the establishment of any claim for highway rights over their land and the requirement, should such a claim succeed, for their boundary wall to be moved back from the carriageway. While Section 6 of The Human Rights Act 1998 makes it clear that it is unlawful for a public authority to act in a way which is incompatible with Convention rights, this does not apply if as a result of one or more provisions of primary legislation (of which the Highways Act is an example) the Authority could not have acted differently. Section 31(1) of the Highways Act 1980 provides that where evidence of use for 20 years exists a way will be deemed to have been dedicated as a highway, in the absence of any evidence that there was no intention during that period to dedicate it, and section 130 imposes a duty upon the highway authority to assert and protect the rights of the public to use the highways for which they are responsible. It is therefore considered that this proposal has no human rights implications.

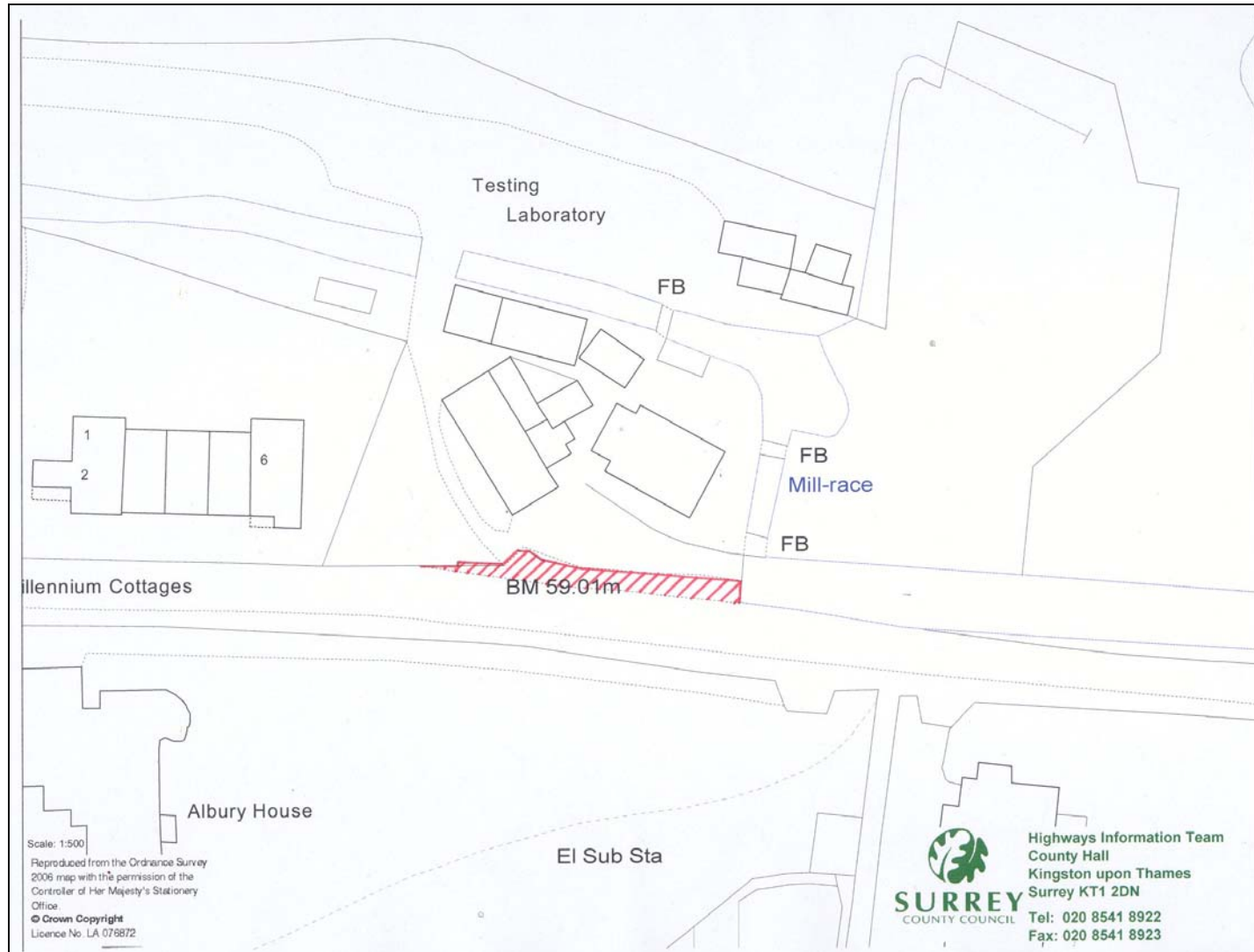
CONCLUSION AND REASONS FOR RECOMMENDATIONS

- 28 There is substantial evidence that lay-by adjacent to the carriageway was used by the public prior to the construction of the wall. The Committee is therefore asked to resolve to recognise the lay-by as part of the public highway.
- 29 The existing layout drawing and evidence provided in the witness statements indicate that the width of the lay-by used by the public was at least 2.0 metres. It is therefore suggested that a strip this wide adjacent to the carriageway be regarded as highway. In order to reinstate a 2.0 metre wide lay-by it will be necessary for the wall placed on it to be removed or relocated and for the lay-by to be surfaced.
- 30 The question of whether the public have established rights over the lay-by is one of fact. As such, members must only consider the evidence before them as to use. Any hardship that may be suffered by the current landowners cannot be taken in to account. Equally the potential danger to pedestrians that presently exists should not be allowed to sway the argument in favour of the claimants.

WHAT HAPPENS NEXT

- 31 Assuming the recommendations are agreed the landowner will be approached with a view to securing the removal of the wall and the surfacing of the lay-by.
- 32 Although not part of this report, the Committee is asked to note that the reinstatement of the lay-by will not provide a safe location for pedestrians to wait for a bus, as there is no footway or other hardstanding in this location. Bus passengers will effectively be standing in the lay-by carriageway as a bus pulls in. As a result it will not be possible for buses to pull completely off the road.
- 33 Following a site visit between County Council and Surrey Police officers when this problem first arose, it was decided to relocate the bus stop some 120 metres to the west outside the Parish Hall. This was considered to be a safer location. This view has been challenged by the Parish Council, which considers that the additional distance which some elderly people must walk to reach the bus stop should be taken into consideration.
- 34 It has also become known since the decision to relocate the bus stop was taken that the footway where it is now located is claimed by Albury Estates, who do not consider it to be part of the public highway. Albury Estates have, however, kindly given temporary permission for the bus stop to remain while these issues are resolved. It is possible that a claim similar to that being considered in this report might be made in relation to the footway in question, i.e. that it, too, has become part of the highway by virtue of use.
- 35 The information in paragraphs 32 to 34 is given in order to provide the Committee with a complete picture, and to indicate that the decision made by the Committee may not see the final resolution of this complex issue. This information has no bearing on whether or not the lay-by should be considered to be public highway, and should not be taken into account by the Committee in reaching its decision.

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BACKGROUND PAPERS	None



ITEM 11 : ANNEXE 2 : CHART SUMMARISING CLAIMED PUBLIC RIGHTS

