



## OFFICER REPORT TO LOCAL COMMITTEE (GUILDFORD)

### ALLEGED PUBLIC BRIDLEWAY BETWEEN HALFPENNY LANE AND EAST SHALFORD LANE, GUILDFORD, CP229(ii)

22 September 2010

#### KEY ISSUE

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.

#### SUMMARY

Mrs Avril Sleeman submitted an application for a Map Modification Order (MMO) to add the above public bridleway, running between East Shalford Lane (point A) and Halfpenny Lane (point D) as shown on drawings 3/1/75/H27 and H28, to the Surrey County Council DMS. (ANNEX Bi, ii)

It is considered that a public bridleway, is reasonably alleged to subsist over the route. A legal order to modify the definitive map and statement should be made.

#### OFFICER RECOMMENDATIONS

**The Guildford Local Committee is asked to agree that:**

- (i) Public bridleway rights are recognised over A-D on plans 3/1/75/H27-28 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 bridleway over a route which commences at East Shalford Lane opposite Manor Cottage extending generally north-eastwards through Manor Farm to junction with Footpath 26 Shalford (A-B); and by
- upgrading that length of public footpath 26 Shalford from its junction with the new bridleway referred to above and extending generally eastwards to Little Halfpenny Farm (B-C).
- a bridleway over a route extending eastwards from Little Halfpenny Farm to its junction with Halfpenny Lane and footpath 26 (C-D).

is approved. The routes will be known as public bridleways Nos. 610 (Guildford) and 26 (Guildford).

- (ii) A legal order 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.

## 1 INTRODUCTION AND BACKGROUND

- 1.1 On 24 June 2001 Mrs G. Kerr of Cranleigh, Surrey, submitted an application under the Wildlife and Countryside Act 1981 for a Map Modification Order to add the above bridleway to the DMS. On 30 June 2004 the Council refused this application on the basis that there was insufficient evidence. Mrs Kerr appealed against this decision to the Secretary of State who on 15 November 2005 issued a report directing the Council to make the order. The order was made on 7 June 2006. Two objections were received; from the Landowner and the Ramblers Association so the order was referred to the Secretary of State. A public inquiry was held on 4 April 2007 by an Inspector appointed by the Planning Inspectorate. Following the Inquiry the Inspector did not confirm the order. A copy of both reports can be obtained on request from the Council.
- 1.2 In August 2008, Mrs Avril Sleeman submitted a new application under the WCA 1981 for a MMO to add the bridleway A-D to the DMS. In her application she makes reference to all prior evidence and also encloses one new user evidence form and a copy of the House of Lords decision known as 'Godmanchester'<sup>1</sup>. It is Mrs Sleeman's contention that *"...had that result (Godmanchester) been known at the date of the Inquiry.....the outcome would, I submit have been very different"*. For legal background see ANNEX A to this report.
- 1.3 The route runs from point A where it leaves East Shalford Lane and proceeds in a generally north easterly direction to point B at footpath 26 (Guildford). It then proceeds along footpath 26 in an easterly direction to point C at Little Halfpenny Farm. From point C it proceeds briefly in a south easterly direction and then in a north easterly direction, following a line south of, but parallel to footpath 26 to reach point D at Halfpenny Lane.

## 2 ANALYSIS

### THE INSPECTORS DECISION

- 2.1 In his decision of 2007 the Inspector considered both user and historical evidence presented by the applicant and rebuttal evidence presented by the Objectors.
- 2.2 He drew the following conclusions regarding the user evidence.
- 2.3 The date on which the right of the public to use the route as a bridleway was first brought into question with the erection of signs at Manor Farm was 1983. The statutory period of 20 years referred to in s. 31 of the Highways Act must run from 1963 to 1983.

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<sup>1</sup> R (on the application for Godmanchester Town Council (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action R (on the application of Drain) (Appellant) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and other action. House of Lords Session 2006-07. To be referred to as 'Godmanchester'.

- 2.4 There was sufficient evidence of use during this period to constitute use by the public.
- 2.5 In 1972 the landowner lodged and maintained statements and declarations in accordance with section 34(6) of the Highways Act 1959 (which later became section 31(6) of the Highways Act 1980). Such a deposit was considered conclusive evidence of an owner's *lack of intention to dedicate* but was not considered sufficient to make it clear to the public that their right was being *challenged*. If 20 years are counted back from 1983, there are 11 years since 1972 during which the landowner had shown a lack of intention to dedicate. However, the 20 year period could not run back from 1972, for the above deposit was not considered a 'challenge' to public use. The Inspector concluded that a case based on the statutory period of 20 years must therefore fail.
- 2.6 The Inspector considered whether the public could have acquired a right under common law prior to the making of the Highways Act deposit in 1972. Having considered the various documentary and user evidence, the Inspector initially concluded that there was on the balance of probabilities, sufficient evidence to imply deemed dedication at common law.
- 2.7 These conclusions were then considered with regard to evidence presented by the Landowner who put forward four key reasons why the routes could not be dedicated at common law:
- i. The evidence was insufficient in quality or quantity.
  - ii. There was adequate lack of intention to dedicate on the part of the landowner.
  - iii. The route was not claimed as a rights of way at the time of the compilation of the definitive map.
  - iv. The lessee of any land does not have the capacity to dedicate the land.
- 2.8 The Inspector considered that contrary to the objectors' arguments, there was sufficient quality and quantity of evidence to give rise to an inference that the landowner intended to dedicate public bridleway rights.
- 2.9 The Inspector gave some weight to the argument that there was adequate evidence of lack of intention on the behalf of the landowner and that correspondence from 1971 explicitly showed the view of the landowner (and his father and predecessor in title).
- 2.10 The Landowner argued that as the route through Manor Farm was not claimed as a public right of way at the time of the compilation of the Definitive Map<sup>2</sup>, it was reasonable to assume that it did not have the status of a public right of way and that the remainder of the route enjoyed the status and reputation of footpath only. The applicant countered that the map

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<sup>2</sup> In 1952.

is only conclusive as to the rights of way it contains, not those it omits; and pointed out that in the early 1950s when the map was first compiled there was a significant reduction of the numbers of horses being ridden nationally in the post-war period. The Inspector gave little weight to the objectors point here.

2.11 The Landowner addressed the issue of 'capacity to dedicate'. It was argued that at common law, dedication cannot be inferred against a person who does not have the legal capacity. Between 1947 and 1981, the land in question was tenanted and according to Halsbury's Laws a lessee cannot dedicate land as a highway without the consent of the freehold owner. The Inspector found no evidence that the freehold owner had consented to the land being dedicated as a highway.

2.12 The Inspector concluded that the order should not be confirmed.

#### NEW EVIDENCE

2.13 In August 2008, the applicant submitted a copy of Godmanchester. This consists of two appeals which were test cases brought before the Lords for a ruling on the effect of the proviso in s. 31(1) of the Highways Act 1980:

2.14 *"Where a way over any land...has been actually 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"*.

2.15 The applicant argues that of the four reasons proposed by the objector as to why the order could not be confirmed; two were dismissed by the Inspector and two have been subsequently over-turned by virtue of the above case.

2.16 In the Godmanchester case the Lords refuted the claim that private letters or internal communications not made available to the public showed a lack of intention to dedicate. Lord Hoffman stated at Paragraph 32:

2.17 *"Mr Lords, in my opinion the law as stated by Denning LJ in the Fairey Case and by Hobhouse LJ in the Beresford Case was correct and the Court of Appeal was wrong. I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively assumed nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885)...., to "disabuse [him]" of the notion that the way was a public highway"*.

2.18 Then at paragraph 3:

*"...objective acts must be perceptible by the relevant audience"*.

- 2.19 He then went on in paragraph 37 to infer that the making of a declaration under section 31(6) of the Highways Act 1980 could have the effect of a “calling into question.”.
- 2.20 *“I will leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think they probably would, because their purpose is to give notice to the public that no right of way is acknowledged”.*
- 2.21 The Lords went on to refute in paragraph 47 the claim that the terms of a tenancy agreement can prevent dedication where no other overt act is made towards the public.
- 2.22 *“But I think it was wrong in principle to take the tenancy agreement into account, because it would not have been available to users of the right of way”.*

#### LANDOWNERS COMMENT

- 2.23 Objections have been received on behalf of the landowner. They addressed three issues which they understood to arise from Mrs Sleeman’s application as follows.

##### *The Proviso*

- 2.24 The Godmanchester decision is concerned with the proviso to s. 31(1) of the Highways Act 1980, which clarifies the nature of the evidence which can be sufficient to establish lack of intention to dedicate, so as to defeat a claim for deemed dedication. The Objector argued that the Inspector’s findings were not concerned with this proviso and therefore Godmanchester had no bearing on this case.

##### *Bringing into question*

- 2.25 The objector did not accept the applicant’s suggestion that Godmanchester is authority for a proposition that the lodging of a section 31(6) Statement and Declaration is an effective calling into question of the right of the public to use the route.

They quoted Lord Hoffman again:

- 2.26 *“I will leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we do not need to decide that point”.*

- 2.27 The objector noted that:

- i. Very specifically the point was left open by the Lords and the matter was not argued.

- ii. The requirement is that a challenge, to constitute a calling into question, must be brought home to the users of the way and that a Section 31(6) Statement and Declaration manifestly does not satisfy this.
- iii. They are lodged with the Surveying Authority with no requirement for publication or the display of any notice. The Countryside and Rights of Way Act 2000 may have since included some such provisions, but none existed in 1972.

2.28 For these reasons they do not accept that the date of lodging the first Statement and Declaration (1972) can be an effective calling into question and therefore it is not appropriate to consider the evidence of use for the period 1952-1972 in the context of deemed dedication under section 31.

#### *Common Law*

2.29 The objector emphasised that “Godmanchester” concerned Statutory and not common law dedication. They argue that at common law it is not relevant to consider “lack of intention to dedicate”; rather, it is necessary for the applicant to prove that the landowner has behaved in such a way that it can be inferred that he intended to dedicate. Evidence was thus provided in the form of correspondence with the Freeholder’s agent which showed no consent to the land being dedicated as a highway. The Inspector found that dedication at common law was not possible by reason of lack of capacity.

2.30 The objectors arguments in summary are that:

- i. The Godmanchester decision in relation to lack of intention to dedicate is not relevant to the Inspector’s findings in this case.
- ii. There is no other effective date for calling into question.
- iii. The claim must fail at common law on the grounds of lack of capacity.

#### USER EVIDENCE

2.31 Given that most of the user evidence has already been considered by the committee and at public inquiry, only a brief summary of it will be given here. The applicant’s main argument is that Godmanchester made it possible to use a s. 31(6) deposit as a ‘calling into question’ for the purposes of s. 31(1) of the Highways Act 1980. The inference of this is that the Deposit made by the landowner in 1972 might be that ‘calling into question’. Consequently the period to be considered under Statutory presumed dedication would be 1952-1972, during which a landowner must show that they either communicated a lack of intention to dedicate, or challenged public use in some way.

2.32 49 people completed public user evidence forms; collectively showing use from 1923-2004. 36 show 20 years or more of personal use, although some of this use is shown to have been with some kind of private rather than public right. (See the bar chart ANNEXE C).

2.33 12 of these forms were submitted in 1983 for the section A-B between East Shalford Lane and footpath 26. Whilst 6 of these 12 *claimed* bridleway

rights, it is not always clear whether they rode or walked along A-B. To establish bridleway rights it is necessary to provide evidence of use of the route on horseback not merely for users on foot to believe it was a bridleway. Additional evidence forms submitted during 2004 and 2007 show a variety of use from 1931 to the present day. Those forms submitted in 1983 are of little relevance as they do not specify how respondents used the routes, and only refer to a small section of it.

- 2.34 The 20-year period 1952-1972 is indicated by two solid vertical lines on the user chart at annexe C. Whilst it is not necessary for all claimants to demonstrate continuous usage throughout the 20 year period, they must demonstrate that use has been made by the public on horseback of the route continually during that period. When the Secretary of State directed the Council to make an order in 2005, this decision was on the basis that there was evidence to show sufficient uninterrupted continuous use as of right between 1952 and 1972, despite the fact that only two individuals had used it between 1952 and 1954. Whilst some reservations must be expressed about the evidence, (the “calling into question date” notwithstanding), it would be unreasonable to contradict the Inspector when he concluded on the basis of this evidence that:

*“Having given due consideration to the evidence that has been submitted in this Appeal, I conclude that, on the balance of probabilities, the provisions of Section 31(1) of the 1980 Act can be met and that an order should be made”.*

### 3 OPTIONS

- 3.1 The committee may agree or disagree with the officer’s recommendations or they may decide that the evidence submitted shows the routes to be of a different status to that recommended. Decisions can only be made on the basis of the evidence submitted as interpreted under the current legislation. Matters such as convenience, amenity or safety are irrelevant. (See Annex A).

### 4 CONSULTATIONS

- 4.1 The Ramblers Association objected to the application on the basis that:

*“it would be detrimental to foot travellers if these footpaths should deteriorate as a result of being reclassified...such reclassifications could be used as grounds to request more and more footpaths countryside to be reclassified as bridleways. This would be disastrous for the English network in general”.*

These objections are legally irrelevant under the current legislation.



- 4.2 Guildford Borough Council had no objections to, nor any comments to make about the application.

## **5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS**

- 5.1 If a MMO were to be made the cost of advertising it would be approximately £1200, met from the County Council's Rights of Way 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 Map Modification Order process is about formalising rights, which already exist but have not been recorded. The impact of this process on the above is therefore usually negligible. However it is recognised that we must consider Human Rights Legislation.
- 6.2 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. Decision makers are required to weigh the adverse impact of the development against the benefits to the public at large.
- 6.3 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.
- 6.4 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.
- 6.5 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.
- 6.6 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.

- 6.7 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.
- 6.8 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.

## 7 CRIME AND DISORDER IMPLICATIONS

- 7.1 Such issues cannot be taken into account when making a decision whether the public have acquired rights or not. This route has been in use for a substantial period of time so it is unlikely that legally recording it will have significant crime and disorder implications.

## 8 CONCLUSION AND RECOMMENDATIONS

- 8.1 Any decision must be made on the legal basis set out in ANNEXE A to this report. 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.

- 8.2 Under Section 53(3)(c)(i) of the WCA1981,

*“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”.*

- 8.3 And under Section 53(3)(c)(ii) the authority shall modify the DMS if:

*“a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description”.*

- 8.4 There appears to be no specific documentary evidence to indicate that public rights of any sort exist over the alleged route; even whilst it has been shown to have been in existence for over 100 years; hence the claim must rely on user and landowner evidence either by statute or common law.

- 8.5 Section 31 (1) of the Highways Act 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”.*

- 8.6 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 other.
- 8.7 The House of Lords Decision known as Godmanchester indicates that the making of a deposit under S. 31(6) of the Highways Act 1980<sup>3</sup> might be shown to have the effect of “calling into question”. Prior to this, such a deposit was considered only to display a “lack of intention to dedicate”. Since this decision, several Inspectors appointed by the Secretary of State have confirmed orders on the basis that such a deposit is an effective calling into question. The intimation being that this fits the description of “other” mentioned in paragraph 8.6 above. Statutory dedication over 20 years prior to the 1972 deposit might therefore be considered.
- 8.8 The user evidence over this period; whilst continuous, is rather fragmentary, but in November 2005 the Appeal Inspector concluded that there was sufficient evidence between 1952 and 1972 to conclude that, on the balance of probabilities, the provisions of section 31(1) of the 1980 Act could be met.
- 8.9 It is therefore concluded that there is sufficient evidence, on the balance of probabilities that public bridleway rights are reasonably alleged to subsist over the route A-D shown on the drawings at annex B and that an Order should be made.
- 8.10 The Guildford Local Committee is asked to agree that:

Public bridleway rights are recognised over A-D on plans 3/1/75/H27-28 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 bridleway over a route which commences at East Shalford Lane opposite Manor Cottage extending generally north-eastwards through Manor Farm to junction with Footpath 26 Shalford; and by
- upgrading that length of public footpath 26 Shalford from its junction with the new bridleway referred to above and extending generally eastwards to Little Halfpenny Farm.

<sup>3</sup> Or section 34(6) of the Highways Act 1959 under which the landowner made a statutory declaration in 1971.

- a bridleway over a route extending eastwards from Little Halfpenny Farm to its junction with Halfpenny Lane and footpath 26.

is approved. The routes will be known as public bridleways Nos. 610 (Guildford) and 26 (Guildford).

## 9 WHAT HAPPENS NEXT

- 9.1 All interested parties will be informed about the decision. If Committee decides that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 9.2 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.

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