



**OFFICER REPORT TO SURREY COUNTY COUNCIL
LOCAL COMMITTEE (GUILDFORD)**

ALLEGED PUBLIC RIGHT OF WAY AT FOX CORNER, PIRBRIGHT

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

The late Mr Mike Nevins submitted an application for a Map Modification Order (MMO) to add a public footpath at Fox Corner to the Surrey County Council DMS. The claimed route runs between points A and D as shown on drawing 3/1/61/H9 (see Annexe A).

It is considered that the evidence shows that neither a public footpath, nor a right of way of any other status, can reasonably be alleged to subsist over the route. As such no legal order to modify the definitive map and statement should be made.

OFFICER RECOMMENDATIONS

The Guildford Local Committee is asked to agree that:

- (i) No public footpath rights are recognised over A-D on plan 3/1/61/H9 and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is not approved.
- (ii) In the event of the County Council being directed to make a MMO by the Secretary of State following an appeal by the claimant, the County Council as surveying authority will adopt a neutral stance at any public inquiry, making all evidence available to help the inspector to determine the case.

1 INTRODUCTION AND BACKGROUND

- 1.1 In November 2005, the late Mr Mike Nevins submitted an application under the WCA 1981 for a MMO to add a footpath to the DMS. The application was accompanied by 22 user evidence forms. For legal background on MMOs see Annexe B to this report.
- 1.2 The claimed route commences at point A where it leaves Guildford Road between the houses known as Brookhouse and Fordwych. It then runs for 267 metres in a generally easterly direction behind Pirbright Cottages to rejoin Guildford Road at point D. At a point approximately half way along this route is a pedestrian access to the Fox Corner Community Wildlife Area. A vehicular and pedestrian access to the wildlife area is also available at point D.

2 ANALYSIS

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20 year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. In such cases the use must have been sufficient to raise a presumption that the landowner had intended to dedicate the route.
- 2.2 22 people completed public user evidence forms, spanning a period of 54 years from 1951 to 2005. Individual use on foot varied from 10 times per year to daily. Of the 22 users, 8 gave evidence of use in excess of 20 years. All of those who had completed forms had used the route on foot, however 11 had also driven over it while one user has ridden a horse over it. 15 of the 22 users believed the route to be a Byway Open to All Traffic while 3 more claim it as a bridleway.
- 2.3 13 of the claimants are frontagers of the route. Collectively it is these users who make up the majority of use of the path. Of the remaining 9 users (i.e. the non-frontagers) 3 have used the route almost exclusively to visit neighbouring properties (i.e. either Pirbright Cottages or the Wildlife Area). The remaining 6 users have, at least in part, used it as a through route although on occasions they have also used it to access the Wildlife Area. All of the six who have used it as a through route have done so on foot; one of them has also used it on horseback while another has driven over it.
- 2.4 Officers interviewed 8 of the claimants. From these interviews and further correspondence with the users it is apparent that the route has been obstructed on a number of occasions. In the early 1980s and again in 2005 gates were briefly closed at the western end and in 1992 the central section of the route was narrowed by the cultivation of plants.

2.5 A summary of the user evidence received can be found at Annexe C.

LANDOWNERS EVIDENCE

2.6 The Land Registry shows that the alleged path has three owners:

- i. Mr Ransom of Brookhouse owns from A-B as shown on drawing 3/1/61/H9.
- ii. Guildford Borough Council own the central section of the path (B-C) which they lease to the Fox Corner Community Wildlife Area Committee (FCCWAC). Pedestrians can access the wildlife area via a kissing gate, whilst there is a vehicular entrance adjacent to point D.
- iii. Mr A. Denman owns C-D.

2.7 In addition to the landowners, all of those with properties abutting the path were advised of the application and invited to comment. One of the landowners, Mr Ransom, did not respond. A summary of the comments received can be found at Annex D.

2.8 Several of the adjacent landowners provided copies an Abstract of Title dated 1896 which forms part of their deeds. Attached to the Abstract is a plan which clearly marks the route in question (albeit on a slightly different line at the eastern end). The route is referred to as the 'roadway and land belonging to Mr Terry'. The Abstract provides certain properties with a private right over the route.

DEFINITIVE MAP

2.9 In 1938 Guildford Rural District Council prepared a map for the purposes of the Rights of Way Act 1932 which depicts all the rights of way that were considered to be public. Although A-D is on the map no public rights of way are shown running over it. Neither the 1952, 1959, 1966 nor the current Definitive Map record any public rights over the route.

HISTORIC EVIDENCE

2.10 There is no evidence of the route on Lindley Crosley's (1773), Colonel Mudge's (1816) or Greenwood's (1823) maps. However Roque's Map (1770) and Lord Pirbright's Manorial Map (1807) do show the route, which is depicted in much the same way as other highways in the area.

2.11 The route does not appear on the 1876 Ordnance Survey Map. However, by 1896 when the second edition was published 1 to 4 Pirbright Cottages had been constructed at the western end of the route thus defining that section of the path. By the 1915 edition most of the cottages had been built and the full length of the route is visible.

2.12 The map prepared for the 1845 Pirbright Tithe Award clearly depicts the claimed route but does not state what, if any, rights exist over it.

- 2.13 The land over which the claimed path runs appears uncoloured on the 1910 Finance Act maps which indicates that it was not subject to tax. One explanation for this is that the Inspector of Taxes may have presumed it to be a public highway.
- 2.14 In the mid-1960s it was proposed to divert the Guildford Road (B380) onto the claimed route. As part of this proposal Guildford Rural District Council compulsorily purchased land to the west of Bullswater Bridge. However following local government reorganisation in 1972 the diversion scheme was dropped.

3 OPTIONS

- 3.1 The committee can agree with the officer recommendation, in which case no order would be made and the route would not be added to the DMS.
- 3.2 Where the County Council decides not to make an order, the decision can be appealed to the Secretary of State. If such an appeal resulted in a public inquiry the County Council would normally take a neutral stance.
- 3.3 Alternatively, if they are of the view that there is sufficient evidence to reasonably allege that public rights exist, the committee may disagree with the officer recommendation. Should this be the case a resolution will be needed indicating what rights are considered to exist over the route (i.e. whether the evidence suggests that it is a public footpath, bridleway, restricted byway or byway open to all traffic).
- 3.4 The decision 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 not relevant (see Annex B).

4 CONSULTATIONS

- 4.1 Mr Milton of the Open Spaces Society expressed a 'non official' view that there seems to be enough evidence for a restricted byway, but wondered if it should be a road used by the public but not maintained by the Highway Authority.
- 4.2 Pirbright Parish Council explained that the road was known locally as 'back lane' and that it was shown on the manorial map of 1807 of an apparently equal status to the Guildford Road and presumably open to all traffic. In their opinion it had probably fallen into disuse as a through route when Pirbright Cottages were built in 1896. Since then its use has been confined to a) vehicular and other access to bordering properties and b) a footpath or bridleway used by the general public. They did not believe that use had been restricted by the owners or frontagers.
- 4.3 No formal responses were received from the Ramblers Association, the British Horse Society, the Land Access and Recreation Association or the All Wheel Drive Club.

5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 5.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, taken as a whole, is sufficient to reasonably allege the existence of a right of way.
- 5.2 Having said this, if the committee were to agree with the officers' recommendation that no MMO should be made there will be no direct costs to the County Council. If that decision were to be successfully appealed then the Secretary of State could order the County Council to make a MMO. This is likely to cost in the region of £1200, which would be met from the County Council's Countryside Access 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. By not amending the DMS with the addition of a right of way over this route the County Council will be maintaining the status quo. If it is agreed that the evidence suggests that there are no public rights over the route, those who continue to use it without lawful authority¹ may be committing trespass against the owner of the land.

8 CONCLUSION AND RECOMMENDATIONS

- 8.1 Any decision must be made on the legal basis set out in Annexe B to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way exists. Other issues such as amenity, safety or convenience are irrelevant.
- 8.2 Under Section 53 of the Wildlife and Countryside Act 1981, *“the authority shall make such modifications to the Definitive Map and Statement as appear to them to be requisite in consequence of the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates”*.
- 8.3 While the documentary evidence does appears to suggest that the route has physically existed for over 100 years, it does not seem to indicate the existence of any public rights over it. For this reason the claim must rely on user and landowner evidence either by statute or at common law.

¹ In this context ‘lawful authority’ includes the exercising of a private right.

ITEM 8

- 8.4 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”.*
- 8.5 The period of 20 years referred to in sub-section (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether that is by a notice, by the making of a schedule 14 application, by blocking the route or otherwise.
- 8.6 Whilst a number of users indicated that gates had been closed along the route at various times, it appears that none of these prevented the public from using the route. The relevant calling into question must therefore be the submission of the late Mr Nevins’ Schedule 14 application which was received in November 2005. The relevant 20 year period is therefore considered to be 1985 to 2005.
- 8.7 In total, 22 evidence forms and several supporting letters show considerable and regular use of the route. However, a distinction must be drawn between a public right of way – that is a route over which the public have a right to pass and repass - and a private right such as an easement. The latter of these two types of right tend to be attached to property and generally consist of a right to get to and from one’s property over another persons land. Such a right would normally extend to the occupiers and their invitees (both explicit and implicit), but not the public at large.
- 8.8 Use of a route by an adjacent landowner, or use with their express or implied permission, is an assertion of a private rather than a public right. This principle equally applies to use where there are no formalised or recorded private rights. In such cases the use of adjoining landowners and their visitors contributes to the creation of a private right rather than a public one. Therefore, in this case, it is considered that use of the route to access either Pirbright Cottages or the wildlife area must be considered an assertion of a private right. The only use which might give rise to a public right of way is use as a through route.
- 8.9 In light of the above, evidence of ‘public’ use of the route can be limited to 6 claimants, five of whom claim to have used it as a through route for more than 20 years. Of the 6 ‘public’ users at least three of them have, on occasions, used it in a private capacity. Most of them have used the route exclusively on foot, but one has also used it on horseback and a further user has driven over it in a vehicle (although this use is likely to have been private).
- 8.10 In the circumstances it is considered that there is insufficient evidence to suggest that the route has been used by the public at large. As such it has

been concluded that public rights have not been acquired either by virtue of section 31 of the Highways Act 1980 or at common law.

8.11 The Guildford Local Committee is asked to agree that:

- i. No public rights are recognised over A-D on plan 3/1/61/H9 and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is not approved.
- ii. In the event of the County Council being directed to make a MMO by the Secretary of State following an appeal by the claimant, the County Council as surveying authority will adopt a neutral stance at any public inquiry, making all evidence available to help the inspector to determine the case.

9 WHAT HAPPENS NEXT

9.1 All interested parties will be informed about the decision. If the recommendations are agreed no legal order will be made. The applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.

9.2 If the 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.

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

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