



## **Alleged Public Bridleways between Beech Avenue and High Barn Road, Effingham**

### **Surrey County Council Local Committee (Guildford)**

**22 June 2011**

#### **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 of Rights of Way (DMS) if it discovers evidence which on balance supports a modification.

#### **SUMMARY**

In 2008 Mr C. Sandford submitted an application for a Map Modification Order (MMO) to add:

- i) a public bridleway from the northern junction of Beech Avenue and Footpath 491 (Effingham) to Footpath 492 (Effingham), and
- ii) a public bridleway between High Barn Road and the southern junction of Beech Avenue and Footpath 491 (Effingham)

to the Surrey County Council DMS.

It is considered that the evidence shows that the claimed rights have been acquired by the public. A legal order to modify the definitive map and statement should therefore be made.

## OFFICER RECOMMENDATIONS

### The Local Committee (Guildford) is asked to agree that:

- (i) Public bridleway rights are recognised over the route A-C on drawing 3/1/58/H11 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 bridleway is approved. The route will be known as Public Bridleway no. 603 (Effingham).
- (ii) Public bridleway rights are recognised over the route B-C-D-E on drawing 3/1/58/H12 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 bridleway is approved. The route will be known as Public Bridleway no. 604 (Effingham).
- (iii) Legal orders should be made and advertised to implement these changes. If objections are maintained to either or both of those orders, it/they will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

## 1 INTRODUCTION AND BACKGROUND

- 1.1 In September 2008 the County Council received two applications from Mr C. Sandford to modify the DMS; both applications were made under the provisions of the Wildlife and Countryside Act 1981. The applications were accompanied by 79 user evidence forms and one letter of support.
- 1.2 The first application claims bridleway status for A-C as shown on plan number 3/1/58/H11 (**Annex A**). In places this route is up to 2 metres wide however elsewhere it is considerably narrower with the trees on either side crossing the pathway to form a low arch.
- 1.3 The second application claims bridleway status for B-C-D-E as shown on plan number 3/1/58/H12 (**Annex B**). B-C is used as a vehicular access to Kirklands, an adjoining property. From C through to E the route varies in width but tends to be between 2 and 2.5 metres wide. As with A-C, this section of the claimed route runs on the eastern edge of a narrow strip of woodland.
- 1.4 Historically B-C-D-E formed part of Old Critten Lane which ran from Effingham to Ranmore. In 1870 the then Lord of the Manor successfully applied to have the public rights over that part of Old Critten Lane extinguished. At the same time Beech Avenue was created as a public highway. The woodland through which the claimed route passes remained in the ownership of the Lord of the Manor until 1966 when it was bequeathed to the County Council.

- 1.5 At the request of the Parish Council the County Council dedicated A-C-D-E as a public footpath in 1996. It was subsequently recorded on the definitive map as Footpath 591 (Effingham). Signposts stating that the route is a footpath are located points A and E. There are waymarks to the same effect at points A, C and D.
- 1.6 In 2011 the County Council undertook work to thin out the woodland adjacent to Beech Avenue and in doing so considerably changed its character. However, Mr Sandford's applications are based on evidence from before 2008 and so the recent landscape changes are not discussed within this report.
- 1.7 For legal background to this report see **Annex C**.

## 2 ANALYSIS

### PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 User evidence forms submitted by 79 people spans a total period of 57 years from 1952 to 2008. Only one user suggests that their use was with permission while another confirms that they were aware that the route was a footpath. Individual use varies considerably from as little as twice a year to 520 times per year. A summary of the user evidence is available in **Annex D** (please note that for the purposes of this annex the users have been split according to the sections of the routes they claim to have used).
- 2.2 Not all of the users have used every section of both of the claimed routes. Use can be split between each section as follows:
- 31 of the claimants used A-C
  - 60 of the claimants used B-C
  - 70 of the claimants used C-D
  - 75 of the claimants used D-E
- 2.3 Understandably people's estimates of the width of the routes differ and many refer to the width varying throughout the length of the path and also seasonally. Most record it as being between 2 and 3 metres wide, although this must be considered as an average. In some places, particularly A-C, it is much narrower.
- 2.4 29 users refer to some sort of gate and/or barrier on the route. However nearly all of these are either referring to barriers erected at points D and E by the County Council in 2008 or to structures which exist adjacent to, rather than across, the claimed routes. Only one of the 79 users clearly states that there was a structure across the claimed route prior to 2008.
- 2.5 Other restrictions to use referred to in the user evidence were small posts and some low branches across the path. Neither of which appeared to have offered much impediment to equestrian use. Several

of the users also refer to notices being displayed. However, only one of those the notices mentioned was both in place prior to 2008 and of the type which would have discouraged equestrians.

#### LANDOWNERS EVIDENCE

- 2.6 The County Council's Estates Planning and Management Team (EPM) have been informed of the application. In response they point to the fact that 'appropriate' notices were posted on site prior to the storms of 1987. At the same time it is claimed that correspondence was sent to 'various parties' setting out the County Council's objections to the route being used by horse riders. They also point to the fact that signposts at points A and E clearly show the route to be a footpath. They go on to state that if higher rights were established it would encourage more horse riders onto the route which in turn would undermine the Council's plans to create a sustainable natural woodland.
- 2.7 While EPM accept that there has been 'sporadic and occasional' equestrian use of the route A-E, they claim that it would be unreasonable to expect a public authority to place notices on every footpath which crosses its land. However, a lack of resources to invest in restricting access does not prevent the public from acquiring rights. A landowner can demonstrate a lack of intention to dedicate very simply and cheaply by either erecting notices or making a statutory declaration<sup>1</sup>.
- 2.8 Mr Lloyd, who owns the driveway to Eastcourt (which crosses the claimed routes between points D and E), also objected to the DMMO application. He states that he was unaware of equestrian use of the route and that if it were to be a bridleway, horse riders would cause his driveway to become very muddy and potentially even dangerous. He goes on to say that it would be dangerous for horse riders to exit onto Beech Road at point E.
- 2.9 Mr Crabb owned the track running from B-C between 1984 and 1989. During that time he claims to have erected a gate and 'no horses' notices as well as informing local riding stables that they could not use it. For the most part the gate was left open to allow walkers to pass. However, on the advice of his solicitor, Mr Crabb did periodically close it (maybe once every three months) in order to prevent public rights from being acquired. According to Mr Crabb both the gates and the notices were still in place when he moved away from Kirklands in 1989.
- 2.10 Mr and Mrs Matthews purchased the track in June 1989. Mrs Matthews has confirmed that when they moved into the property there were no signs or gates discouraging equestrian use on that part of the claimed route marked B-C, nor have they taken any action to discourage equestrians since that time. Mrs Matthews also states that they have

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<sup>1</sup> Section 31(6) of the Highways Act 1980

regularly seen horse riders both on A-C-D-E and B-C and that she hopes the use continues.

#### DEFINITIVE MAP

- 2.11 Neither of the claimed routes appear on copies of the DMS prior to 1996 (when A-C-D-E was dedicated as a footpath). Neither do they appear on the map prepared in 1938 for the purposes of the Rights of Way Act 1932 by Guildford Rural District Council.

#### HISTORIC EVIDENCE

- 2.12 As mentioned in paragraph 1.4 all public rights which existed over Old Critten Lane (i.e. B-C-D-E) were extinguished in 1870. The routes appearance on maps drafted before that date is therefore of little assistance. The extinguishment order of 1870 did not include A-C. That section does appear on Mudge's map of 1816 but not on the Tithe Award of 1870.
- 2.13 B-C-D-E appears on the first edition Ordnance Survey Map dated 1869/70. A-C does not appear until much later. Of more help are the more recent aerial photographs, and in particular that of 1988. Many mature trees were missing at that time following the storms of the previous year. As a result sections of the path, particularly around point D, are clearly visible.

### **3 OPTIONS**

- 3.1 The committee may agree or disagree with the officer's recommendations that rights have been acquired. Alternatively, they may decide that the evidence submitted shows that the routes should be of a different status to that recommended. Decisions can only be made on the basis of the evidence submitted. The recommendation is based upon that evidence and interpreted under the current legislation. Matters such as convenience, amenity or safety are irrelevant (see **Annex C**).

### **4 CONSULTATIONS**

- 4.1 A large number of user groups have been consulted. The British Horse Society and the Open Spaces Society both supported the claim. The Ramblers objected to the proposal on the basis that it was clearly waymarked as a footpath. The Ramblers representative goes on to state that, if the Footpath 491 were to be recognised as a bridleway the surface of the route will deteriorate. None of the other user organisations responded to the consultation
- 4.2 Guildford Borough Council had no comment to make but the Parish Council have taken a strong interest in the matter. Although they do not deny that the routes in question have been used by horse riders, the Parish Council do object to the existence of equestrian rights over them.

On a number of occasions prior to the application they requested that horse riders be prevented from using footpaths in the area. In January 2009 they wrote to the residents in the vicinity of the claimed route informing them of the claim and seeking their views on it. 15 responses were received; each of which is summarised in **Annex E**.

## **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 Map Modification Order process is about formalising rights, which already exist but have not been recorded. The impact of this process on the above issues 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 These two routes have been in use for a substantial period of time. It is unlikely that legally recording them will have significant crime and disorder implications. In any case such issues cannot be taken into account when making a decision whether the public have acquired rights or not.

## **8 CONCLUSION AND RECOMMENDATIONS**

- 8.1 A decision on this claim must be made on the legal basis set out in Annexe C to this report and the only relevant consideration is whether the evidence is sufficient to raise a presumption that public bridleway rights exist. Other issues such as amenity, safety or convenience are irrelevant.
- 8.2 Section 53 of the Wildlife and Countryside Act 1981 places a duty on the County Council to make such modifications to the Definitive Map and Statement as appear to be requisite in consequence of certain events. Those events include the discovery of evidence which, when considered with all other relevant evidence, shows either that;
- a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist<sup>2</sup>; or
  - a right of way which is shown on the DMS as a highway of a particular description ought to be there shown as a highway of a different description<sup>3</sup>.

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<sup>2</sup> Section 53(3)(c)(i) of the 1981 Act

<sup>3</sup> Section 53(3)(c)(ii) of the 1981 Act

- 8.3 In this case B to C does not currently appear on the DMS. Therefore an order can (and must) be made if it can **reasonably be alleged** that public rights have been acquired. However, as A-C-D-E does appear on the DMS as a footpath, an order can only be made for this section if it is concluded that, **on the balance of probabilities**, higher rights exist. The second of these tests being harder to fulfil than the 'reasonably alleged' test.
- 8.4 There appears to be no documentary evidence to indicate that public rights of any sort exist over either route, hence the claims 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 above must be calculated retrospectively from the date when the right of the public to use the way is called into question. In this case equestrian use of the routes was called into question in June 2008 when the County Council erected barriers. It was shortly after this that Mr Sandford submitted his applications. The relevant 20 year period is therefore 1988 to 2008.
- 8.7 This case is complicated by the fact that those who submitted user evidence used differing combinations of the claimed routes (see paragraph 2.2). However, the level of use for each section of path is considered to have been more than sufficient to demonstrate that it has been enjoyed by the public on horseback over the full 20 year period. In fact nearly all of the available evidence, including much of that submitted by those who argue that bridle rights have not been acquired, points to the fact that horses have been using the claimed routes.
- 8.8 While some members of the public have expressed doubt as to how practicable it would have been to ride between points A and C, evidence forms would suggest that even this section was well used. In 2008 A-C was used by 8 of the claimants. This is the lowest number of users to have used any one section in any given year. However based on their estimated average frequency of use they were still collectively using the path A-C 4.5 times per week during that year.
- 8.9 The Parish Council have suggested that riding a horse over A-C-D-E contravenes section 72 of the Highways Act 1835 which makes it a criminal offence to ride over a footpath by the side of a road. If this is the case then equestrian use of that part of the route since 1835 could not possibly have given rise to higher rights. However the courts have



confirmed that section 72 only applies to paths by the side of a road<sup>4</sup> and there is a clear gap between the edge of Beech Avenue and the claimed route. As such equestrian use has not been an offence under section 72.

- 8.10 If Members agree that there has been sufficient public use to raise a presumption that public rights have been acquired, then they will need to consider whether that presumption has been rebutted by actions which would have demonstrated to a reasonable user that the landowner did not intend to dedicate such rights during relevant 20 year period. Irrespective of how much use there has been, one act by the landowner showing a lack of intention is sufficient to rebut the application.
- 8.11 There is little evidence to suggest that any part of the route was physically obstructed by the landowners until the County Council erected barriers in 2008. Although Mr Crabb claims to have placed a gate between points B and C, his successor in title suggests that no such structure was in place when they purchased the property in 1989. In any case the gate was closed so infrequently that users appear to have been completely unaware of it. Similarly the notices posted by Mr Crabb were also not seen by the users.
- 8.12 One user and two respondents to the Parish Council's consultations do refer to having seen 'no horses' signs on that section of the route owned by the County Council. However much of the evidence points towards the fact that those signs were erected in the mid 1980s but were lost at the time of the 1987 storms. They do not appear to have been replaced until the 2008 when equestrian use was called into question.
- 8.13 The Parish Council have argued that in dedicating Footpath 491 in 1996 the County Council made the public aware that the route was not to be used by equestrians and that this amounts to a lack of intention to dedicate anything but a footpath. However, just because the Council failed to dedicate higher rights does not necessarily mean that a conscious decision was taken to prevent the route from being used by horse riders. As such, on the evidence available, it is not considered that the County Council's dedication of a footpath expressed a lack of intention to dedicate higher rights; it only shows they were willing to dedicate a right of way on foot. This conclusion is supported by the fact that, despite continued equestrian activity the County Council took no further action to limit that use until 2008. Furthermore, irrespective of the dedication, horse riders continued to use the route in large numbers. In fact the evidence available suggests that the number of users increased after 1996 indicating that equestrians did not believe the landowner was trying to stop them.

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<sup>4</sup> In *R v Pratt* [1867] 3 QBD 64, followed in *Selby v DPP* [1994] RTR 157 Mellor J. concluded that "It is clear what the object of this enactment [i.e. Section 72 Highways Act 1835] was: it was intended not to protect footpaths simpliciter, but only footpaths or causeways by the side of a road"

8.14 Another argument put forward by both the Parish Council and EPM was that the footpath signposts at points A and E had the effect of demonstrating to the public that the route was a footpath only and that the County Council had no intention of dedicating higher rights. Section 27(2) of the Countryside Act 1968 requires the County Council to signpost all footpaths, bridleways and byways where they leave a metalled road. It is suggested that in complying with this duty the County Council was acting as highway authority rather than landowner and that they had little choice but to erect signs. Furthermore, it could also be argued that a member of the public would have interpreted the signposts as a statement of the rights which were formally recognised rather than the County Council's desire to prevent others from using it. This argument is supported by the fact that equestrians continued to use the route even after the signposts were erected.

8.15 In light of the above it is suggested that there has been sufficient equestrian use of both A-C-D-E and B-C for public bridle rights to have been acquired. Furthermore, there is little evidence that the landowners expressed a lack of intention to dedicate such rights. If Members agree that, on the balance of probabilities, the two routes have become bridleways orders must be made to add them to the DMS as such.

**9 WHAT HAPPENS NEXT**

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

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