



**OFFICER REPORT TO LOCAL COMMITTEE
(GUILDFORD)**

ALLEGED PUBLIC RIGHT OF WAY AT FOX CORNER, PIRBRIGHT

22 SEPTEMBER 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 (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 the legal background on MMOs see **Annexe B** to this report.
- 1.2 Mr Nevins' application was considered by the Guildford Local Committee at its meeting on 22 September 2010 (a copy of the "2010 report" is attached as **Annexe C**). The Committee felt that the evidence available to them was insufficient to demonstrate that public rights had not been acquired but that further investigation locally may provide a more comprehensive body of evidence on which to make a decision at a future date. In light of this it was resolved that:

"no decision should be taken at this stage but that officers should be requested to undertake further investigation with a view to establishing whether additional evidence would demonstrate the acquisition of public rights and, if so, whether these relate to a footpath, a bridleway or a byway open to all traffic."

2 ANALYSIS

- 2.1 As a result of the Committee's resolution in 2010, officers posted notices at either end of the claimed route seeking further evidence both from those who have used the lane and from those who believe that public rights have not been established. A copy of that notice was circulated to Members of the Local Committee on 6 October 2010. It is understood that the local County Councillor also asked for additional evidence in the parish newsletter.
- 2.2 In response to this latest round of consultations, the County Council received a further seven user evidence forms. Four of those forms are updated versions of forms which accompanied the original application in 2005.
- 2.3 Of the remaining three 'new' user evidence forms, two are from individuals who have used the route to visit adjacent properties. The one new claimant who used the track as a through route did so outside of the 'relevant' 20 year period (that period being 1985 to 2005 as explained in paragraph 8.6 of the 2010 report).
- 2.4 A summary of the all the user evidence forms, including those received since the Committee last considered this matter, can be found at **Annexe D**.
- 2.5 Since September 2010 the County Council have also received several emails and letters containing evidence not covered within the user evidence forms. That correspondence is summarised below:

- The owners of that section of the path shown A-B on drawing number 3/1/61/H9 confirmed that they have lived in Brook House since 2004. During that time they have witnessed occasional use on foot and in vehicles by a few residents of Pirbright Cottages. They have witnessed only minimal 'public' use of the route; this has included seeing two horse riders on two separate occasions.
- Reverend Busby, who lives adjacent to the track, confirms that he has seen members of the public using it both on foot and horseback.
- Mrs Myers writes that the route was used by horse riders at Berrylands Stables during the 1970s. According to Mrs Myers, Bridley Manor Equestrian Centre are also keen to ensure that the claimed route is recognised as a bridleway. However no one from that establishment was willing, or able, to submit evidence of their own use. Furthermore, it is suggested by Mrs Myers that the route has not been on the Equestrian Centres list of locally available routes.

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 the Committee resolve that there is sufficient evidence to reasonably allege that public rights exist, they may disagree with the officer recommendation. Should this be the case the resolution will need to indicate 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 In addition to those consultations referred to in section four of the 2010 report, the County Council have sought additional evidence by posting notices at either end of the route. Those notices explained the nature of the application and asked members of the public to submit any evidence that they believed might be of relevance. In addition to this those who had previously submitted evidence were contacted and asked if they had anything to add to their previous statements.

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 Council must act within current legislation. 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.

7 THE HUMAN RIGHTS ACT 1988

- 7.1 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.
- 7.2 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.
- 7.3 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.
- 7.4 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.
- 7.5 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.

- 7.6 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.
- 7.7 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.
- 7.8 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.

8 CRIME AND DISORDER IMPLICATIONS

- 8.1 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.

9 CONCLUSION AND RECOMMENDATIONS

- 9.1 As mentioned in the 2010 report, applications of this type 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.
- 9.2 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*

¹ In this context ‘lawful authority’ includes the exercising of a private right.
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subsists or is reasonably alleged to subsist over land in the area to which the map relates”.

- 9.3 No additional documentary evidence has come to light since the matter was last discussed by the Committee and as such it is still considered that the claim must rely on user and landowner evidence rather than historic documentation.
- 9.4 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”.*
- 9.5 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.
- 9.6 As mentioned in paragraph 8.6 of the 2010 report, the relevant 20 year period was considered to be 1985 to 2005. Nothing in the new evidence suggests that this was incorrect.
- 9.7 Paragraph 8.9 of the 2010 report explains that only six of the original 22 evidence forms which were submitted with Mr Nevin’s application were considered to have been from individuals whose use could contribute to the acquisition of public (rather than private) rights.
- 9.8 Of the seven ‘new’ forms, four update previously submitted evidence (i.e. they are from individuals who submitted forms with the original application in 2005). Where those four forms do provide new evidence it tends to be for the years after 2005. As this falls outside of the relevant period referred to in paragraph 8.6 it can only be given minimal weight. The evidence in another of the new forms (i.e. one that was completed by an individual who had not previously submitted evidence) also demonstrates use which is outside of the relevant period.
- 9.9 The two remaining new evidence forms which do cover the relevant period are from individuals who claim to have used the track solely to access adjoining properties and so, for the reasons set out in paragraph 8.8 of the 2010 report, their use must be considered private rather than public.
- 9.10 The County Council has received 25 user evidence forms in total. Of those only seven can be considered to demonstrate ‘public use’. A summary of these seven forms can be found at **Annexe E**. During the ten year period between 1996 and 2005 the track was being used by 6 of the users. However prior to 1990 there is evidence from no more than four public users.

9.11 As mentioned above, in addition to the new user evidence forms, the County Council has also received a number of letters and emails since last September. The correspondence shows that there is a desire amongst certain sections of the local community for the path to remain open; however they demonstrate very little actual through use by members of the public. Furthermore much of the evidence supplied in the letters are anecdotal accounts of third party use. While this is by no means irrelevant it must be given much less weight than 'first hand' evidence.

9.12 Given the lack of public use between 1985 and 2005 (and particularly between 1985 and 1990) it is not considered that a public right has been acquired under section 31 of the Highways Act 1980.

9.13 In addition to the Highways Act, the public can also acquire rights of way at common law. In order to do so it must be possible to infer from acts undertaken by the landowner that they had intended to dedicate the route. It must also be shown that the route has been accepted as a right of way by the public. In this case none of the landowners actions appear to show that they were intending to dedicate the route. Furthermore, it could be argued that, given that the route is located in the middle of a village, the level of public use has been insufficient to demonstrate that it has been accepted as a right of way by the public.

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

9.15 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.

10 WHAT HAPPENS NEXT

10.1 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.

10.2 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.

Version No. 1.1 Date: 24.08.2011 Initials: AS No of annexes: 4