

TO: PLANNING AND REGULATORY COMMITTEE

DATE: 21 FEBRUARY 2001

BY: HEAD OF ENVIRONMENTAL AND ECONOMIC POLICY

DISTRICT(S): REIGATE AND BANSTEAD

ELECTORAL DIVISION (S):
BANSTEAD SOUTH

PURPOSE: FOR DECISION

S/A REF: 72 5B

**TITLE: MAP MODIFICATION ORDER FOR THE INCLUSION OF SANDY LANE,
KINGSWOOD ONTO THE DEFINITIVE MAP AND STATEMENT AS A
BRIDLEWAY**

SUMMARY

Mrs Patricia Etheridge has made an application under Section 53 (and Schedule 14) of the Wildlife and Countryside Act 1981 for the modification of the Definitive Map and Statement (DMS) by the addition of a bridleway over Sandy Lane, Kingswood.

User evidence submitted by the applicant and other documentary evidence has been examined in accordance with the provisions of Section 53 of the Act and is not considered sufficient to support the making of a Map Modification Order.

INTRODUCTION

- 1 In March 2000 Mrs Etheridge made an application under the provisions of Section 53 (Schedule 14) of the Wildlife and Countryside Act 1981 (WCA) for a Map Modification Order to modify the DMS by the addition of a bridleway over the route of Sandy Lane leading from Chipstead Lane to Waterhouse Lane as shown A-B-C-D-E-F on the attached Drawing No 3/1/36/H18. For legal background see ANNEXE 1 to this report.
- 2 The application was supported by 25 public user evidence forms completed mainly by local residents.

DESCRIPTION OF ROUTE

- 3 The route of Sandy Lane commences at point 'A' from its junction with Chipstead Lane and proceeds in a north westerly direction to point 'B'. Thereafter it curves generally northwards, passing its intersection with R/W 117 to meet with Woodland Way at point 'D'. At this point it turns north-westwards, then generally northwards and, after passing its intersections with Warren Drive and R/W 118, the Lane continues to terminate at point 'F' on Waterhouse Lane.
- 4 Sandy Lane is a private road which from point 'F' gives access to a number of properties abutting the Lane and the Kingswood Warren Estate. Between points 'A'-'B' it is a rough unmade track, the remainder has a metalled surface which is maintained by the frontagers.
- 5 At point 'A' there is a no through road sign and notice reading "*Private Road – No Public Right of Way – Section 31 Highways Act 1980.*" There are also two locked field gates: one has a small

gap beside it, the other an unlocked wicket gate. Attached to a tree nearby is a notice reading “*Caution live bees on ground do not loiter.*”

- 6 Between points ‘A’ and ‘B’ there are two notices attached to fences abutting the Lane, one reading “*Private Keep Out*” and the other “*Shrimpsfield – Private No right of way*”. Further north of point ‘B’ is a partly illegible notice reading “*Private road*” and notice reading “*Turn here only – no width to turn beyond – No Parking*”.
- 7 Between points ‘C’-‘D’ there is a no through road sign. At point ‘C’ there is a notice reading “*Private Road*” that lists the names of 7 properties and then reads “*Private Land – No Right of Way*”.
- 8 Near point ‘F’ there is a sign reading “*Please drive carefully – Privately maintained road*”, with a 30mph speed limit and sign reading “*Private Road No Public Right of Way – Section 31 Highways Act 1980*”. At point ‘F’ there is a notice reading “*Kingswood Golf Club*” and a street name plate.

BACKGROUND

- 9 In 1990 the frontagers of the southern section of Sandy Lane (‘A’-‘C’) consulted Reigate and Banstead Borough Council (the Borough Council) over measures to stop through traffic along Sandy Lane. The frontagers were informed by the Borough Council that in the opinion of the Borough Solicitor this section was not a public highway, therefore it was “up to the residents as to which measures are used”.
- 10 Frontagers erected a line of bollards across the Lane near point ‘B’ resulting in complaints to the Borough Council and the later submission of 36 public user evidence forms to the Borough Council claiming public vehicular rights over section ‘A’-‘C’.
- 11 In April 1993 a new Highways Agency Agreement came into operation, and further investigation into public byway status of the Lane was carried out by the County Council.
- 12 On 1 December 1995 a report was taken to the former Programme and Review Sub-Committee, recommending that a Map Modification Order be made to include Sandy Lane onto the DMS as a Byway Open to All Traffic. The recommendation was approved and the Order was made on 24 January 1996.
- 13 In consequence a number of objections to the Order were received, resulting in a public inquiry being held in February 1997. The Secretary of State’s Inspector declined to confirm the Order because he considered that 29 of the 36 claimants had been exercising private rights and that there was insufficient evidence to establish a 20 year period of user because signs on site from 1948 constituted sufficient evidence that the landowner (Costain) had no intention to dedicate the way as a highway.

PUBLIC USER EVIDENCE

- 14 As part of the current claim 56 public user evidence forms have been received, giving evidence of 57 claimants who used the route. In addition, a further 4 persons have submitted evidence in letters or statements of their use of the Lane. Two of the current claimants submitted evidence in 1994.
- 15 Of the 14 claiming BOAT status only 8 give evidence of vehicular use. (This included those who cycled). 16 are claiming equestrian and pedestrian rights, of whom 6 have not ridden over the route. Of the 12 claiming only equestrian rights, 4 have not ridden. 1 person has not indicated the status

that he is claiming. In summary 28 give evidence of use on foot, 26 equestrian usage and 22 give evidence of their use in or on a vehicle [11 of 22 say they cycled].

- 16 Collectively their user evidence spans a period of 64 years (1936-2000). Frequency of use varied from daily to 3 times a year. The claimants used the route for pleasure, exercising their dogs and horses, travelling to London, and avoiding the busy A217. In some cases the usage was part of a circular ride incorporating other public paths, taken either alone or as part of an organised group. All bar one believed they were exercising a public right to pass from one highway to another.
- 17 Evidence of 5 claimants must be discounted as they either lived on the Estate or had a friend who lived on the Estate. However, it is also clear that these 5 also used Sandy Lane at other times in their capacity as members of the public.
- 18 Not all of the claimants used the entire length of Sandy Lane. Some indicate use of Woodland Way or Warren Drive, others say they walked along R/W 117 to get to their destination. 29 claimants refer to a gate or gates along the Lane, saying these were erected in the last 2 years. Some refer to the bollards. Users do not recall these gates or bollards being impassable when on horseback or on foot. 25 mention seeing notices along the route. Only one can remember sometime in late 1999 or early 2000 that she was stopped and challenged by a resident.

LANDOWNER AND FRONTAGERS

- 19 The land over which Sandy Lane runs is unregistered. The freehold owner of Sandy Lane, Costain Group Plc, and the 80 frontagers of Sandy Lane were advised of the application and were invited to comment.
- 20 Costains state that at no time during their ownership of the Kingswood Warren Estate roads and verges was it their intention that frontagers would be subjected to the onerous burden of having to maintain a road used as a public right of way. They further state that the frontagers have always had the right to erect notices on the Estates roads or to take any other action which publishes, indicates or establishes that no public right of way exists.
- 21 Frontagers do not dispute that the Lane has been used by walkers and riders, but they do not believe that dedication of general public rights have occurred. Several points are made by the frontagers which are summarised below:-
 - (a) Costains, as owners of the Lane, have very clearly stated and indicated that they have no intention to dedicate the Lane for public use;
 - (b) there are and have been signs along Sandy Lane since 1948 indicating that the route is and was private;
 - (c) frontagers maintain the Lane, therefore it would be unfair to allow others to use it;
 - (d) any doubts over its status should have been removed following the 1997 BOAT inquiry;
 - (e) users are trespassing.
- 22 During the course of this investigation, Mr Peter Temperton of Woodland Way and the Warren Frontage Owners Association, Mr Peter Hawkins and Mrs S Simmonds of the Sandy Lane Frontage Owners Association have drawn particular attention to the question of public footpaths 117, 118 and 513, suggesting that, because they are connecting onto the Estate private roads, their inclusion on the DMS is in error. It is their submission that these paths are 'private' Estate paths for the use of

Kingswood Warren Estate residents only. This point will be addressed in paragraphs 40 and 41 of this report.

CONSULTATION

23 The views of Reigate and Banstead Borough Council are to be reported at the meeting.

HISTORICAL MAP EVIDENCE

- 24 Prior to the development of the present Estate by Richard Costain Limited in the late 1920's and early 1930's, the Estate comprised of a Mansion House, now owned by the BCC, plantations and woods and a farm house that is now part of the Kingswood Golf Club. Sandy Lane originally was a track that led to and from the farm to Chipstead Lane in the south and to Waterhouse Lane in the north.
- 25 On the map prepared for the purposes of the Finance Act 1910, Sandy Lane and the lane crossed by R/W 118 are contained within plot 213 with reductions of £100 made for footpaths. The footpaths are not identified.

DEFINITIVE MAP HISTORY

- 26 In common with many other definitive paths in the neighbourhood, neither Sandy Lane or footpaths 117 and 118 are set out as being public on Epsom Rural District Council's list of public paths presented to its Highways & General Purposes Committee in February 1907.
- 27 On a map prepared for the purposes of the 1932 Rights of Way Act by the former Banstead Urban District Council in 1947, both footpaths 117 and 118 are shown terminating on Sandy Lane. The intervening length of Sandy Lane between the two terminal points of the footpath is not included as public.
- 28 Public footpaths 117 and 118 are similarly shown on the 1952 DMS. No objections were received to their inclusion or the omission of Sandy Lane at the relevant objection periods for the Map or its subsequent reviews in 1959 and 1966.
- 29 Footpath 513 was included on the 1966 DMS following objections. Supporting the case that public footpath rights existed over its route (known as Kings Walk) were Lady Hildyard (whose family acquired the Kingswood Warren Estate in 1885 and sold it in 1912), Mr A P Costain and the Kingswood and District Residents Association.
- 30 References to the above footpaths are made in the minutes of Kingswood Parish Council, Reigate Rural District Council and Banstead Urban District Council. In the 1920's there were discussions about the status of footpath 117, but by the 1930's Banstead UDC was maintaining it. There are also references to riders and cyclists using the route.

FINANCIAL IMPLICATIONS

- 31 The cost of advertising a Map Modification Order would be approximately £800, which would be met from the County Council's Rights of Way Budget. If the Order is confirmed there will be future cost implications for maintenance, which at this stage cannot be quantified.

ENVIRONMENTAL IMPLICATIONS

- 32 Although there would be no direct impact on traffic movements, the addition of the route to the DMS would have an overall benefit to the local bridleway network.

ECONOMIC IMPLICATIONS

- 33 There are no economic implications.

THE HUMAN RIGHTS ACT 1998

- 34 Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1998. Primary legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular way. While the County Council must interpret primary legislation in a way that is compatible with Convention rights, that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended to Members touches on a Convention right. The making of this Order may affect the rights of the landowners/occupiers (see paragraphs 19-22) under Article 8 of the Convention, the right to a private and family life and Article 1 of Protocol 1, the right to peaceful enjoyment of one's possessions. The Act makes clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law as detailed in paragraph 35 and **ANNEXE 1** to this report.

DISCUSSION

- 35 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 in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates. There appears to be no documentary evidence that public rights exist over the route in question, hence this claim must rely on user evidence.
- 36 Section 31 of the Highways Act 1980 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 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;*
 - *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 by a notice.....or otherwise.*
- 37 Whilst most dedication is implied under statute, dedication as a right of way can be found at common law. Such dedication may be by express act or dedication of the landowner or, in the absence of clear evidence of his express intention, it may be inferred from evidence of user by the public and acquiescence in that user by the landowner.
- 38 As legal clarification of the evidence was important Counsel's opinion was sought. The following discussion is based on that opinion.

Sandy Lane

- 39 Whilst new user evidence has been submitted since the 1997 public inquiry, evidence of the landowner's intention is essentially the same. The Secretary of State's Inspectors finding on the basis of that evidence was that there was no intention to dedicate Sandy Lane as a highway. The case therefore rests on whether the Lane can be presumed to have been dedicated to the public since the date of the public inquiry. The evidence consistently shows that neither the landowner Costain Group Plc (or the frontagers) has ever had any intention to dedicate any public right over the

route. Counsel takes the view therefore that no definitive Map Modification Order should be made in consequence of the Schedule 14 application.

PUBLIC FOOTPATHS 117, 118 AND 513

- 40 The conclusive evidential effect of DMS means that new evidence in support of removing routes from the DMS must show that no right of way existed as at the relevant date of the definitive map on which the way was first shown. Counsel considers that it is for those who contend that there is no right of way to prove that the DMS is in error. It is not for the Council to act on the mere assertion by the frontagers that these paths are not public.
- 41 Even if the frontagers are successful in showing that these routes were included in error, paragraph 13 of DoE Circular 2/93 advises, however, that in such cases “consideration should also be given to whether the way has acquired such rights in the intervening period.”

RECOMMENDATIONS

- (a) That no public bridleway rights be recognised over Sandy Lane as shown A-B-C-D-E-F on Drawing No 3/1/36/H18; that the application for a Map Modification Order under Sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement be not approved; and that the applicant be so informed.
- (b) That, in the event of the County Council being directed by the Secretary of State to make a Map Modification Order for Sandy Lane, the County Council adopt a neutral stance at any subsequent Public Inquiry whilst making all evidence available to help the Inspector to determine the case.
- (c) That the status of the existing Estate footpaths together with the linking section of Sandy Lane be further considered following receipt of a Schedule 14 application and supporting evidence.

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BACKGROUND PAPERS: ALL THE DOCUMENTS QUOTED IN THIS REPORT
