



## OFFICER REPORT TO LOCAL COMMITTEE (SURREY HEATH)

APPLICATION FOR A MAP MODIFICATION ORDER TO DELETE  
PUBLIC FOOTPATH 185 (WINDLESHAM) FROM THE DEFINITIVE  
MAP AND STATEMENT

**9 July 2009**

### 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

Mr Lionel Trice submitted an application in May 2007 for a Map Modification Order (MMO) to delete public footpath 185 (Windlesham) from the Surrey County Council DMS.

It is considered that the evidence indicates that there is insufficient evidence to show that the route was included on the map 'in error' and that no legal order to modify the definitive map and statement should be made.

### OFFICER RECOMMENDATIONS

**The Surrey Heath Local Committee is asked to agree that:**

- i. Public footpath rights continue to be recognised over the route A-B-C on drawing 3/1/83/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 deletion of footpath 185 (Windlesham) 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.

## INTRODUCTION AND BACKGROUND

- 1.1 The route is located in western Lightwater and runs from High View Road in a generally north-westerly direction from opposite no. 17 for 174m towards an area known as Lightwater Country Park. The route is unsurfaced and sandy. There is a gate at point 'A' and a stile at point 'B'.
- 1.2 On 30 May 2007, Mr Trice of 10 Highview Road, Lightwater submitted an application under WCA 1981 for a MMO to delete public footpath 185 (Windlesham) from the Surrey County Council DMS. In the application he made reference to a similar but incomplete application made by Shepperton Builders Ltd. in April 2006. Prior to and since this, the applicant has submitted a substantial body of documentary evidence on this subject. For legal background see **annexes A and B** to this report.
- 1.3 The applicant claims to have made similar applications in 1996 and in 1999 but there is no evidence that these were ever received by the Council.
- 1.4 This route was first brought to the attention of the Council in 1982 by The Rambler's Association, who asked that the path be considered for inclusion on the DMS. Ten user evidence forms were submitted. The claim was dealt with at the time by Surrey Heath Borough Council (SHBC) who were acting as our agent. See **annex C**.
- 1.5 Footpath 185 (Windlesham) did not come to be included on the definitive map and statement for Surrey until 26 February 1991 when the order made to include it on the DMS was confirmed by an Inspector appointed by the Secretary of State. A MMO was made by SHBC on 16 April 1987. Objections were received to this order. It was referred to the Planning Inspectorate for confirmation.
- 1.6 The Inspector's decision was based on the written evidence of eight people, which established that before 1980/81 the claimed route had been used by pedestrians for a period of at least 20 years without interruption. See **annex D**.
- 1.7 At the time the inspector dismissed any evidence suggesting that there were other suitable paths, or that it posed a fire risk. These were explained as matters which did not affect the issue of determining whether a claimed route is a public right of way. He also considered that any obstruction of the path which may have come about as a result of the actions of the Borough Council, were not directed towards denying walkers passage. He also noted that issues of security were not matters he could take into consideration.
- 1.8 Both the landowner and Mr Trice submitted evidence at this stage of the proceedings but none of this was considered sufficient by the Inspector to rebut the evidence that rights had been acquired.
- 1.9 In such cases it is not for the Authority to show that the Definitive Map reflects the true rights but for the applicant to show that it should be revised to delete or downgrade the way. Case law has made it clear that to fulfil the requirements any evidence submitted must be 'new'. An application cannot rely on a re-examination of the evidence considered by the Inspector in 1991.
- 1.10 In this case, any new evidence must address the 20 year period of user (1961-1981) upon which the order was made and later confirmed. Evidence from before or after this period is legally irrelevant.

## 2 ANALYSIS

- 2.1 Evidence was received from the landowner, the applicant and several local users. This is considered below.

### LANDOWNER'S EVIDENCE

- 2.2 A land registry search showed that the land crossed by A-B is registered to Shepperton Builders Ltd. In 2006 they made an incomplete schedule 14 application to delete footpath 185 from the Definitive Map and to upgrade a footpath leading north from Cranwell Grove. This application was not made correctly however. The applicant was so informed but no amended submission was received.
- 2.3 When this issue was first being considered a report was submitted to the Surrey Heath Planning and Infrastructure Committee in 1986 outlining the evidence. The evidence submitted at that time by the landowner was outlined. This report can be seen at **annex C**. Their main response points were:
- i. *...some ten years before the submission, no footpath was in existence over the land to which the claim relates and they therefore disputed continuous and uninterrupted use of the path for twenty years.*
  - ii. *..there was a "very old track where horses had been making a trace across the site after they had broken down fences that were there at the time".*
- 2.4 When the matter was considered at public inquiry in 1991 Shepperton Builders Ltd. had their case summarised by the Inspector in the following terms:
- i. *(They)..own the land crossed by the claimed path. High View Road is a cul-de-sac with little space for the parking of cars. Local residents have a choice of other footpaths between High View Road and the Country Park, both to the west and from Cranwell Grove. A number of recent thefts have been reported. It follows that any need for the path can be satisfied by using other routes and that continued use of the claimed path would be a risk to the security of adjacent premises.*
  - ii. *The footpath routes shown on the Ordnance Survey sheets, 1915 and 1934 editions, do not coincide with that of the claimed path; the routes shown cross properties west of the land owned by Shepperton Builders Ltd.*
  - iii. *The land traversed by the claimed path was fenced off for grazing purposes some 28 years ago. Evidence of such fencing remains.*
- 2.5 On 8 January 1998 Shepperton Builders noted that they supported Mr Trice's action and objections and that SHBC provided inaccurate information to the Secretary of State in 1991.
- 2.6 The incomplete application referred to in para.1.2 contained various contentions and pieces of evidence which Mr Trice asked to be considered as part of his application. The following summarises this information:
- 2.7 Initially they contended that SHBC misrepresented the case for the footpath on 4 counts.
- i. *The word 'gate' was omitted from their claim.*
  - ii. *The stile was not on the boundary of the Country Park but had been placed on the property.*

- iii. *The land 'Silverland' (LR No. SY 184960) was described as 'the undeveloped frontage' and traverses heathland. It should have read the garden/orchard of the property known as 'High Curley' (Silverland).*
- iv. *That vital evidence was withheld by Surrey Heath Borough Council.*
- i. *The path was used only by family and friends.*
- v. *In 1990, it was suggested to the Inspector that a drainage gully was a well-worn footpath.*

2.8 They also drew attention to issues they had with the original user evidence:

- i. *The user evidence was obtained by Councillor Cook who canvassed for support.*
- ii. *Those who claimed unrestricted access across the property were mistaken.*
- iii. *'The footpath to Bagshot' term in the user evidence is misleading.*

2.9 They also noted that:

- i. *It was only after 1951...that a 'gate' was added at point A.*
- ii. *The path was not a public right of way, but used by family and friends.*
- iii. *Mr Trice used to keep an eye on the property in the owner's absence.*
- iv. *Mr Trice alerted the owner of the stile in 1985 and took issue with SHBC.*
- v. *The owner was very ill at the time the order was made.*
- vi. *During 1971 Bagshot Rural District Council (BRDC) carried out earth works which influenced adjacent property.*
- vii. *BRDC contractors excavated a drainage gully across the property, filled the ditch and breached the bank.*
- viii. *SHBC placed a stile over the gully on the fence in 1985. In 1990 it was 'suggested' to the Inspector that the gully was a well worn footpath.*

2.10 On 6 November 2003, Solicitors acting on behalf of Shepperton Builders contacted the Council requesting either a diversion or an extinguishment of footpath 185. They asked for advice on the likelihood of such an application being successful. An officer commented that their proposed diversion line was unsuitable and suggested an alternative. This was not followed up.

#### EVIDENCE SUBMITTED BY THE CLAIMANT

2.11 A large amount of documentary evidence has been received by SHBC and Surrey County Council from the applicant in support of his application. Since 1989 over 75 letters have been received on this subject, often accompanied by new evidence or duplicates of evidence submitted previously.

2.12 At the public inquiry in 1991, Mr Trice's case to the Inspector was largely concerned with; fire risk; the unadopted status of High View Road and therefore its safety; the trespass caused by the stile onto the Country park and also that the path is not needed. These items were addressed and dismissed by the inspector.

2.13 More recently Mr Trice outlined the following issues as the main evidence supporting his application:

- i. *The land was residential since 1934- part of a private garden with a house and stable.*
- ii. *The fence erected in 1974 by BRDC was a direct replacement of one which had been in place many years. There were no stiles.*
- iii. *The stile placed on the fence in 1985 was trespass.*

- iv. *The legal ditch and bank was breached in 1971 by contractors as a result of works undertaken following flooding on the heath.*
- v. *SHBC withheld his letter of 13 June 1989 from the Inspector at inquiry in 1991.*
- vi. *Photographs of 1931 and 1953 show fencing around the area of landing question.*
- vii. *The Ordnance Survey have contradicted uninterrupted use.*
- viii. *The well worn path shown on the 1971 aerial photograph was a drainage gully excavated by contractors D. Hampton Ltd. The stile was placed over it. The inspector may have seen this as a well worn footpath.*
- ix. *Quoted letter by Mr Arliss who noted that ‘ponds’ had formed in his garden, and that he would ‘contact contractors to do something about it’.*
- x. *The path was only used by family and friends.*
- xi. *Letters from SHBC in 1985 and 1987 refer to previous fencing.*
- xii. *SHBC omitted the gate from their declaration at point ‘A’. This was recorded by the Ordnance Survey.*
- xiii. *The stile was contrary to SHBC’s policy regarding private access onto the Country Park.*
- xiv. *The footpath to Bagshot referred to in para. 5.4 of the Inspectors report (Annex D) was via ‘Cranwell’*
- xv. *Ordnance Survey maps 1915-1934 are not supported by photographic evidence.*
- xvi. *No track or path is shown across the land on the Land Registry Plan SY104960.*
- xvii. *The Inland Revenue Valuation Act 1910 map shows the plots omitted by the Ordnance Survey.*
- xviii. *Poor mapping by the Ordnance Survey caused trespass although the land was always properly fenced off.*
- xix. *Mr R.T. Arliss can provide additional evidence*

See **Annex E**.

#### OTHER COMMENTS

2.14 Mr Arliss of 18 High View Road stated that:

- i. *The land was private with no access but that children did use the open area for play.*
- ii. *Tracks were for horticultural equipment and livestock when the area was a smallholding. At various times the land has been an orchard, a piggery, a chicken farm and intensively cultivated.*
- iii. *The land was fenced in from 1920.*

2.15 Mr and Mrs Davies of 139 MacDonald Road noted that *‘there had always been access across that piece of land since they moved to the area in 1961 and that it had never been blocked by fences or gates’.*

2.16 Mr Batchelor of 143 MacDonald Road noted that the area was known as *‘the Orchard and was an easy cut-through to the Country Park and had always been there to his knowledge’.* There is now a gate at High View Road which has been there since about 1996. Before that the access was open.

2.17 Mr and Mrs Price of 97 MacDonald Road moved to the area in 1968 and said that *‘the footpath was not so obvious before the country park was designated as people roamed at will, but nevertheless we have always used it’.*

**DEFINITIVE MAP**

- 2.18 It has been recorded as public footpath 185 (Windlesham) on the DMS since 26 February 1991.
- 2.19 No public rights of way were recorded over the route in question, nor were any initially put forward as a right of way for consideration at any stage in the compilation of the DMS in 1952, 1959 or 1966.
- 2.20 A map (11/35) prepared in 1938 for the purpose of the Rights of Way Act 1932 by Bagshot Rural District Council depicts all the rights of way considered by the Rural District Council to be public. There are NO public rights recorded over the route in question.

**HISTORICAL EVIDENCE**

- 2.21 The route is not visible on Roques (1770), Lindley Crosley's (1793), Colonel Mudge's (1816) or Greenwoods (1823) maps.
- 2.22 Route A-B is not shown on the 25" 1870, 1877 or 1896 edition Ordnance Survey (OS) (XVI:01) maps. The area is recorded within plot 920 as "Rough pasture, trees marsh &c." in the First Edition's book of reference. The 1915 map shows a footpath running west-northwesterly from High View Road but along a slightly different route than that followed by footpath 185 today. The situation also appears similar on the 6" OS maps from 1920 and 1938. There is nothing on any of these maps to suggest its highway status.
- 2.23 The route is visible on the 1971, 1986, 1991, 1992 and 1999 National Grid Maps, although there is some small variance compared to the definitive line. High View Road is shown as enclosed by a solid line in 1971, which may indicate gates or fences. The later maps show the line as pecked and therefore possibly open.
- 2.24 The 1910 Finance Act shows the plot of land over which footpath runs as hereditament 1658. There is no route visible on the Ordnance Survey base map nor are any reductions for rights of way listed for this plot in the accompanying book of reference.
- 2.25 The 1948 aerial photograph is of fairly poor quality. A pale line running north-westwards from High View Road may show that there is use of some kind but no status can be determined from this.
- 2.26 The 1971 aerial photograph shows what appears to be a well worn route running from High View Road to Bagshot Heath across this plot of land. Whilst boundary lines are visible no conclusions can be drawn as the presence of fences or other furniture such as gates or stiles. There is some indication of other 'desire lines' across the area of land linking with this line, which appears to be part of a wider network.

**3 OPTIONS**

- 3.1 The committee may agree or disagree with the officer's recommendations. Decisions can only be made on the basis of the evidence submitted, as interpreted under the current legislation. Matters such as convenience, privacy, amenity or safety are irrelevant. (See Annexes A and B).

#### **4 CONSULTATIONS**

- 4.1 No response was received from Windlesham Parish Council, Surrey Heath Borough Council nor the Rambler's Association.
- 4.2 The British Horse Society neither supported nor objected to the claim.
- 4.3 The representative for the Open Spaces Society stated that *"he wished to object to the application in the strongest terms. This way was put on the definitive map as a result of a public inquiry in 1990 and is extremely well used. The argument produced by Mr Trice is we believe unfounded in law and should therefore be dismissed"*.
- 4.4 No responses were received from any of the relevant County or Borough Councillors.

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

- 5.1 The cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council's Rights of Way Budget. If objections are received and a public inquiry is held, additional costs of around £1000 will also be met from this 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 keeping the Definitive Map up to date. This might involve formalising rights, which already exist but have not been recorded; or deleting or diverting rights which are included on the definitive map in error. 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 Although the route has been in use for a substantial period of time, it is unlikely that removing it from the DMS will have significant crime and disorder implications. Such issues cannot be taken into account when making a decision.

## **8 CONCLUSION AND RECOMMENDATIONS**

- 8.1 A decision on this claim must be made on the legal basis set out in Annex A to this report and the guidance laid out in Annex B. The only relevant consideration is whether the evidence is sufficient to raise a presumption that footpath 185 (Windlesham) was included on the DMS in error and should therefore be deleted.
- 8.2 Section 53 of the Wildlife & Countryside Act 1981 provides for the deletion of a public right of way where evidence is discovered by the surveying authority to show *“that there is no public right of way over land shown in the map and statement as a highway of any description....”*
- 8.3 Evidence is required that the footpath shown on the current Definitive Map and Statement has been included in error and that there were in fact no public rights existing over the footpath at the date that the order to add it to the map was confirmed. The Department of Environment (DOE) circular 18/1990 sets out the Department’s view that the burden of proof is on the person seeking to demonstrate that the Definitive Map is incorrect. This approach was confirmed by the Court of Appeal in *Trevelyan v. Secretary of State for the Environment, Transport and the Regions* 2001. The case provided that the initial presumption was that a right of way did in fact exist and that the standard of proof required to show that the inclusion of the path on the Definitive Map was incorrect, was ‘on the balance of probabilities’.
- 8.4 More specifically the following requirements outlined by DEFRA in their recent circular 1/09 (Annex B) must be met:
- The evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made. (or in this case at the time the order was confirmed by the Planning Inspector).



- The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.
  - The evidence must be cogent.
- 8.5 The evidence submitted by or referred to must therefore meet all of the above requirements in order for the application to be successful.
- 8.6 Much of the evidence submitted had already been considered by a Planning Inspector during the inquiry in 1991, to which both the claimant and landowner submitted evidence. This includes much of the evidence regarding the fences around the land, access to it via the stile and issues of general trespass. The Inspector's view on this is outlined in para. 9.3 of his report. (Annex D). It is also clear that the Inspector had also considered the historic Ordnance Survey mapping. The evidence is therefore NOT 'new'.
- 8.7 Much of the documentary evidence submitted by the applicant relates to years outside of the relevant period 1961-1981 mentioned in section 1.9. This includes for example all historical mapping, Ordnance Survey mapping and aerial or ground photography prior to 1961.
- 8.8 The suggestion by the applicant that the footpath was actually a drainage gully and that the Inspector might have been mistaken is not supported by any original user evidence nor presumably by the Inspector's site visit. It was not brought to the attention of the Inspector at the original inquiry in 1991, nor was this referred to on the applicant's earliest objections to SHBC when the legal order was made to add footpath 185 to the DMS. In addition this gully clearly links into a network of other routes in the area and had been recorded by the Ordnance Survey long before the alleged gully was dug. This evidence must be discounted as it cannot challenge the basis upon which the Inspector made his decision and therefore cannot 'displace the presumption that the definitive map is correct'.
- 8.9 Much of the evidence relates to issues of privacy, security, safety and trespass. These are not relevant under the current legislation. Under s. 31(1) of the Highways Act the public can acquire a right through use (and trespass) if it is not challenged effectively by the landowner.
- 8.10 Additional evidence of unhindered use of the footpath throughout this period has been acquired from several local residents (see paras. 2.15-2.17) which further negates claims that no public access existed, or that such access obstructed at various times.
- 8.11 I conclude that there is inadequate evidence to show that on the balance of probabilities the current Definitive Map and Statement is incorrect and that Footpath 185 (Windlesham) should be deleted between A-C. The application under s. 53(3)(c)(iii) of the Wildlife and Countryside Act 1984 should therefore be rejected and no order should be made.

## **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 claimant will be informed and will have opportunity to appeal to the Secretary of State. If an order is made and objections are maintained to that order, it will be submitted

to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**LEAD OFFICER and CONTACT OFFICER:** Daniel Williams, Senior Countryside Legal Officer  
**TELEPHONE NUMBER:** 020 8541 9245  
**E-MAIL:** [daniel.williams@surreycc.gov.uk](mailto:daniel.williams@surreycc.gov.uk)

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

Version No. 1      Date: 30.06.09      Initials: DJW      No of annexes: 5 + plan