



OFFICER REPORT TO LOCAL COMMITTEE (SURREY HEATH)

ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC (BOAT) ALONG HIGH VIEW ROAD, WINDLESHAM

15 October 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 add a public byway open to all traffic (BOAT) along High View Road, Windlesham to the Surrey County Council DMS.

It is considered that the evidence shows that only a public 'restricted byway' exists over the route. A legal order to modify the DMS should therefore be made.

OFFICER RECOMMENDATIONS

The Surrey Heath Local Committee is asked to agree that:

- i. Public restricted byway rights are recognised over the route A-B-C-D on drawing 3/1/83/H10 and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a BOAT is not approved. The route will be known as Public Restricted Byway no. 188 (Windlesham).
- ii. A legal order should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

1 INTRODUCTION AND BACKGROUND

- 1.1 In May 2007, Mr Trice of 10 Highview Road, Lightwater submitted an application under WCA 1981 for a MMO to add a BOAT to the DMS. The application was accompanied by 18 user evidence forms; 7 additional forms were received later. These forms showed use by 29 people. A substantial body of documentary evidence had already been received prior to the application, which Mr Trice has continued to supplement. For legal background see **ANNEXE A** to this report.
- 1.2 The claimed BOAT runs from point A at Curley Hill Road along High View Road in a westerly direction for 548 metres, passing point B and C, to reach point D, a small informal parking area which is an access point to High Curley. The route is roughly metalled, between 3-10 metres wide and is currently a vehicular cul-de-sac at its eastern end. The route is currently recognised as a private street along which the nature and extent of any highway rights is uncertain. Despite this two existing highways (Cranwell Grove- an adopted highway and public footpath 185 Windlesham) branch off from the route at points B and C.
- 1.3 This application was originally considered by Surrey Heath Local Committee on 9 July 2009 but was deferred until the next meeting. During that meeting, the members of the committee requested that further information be provided regarding the interpretation of the evidence in the light of the recently introduced Natural Environment and Rural Communities Act 2006 (NERC).
- 1.4 This report outlines all of the previously considered evidence and then reviews how this should be interpreted in the light of the NERC 2006 Act. No new evidence has been uncovered, submitted or considered since the meeting of 9 July 2009.

2 ANALYSIS

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 29 people completed public user evidence forms, collectively showing use of the routes from 1934-2007, although there was probably no use from 1935 until later that decade. 25 show 20 years or more of personal use, as shown on the bar chart **ANNEXE B**. Officers interviewed eight claimants.
- 2.2 24 of the claimants thought that the route A-D should be a BOAT; two that it should be restricted byway and three did not distinguish. Of the users, 20 claim use on foot and 20 in a Mechanically Powered Vehicle (MPV); in both cases 17 of which were for greater than 20 years. An additional 4 claim use either on a bicycle or on horseback.
- 2.3 Most use appears to have been for recreation, dog walking, visiting family and friends along High View Road and to access High Curley and Bagshot Heath.
- 2.4 None of those interviewed claimed to drive up the route regularly and most had actually only walked. Several mentioned that there were often cars parked at the end of the route. One claimant noted that there have been various attempts to develop plots of land off the route over the years but these have not been successful. This claimant also mentioned that the High View Road Association maintains the road and objects to building alongside it.
- 2.5 Footpath 185 (Windlesham) commences from point C on High View Road and was added to the Definitive Map after a public inquiry in 1991, on the basis of user evidence between 1961 and 1981. It is clear that anyone using this path must have also used some or all of High View Road during this period and this is verified on examination of their evidence forms.

LANDOWNERS EVIDENCE

2.6 A land registry search showed that the land crossed by A-D is not registered.

2.7 At least 39 individual properties front onto High View Road all of whom were consulted. The following is a summary of the comments received from these frontagers.

- i. Three were uncertain what the effect of the application might be and wanted to know more about it.
- ii. One said he preferred that the road remain as it is.
- iii. Two supported the application, one of whom provided some additional documentary evidence. He has not been able to establish any owner for the road but did mention that householders effectively own half or up to the centre of the road.
- iv. One stated that no-one had ever been stopped using the road and that most users were dog walkers. He also mentioned that there had been ongoing issues over the development of land adjacent to the route and that 'nobody really wanted the road made up'.
- v. Windlesham Parish Council noted that they owned land at the end of the route (beyond D) and had long provided an informal car park on land that they own, but that vehicles were otherwise not permitted on High Curley under Byelaws which came into effect on 1 August 1955.
- vi. Shepperton Builders own a plot of land adjacent to the route and confirmed that they supported the application. They stated that the public 'have enjoyed access on foot, horseback and in a motorised vehicle... from at least c1960. They also claimed that there is a BOAT 'from point D as shown on the plan linking back to High Curley Road and also from point D onto Lightwater Country Park'.

2.8 Some of the frontagers have wordings in their title deeds to the effect- "*..and also will keep in repair half the road and footpath adjoining the said piece of land until the Parochial or other Public Authorities shall take upon themselves the repairs of the same*". This indicates that all frontagers are likely to have a responsibility towards the maintenance of High View Road given that no public authority has yet admitted or taken on those responsibilities. It is not known if all frontagers have this responsibility written into their deeds.

DEFINITIVE MAP

2.9 No public rights of way are recorded over the route in question, nor was it initially put forward as a right of way for consideration in the compilation of the DMS in 1952. However, on publication of the 'draft map', an objection was received from Bagshot Rural District Council regarding its 'omission'. This objection was on the basis that "public rights had been established by uninterrupted user in all these cases¹". Windlesham Parish Council also noted that this was "clearly a public highway for all purposes although not one repairable by the inhabitants at large". This objection was not upheld however and the Highways and Bridges Committee on 23 September 1953 agreed that this route should not be added to the Definitive Map as a bridleway.

2.10 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

¹ Bridleway rights in this case.

District Council to be public. There are NO public rights recorded over the route in question.

HISTORIC EVIDENCE

- 2.11 The route is not visible on Roques (1770), Lindley Crosley's (1793), Colonel Mudge's (1816) or Greenwoods (1823) maps.
- 2.12 Route A-D is not shown on the 25" 1870 or 1877 edition Ordnance Survey (OS) (XVI:01) map. The area is recorded within plot 920 as "Rough pasture, trees marsh &c." in the First Edition's book of reference.
- 2.13 The route is visible on the 25" 1896, 1915 editions and later on the 1971, 1986, 1991, 1992 and 1999 National Grid Maps. Throughout this period there is a gradual increase in the developments fronting the route and the route becomes 'enclosed' along most of its length. 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.
- 2.14 The 1910 Finance Act map shows the route as uncoloured along its entire length A-D, which indicates that it was not subject to tax and therefore presumed to be a public highway by the Inspector of Taxes. Beyond the claimed length the route enters High Curley to the west and is incorporated within hereditament 1659. Presumably the route was not considered a public highway along this section
- 2.15 Maps prepared for the purposes of the Windlesham Tithe Act and the Windlesham Enclosure Award do not provide any useful information.
- 2.16 The route is visible on 1948, 1971 and 1998 aerial photographs although little can be interpreted about its nature or status from these.
- 2.17 The issue of the condition of this route was considered by Bagshot Rural District Council on various occasions between 1955 and 1970. Towards the end of this period the route was considered a top 10 priority for being made up under the Private Street Works Code and a survey was requested. There is no evidence to suggest that this was done. The Surrey Highways Information Team confirmed in 2006 that the route was never adopted nor entered onto the list of publicly maintainable highways.

OTHER EVIDENCE SUBMITTED BY THE CLAIMANT

- 2.18 The claimant highlights two sections in a piece of literature published by Surrey Heath Borough Council: "...the main road linking Chertsey Abbey and Frimley Priory skirted the base of High Curley Hill" and "Curly Hill was also a source of the local supply of gravel. By statute, during the reign of William and Mary, all local residents had to spend four days each year collecting gravel to repair the pot holes in local roads, extraction ceased in 1910." Neither of these texts refer to High View Road (which did not exist during much of this period) nor can any conclusions be drawn about public rights from them. If these users were travelling along High View Road because they were compelled to do so under statute, it is unlikely that this would establish a public right.
- 2.19 Five maps from the 1800s provided by Cambridge University and highlighted by the applicant do not show the route of High View Road.
- 2.20 Land registry details showing the extent of the claimants property do not contain any information regarding the status of the route.

- 2.21 A letter from Surrey Heath Borough Council notes ‘..clearly, if the widening of the road byelaw width and provision of a suitable gravel surface were matters covered by the planning permission, then they should have been done’. This does not indicate that the route is recognised as public.
- 2.22 Cranwell Grove, which leads off Highview Road, is already an adopted road. Whilst this may seem an anomaly it is not an unusual occurrence and does not automatically mean the whole length of High View Road is also adopted or that it should be.
- 2.23 An extract from the Windlesham Urban District Council minute dated April 1929 notes that a fire hydrant should be provided in High View Road. The claimant does not refer to any law which states that a road has to be a public highway to be supplied with a hydrant.
- 2.24 A planning permission document dated 1955 refers to the widening of High View Road to “..a byelaw width street and the provision of a suitable surface....in the interest of public safety.” This might indicate that the Planning Department at Bagshot RDC knew there was some public use, but nevertheless this does not make the route into a highway.

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

- 2.25 Sections 66 and 67 of this Act were expressly focused upon restricting the ability of the public to acquire and then record new public vehicular rights. This was done as a response to the decision in the House of Lords known as *Bakewell Management Ltd. V Brandwood & others* which made it possible for public vehicular rights to be acquired as a result of a criminal act- namely, driving over a footpath, bridleway or common. This Act reverses the effect of this decision by preventing the creation of public rights to drive mechanically propelled vehicles (MPVs) by mere use and by extinguishing any unrecorded rights (with some exceptions).
- 2.26 Section 66 of the provides that no public right of way for MPVs is created after commencement (2 May 2006) except on express terms or by construction of a road for such vehicles under statutory powers. This addresses the future creation of rights. Of more importance here however is Section 67.
- 2.27 Section 67(1) extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the DMS, or is shown as a footpath, bridleway, or restricted byway. In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the DMS as a byway open to all traffic. This is however subject to a number of subsections (2 to 3 and 5 to 7 in this case).
- 2.28 Under subsection 67, the burden of proving that mechanically propelled vehicular rights have not been extinguished in such cases would therefore fall to anyone using a mechanically propelled vehicle on a given highway. They would have to show both that: (a) a public right of way for mechanically propelled vehicles existed at the commencement of section 67 (on 2 May 2006); and (b) that those rights had not been extinguished, because one of the exceptions in 67(2) or 67(3) applies. Or if only a private right is being sought then they must meet the requirements of section 67(5).

The exceptions outlined by s. 67(2) are now examined in turn:

- 2.29 **Subsection 67(2)(a)** – *excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the ‘ordinary roads network’.*
- 2.30 This would not be relevant to the Definitive Map. The Wildlife and Countryside Act 1981 s. 66(1) states that ‘BOAT’:
- ‘...means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpath and bridleways are so used’.*
- If the way was ‘mainly used by the public in motorised vehicles’ then vehicular rights might be reserved, but such a route could not be recorded on the DMS and therefore an MMO could not be made.
- 2.31 **Subsection 67(2)(b)** – *excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the DMS as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’.*
- 2.32 This route is not and never has been recorded on the Surrey List of Streets.
- 2.33 **Subsection 67(2)(c)** – *excepts ways that have been expressly created or constructed for motor vehicles.*
- 2.34 There is no evidence to suggest that the route was expressly created or constructed for motor vehicles and indeed it has been a criminal offence to drive along it since 1930. Evidence of the route on non-definitive mapping cannot indicate anything more than its physical existence.
- 2.35 **Subsection 67(2)(d)** – *excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.*
- 2.36 There is no evidence to show that this is the case.
- 2.37 **Subsection 67(2)(e)** – *excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road’.*
- 2.38 It may be possible to show that the above is the case but no evidence has yet been submitted which can convincingly show that long-use by the public in MPVs occurred prior to 1930. Such a right must have been created by inference of dedication at common law through use by MPVs before 1 December 1930.
- 2.39 **Section 67(3)**- *provides that existing rights are preserved if:*
- a. *before 20 January 2005 the way had been the subject of an application under the Wildlife and Countryside Act 1981 to add it to the DMS as a BOAT;*
 - b. *before 2 May 2006 the County Council had made a determination in relation to such an application;*

- c. *before 2 May 2006, an application to add it had been made by a person with an interest in the land where the way was reasonably necessary to access their land.*
- 2.40 **Section 67(5)** of NERC provides a private right for mechanically propelled vehicles for those persons who have reasonable need for access by MPVs to land in which they have a interest, in all cases where a public right of way for MPVs is extinguished under s. 67(1) of the Act.
- (5) *Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies-*
- a. *was reasonably necessary to enable a person with an interest in land to obtain access to the land, or*
 - b. *(b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.*
- 2.41 This private right extends to landowners, occupiers and tenants. It also includes lawful visitors to the person who has an interest in the land, including businesses, trade or professional visitors, postal or other deliveries, the highway authority; and utility companies. The Act is silent regarding the Council's responsibility to record or defend such rights.
- 2.42 **Section 67(6)** *For the purposes of section (3) an application under s. 53 of the WCA 1981 is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.*
- 2.43 **Section 67(7)** *For the purposes of subsections (3)(c)(i) and (5)(a), it is irrelevant whether the person was, immediately before commencement, in fact-*
- a. *exercising a public right of way, or*
 - b. *able to exercise it.*
- 2.44 **Section 70(1)** allows for the recording on the DMS of a 'restricted byway'. This type of highway was first provided for under the Countryside and Rights of Way Act 2000. It was envisaged that such rights would only come into being through the statutory reclassification of RUPPS (Roads Used as a Public Path). Section 70(1) however means that restricted byways can be established and recorded on the Definitive Map on the basis of either historic evidence or evidence of use. The implication of this is that where a route carries historic vehicular rights, but the MPV rights are extinguished by s. 67 of the NERC Act, it will be possible to record that route as a restricted byway, rather than a BOAT.

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 as interpreted under the current legislation. Matters such as convenience, amenity or safety are irrelevant. (See Annex A).

4 CONSULTATIONS

- 4.1 Windlesham Parish Council, which is an adjacent landowner, indicated that that "there is surely no doubt that the existing condition and width of the road is

adequate for use by people on footpath on horseback or by motor vehicles” and that “no individual or body claims ownership of High View Road” and that “nobody has ever been challenged for using a motor vehicle”

- 4.2 The British Horse Society confirmed their support but noted that ‘bridleway’ would appear to be more appropriate given the fact that only horses could legally proceed into the Country Park (byelaws permitting).
- 4.3 The Ramblers Association did not oppose the application, stating that they would probably be indifferent as to whether High View Road remained a private road or became a BOAT as long as there was pedestrian access along it to FP 185.
- 4.4 No responses were received from Surrey Heath Borough Council 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 Countryside Legal Budget. If objections are received and a public inquiry is held, additional costs of around £1000 will be 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 This route has been in use for a substantial period of time. It is unlikely that legally recording it will have significant crime and disorder implications. 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 A and sections 2.25-2.44 to this report. The relevant consideration here is whether the evidence is sufficient to raise a presumption that public BOAT rights exist. 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 DMS 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 There appears to be no documentary evidence which conclusively indicates that public rights of any sort exist over the route. Nevertheless mapping evidence indicates that it has been in existence since at least 1896. More significantly the Finance Act 1910 shows that the route was non-taxable and therefore either public highway, common land or similar.
- 8.4 The Council minutes referred to, and the objection lodged against the Draft Definitive Map, indicate that the issue of its use and status has been under consideration for some time but always deferred or dismissed.
- 8.5 The claim must therefore rely on user evidence either by statute or common law.
- 8.6 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”*.
- 8.7 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 for example by a notice, by the making of a schedule 14

application, by blocking the route...or otherwise. In this case this must coincide with the making of the schedule 14 application on 3 May 2007.

- 8.8 Route A-D: The alleged BOAT appears to be supported by a substantial body of user evidence with up to 29 users, as many as 25 of whom had used the route for a period in excess of 20 years, largely on foot but also in an MPV. None of these users had any recollection of their use of the route being challenged in any way. 20 people had used the route in a vehicle during the 20 years up to 2007 and 20 had also or only used it on foot.
- 8.9 Whilst a highway is normally considered to run from one public place to another, there is no legal reason why a highway cannot be a cul-de-sac. It seems clear that west of point D the public have either an invitation or a right to travel on foot, it is therefore reasonable that a highway might end at such a location.
- 8.10 Until 2006 the above evidence would have been considered sufficient to show that BOAT rights had been acquired. The introduction of the Natural Environment and Rural Communities Act 2006 (NERC) changes any conclusion, which might be reached.
- 8.11 The important parts of this Act are discussed above at length, but to summarise, its effect is to extinguish those vehicular rights which were not shown on the DMS at the commencement of the act (2 May 2006) or were shown only as a footpath, bridleway or restricted byway. This general rule is subject to the exceptions and conditions outlined above, none of which are deemed to apply in this case.
- 8.12 I conclude that the public had acquired vehicular rights over route A-B-C-D on plan 3/1/83/H10 between 1987 and 2007, but that these were extinguished by NERC on 2 May 2006, so the appropriate status is that of 'restricted byway'. The Definitive Map should be modified accordingly. This will give the public a right over the route on foot, horseback, bicycle and in non-mechanically propelled vehicles. Any private vehicular rights, which currently exist or are permitted by the landowners, will remain unaffected.

9 WHAT HAPPENS NEXT

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

**LEAD OFFICER and
CONTACT OFFICER:**

Daniel Williams, Senior Countryside Legal Officer

TELEPHONE

08456 009 009

NUMBER:

E-MAIL

daniel.williams@surreycc.gov.uk

BACKGROUND

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

PAPERS:

Version No. 2

Date: 02.09.09

Initials: DJW

No of annexes: 2 + plan