



**OFFICER REPORT TO LOCAL COMMITTEE
(SURREY HEATH)**

**Alleged Public Byway Open To All Traffic (BOAT) along High
View Road, Windlesham**

15 July 2010

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. This application was considered by Surrey Heath Local Committee on 9 July 2009 but was deferred until the next meeting of 15 October 2009 when Officers recommended that an order for restricted byway be made (refer to minute 58/09). Following committee it was realised that there was a legal flaw in the original recommendation. A new recommendation is attached below.

It is considered that the evidence shows that only public footpath rights exist over the route. A legal order to modify the definitive map and statement should therefore be made.

OFFICER RECOMMENDATIONS

The Surrey Heath Local Committee is asked to agree that:

- i. Public footpath rights are recognised over the route A-B-C-D on drawing 3/1/83/H10 (**ANNEXE A**) 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 BOAT is not approved. The route will be known as Public Footpath 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 was also received. For legal background see **ANNEXE B** to this report.
- 1.2 The application was originally considered by Surrey Heath Local Committee on 9 July 2009 but was deferred until the next meeting. During the July meeting members also requested that further information was provided regarding the interpretation of evidence in the light of the recently introduced Natural Environment and Rural Communities Act 2006 (NERC).
- 1.3 At the meeting of 15 October 2009 committee resolved that a legal order for restricted byway be made (refer to minute 58/09).
- 1.4 Following this meeting officers realised that the recommendation and its resultant resolution were legally flawed. An additional period of consultation was undertaken with relevant interested parties who were asked to comment within 28 days.
- 1.5 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 (refer to **ANNEXE A**). The route is roughly metalled and between 4.5-13 metres wide. The route is currently recognised as a private street along which the nature and extent of any highway rights is uncertain. Two existing highways (Cranwell Grove- an adopted highway and public footpath 185 Windlesham) branch off from the route at points B and C.
- 1.6 Point A is located at the junction of High View Road and Curley Hill Road, the latter of which is recorded on the Definitive Map as a public bridleway. Any alleged BOAT must meet another vehicular highway. Macdonald Road is the closest highway to High View Road which carries full vehicular rights and which links into the wider network. Therefore the section Z-A over

Curley Hill Road as shown on the drawing 3/1/83/H10 (**ANNEXE A**), must also be considered as part of the application.

2 ANALYSIS

- 2.1 The previous committee report of 15 October 2009 explained how mechanically propelled vehicular (MPV) rights 'had' been acquired but then extinguished by the Natural Environment and Rural Communities Act 2006 (NERC 2006) leaving a restricted byway. This conclusion was incorrect. Any member of the public using High View Road in a MPV would have first crossed part of Curley Hill Road- a Public Bridleway (shown Z-A on the attached drawing 3/1/83/H10a) over which there are no recorded vehicular rights. This then links to McDonald Road, which is the nearest public highway carrying vehicular rights¹. Section 34 of the Road Traffic Act 1988² makes it a criminal offence to drive a MPV on a public bridleway without lawful authority. The Courts have since confirmed³ that a criminal offence cannot give rise to the acquisition of rights. Section 66 of NERC 2006 reaffirmed this judgement in statute. Given that the public cannot have reached and used High View road without committing a criminal offence, they cannot have acquired rights in a MPV over it. In this case the remaining lawful evidence suggests that use by the public on foot must have given rise to public footpath rights over High View Road but no higher status.
- 2.2 Residents⁴ crossing High View Road and Curley Hill Road in a motorised vehicle in order to access their own property would normally be doing so with a private right. This use would not contribute to a public vehicular right, nor would these rights be affected by any change in status to public footpath.

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. This above recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity or safety are irrelevant (see **ANNEXE B**).

4 CONSULTATIONS

- 4.1 A response was received from the British Horse Society. They objected strongly to the route being made a footpath only and see no reason why,

¹ Albeit one also recorded as a public bridleway.

² Formerly section 14 of the Road Traffic Act 1930.

³ *Robinson v Adair*[1995]

⁴ This would also include any of their guests, invitees and any utilities/services such as police, ambulance, fire and post.

given that High View Road gives access to Lightwater Country Park, that bridleway status should not be recognised, forming a network with the other bridleways and contributing to the Rights of Way Improvement Plan. They also suggested that there was little equestrian evidence because there was no need to include equestrian use when claiming a BOAT and that the applicant would not have known how to contact those horse riders who did use the route. None of these objections are legally relevant as they do not relate to the user evidence available. No evidence has yet been submitted to support this assertion.

- 4.2 Windlesham Parish Council understood that mechanically propelled vehicles could not be legally used by the public along the bridleway known as Curley Hill Road and did not raise any objection to the proposed revised recommendation.
- 4.3 High View Road resident Mr Hammond expressed concern about the possible waste of money and time over past errors and also the rather illogical way in which adopted highways, rights of way and public streets may intersect. Otherwise he had no objection to the recommendation.
- 4.4 High View Road resident Mr Arliss expressed some frustration over the matter but understood the new recommendation.

5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 5.1 The cost of advertising a Map Modification Order would be approximately £1000, 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 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 B** 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 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 subsists or is reasonably alleged to subsist over land in the area to which the map relates”*.

and

- 8.3 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”*.
- 8.4 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.
- 8.5 Use by the public of this route in a motorised vehicle must have crossed part of the public bridleway known as Curley Hill Road. This would have been a criminal offence. Such offences cannot give rise to a legal right. Therefore this claim cannot give rise to a BOAT nor can it give rise to a restricted byway. The user evidence does not clearly indicate any use of the route on horseback, although there is a small amount of use on a bicycle. It is deemed that this is not sufficient to give rise to the status of bridleway. 20 users had used the way on foot, 18 during the period 1987-2007, 14 of which for the whole period (refer to **ANNEXE C**). This is deemed to be sufficient to give rise to pedestrian rights.
- 8.6 I conclude that the public have acquired pedestrian rights over route A-B-C-D on plan 3/1/83/H10 (**ANNEXE A**) between 1987 and 2007. The definitive map should be modified accordingly. This will give the public a right of way over the route on foot. Any private vehicular rights, which currently exist or are permitted by a landowner, 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.

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