



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

**APPLICATION FOR A MAP MODIFICATION ORDER TO ADD A
FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT FOR
SURREY FROM THE HIGHWAY VERGE ON FORD ROAD TO
FOOTPATH NO. 45 (CHOBHAM)**

30 June 2011

KEY ISSUE

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to maintain a definitive map and statement (DMS) of public rights of way within Surrey. It also has a duty to modify the DMS if it discovers evidence which, on balance, supports a modification, and where there arises under section 31(1) and (2) of the Highways Act 1980 (HA 1980), an unrebutted presumption of dedication of a way as a public footpath as a result of 20 years public use of a way as of right and without interruption, the 20 years ending with the date when the right of the public to use it was brought into question.

SUMMARY

Mr James Curwen submitted an application in August 2008 for a Map Modification Order (MMO) to add a public footpath between Ford Road and Footpath No. 45 (Chobham), to the definitive map and statement for Surrey. That part of the route shown 'X' – 'A' is highway verge and already available to the public. The claimed route is therefore shown 'A' – 'B' - 'C' on Drawing No. 3/1/81/H68A. The matter was deferred from the meeting on 14 October 2010 to 30 June 2011, pending a site visit. The landowner, Mr Money, was invited to submit further evidence to substantiate his claim that he had no intention to dedicate the land concerned to the public, but no evidence has been provided.

Evidence can be documentary and /or user evidence. The evidence submitted in support of the application is considered sufficient on the balance of probability to establish that public rights subsist or are reasonably alleged to subsist and to warrant making a map modification order under s.53 WCA 1981.

OFFICER RECOMMENDATIONS

The Local Committee (Surrey Heath) is asked to agree that:

- i. A Map Modification Order (MMO) be made to add a public footpath from the highway verge on Ford Road to Footpath No. 45 (Chobham) to the definitive map and statement for Surrey.

- ii. In the event that one or more objection is received and maintained, that the order and supporting documentation be forwarded to the Secretary of State for the Environment, Food and Rural Affairs to decide the matter.

1. INTRODUCTION AND BACKGROUND

- 1.1 The claimed route (shown 'A' – 'B' – 'C' on Drawing No. 3/1/81/H68A see **Annex 1**), commences at the end of the highway verge on Ford Road and proceeds in a south easterly direction for 4.2 metres (along land in the ownership of Mr Edward and Mrs Catherine Money) to connect to Footpath No. 45 (Chobham) at grid reference 96435 east 62485 north.
- 1.2 Sale Particulars dated June 1870 show the land in the immediate vicinity of the claimed route in the same ownership as Shrubbs Farm. Shrubbs Farm was let out to a series of tenants from 1870 for approximately 20 years. At some stage the land east of Ford Road (i.e. the land over which the claimed route runs) was sold and became part of Buckstone Farm. Mr Edward Money acquired the land in May 1980.
- 1.3 Deep Ford Cottage appears to have been constructed for a gardener and odd-job man called Alan Bloomfield who worked for Mrs Coleridge, of Buckstone Farm. Mr Bloomfield ran a chicken farm on land next to Deep Ford Cottage. Access to the chicken farm ran from Ford Road, along the claimed route, across land forming part of Buckstone Farm.
- 1.4 Mr & Mrs James Curwen purchased Deep Ford Cottage in 1974. During the negotiations Mr and Mrs Curwen became aware that there was no right of access over the track from Ford Road to Deep Ford Cottage. As a result, Mr & Mrs Curwen asked Mr Money's administrator to grant them a right of way for vehicles and animals from Ford Road to their property across Buckstone Farm land. The Deed of Grant between the Moneys and the Curwens dated 14 February 1979 (**Annex 2**), gave the Curwens a right of access over the land coloured pink in the plan (point A to point X to point YB) in the Deed for a peppercorn rent. The Deed was non-assignable and personal to the Curwens and was deemed to be terminated on the sale of Deep Ford Cottage or on 1 January 1987, whichever occurred earlier. On 2 June 1982, Mr & Mrs Curwen were granted a licence to park private vehicles on the land coloured pink. In March 2000 Mr Money wrote to Mr Curwen reminding him that the licence only permitted 'vehicles belonging to' him and his family to park in the area.
- 1.5 The Curwens sold Deep Ford Cottage in late 2007 and access to Footpath No. 45 from Ford Road was stopped up by Mr Money at that time by padlocking the gate at point 'B'. A new gate was installed at point 'C' at around this time and fencing erected to enclose Footpath No. 45 (Chobham) where it runs along the eastern boundary of Deep Ford Cottage.
- 1.6 Mr Edward and Mrs Catherine Money are currently in the process of selling Buckstone Woods to Mrs Peake of Deep Ford Cottage. The possibility of dedicating a strip of land shown coloured purple on drawing number 3/1/81/H68d (see **Annex 5**), has been discussed with Mr Money and Mrs Peake but no agreement has been reached. Those persons submitting user evidence forms were contacted and consulted on the proposed dedication. Nine of the eighteen persons submitting user evidence forms agreed to withdraw their evidence forms if the proposed dedication was agreed. No

reply was received from the applicant and the remaining nine persons who submitted user evidence forms. There is a small strip of land between what the council considers to be highway verge and the land known as Buckstone Woods, currently in the ownership of Mr and Mrs Money. If the proposed dedication were completed, the council would still need to make a creation order to create a footpath from the highway verge to the boundary of the land known as Buckstone Woods.

2. ANALYSIS

- 2.1 Evidence was received from the landowner and the applicant. To fulfil its duty under s.53 WCA 1981 the council must consider this evidence and its findings are summarised below:
- 2.2 Dedication of public footpath rights may be presumed under the statutory test set out in Section 31 HA 1980 or under common law.

Statutory Test

- 2.3 In order to establish the rebuttable presumption, a claimant must show not less than 20 years of use by the public, 'as of right', that is, not by force, secrecy or with revocable permission, actual or implied, and that the use was 'without interruption' (i.e. without interference from the landowner by overt or identifiable acts preventing or significantly deterring passage). If this test is satisfied, the council must then decide whether deemed dedication is rebutted by sufficient evidence that there was no intention on the part of the landowner during the 20-year period that the route should be dedicated.

Date of Calling into Question

- 2.4 The applicant states that the gate at 'B' on Drawing No. 3/1/81/H68A was closed and padlocked in November 2007. The landowner corroborates this date. The period of 20 years use required before dedication of the route can be presumed under s.31 HA 1980 (i.e. the relevant period), therefore runs from 1987 to 2007. The evidence obtained from the user evidence forms supports use of the claimed route from 1955 to 2008, in excess of the relevant period.

Documentary Evidence

- 2.5 **Map Evidence**
A number of maps including, Colonel Mudge's Map 1816, Lindley Crosley's Map 1793, and Greenwood's Map 1823, the Tithe Map of 1841, and the Ordnance Survey Sheet X-15 dated 1896, 1871 and 1914 were considered. Colonel Mudge's Map 1816, Lindley Crosley's Map 1793, and Greenwood's Map 1823 show Ford Road but are drawn at a scale that does not assist in this matter. The Ordnance Survey Sheet X-15 dated 1896, 1871 and 1914 show Footpath No. 45 in the same position. The OS map dated 1914 shows the track leading to the farm buildings. OS maps provide good evidence of what existed on the ground at the time of the survey. They are not however, indicative of the status of the route. The Bagshot Rural District Council 1932 Rights of Way Map 11/35 shows Footpath No. 45 running north from Clappers Lane to within a few metres of Ford Road just below Shrubbs Farm. The Tithe Map of 1841 does not assist in this matter.

- 2.6 The 1952, 1959, and 1966 Definitive Maps show Footpath No. 45 in the same position. It is clear from the 1952 draft map that Footpath No. 45 did not extend across the spur to join Ford Road.
- 2.7 Deed of Grant dated 14 February 1979 and Licence dated 2 June 1982
The landowner relies on the Deed of Grant dated 14 February 1979, the licence dated 2 June 1982 and a letter to Mr Curwen dated 14 March 2000 reminding him of the terms of his licence, to indicate that he had no intention to dedicate to the public. The Deed, licence and the letter are personal to the Curwens and do not extend to the public at large.
- 2.8 Statutory Declarations under section 31(6) Highways Act 1980
A statutory declaration made under s.31 (6) HA 1980 is sufficient evidence to prove that a landowner has no intention to dedicate a route on his land as a public right of way. The council does not have any record of a statement and plan or a statutory declaration being made by the landowner, in relation to the land concerned.
- 2.9 Letter from Mrs Anna Peake (current owner of Deepford Cottage)
Mrs Peake claims that the gate (probably the gate at 'B') was closed periodically and that Mr Curwen gave her this information. She also says that Mr Harris, director at Knight Frank said that the gate was mostly open 'but when the gate was closed', his family either 'walked around' it or climbed 'over the top'. Mrs Peake goes on to say that when the gate was first locked, their hedge was cut back to facilitate access. She has since erected a wooden fence to abut the gate to close the gap.

Conclusion regarding Documentary Evidence

- 2.10 The map evidence shows that Footpath No. 45 does not meet Ford Road. The track to the farm buildings appears to have been in existence since at least 1914. Mr and Mrs Curwen and their family had a licence to use the claimed route and this licence was personal to them. The landowner relies on the Deed of Grant to indicate that he had no intention to dedicate to the public but this deed was made between him and Mr and Mrs Curwen and not with the public at large. Mr Money did not lodge a statement and plan or a statutory declaration with the council to prevent the public acquiring rights over his land. Users of the route do not report an obstruction until 2007. Mrs Peake relies on information supplied by other people. This information conflicts with the user evidence. From her letter it seems that, up until 2007, people continued to use the route even though the gate at 'B' might have been closed. The documentary evidence is not, on its own, conclusive but when combined with the user evidence, may assist in deciding whether the claim meets the statutory and/or the common law tests.

Evidence of Users

- 2.11 The applicant submitted 18 user evidence forms. Taken together, their usage covers a period from 1955 to 2008 (see **Annex 3**). Miss Kay Alexander and Mr Beavis have used the route throughout the whole period. All those submitting forms claim use on foot. None reported having been challenged or obstructed in their use or having received permission to use the route. No user recalls any signs prohibiting use. Seven users recall a gate being open until 2007. Five of those who submitted forms were interviewed. Mrs Julia Thomas and Mr Julian Thomas used the claimed

route for delivery and collections and, as they would have been acting as a licensee, their evidence has not been counted. The applicant states that the principal users of the route are persons living in Ford Road.

- 2.12 The landowner acknowledges that the route may have been used but claims that the users are ‘friends and acquaintances’ of the applicant’s family and ‘suppliers’ to his business. Although the route appears to have been used in the main by residents of Ford Road it is well established that use by local residents is sufficient.¹

Conclusions regarding User Evidence

- 2.13 In the circumstances it is the officer’s view that the public used the claimed route during the period from 1987 to 2007 ‘as of right’ and ‘without interruption’. The evidence provided by the landowner is not sufficient to establish that he had no intention to dedicate the route during the relevant period and this raises a presumption that it has been dedicated as a public footpath.

Common Law

- 2.14 While the evidence is considered to meet the statutory test, for completeness, both tests have been considered. If the committee agrees that the statutory test has been met there is no need to consider the test at common law. Dedication at common law is considered below.
- 2.15 An inference that a way has been dedicated for public use may be drawn at common law where the actions of the landowner (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
- 2.16 Dedication may be express or implied from evidence of user by the public and of acquiescence in that user by the landowner. Unlike the statutory presumption of dedication contained in section 31 HA 1980, the period of user which is necessary at common law to establish or prove a dedication to the public has never been defined. Every case must depend on its own facts.
- 2.17 Under common law, dedication of the route as a footpath may be implied, as the lack of action by Mr Money to prevent the public using the route and the public’s acceptance of the route by using it, infer that the route has been dedicated for public use.

Burden of Proof

- 2.18 At common law, the burden of proof is upon the person claiming the right (i.e. the applicant), to show both that the owner of the land intended to dedicate over it a public right of way (actual or implied), and that the public accepted the right of way.

3 OPTIONS

¹ R v Residents of Southampton (1887)

- 3.1 The committee may agree or disagree with the officer's recommendations that rights have been acquired. Decisions can only be made on the basis of the evidence submitted and interpreted under current legislation. Matters such as convenience, amenity or safety cannot be taken into account. (see **Annex 4**).

4 CONSULTATIONS

- 4.1 The Surrey Heath Borough Council and Chobham Parish Council have no comments on the application.
- 4.2 The Ramblers and the Open Spaces Society support the application. No response was received from the British Horse Society.

5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 5.1 The cost of advertising a Map Modification Order would be approximately £1,200, and would be met from the County Council's Countryside Access budget. If objections are received and a public inquiry is held, additional costs of around £1,000 will also be met from the same 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. If the path is added to the definitive map the council will negotiate with the landowner with the aim of ensuring that the least restrictive option is employed when considering access between the highway verge and the land in private ownership (i.e. point 'B' on Drawing No 3/1/81/H68A).

7 CRIME AND DISORDER IMPLICATIONS

- 7.1 The public has used the route as a footpath for a substantial period of time. It is unlikely that any change in status will have a significant impact on crime and disorder. Such issues cannot be taken into account when making a decision whether the public have acquired rights or not.

8 THE HUMAN RIGHTS ACT 1998

- 8.1 The Map Modification Order process is concerned with keeping the Definitive Map up to date. This might involve formalising rights, which already exist but have not been recorded or deleting rights included on the definitive map in error. Whilst the impact of this process on the above issues is usually negligible it is recognised that Human Rights legislation must be considered.
- 8.2 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. When making a decision under s.53 WCA 1981, the only relevant consideration is whether the evidence is sufficient to raise a presumption that footpath rights exist over the claimed route. Under

the WCA 1981, other issues such as amenity, safety or convenience are not relevant.

- 8.3 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.
- 8.4 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.
- 8.5 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 constitutes such interference and engages Article 8.
- 8.6 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.
- 8.7 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.
- 8.8 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.

9 CONCLUSIONS AND RECOMMENDATIONS

- 9.1 A decision on this application must be made on the legal basis and the guidance laid out in **Annex 4**. Under Section 53 of the Wildlife and Countryside Act 1981 the only relevant consideration is whether the evidence is sufficient to raise a presumption that footpath rights exist. Other issues such as amenity, safety or convenience may not be considered.
- 9.2 Whilst the documentary evidence shows the existence of the claimed route from at least 1914, it is insufficient to indicate its status. The claim must rely on user evidence.
- 9.3 The decision is made on the balance of probability,² that is, whether or not, on balance, public rights subsist or are reasonably alleged to subsist. If they

² R. v Secretary of State for the Environment, ex parte Bagshaw and Norton [1994] and R. v Secretary of

do, the status, the width of the path and any limitations must also be determined.

- 9.4 Where there is conflicting evidence, as in this case, the council ‘must bear in mind that an order made under s.53 (2) following a Schedule 14 procedure still leaves both the applicant and the objectors with the ability to object to the order under Schedule 15’ and that ‘conflicting evidence can be heard and those issues determined following a public inquiry’.³
- 9.5 Taking the evidence as a whole (and in the absence of an agreed dedication agreement), the officer considers that there is sufficient evidence, on the balance of probability, to warrant making a map modification order under s. 53 (2)(b) and (3)(b) and (c)(i) to establish that public rights subsist or are reasonably alleged to subsist over the claimed route and to add a footpath to the definitive map and statement for Surrey.

10 WHAT HAPPENS NEXT

- 10.1 All interested parties will be informed about the decision. If the recommendations are agreed a MMO will be made. If one or more objection to the order is made and maintained, the order will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

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

³ State for Wales, ex parte Gordon Emery [1997]
R v Isle of White CR v O’Keefe [1990] 59 P. & C.R. 283