



**OFFICER REPORT TO LOCAL COMMITTEE
(WAVERLEY)**

**ALLEGED PUBLIC FOOTPATH(S) BETWEEN CHURCH LANE
AND PUBLIC FOOTPATH 130 (WITLEY)**

17 June 2011

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

Mrs Christy Crouch submitted an application for a Map Modification Order (MMO) to add two public footpaths between Church Lane and public footpath 130 (Witley) to the Surrey County Council DMS.

It is considered that the evidence shows that public footpaths are reasonably alleged to subsist over the routes. A legal order to modify the definitive map and statement should therefore be made.

OFFICER RECOMMENDATIONS

The Local Committee (Waverley) is asked to agree that:

- (i) Public footpath rights are recognised over routes A-D, B-D and C-D on drawings 3/1/16/H25 and H26 and that this 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 the

aforementioned footpaths is approved. The routes will be known as Public Footpaths no. 599, 600 and 601 (Witley).

- (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 On 7 August 2008, Mrs Christy Crouch submitted an application under WCA 1981 for a MMO to add three footpaths to the DMS. The application was accompanied by 52 user evidence forms, which were later supplemented by a further 22 forms. For legal background see **ANNEXE A** to this report.
- 1.2 Claimed route A-D commences at point A which is located 16m to the northeast of Parsonage Farm at the junction with public footpath 130 (Witley). It then runs in a north easterly direction for 355m to point D, to the south east of Winkford Farm. B-D commences at a point on footpath 130 (Witley), 240m south of Lemonfield Cottage and proceeds in a south-easterly direction for 780m to point D to the south east of Winkford Farm. C-D commences from Church Lane in a generally westerly direction for 171m to point D south east of Winkford Farm.

2. ANALYSIS

STATUTORY TEST

- 2.1 In order to establish a public right, it must be possible to show 20 years of use, 'as of right', that is, not by force secrecy of permission and that the use was 'without interruption'. If this test can be satisfied, the Council must then decide whether this deemed dedication is rebutted by sufficient evidence to show that there was no intention on the part of the landowner during the 20 year period to dedicate the route.

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.2 75¹ people have completed public user evidence forms, collectively showing use of the route on foot from 1967-2009. Officers interviewed 13 of these claimants.
- 2.3 Use of route A-D runs from 1969-2009. 73 of the claimants had used this route at some time from as little as once ever to daily. 17 claim to have used it more than 100 times per year. 13 also claim to have used the route as a bridleway at some time between 1976 and 2009, mostly by

¹ Form 20 contained evidence from a Mr and Mrs Hamilton.

ITEM 9

bicycle. 2 claim use in a mechanically powered vehicle (MPV) between 1991 and 2002. 43 had used the route in some way for a continuous period of at least 20 years.

- 2.4 Use of route B-D runs from 1967-2009. 66 of the claimants had used this route from as little as twice annually to daily. 10 claim to have used the route as a bridleway between 1976 and 2009, mostly by bicycle. None had used the route in an MPV. 22 had used the route in some way for a continuous period of at least 20 years.
- 2.5 Use of route C-D runs from 1967-2009. 66 of the claimants had used this route at some time from as little as once ever to daily. 10 claimed to have used the route as a bridleway. 20 claim to have used it more than 100 times per year. 10 claim to have used the route as a bridleway 1971 and 2009, mostly by bicycle. Only one claimed to have used the route as an MPV.
- 2.6 The reasons for using the ways included: walking and dog walking, health, pleasure, socialising, visiting friends and family, circular routes, fitness and shopping. The most common use was generally recreational exercise.
- 2.7 All of the users claim to have used the route openly and none had sought permission. None had ever worked for the landowner. 15 record having met the landowner or their tenant farmer Mr Ranson. Only three recall ever being challenged- this occurred during summer/autumn 2006.
- 2.8 Only 2 users remember a gate on A-D. Ms Taylor noted a gate near Winkford Farm which had appeared in 2007. Mrs Speller records old rusty gates.
- 2.9 Several users noted gates between B and D- mostly adjacent to Winkford Farm where areas were sometimes corralled for cattle control- any closures were always temporary.
- 2.10 Many of the users recorded some kind of gate at point C on Church Lane. Whilst memories of this varied somewhat, the consensus generally was that there was a metal gate with a gap on its southern side. The gate was remembered to be generally open and never locked. It was noted by some that it was only locked after foot and mouth disease or this may have been the result of theft from the barns. It was also noted that a notice appeared on the gate during foot and mouth which said “for access please telephone.....”
- 2.11 A few users also mentioned the presence of electric fences, string or tape between point B and D although this was never perceived as an obstruction to use.

LANDOWNER'S EVIDENCE

2.12 The Land Registry shows that the land crossed by B-D and C-D is entirely owned by Mr and Mrs Swarbreck of Hambledon House, Hambledon who have held title since 19 August 2004. They also own the majority of A-D. The first 78 metres travelling east from point A is now owned by Mr and Mrs Morris who have held title since 10 March 2008. Prior to this it constituted part of the surrounding title held by Mr and Mrs Swarbreck.

2.13 Mr and Mrs Swarbreck objected on the basis that they had challenged people using the routes, including the claimant and Mr Nicholas Holder.

2.14 No comments were received from Mr and Mrs Morris.

2.15 Mr Robert Ranson (who is tenant farmer of the land) also submitted the following evidence.

- He had been farming the land for over 30 years and knew the estate well having been born at Parsonage Farmhouse
- Route B-D had certainly been closed off with electric fences on several occasions, including in 1976, 1992 and 2010 whilst cattle grazed on it. (For example from June to August 2010 up to 200 cows and calves fed every day along the trackway. There were at least 6 double stranded electric wires across the roadways).
- Cattle were corralled on a weekly basis across route B-D at Winkford Farm since 1975.
- There were always gates at point C, which were often locked after about 1991. The public sometimes forced their way past these.
- He works on the farm very regularly and only rarely sees people using the routes which does not seem to coincide with the very large number suggested by the evidence forms.
- The gate at Church Lane has been secure enough to keep out the public on several occasions, but each time somebody comes along and used strong wire cutters to obtain access.

2.16 No useful information has been acquired from earlier landowners: Mr Zardari 1995/6-2004 and the Suen family 1984-1995. Thames Water were the landowner from 1975-1984 but had retained no useful management records.

2.17 Adjacent landowners Mr and Mrs Houston of Winkford Grange confirm they had consistently used the track C-D since 1990 and that it has been a popular walkway throughout the period. They support the application.

- 2.18 On 26 July 2004 Mr and Mrs Swarbreck deposited a statement and plan under s.31(6) of the Highways Act 1980. This deposit shows land which they considered to be public highway at the time. By stating that no other ways over the land shown on the attached plan have been dedicated as public highway, protection is obtained against the future acquisition of public rights. Mr and Mrs Swarbreck have not yet completed the second part of the process which is the submission of a supporting statutory declaration which is signed by a solicitor or Commissioner of Oaths.
- 2.19 An earlier deposit was made by former landowner Sir John Leigh Bart on 16 March 1939 under s.1(4) of the Rights of Way Act 1932. On the plan accompanying this deposit he did not recognise public rights along any of the claimed routes.

DEFINITIVE MAP

- 2.20 No public rights of way are recorded over the route in question and there are no records to suggest that the path was amongst those put forward by the Council for consideration at any stage in the compilation of the Surrey County Council Definitive Map and Statement in 1952, 1959 or 1966. It was not shown on a map prepared by Hambledon Rural District Council in 1948 for the purposes of the Rights of Way Act 1932.

HISTORIC EVIDENCE

- 2.21 None of the routes are visible on any historic maps preceding the Ordnance Survey, nor are they visible on the 1871, 1872 or 1897 Ordnance Survey editions. The 1912 edition shows route C-D with pecked lines, but A-D and B-D are not visible. The 1916 map shows B-D and C-D indicated by double pecked line enclosed by solid lines and incorporating verges; A-D is shown only by double pecked lines. On the 1976/7 National Grid maps all of the routes are shown enclosed by solid lines, indicating that they are fenced from the surrounding fields. A solid line is shown across the route at 'C' which usually indicates a gate, although this gives no indication about whether it is locked or not.
- 2.22 The route appears visible on aerial photographs from 1948, 1971, 1988 and 1999. No conclusions can be drawn regarding status or the presence of gates due to scale and tree cover. Photographs taken on the ground in August 2006, September 2008 and June 2010 do not show any fences, gates, cattle or other obstructions along the claimed routes except for at point 'C' where the barricaded gate is visible in the 2010 photos.

PREVIOUS CLAIM – HASLEMERE ROAD TO FOOTPATH 130 (WITLEY)

- 2.23 In 2006 a claim was made for a public footpath between Haslemere Road and footpath (130) Witley. On 12 September 2008 the Committee agreed that a map modification order be made to add this to the map. Objections were received to the order and the matter was referred to the Secretary of State. An Inspector was appointed to examine the matter and an Inquiry held over 4 days in late 2009. The order was confirmed as footpath 598 (Witley) with minor modifications. Many of the users for route this route also use the current claimed routes A-D, B-D and C-D. Much of the evidence they discuss with regard to signage, gates and challenges (or otherwise) has bearing here.
- 2.24 Of the evidence forms submitted for footpath 598, 11 make reference to one or all of the routes being considered here. 8 of these users also completed an evidence form for this claim, 7 of which were for all three routes. There are some minimal differences between these forms but they do not affect the conclusions here. None of the forms make any reference to physical challenge until around 2006 when signs were erected.
- 2.25 Several adjacent landowners stressed at the Inquiry that they had never been given permission to walk across the estate as a whole nor did they have any private rights to do so. It was found that some of the notices and gates were erected in 2001 by the Moore family. This was found to be the 'point of challenge' by the Inspector. It is debatable, however, whether the same challenges can be used here as they were not erected in positions where they could have been effective.

3 OPTIONS

- 3.1 The Committee may agree or disagree with the officer's recommendations or they may decide that the evidence submitted shows the routes to 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 The Ramblers' Association supported the application.
- 4.2 The Open Spaces Society welcomed the addition of these paths to the definitive map. They stated that they were well used by local walkers and that local people had spoken about having used these tracks over a period of many years.

- 4.3 Waverley Borough Council had discussed this with local councillors and the portfolio holder but had no further information to add.
- 4.4 The local County Councillor Mr David Harmer did not make any comment.
- 4.5 The Borough Councillor Mr Nicholas Holder wrote submitting the following information:
- Up until 1996 Rockwood was owned by Mr and Mrs Suen who employed a tenant farmer. At this time the estate was walked by three families who lived on the estate. The Moores, the Sargants and the Unwins and also Mr Boote. They exercised their dogs and were allowed to do so by the owner.
 - In 1992/3 Winkford Farm was corralled by the farmer making it impossible for anyone to walk through.
 - In 1996 the estate was sold to Banazir Bhutto who was an absentee landlord. During this time walkers freely walked all over the estate.
 - In 2004 the Swarbrecks bought the Estate. They took advice from the Countryside Access Officer and erected notices on all tracks to stop trespassing in summer 2006.
 - The estate is currently being broken up and sold. Part of the land affected has been sold to Mr and Mrs Morris who intend to develop part of the track into an orchard.
 - Mr Swarbreck intends to develop Winkford Farm into a dwelling and will take action against Mrs Crouch in the High Court to protect his privacy.
 - Mr Holder's area as Borough Councillor does not extend to the route covered by the claim paths.
 - He can count on one hand the number of walkers he has spotted over the years walking these footpaths.
 - He wished to act as arbitrator between the parties to reach some kind of compromise for the benefit of the public purse.
- 4.6 Witley Parish Council confirmed that they had no objection to the above application if the applicant has provided sufficient evidence.
- 4.7 The Senior Countryside Access Officer for West Surrey made the following observations:
- Complaints were received in 1999-2001 about electric fencing in this section of Witley Park.
 - He met Mr Ranson on-site on 28th January 2002 and drove A-D and B-D. There was an electric fence across the route half way along B-D which had to be unfastened. The fence was still there during another site visit on 25th February 2002.
 - On a visit (late 2002 or early 2003) to the site he encountered Mr Ranson moving some cattle across the track.
 - He had never used C-D but was aware that the gate at C was frequently kept locked.

- He did recall occasionally seeing users on A-D and B-D since 2002.
- He was with Mrs Swarbreck when she challenged one walker but does not remember the date (probably some time between 2005-8).

5 FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 5.1 If a MMO were to be made, the cost of advertising it would be approximately £1200, 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 formalising rights, which already exist but have not been recorded. 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 Such issues cannot legally be taken into account when making a decision if 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 to this report and the only relevant consideration is whether the evidence is sufficient to raise a presumption that public footpath 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”*.
- 8.3 There appears to be no specific documentary evidence to indicate that public rights of any sort exist over the route, hence the claims must rely on user and landowner evidence either by statute or common law.
- 8.4 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”.

- 8.5 The user evidence appears to show regular use on foot over all of the routes from 1967 to 2009. The period of 20 years referred to in subsection (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 other. Whilst it seems that a notice was erected and a gate possibly locked at point C, this was not perceived to be a challenge. This was because a pedestrian access continued to be maintained and the notices coincided largely with foot and mouth disease in 2001 when access to the countryside was generally curtailed. The erection of electric fences at various points along B-D was not perceived as a challenge to the public as users said you could easily step over these or unclip them to pass. Similarly the occasional corralling of cattle was recognised but perceived to be a temporary issue and not a challenge to use. NO users recalled meeting cattle more generally along the route of B-D.
- 8.6 Users did not feel that their use was challenged until Mr and Mrs Swarbreck put notices widely across the estate during 2006. Prior to this the public's right to use the route was probably first effectively challenged in 2004, when the Swarbrecks made their Section 31(6) deposit. None of the users perceived the erection of electric fences, tapes or the corralling of cattle along the track B-D and near to point D to be a challenge to their use. Some users said they would probably go over or under electric fences/tapes and any cattle corralling was perceived as temporary. It is therefore some doubt regarding whether these events could have been considered effective challenges to use.
- 8.7 30 people claim to have used the route on foot during the 20-year period from 1984 to 2004 and another 32 for part of it. 12 had used the route on bicycle or horseback at some time during this period, although only one for the whole period. Only two or fewer users ever claim to have used the routes in a MPV. I do not believe that this evidence is sufficient for bridleway or vehicular rights to have arisen.
- 8.8 Insufficient evidence has been submitted to show that public use on foot was effectively challenged between A-D, B-D and C-D or that there was no intention to dedicate this land until the s. 31(6) deposit was made in 2004. The deposit made under the 1932 Act is of no relevance to the period 1984-2004, as such deposits were only effective for 6 years.
- 8.9 It is concluded, on the balance of probabilities, that public footpath rights can be reasonably alleged to subsist over routes A-D, B-D and C-D between Church Lane and public footpath 130 (Witley) on the basis of use by the public between 1984 and 2004.
- 8.10 The Local Committee (Waverley) is asked to agree that:

- i. Public footpath rights are recognised over routes A-D, B-D and C-D on drawings 3/1/16/H25 and H26 and that this 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 the aforementioned footpaths is approved. The routes will be known as Public Footpaths no. 599, 600 and 601 (Witley).
- 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.

9 REASONS FOR RECOMMENDATIONS

- 9.1 The evidence shows that public footpaths are alleged or are reasonably alleged to subsist over the routes A-D, B-D and C-D on plans 3/1/16/H25 and H26.

10 WHAT HAPPENS NEXT

- 10.1 If Committee decided that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 10.2 If Committee decides that no order be made, the applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 10.3 If the Committee resolution is against Officer's recommendations then they should record the reasons and cite evidence for the decision. This will make it easier to explain the decision should the matter proceed to public inquiry or appeal.
- 10.4 All interested parties will be informed about the decision

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