



OFFICER REPORT TO LOCAL COMMITTEE (WOKING)

APPLICATION FOR A MAP MODIFICATION ORDER TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT FOR SURREY BETWEEN FOOTPATH NO. 102 (WOKING) AND FOOTPATH NO. 28 (WOKING) AT WOKING GOLF CLUB

28 MARCH 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 John Tarring submitted an application in June 2010 for a Map Modification Order (MMO) to add a public footpath between Footpath No. 102 (Woking) and Footpath No. 28 (Woking) at Woking Golf Club, to the definitive map and statement for Surrey.

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 (Woking) is asked to agree that:

- i. A Map Modification Order be made to add a public footpath between Footpath No. 102 (Woking) and Footpath No. 28 (Woking) at Woking Golf Club to the definitive map and statement for Surrey. The route will be known as public footpath no. 415 (Woking).
- 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' on Drawing No. 3/1/79/H55 (see Annex 1)), commences at its junction with Footpath No. 102 (Woking) at grid reference 98113 east, 57486 north and proceeds in a generally southeasterly direction for 74 metres to its junction with Footpath No. 28 (Woking).
- 1.2 Due to a shortage of available space in London in the 1850s to bury the dead the London Necropolis and National Mausoleum Company was incorporated. The company was empowered by legislation to establish a cemetery and to close or divert all footpaths, highways and watercourses across land in its ownership. In 1854 it purchased 2,268 acres of common land in what was then the Parish of Woking. It rented out some 8% of its original holding for a golf course.
- 1.3 Woking Golf Club was founded in 1893 and in 1972 the Members acquired the freehold. The Clubhouse lies at the end of Pond Road, a private road. A pavilion is shown on the site on the 1896 Ordnance Survey Map. Some building work appears to have taken place between 1896 and 1912. The claimed path is annotated as a footpath on the 1912, 1916 and 1934 Ordnance Survey Maps.

2. ANALYSIS

Statutory Test

- 2.1 In order to establish the rebuttable presumption, a claimant must show 20 years of use, '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.

Burden of Proof

- 2.2 The burden of proof in establishing that intention to dedicate in the landowner is on the person who asserts that there has been a dedication.

Documentary Evidence

- 2.3 Map Evidence
The historic maps produced by Bowen 1749, Senex 1729, Andrews 1777, Lindley & Crosley 1793, Col Mudge 1816 and Greenwoods 1823, the Tithe map and the 1910 Finance Act map do not assist in this matter. The Ordnance Survey Map of 1871 shows a route approaching from the north crossing the railway and proceeding in a southeasterly direction to circumvent the pond and proceed along what is now Pond Road. This route is recorded on the definitive map and statement as Footpath No 102 (Woking). Another route is shown approaching from the northeast and joining Footpath No 102 north of the railway bridge (FP 103) and the route that is now FP 28 (Woking) is shown commencing at the northeast edge of the pond. The 1896 OS map shows the same routes and the Pavilion is shown approximately 60 metres west of the pond. The 1912 OS map shows

an enlarged pavilion and the claimed route is annotated as a footpath. The Clubhouse is shown on the OS maps dated 1916 and 1934 and the claimed route is annotated as a footpath on both. 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.

- 2.4 The Rights of Way Act 1932 enabled landowners to deposit maps with the council showing those ways on their land that they admit to being public rights of way. These provide very strong evidence of the existence and status of ways. The Urban District Council Map of 1932 shows Footpath Nos. 27 and 28 but not Footpaths Nos. 102 and 103 (Woking). Footpath No. 28 terminates at the northeast boundary of the pond. The claimed route is shown on the map but is not admitted as a public right of way.
- 2.5 The 1952 draft Definitive Map and Statement (DMS) records Footpath Nos. 27, 28, 102 and 103. The claimed route is shown on the map but is not recorded as a public right of way.
- 2.6 The landowner has experienced problems with theft, vandalism and criminal damage to its premises. They say that the car park was at one time fenced with a chain link fence erected pre war and approximately 5 feet in height running continuously from the entrance at Pond Road to the stile at the railway bridge (i.e. along its boundary with Footpath No. 102 Woking). The fence fell into disrepair and was 'replaced by a ranch style wooden fence approximately 30 years ago'. The landowner says that 'over the years', the wooden fence 'also became broken and was vandalised'. The landowner has provided a photograph of the concrete posts that supported the earlier fence. In 2009, Woking Golf Club replaced the fence with 'a more robust metal one' in order to:
- a) provide security for members' and visitors' property, the Clubhouse and the staff;
 - b) improve safety for members and visitors and the public;
 - c) to extend the area of parking available and to make the area more attractive.

The erection of the metal fence was done in two phases. The second phase, in 2009, obstructed the claimed route and led to the application for a map modification order (see 2.11).

- 2.7 Statements from the House Manager, the Head Greenkeeper, the current Secretary and a previous Secretary to Woking Golf Club have been provided stating that the public were challenged when using the claimed route. They have also provided a copy of a letter that they say was handed out to people in 2006 by the late Past Captain, Mr John Matheson, Head Greenkeeper and the current Secretary to the Club. The letter requests that people keep to the public footpaths. The evidence of challenge falls within the relevant period. Minutes of the General Committee dated 19.09.99 record a problem with 'Trespassers/Car Park Users' and 'Options discussed to tackle this problem included; meeting the Trespassers face to face, placing more notices around the course, placing an appropriate reminder in our Newsletter for members to explain to those Trespassers and Dog Walkers the risks they might be taking'. The minutes of the General Committee dated 16.05.99 reports problems with trespassers and resolves to increase the number of signs around the course. Minutes of the meeting held prior to 23 September 1990 resolve to proceed with a notice stating 'Woking Golf Club, Private, Visitors Car Park in far end'. The landowner has erected signs stating 'Woking Golf

Club', 'Private Club', Please keep to the public footpath at all times' at the beginning of the 1st, 4th 17th holes, on Mile Path at the crossing to the 15th hole, behind the practice ground, behind the 13th green, between the 6th and 8th hole and at the entrance to the 8th hole (see Annex 2).

- 2.8 The applicant provided a photograph (taken on 25 February 2010) of a sign stating 'Woking Golf Club, Private Property, Not a public right of way' which was attached to a tree adjacent to the claimed route and visible if approaching from the north of the route. The applicant states that this sign was erected a few weeks prior to the erection of the fencing and that to his knowledge, 'no such notice or fence has been present, prior to this, since 1972'.
- 2.9 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.

Conclusion regarding Documentary Evidence

- 2.10 The map evidence shows that the route has been designated as a footpath on Ordnance Survey maps since 1912 but that it was not admitted as a public right of way on the 1932 map produced by the UDCW or recorded as a public right of way on the 1952 draft definitive map. Signs have been erected at various points on the course but not specifically on the claimed route until 2009. Minutes of meetings at Woking Golf Club suggest that the club was aware that the public were using the claimed route. The applicant's evidence is that signs stating "No Public Right of Way" were not erected on the route until a few weeks before the second phase of the metal fencing was completed. Woking Golf Club has not submitted a statutory declaration to the council. The public claim to have used the route over the relevant period despite signage at other points on the course. 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.

Date of Calling into Question

- 2.11 The applicant states that Woking Golf Club erected metal railings in November 2009 obstructing the claimed route. The period of 20 years use required before dedication of the route can be presumed under HA 1980 (i.e. the relevant period), therefore runs from 1989 to 2009. Woking Golf Club was the registered proprietor of the land over which the claimed route runs during the whole of this period.

Evidence of Users

- 2.12 Twenty one user evidence forms were submitted to support the application. A summary of these forms is provided in Annex 3. Of those 21, 17 persons have used the route throughout the relevant period. The frequency of use varies from 12 times a year to twice a day throughout the year. Two persons have used the route for 50 years. One person claims use of the route on a bicycle from 1989 to 2005. Prior to the notices and fencing erected in 2009,

the users do not recall seeing any signs, fencing or other obstruction on the claimed route. Not one of the 21 users say they were stopped or challenged on the route. Eleven persons were interviewed and signed a supplementary statement.

Conclusions regarding User Evidence

- 2.13 The users are consistent in their description of the claimed route, the lack of signing and the lack of challenge. None of the users asked for permission to use the route and all used the route openly. The user evidence meets the statutory test and the officers' view is that the claimed route was used by the public during the period from 1989 to 2009 in such a manner as to raise a presumption that it had been dedicated as a public footpath, unless there is sufficient evidence that there was no intention to dedicate it. Whilst the landowner has produced evidence of signing it appears to have been placed at other sites on the golf course and has not prevented use of the claimed route. In the officers' view, there is insufficient evidence to establish that the landowner had no intention to dedicate the route during the relevant period.
- 2.14 While the evidence is considered to meet the statutory test, for completeness the test at common law has also 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 falls to be considered below.

Common Law

- 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 may be implied, as the lack of action by Woking Golf Club to prevent the public using the route, and the acceptance of the route by the public, by using it, infer that the route has been dedicated for public use.

3 OPTIONS

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

4 CONSULTATIONS

- 4.1 Woking Borough Council has no comments on the application.

- 4.2 No response was received from the British Horse Society or the Open Spaces Society.
- 4.3 The Ramblers say that the 1983 OS map shows a track along most of the claimed route from FP 102 towards FP 28.

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. The application is not considered to have any equalities and diversity implications.

7 CRIME AND DISORDER IMPLICATIONS

- 7.1 The public claim they have used the route as a footpath in excess of 20 years. The landowner has produced a number of letters from the police recording incidents of criminal damage and theft at Woking Golf Club in evidence and wishes to reduce vandalism and crime on its property. Under section 53 WCA 1981 the council may only consider the evidence. Crime and disorder 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 has 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 will constitute such interference and thus engage 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 and 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, security, safety or convenience may not be considered.
- 9.2 Whilst the documentary evidence shows the existence of the claimed route from at least 1912, 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,¹ that is, whether or not, on balance, public rights subsist or are reasonably alleged to subsist. If they 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

¹

R. v Secretary of State for the Environment, ex parte Bagshaw and Norton [1994] and R. v Secretary of State for Wales, ex parte Gordon Emery [1997]

order under Schedule 15' and that 'conflicting evidence can be heard and those issues determined following a public inquiry'.²

- 9.5 Taking the evidence as a whole it is considered 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 objections to the order are made and maintained, the order will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

LEAD OFFICER: Debbie Spriggs, SCC Countryside Access Manager
(County Hall)

TELEPHONE NUMBER: 020 8541 9343

E-MAIL: debbie.spriggs@surreycc.gov.uk

CONTACT OFFICER: Sue Briant, Countryside Access Officer

E-MAIL: susan.briant@surreycc.gov.uk

TELEPHONE NUMBER: 020 8541 7634

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

² R v Isle of White CR v O'Keefe [1990] 59 P. & C.R. 283