

SURREY COUNTY COUNCIL

LOCAL COMMITTEE (REIGATE AND BANSTEAD)



DATE: 3 MARCH 2014

LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN BELL STREET AND PARK LANE ACROSS PRIORY PARK AND THROUGH TO HIGH STREET, REIGATE

DIVISION: REIGATE

SUMMARY OF 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 can be reasonably alleged to support a modification and where under section 31(1) and (2) of the Highways Act 1980 (HA 1980) an unrebutted presumption of dedication of a way as a public right of way arises as a result of 20 years of use without force, secrecy or permission; the 20 year period ending with the date when the right of the public to use it was brought into question. This duty also applies if rights can be reasonably alleged to subsist on the basis of dedication at common law as implied from evidence of use by the public and of acquiescence to that use by the landowner.

On 7 March 2009 Surrey County Council (SCC) received an application from Mr Simon Elson under the provisions of the Wildlife and Countryside Act 1981 for a Map Modification Order to modify the definitive map and statement by the addition of public footpaths between A-S-T-B-R-J-E-O-P-W-V-C and B-Q-F-X-Y-G-D as shown on drawing **3/1/37/H64** (Annex B1) to the SCC DMS.

RECOMMENDATIONS:

The Local Committee (Reigate and Banstead) is asked to agree that:

- (i) Public footpath rights are recognised over A-B-C and B-F-D on simplified plan **3/1/37/H64A** (Annex B2) 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 these footpaths is approved. The routes will be known as public footpaths No. 632 and 633 (Reigate).
- (ii) None of the other routes indicated on plan 3/1/37/H64 should be added to the Definitive Map and Statement.
- (iii) 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.

REASONS FOR RECOMMENDATIONS:

The evidence submitted in support of the application is considered sufficient to establish that public footpaths are reasonably alleged to subsist, having been acquired at both statutory presumed dedication (under s. 31(6) of the Highways Act 1980) and common law over sections A-B-C and B-F; and at common law between sections F-D. Evidence shows that the landowners have not challenged users or taken sufficient actions to demonstrate their lack of intention to dedicate during the relevant periods. A map modification order to modify the definitive map and statement by the addition of footpaths as described above should be made under s. 53 of the WCA 1981.

1. INTRODUCTION AND BACKGROUND:

1.1 On 7 March 2009 the County Council received an application from Mr Simon Elson¹ under the provisions of the Wildlife and Countryside Act 1981 for a Map Modification Order to modify the definitive map and statement by the addition of public footpaths as follows:

- i. From Bell Street opposite no. 47 in a westerly direction through a gap in the wall and then across a public car park, curving slightly north westerly. It then runs more westerly again between two buildings which constitute Reigate Priory Community School. It continues to the north of the school's playground in a north easterly direction towards Park Lane. This is a metalled route throughout. Gates or barriers are currently located at T, J and P. These only restrict vehicular movements and do not prevent pedestrian use. The barrier at T was a single bar which could be walked around on both sides until 2011. It has recently been changed for a gate (which is closed), and an adjacent pedestrian gate on the northern side which is left open. J and P are single bars which only restrict vehicular use. The area in question comprises a former mansion house, known as the Priory, its formal gardens and pleasure grounds surrounded by a park of about 19 acres. (Route A-S-T-B-R-J-E-O-P-W-V-C)
- ii. From a point just to the northwestern corner of the Priory running in a north westerly direction to the northern edge of the park, along a pedestrian path between mature trees, then crossing the unnamed road which is the access to Morrisons supermarket car park before running northwards in front of the supermarket itself along its eastern side. Part of the route is now covered by a roof overhang (or portico). It continues to an area known as Cage Yard before rising up low steps between numbers 27 and 31, to the High Street. (e.g. B-Q-F-X-Y-G-D).

as shown on plan 3/1/37/H64² (Annex B1). A total of 57 user evidence forms were submitted in support of the application.

¹ Mr Elson is currently Principal Environmental Enhancement Officer for Surrey County Council. This application is made on his own behalf as a member of the public.

² This detailed plan shows all of the routes indicated on user evidence forms with each junction or relevant point given a reference letter.

- 1.2 The application was prompted by planning proposals affecting the school grounds the section of the route S-T-B-R which will be outlined further below.
- 1.3 Reigate Priory is currently used as a Junior School for children aged 7-11. The car park to the east of the school was granted planning permission in 1951. Further to the west of the playground are playing fields, which constitute an integral part of the park. Immediately to the south of the Priory are formal gardens. The Priory is home to a museum that is occasionally open to the public.
- 1.4 The southern area of the park was purchased in 1920 by Randall Vegan and presented to the people of Reigate 'to be preserved in its natural beauty for the use and quiet enjoyment of the public'. In 1921 the Priory and 68 acres was purchased by Admiral and Countess Beatty. During WW2 the Priory was let as offices to Joseph Rank (the Millers) then sold the estate to Crusader Insurance Company Ltd. who proposed to develop it as a residential estate. The application for development was refused planning consent. Despite appeals the Minister later upheld the Council's decision as he considered that it should be reserved for a public open space.
- 1.5 In 1946 the Mayor of Reigate launched an appeal to buy, adapt and maintain the estate. SCC was approached and as a result of negotiations the whole of the Estate was acquired in 1948 in the following manner-
- 1.6 An area of 43 acres purchased by the then Reigate Borough Council (RBC) for playing fields. An area of 16.5 acres was purchased by SCC for school playing fields. The mansion (the Priory) and its curtilage comprising approximately 6.7 acres were purchased by the Reigate Corporation at a cost of £17,300 (of which SCC contributed 2/3).
- 1.7 In 1950 the 'Heads of the Agreement' was modified by correspondence so that the County Council was permitted to use part of the mansion for period not exceeding 10 years for the education purposes under the Education Act 1944. In 1952 this period was extended to 35 years. In 1997 SCC entered into a new 125 year lease for the property.
- 1.8 The playing fields were purchased by SCC for the purposes of school playing fields under the Education Act 1944. These playing fields were transferred to Reigate and Banstead Borough Council (RBBC) in 2006. The park is a public open space purchased by the Borough Council under the Physical Training and Recreation Act 1937. RBBC holds legal title to the mansion whilst both Councils jointly share its use and upkeep.
- 1.9 The land between the northern boundary of the Priory and the High Street has been subject to several development stages over the last 100 years which have substantially changed its appearance on mapping and on the ground. Prior to the construction of the current supermarket and car park, the land was initially the site of the Reigate Brewery and other buildings with connections to those shops fronting the High Street. The brewery buildings remained largely in place until they were demolished in 1992/3 to make way for the construction of a supermarket. Prior to this part of the land was cleared to make way for public car parking, which was accessed by vehicle across the park from Park Lane. There were separate routes into and out of this car park, which was located where the body of the supermarket now stands. To the east of this, the former Brewery and other buildings became the supermarket car park. Planning permission for the

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construction of the supermarket was granted on 10 November 1992 and construction began during 1993.

- 1.10 This is a non-executive function requiring a decision from the Committee members.

2. ANALYSIS:

PUBLIC USER EVIDENCE

- 2.1 The user evidence submitted by 57 people spans a period of 69 years from 1940 to 2009. Individual use varied from twelve times per year to more than 200. All but one of the users claim that the way was a public footpath, the other (10)³ that the route was a restricted byway. Use was on foot along all routes although it was mentioned that formerly the route from Park Lane was as an access to the car park behind the shops. The access from Bell Street was blocked to vehicles by a barrier at T between the school buildings. 10 users were also interviewed.
- 2.2 Use of the route was for access, shopping, recreation, as a short-cut, to visit the park, the High Street, the library, church, dentist etc.
- 2.3 Only 4 users mentioned the presence of gates (6, 10, 13, 18), although it seems that the barrier on the route was not referred to by many users due to the fact that it did not prevent use. This is confirmed by form 1, which states that there were no stiles or gates, but later refers to vehicle barriers.
- 2.4 Only one user had ever seen a notice (13)⁴. None ever worked for the landowner nor sought or were ever given permission to use the land. None were ever turned back or challenged by a landowner whilst using the route.

Individual annual average use is as follows:

	Maximum use	Minimum use
On foot	200 (form 36) and 'most days' (form 39)	1 (form 56)

- 2.5 Examination of the plans provided with the user evidence forms show that a variety of different routes have been used across the park and through to the High Street. The various routes are shown by bold black dashes (the routes on Mr Elson's application plan) and by grey dashes (all other routes) on plan 3/1/37/H64 and summarised in the table below. It is not always clear which routes are being referred to when a user describes the nature and frequency of their use.

Section	Users	Total number
A-B	1-57	57
B-J-E-C	1-57	57
B-F-G-D	1-19, 21-57	56
E-I-F	3	1

³ All user numbers listed in brackets.

⁴ Although they gave no information about what this sign said on their form.

G-H	3	1
I-C	5, 18, 28, 36, 45, 52	6
F-I-J	5, 15, 18, 20, 21, 25, 45, 49	8
K-L	23, 37	2
F-K	31	1
J-I-K-C	30, 31, 36	3
R-Q	49	1
I-F	52	1

2.6 There was some variation in the estimates users provided for widths. Most estimated between 1 and 3 metres. Two of whom guessed up to 4 metres (40, 47), one 'from 3-20 feet' (15) and another 5 metres+, (21). The route is consistently described as a good, surfaced path or highway throughout, or over hard surfaces and existing footpaths. A bar chart of the evidence contained in the forms, can be seen in **Annex C**.

LANDOWNERS EVIDENCE

2.7 The 43 acres purchased by the former Reigate Borough Council⁵ include sections A-S⁶ and R-C including most of the lesser used routes such as V-K-N-I. A small section of the pavement V-P appears to run a little further south than it has historically, even within very recent years. This was probably after restoration works during 2007. This crosses into the land originally purchased by SCC⁷ for playing fields between sections P-W, although much historic use was probably a little further north on RBBC land. This is borne out by the mapping and indications on the plans attached to user evidence forms.

2.8 Sections S-R and B-Q run over land purchased by the Reigate Corporation⁸, but subsequently leased SCC since 1950. SCC supplied no opinion or material to support or rebut the claims in relation to their time as a landowner of part of the park or in their current capacity as tenant of the Priory School land.

2.9 RBBC made no formal representations from a planning or heritage point of view and acknowledged that the matter would be resolved by a review of the evidence. They noted that the design of Morrisons reinforces the link from the Priory Park to the High Street in terms of its design and crossing of the road immediately adjacent to the entrance to Priory Park.

2.10 They noted: *"From the Council's perspective as freeholder the lease reserves a right for the landlord (RBBC) "and all other persons having a like right" to pass along access ways defined in the lease. These access ways include the road that runs through the site, the path through the playground and the path that runs between and roughly parallel to, the school and Bell Street car park. This does not confirm that any public right exists but it does allow for the possibility that other rights may exist"*. No evidence supporting or rebutting the application was submitted.

⁵ Now RBBC

⁶ Managed as part of the Park to provide effective vehicular access. See Priory Park Management and Maintenance Plan 2010.

⁷ Transferred to RBBC, with title absolute being recorded by the land registry on 15 May 2006.

⁸ Now absorbed into RBBC

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- 2.11 Sections F-D, G-H and U-L fall outside and to the north of the historic Priory grounds. This land originally belonged to Safeway Stores Ltd. who assumed title in December 1992 (now **WM Morrison Supermarkets PLC**). Their Land Registry title deed shows that the full land extent is subject to many and various 'charges', transfers and leases; outlining a variety of private rights of way which are reserved for various private 'persons', but at no point reserves a right of way for the public at large.
- 2.12 F-G: runs from the northern entrance of Priory Park, crossing the Morrisons access road then across the front of the superstore. Much of this use is up against the front of the store under a covered portico area, although some may walk users across the car park between the cars during periods of low traffic.
- 2.13 G-D: runs through an area known as The Cage or Cage Yard and then up brick steps to the High Street. This also falls within the Morrison title and acts as a primary pedestrian access point. It seems that this area was redeveloped at the same time as the supermarket.
- 2.14 G-H and U-L were not included on the original schedule 14 application. Both appear to a small extent on the user evidence plans submitted and fall within Morrisons' land. A small section of land at the northern end of G-H appears unregistered.
- 2.15 **Gordons LLP** responded on behalf of their client Morrisons. They said that their client was not aware that there had ever been an assertion of any public route over their land, but noted that 'access' is provided to the store. They quoted the following (*italics*) in objection to the alleged right of way. Officer comments follow in boxes.

"...a Section 106 agreement dated 9 November 1992 made between RBBC (1) and Rowanspon Ltd. (2) and Safeway Stores PLC (3) which specifically required that the developer is to preserve a pedestrian footpath, being showed on the plan annexed to the Agreement by a broken green line on the proviso that:

- a) No legal right of way is created and display signs to this effect will be erected along the route of the footpath*
- b) No public right so way is deemed to exist at the time of the completion of this Agreement⁹*

The route of the proposed pedestrian footpath within the application follows a very similar line to that contained within the application received by the Council and the S.106 Agreement provides evidence to the rebut the claim that the general public have enjoyed free access on foot over the claimed route for a period in excess of 20 years. In this case there is no evidence that the landowner had any intention of dedicating the way to the public which is supported by the S. 106 Agreement".

"A s. 106 agreement is a local land charge and therefore a publicly available document and... of interest to the people who have claimed to use the route since 1989".

⁹ see s. 4.1.5 of Agreement under s. 106 of the Town and Country Planning Act 1990.

Comments: The two provisos are legal agreements between two parties only. Their effectiveness is therefore dependent upon whether they were effectively fulfilled. S. 31 of the Highways Act 1980 provides for statutory presumed dedication where a way is deemed to have been dedicated as a highway (given sufficient use) unless there is evidence of contrary intention. In order to demonstrate ‘sufficient evidence that there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner, such as to show the public at large that their use was being challenged and therefore giving them the opportunity to meet that challenge¹⁰. No evidence was provided to show that this has been the case and it is unlikely that the average user would have reason to inspect this document or to suspect the ‘intention’ of the landowner. The Highways Act 1980 also provides specific facility for expressing a lack of intention to dedicate under s. 31(6). No such deposit was made.

2.16 Gordons LLP made reference to the erection of hoarding around the site during the construction of the supermarket and works at ‘The Cage’ and 27-37 High Street stating:

“Planning permission was granted on 10 November 1992...and one of the conditions relating to the development of the store and refurbishment of properties was the construction of hoarding around the development area”.

And

“Throughout the construction of the development, a hoarding of minimum height 1.8 metres shall be erected along the appropriate frontages of High Street, Bell Street and Priory Park, to prevent unauthorised access and to provide safety for users of the adjoining public highway and such hoarding shall be maintained to the satisfaction of the Local Planning Authority”.

And

“This condition would have required hoarding on Bell Street and Priory Park and as such access would have been prevented through the store’s grounds whilst development was ongoing”.

2.17 The landowner was unable to secure assurance from RBBC Planning Department that all conditions were met but have obtained confirmation that no issues of planning enforcement arose and that access to the site would have been interrupted during development and refurbishment of the site. They claim that this rebuts any claim of a right of way at that time. They do claim to have confirmation of compliance of conditions set out in the planning permission from February 1993 to December 1993 showing that works were being carried out during this time. Gordon’s contend that the statutory test of uninterrupted use for 20 years required by the Highways Act cannot be met.

Comments: The erection of hoarding across the site would have obstructed use by the public completely during the period it was constructed. Even if no confirmation is available that conditions were met, it seems likely that construction of the supermarket could not have taken place without closure and enclosure of the site. If so this might have brought the way into question and prevented use from February 1993 until December 1993. Alternatively it might be argued that any hoarding was not for the purposes of preventing access by the public in order to challenge their use, but was for the purposes of health and safety in which case this might not be an effective

¹⁰ Outlined by *Fairey v Southampton CC* [1956] and House of Lords in the Decision: *R (Godmanchester¹⁰ Town Council) v Secretary of State for the Environment and Rural Affairs* [2007].

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challenge in 1993. If the 20 year period cannot be fulfilled the Council may also consider the matter at 'common law'.

2.18 Sections S-R and B-Q fall within the land owned by RBBC but leased to SCC. Objections were received from **Stevens and Bolton LLP** acting for the **Governing Body of Reigate Priory School**¹¹ ("Governing Body") but no comments or evidence were received from SCC as tenant. The comments of the Governing Body are summarised in italics below; officer comments are in boxes.

The Governing Body has no proprietorial interest in the land, but do have a professional interest because it passes directly through the Reigate Priory School. This is a Junior School for boys and girls aged 7-11. The school is Surrey maintained. The application route passes between two school buildings over which school children must pass when travelling between buildings.

Comment:

Whilst the Governing Body may raise objections and outline action which may have occurred, it is debatable whether they could validly act with authority to challenge public use. SCC as tenant however would probably have this authority. The impact of any such application (and subsequent order) upon the children attending the school is not legally relevant when deciding this matter.

- i. *The 20 year period must be calculated retrospectively from the date of the application being 7 March 2009.*
- ii. *In respect of the School, use of the land was not "as of right";*
- iii. *Two photos from before and after 2009 which show a notice labelled:*

*Reigate Priory School
NO ENTRY*

- iv. *These were only visible to those entering from the east but it is inconceivable that the prohibitory sign at the eastern entrance would not have been seen by others.*
- v. *The notice conveys the intention that the landowner objects to or contests the user's use of the land. This contentious use cannot therefore be as of right and use is not then in accordance with s. 31(1) of the Highways Act 1980¹².*
- vi. *Those using the land whilst visiting the school or in connection with it is some way would have done so with implied permission of the school and accordingly use cannot be as of right¹³.*

¹¹ The Governing Body consists of 18 Governors including Parent Governors, Local Authority Governors, the Head Teacher, the Deputy Headteacher and other staff. The objections were based on discussion with the Head, the Deputy Head and individual Governors and represent their combined concerns.

¹² Oxfordshire and Buckinghamshire Mental Health Foundation Trust v Oxfordshire County Council [2010] EWHC 530 (Admin)).

¹³ This applied to 8 (of the 40 received) evidence forms.

See Annex 10

Comments:

i. The 20 year period may fall anywhere and is dependent upon when public use was first called into question. If an earlier date of challenge is found an earlier 20 year period may be used.

ii. The Governing Body argues that the Oxfordshire [2010] case supports their argument that the notices were sufficient to be inconsistent with dedication. Careful reading of the case however shows that the reverse is true. The key point according to Judge Waksman QC was whether “the notice rendered use contentious” *and* “What did the notices convey to the users?” It is not sufficient to state that the notices did convey to the users that their use was contentious, but the effect (if any) upon their use must be examined. In Godmanchester [2007] the ‘intention’ of a landowner was considered to mean “what the ...users of the way, would reasonably have understood the landowner’s intention to be”.

iii-iv. The signs ‘may’ clearly indicate that the property being entered is the Priory School and ‘may’ indicate that there is no entry through the vehicular barrier (and later gate). It is not clear however (and the user evidence supports this) that there is no entry through the property as a whole on foot and indeed there were clear gaps on each side of the barrier prior to 2009. Even after 2009, the more significant separate vehicular and pedestrian gate (and fencing) does little to suggest that the right of way is being challenged. It has not been made clear when this notice was erected. Photographs taken in October 2002 show that it was in place at that time, being erected on the same swing barrier as was in place until 2009. Another photo taken from the west in 2002 appears not to show it in place. Both photos show the gap each side of the barrier and the public freely using the way.

vii. *The aforementioned sign would have indicated a lack of intention to dedicate.*

viii. *The lease between RBBC imposes on the tenant (SCC) an obligation in the following terms:*

“To take all reasonable steps to prevent any new window light opening doorway path passage pipe or other encroachment or easement being made or acquired in against out of or upon the Premises and to notify the Landlord immediately if any such encroachment or easement shall be made or acquired (or attempted to be made or acquired) and at the request of the Landlord to adopt such means as shall reasonably be required to prevent such encroachment or the acquisition of any such easement”

ix. *The Governing Body argue that a right of way falls within the phrase “other encroachment or easement” and that this covenant evidences an intention no to dedicate. They emphasize that the lease is available to the public at the Land Registry.*

Comments:

Any comments contained within the lease between RBBC and SCC or within their land registry documents were between two parties and the public could not have risen to this challenge. Whilst these may not have been private documents as such there must be evidence of some overt acts on the part of the landowner to show the public at large that their use was being challenged and therefore giving them the opportunity to meet that challenge.

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- x. In respect of the Priory Park land and the car park land, the authority must consider what permission or right the public have to use the land over which the application route passes; any use by the public in accordance with such permission cannot be use “as of right”.

Comments:

Reigate Priory Estate was acquired in 1947 by Reigate Borough Council under the Physical Training and Recreation Act 1937.

Two issues arise out of the statutory regime governing the land:

1. Whether the use was by statutory right (as of right);
2. Whether the terms on which the land was held and people allowed onto it gave permission (by right).

Byelaws were also made by RBBC under s. 164 of the of the Public Health Act 1875 and s. 12 and 15 of the Open Spaces Act 1906 with respect to Priory Park Reigate.

S. 164 of the Public Health Act authorises urban authorities to acquire and maintain ‘lands for the purpose of being used as public walks or pleasure grounds’. The byelaws are for the ‘regulation of any such public walk or pleasure ground’. Where the public enter a recreation ground they do so pursuant to the Public Health Act, perhaps ‘by right’ under s. 164, although any such right is subject to management of the site.

Section 12 of the Open Spaces Act 1906 gives the Local Authority powers over open spaces vested in it and allows them to exercise said powers. S. 15 allows the authority to make the aforementioned byelaws.

The current byelaws¹⁴ were not introduced until 2001 and are applicable to land in the ownership of RBBC¹⁵. They replaced the old byelaws introduced by the former Reigate Borough Council. The school itself and therefore section S-R and B-Q fall outside the remit and extent of these byelaws. (Also see s. 9.15-9.18

- xi. The authority must consider whether use of the Morrisons land was possible during the requisite period.*
- xii. The evidence is insufficient to establish that the Application route has been actually enjoyed by the public for the requisite 20 year period.*
- xiii. This assumption was made on the basis of the 40 forms initially received from the Council.*
- xiv. 8 (of the 40) forms describe use wholly or partially in connection with the school, and as noted above at paragraph 4.7 such use cannot be “as of right”.*
- xv. It is not clear how the evidence was collected and deponents should be independently interviewed to seek verification of the written statements.*
- xvi. The applicant has not proved that use by the public at large has been made of the application route for the requisite 20 year period and the presumption of dedication as a public highway cannot therefore arise.*

¹⁴ Covering issues regarding obstructions or activities contrary to the byelaws.

¹⁵ A map indicating the extent of this ownership is included with the byelaws. According to Robin Davis of RBBC the playing fields to the west of the school were recently given to RBBC from SCC and have subsequently become subject to the same byelaws.

Comments:

xi. See s. 2.17

xii. See section 2.1-2.6 and 9

xiii. 57 Forms were provided but only 40 were commented upon.

xiv. 13 forms mention use in relation to a school. None indicate however that their use was solely for attending Reigate Priory School.

xv. The evidence was collected on standard evidence forms supplied to and distributed by the claimant. Ten users were interviewed in person.

xv.i See section 9.

2.19 *“The legal test for the making of a map modification order has not been met and the Council should decide not to make an order”.*

Comments:

See section 9.

2.20 *“In the event that that an Order is made the Governing body/ freeholder /lessee will have to ability to make an application under s. 118A/B of the Highways Act 1980 to the Authority to close or divert the right of way for the purpose of protecting pupils or staff”.*

Comments:

Whilst this is correct it is of no legal relevance to deciding this matter, nor can the result of any such application be assured.

2.21 The following additional (summarised) observations were received on behalf of the Governing Body in February 2014.

- i. The Governing Body has concerns that the user evidence forms were modified after the initial application.
- ii. They noted that some applicants were no longer using or able to use the route.
- iii. The maps attached to the user forms show the route as it was prior to refurbishment of the park in 2008.
- iv. The delay in processing the claim has prejudiced the rationale of the application.
- v. They wish to place on record that the safety of the children (currently 630) is paramount.

Comment:

i. The application was made in March 2009, accompanied by user evidence forms completed by each user. The plans accompanying these forms were completed by the applicant however. These forms were returned so that each user could

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individually complete and sign their plans. The amended forms were returned in November 2009.

ii. See s. 9.4-9.13. Only evidence prior to 2009 is being considered. Any use following this date is no of importance to this decision.

iii. It is acknowledged that some changes on the ground have occurred in the park. Maps showing these changes were not available for distribution at the time the user forms and plans were sent to the applicant. These changes are not deemed to have occurred with the intention of challenging use. On the contrary, use continued and was further facilitated by the works undertaken.

iv. The application was received in 2009. Consultations with interested parties were carried out that year. No formal response was received from the landowner until spring 2012 or from the Governing Body until December 2012. Work could not begin on writing a recommendation until this evidence was available. Unfortunately available resources and a backlog of claims mean that it is not uncommon for such matters to take several years to reach committee. This does not invalidate the application or the evidence attached to it.

v. Whilst it is understood that the safety of the children is of paramount importance to the Governing Body, this is not an issue which the legislation allows the committee to consider when making a decision.

PLANNING PROPOSALS

2.22 In August 2007 County Councillor Simon Harding¹⁶ contacted Countryside Access with regard to proposals at the School. During the planning process it was recognised that the route through the school was well used and that an approach was required to the problem. Several Councillors discussed the matter and were made aware of the possibilities in terms of claims for new rights of way and the mechanisms by which rights of way might be diverted or extinguished by s. 118B and 119B of the Highways Act 1980 (regarding rights of way across school premises).

2.23 In August 2007 RBBC consulted¹⁷ on Planning Application P/08/01064/F and referred the below report to Planning Committee in September 2008.

“Replacement of security barrier/bollards with vehicular/pedestrian gates/fencing which would retain pedestrian access at all times”.

2.24 The application sought planning permission and listed building consent for the replacement of a lifting barrier and concrete bollards, at the vehicular and pedestrian access to Reigate Priory School, leading from the Bell Street public car park. The proposal would include fencing and gates and retained a public pedestrian thoroughfare to the northern parts of Priory Park and Reigate town centre.

¹⁶ Member for Reigate Central 2005-2009.

¹⁷ Representations were received from SCC, The Reigate Society, Park Lane and Reigate Residents Association and The Friends of Priory Park who expressed concern about the curtailment of access through the school and park.

- 2.25 On 19 May 2009 RBBC issued a Development Procedure Order that the development had been permitted subject to:

“..the gate ...shall be fixed open in accordance with the details to be submitted and approved in writing by the Local Planning Authority”.

- 2.26 In October 2010 the Senior Planning Officer at RBBC confirmed that the proposed method of keeping open the pedestrian gate was acceptable and the condition discharged.

DOCUMENTARY EVIDENCE

- 2.27 A map (5/47) prepared in 1947 for the purposes of the Rights of Way Act 1932 by Reigate Urban District Council shows no public rights recorded over the route in question nor was the path put forward by the Parish or Borough Council for consideration at any stage in the compilation of the definitive maps of 1952, 1959 and 1966.

- 2.28 The paths do not appear on any historic maps between 1770 and 1823.

- 2.29 On the 1871 1st Edition 1:2500 O.S. map XXVI:15, 1871 and 1872 editions an east-west route is visible as a feature. Cages Yard is visible on these maps but it is not clear whether there is a viable route through from the Priory to the High Street. It appears likely that none of the routes were available to the public at this time. The east-west route was enclosed within The Priory grounds, probably serving the purpose of a private drive. There is no obvious route through to the High Street. The 1896, 1914 nor the 1933 maps show few changes. No route is visible to the High Street.

- 2.30 The 1964 Ordnance Survey National Grid Map at 1:2500 reveals significant changes. The Priory had been developed into the Reigate Priory School. The entrance to the car park from Bell Street at point B appears to show an open gap without gate, although there may be a gate further west at the north western corner of the indicated car park. The map does not state whether the solid line shown indicates a gate (locked or open) or some other kind of boundary; or indeed what sort of traffic it may or may not pose an obstruction to. At point C the route appears un-gated. This provides access into the Priory Park and onto a car park. There is no obvious route to the High Street.

- 2.31 The route is visible in part on the 1948, 1971, 1989, 1998 and 2006 aerial photographs although little can be interpreted about its nature or status due to tree cover and shadow. The 1971 photo shows the car park which once occupied the Morrisons site. It seems likely that pedestrian access existed to the High Street, but this cannot be confirmed from this aerial view. The situation is similar on the 1988 photograph although the car park has expanded in size.

- 2.32 Site photos from 2002 and 2013 show the routes being freely used by the public. Two shoppers for example are shown walking from F-Q and then through the school buildings between B-T. School children are visible crossing the route between old and new buildings. There are no visible obstructions between B-T. A single bar is visible at 'T' to prevent vehicular traffic, with a gap to the side of it to permit pedestrian traffic. The photos from October 2002 show a notice attached to the single bar barrier stating: The positioning and wording suggests that it is aimed at vehicular movements along the roadway rather than pedestrians. This

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notice is not clearly visible from photos taken in December 2002 and may be missing.

Surrey County Council
Reigate Priory School
No Entry

2.33 At the December 2002 visit the incumbent headteacher Mrs G Cox produced a 'new notice' to be erected on site stating.

SURREY COUNTY COUNCIL
PRIVATE PROPERTY
NO PUBLIC RIGHT OF WAY
Any persons who without lawful authority
is present on school premises
(including playing fields) and causes
or permits a nuisance (including
fouling by dogs), commits an offence
and is liable to be fined.
S. 40 Local Government Act (Misc. Provs.)

2.34 This notice would have been sufficient to draw the right of public into question. However we have no evidence that these notices were placed at any point along the claimed route. No users of the way S-R recall seeing these signs.

2.35 On 18 and 25 February 2002, two schedule 14 applications were made for a route contained within the curtilage of Priory Park and Priory School. The former applications for routes A-B-C along the western side of the School were considered by Reigate and Banstead Local Committee on 1 April 2003. The committee agreed with officer recommendations that use had been by permission and so no public right of way has arisen or could have arisen.

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 or along a different line. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant. (See Annex A).
- 3.2 If no order is made then the applicant may appeal to the Secretary of State to direct us to make the order.

4. CONSULTATIONS:

- 4.1 No formal reply was received from RBBC as local authority, although a response as landowner was received and outlined above.

- 4.2 The Ramblers Association and the British Horse Society representative did not comment.
- 4.3 The County Councillor Mr Peter Lambell¹⁸ asked to be kept informed but submitted no evidence or opinion.
- 4.4 The SCC Countryside Access Officer for Reigate and Banstead commented that she had lived in the area since 1973. During that time she had known and used the route from Bell Street, through the car park to Park Lane. She stated that there had always been access northwards to the High Street but that before Morrisons there was a large car park from which you could walk to the High Street. The east-west route had not changed and has always been tarmaced with a bar to prevent unauthorised vehicles. Pedestrians and cyclists were unobstructed. The north-south route was always well used before Safeway was built and has been very busy since. She could not recall whether there was access during the construction. She had never seen any notices prohibiting use or heard of anyone being challenged. Bicycles and pushchairs were regularly seen on the routes and it was unusual not to meet others doing so. She had always thought that the route was a right of way and that the east-west route was part of the public park and therefore available for public access. She believes that the public have acquired rights by virtue of long unhindered public use.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

The cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council's Countryside Access Budget. If objections are received and a public inquiry held, additional costs of around £1000 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

There are no equalities and diversity implications. These are irrelevant factors under the current legislation.

7. LOCALISM:

This issue is not relevant and cannot be considered under the current legislation.

8. OTHER IMPLICATIONS:

Area assessed:	Direct Implications:
Crime and Disorder	None of the these are relevant considerations under the current legislation
Sustainability (including Climate Change and Carbon Emissions)	

¹⁸ Member for Reigate Central 2009-2013.

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Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	
Public Health	

HUMAN RIGHTS ACT 1998

Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1998. Primary Legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular way. While the Council must interpret primary legislation in a way that is compatible with Convention rights that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended to Members touches on a Convention right. The making of this order may affect the rights of the landowner/occupier (paragraph 2.12) under Article 8 of the Convention, the right to a private and family life and Article 1 of Protocol 1, the right to peaceful enjoyment of one's possessions. The Act makes it clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law as detailed in paragraph 9.2-9.6 and Annex A of this report. As such the recommendation to the Members is not considered to be in breach of the 1998 Act

9. CONCLUSION AND RECOMMENDATIONS:

- 9.1 A decision on this claim must be made on the legal basis set out in **Annex A** to this report. The relevant consideration is whether the evidence is sufficient to raise a presumption that public footpath rights exist. Other issues such as amenity, safety, security or convenience are legally irrelevant.
- 9.2 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".
- 9.3 The documentary evidence shows the existence of parts if not all of the claimed routes since at least 1971. None of the documents are however conclusive so the claim must rely on user evidence either by statute or common law.

STATUTORY TEST

- 9.4 Dedication of public rights may be presumed under the statutory test set out in section 31 of the Highways Act 1980 (HA 1980) whereby the Council must be satisfied that the claimed route has been used by the public as of right; that is not by force, secrecy or permission. The use must have been without interruption for a period of 20 years retrospectively from the point at which the right of the public to use the way is brought into question whether by notice or otherwise, and also whether it is land over which a right is capable of being acquired. If this test is satisfied the council must then decide whether deemed dedication has been effectively rebutted and that there was no intention on the part of the landowner

during the 20 year period to dedicate the route. Any evidence falling after the 20 year period would be of no relevance to deciding the matter.

COMMON LAW

- 9.5 An inference that a way has been dedicated for public use may also be drawn at common law where the actions (or lack of) by the landowner indicate they intended a way to be dedicated as a highway and where the public have accepted it. Dedication may be express or implied from evidence of use by the public and of acquiescence to that use by the landowner. The period of use required to give rise to dedication at common law has never been defined and will depend upon its own facts.
- 9.6 Any recommendation must ultimately be made on whether rights are reasonably alleged to subsist¹⁹. Where there is conflicting evidence the council “must bear in mind that an order made under s. 53(2) WCA 1981 following a Schedule 14 application 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” .

CALLING INTO QUESTION AND PUBLIC USE

- 9.7 It is first necessary to establish when the public’s use was first brought into question and whether sufficient time has passed (20 years) since any previous challenge.
- 9.8 Over section S-T-B-R, B-Q none of the users recalled being challenged, nor saw notices such as those referred to by the former Headmistress. She claims that signs had been erected since 1990 stating: “This land belongs to Reigate Priory Middle School. No admittance”, but were replaced 3 times. They were not in place when Officers visited the site in 2002 and no users refer to them. Those notices in place were clearly directed to vehicular traffic.
- 9.9 The sections R-J-E-O-P-W-V-C, and Q-F appear little changed since the park was first acquired and opened to the public in 1947. Neither the users nor the landowner refer to any challenges over this land since it was made available as a park. The same applies to section A-S-T although the car park has since been remodelled.
- 9.10 Section F-X-G-D has been subject to significant change due to the presence of the brewery followed thereafter by the construction and use of car parks and eventually the redevelopment of the site by Safeway in around 1992-4. These changes must have had an impact upon use on the ground. It seems unlikely that clearance of the brewery, the surfacing and use of car parks and the construction of a large supermarket could have taken place whilst public access along F-G remained on the same line. Some uncertainties in the user evidence seem to support this. Morrisons confirmed that planning conditions would have required closure of the site, although there is no recorded confirmation that it took place. There appears to be a general consensus that this route changed during the construction of the supermarket, perhaps by several metres or more. Many users suggested a ‘slight’ change. Mr Wickman (52) suggests that the current route only came into existence in 1993, whilst others (45) indicated a

¹⁹ As clarified in *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]; 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. Annex 10

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dog-leg. Users of the way before this time were very unclear whether the way was always passable and what route they took. Given these changes and the continual movement and variety in the location of parked cars, use for 20 years prior to 1993 is unlikely to have occurred without interruption. Whether these interruptions constitute a valid interruption for the purposes of s. 31 of the Highways Act 1980 is less certain. It 'may' be possible to infer that the public have used this route for 20 years from 1989-2009 without a valid challenge, given that any obstructions were probably not put in place for the reason of bringing public use into question for the purposes of the Highways Act 1980. The evidence does not make this clear and this cannot be relied upon.

- 9.11 In the case of A-S-T-B-R-J-E-O-P-W-V-C and B-Q-F the 20-year period must rely upon the making of the Schedule 14 application by Mr Elson on 7 March 2009. The period in question being 1989-2009.
- 9.12 56 people had used the routes throughout this period, mostly on foot. 1 other did not record dates, but may also have used it throughout. The use varied between 1 and 200 times per year. Taken together user evidence suggests that there is sufficient user between 1989 and 2009 to reasonably allege that the routes 'claimed' have been dedicated as public footpaths. Whilst it is not necessary to rely upon it in this case, the evidence between 1940 and 2009 is sufficient for rights to have also come into existence along these routes at common law.
- 9.13 In the case of F-Y-G-D the user evidence is of sufficient quantity and quality after 1993 that the period 1993-2009 can be considered at common law even though these 16 years of use are insufficient to give rise to statutory presumed dedication. This is for the following reasons. The evidence forms show substantial use of the way and refer to no challenges to their use. Inspection of the route on the ground suggests that the route has been provided for the public. There is a level, well surfaced route; in some places well lit, incorporating elements of information and signage, placed and designed to encourage or facilitate rather than to challenge public use and indicates more than acquiescence. The commercial landowner in this case cannot argue that they were unaware that the route was being used as a public right of way and had every opportunity to challenge this use but did not do so. Whilst the route is clearly used as an access to Morrisons and other shops it is also a 'notorious' and heavily used cut-through from Priory Park to the High Street. As such rights can be reasonably alleged to subsist on the basis of dedication at common law.

USE 'AS OF RIGHT' OR 'BY RIGHT'

- 9.14 It is not merely sufficient for use of the way to have been sufficient, open and without challenge, it must also have been 'as of right'. This means that the user must have been without force, secrecy or licence. It is not necessary for the user to have a belief that their use is as of right.
- 9.15 This issue is of importance to the Reigate Priory Estate, which was acquired in 1947 by Reigate Borough Council under the Physical Training and Recreation Act 1937 and later became subject to byelaws made by RBBC under s. 164 of the Public Health Act 1875 and s. 12 and 15 of the Open Spaces Act 1906. In 1976 s. 5 of the Local Government (Miscellaneous Provisions) Act 1976 stated that any land held under the 1937 Act for the purposes of recreation would thereafter become held under s. 19(1) of the 1976 Act [that is for the purpose of providing recreational facilities]. This statutory appropriation implies that land

became held for public recreational purposes and so arguably confers on users a right to use the land for such purposes.

- 9.16 It must be established whether use over Priory Park (A-S and R-J-E-O-P-W-V-C) has been ‘as of right’ or ‘by right’ under an implied licence flowing from the above acts. In the case of *Beresford v Sunderland CC* [2003]²⁰ the House of Lords held that unless clear express licence was made there is no basis for implying a license to use land. Inactivity or acquiescence was not sufficient. If this can be shown, user of land in a park to which there was public right of access, set out for recreation, was ‘*by right*’ rather than ‘*as of right*’. More recently in the case of *Barkas v N Yorkshire CC and Scarborough Council* [2011] it was considered that where land was specifically appropriated (or acquired) to the purpose of public recreation there would be a public statutory right for the recreational use of the land by users and therefore use could not have been ‘as of right’ but was ‘by right’. In this case the land was purchased using the 1937 Act (albeit subsequently appropriated to the 1976 Act), and thereafter actively regulated with byelaws under the 1875 and 1906 Acts. Throughout the relevant 20 year period the landowner has made this land available to the public and ‘actively’ encouraged use with signage, maintenance and facilities- use by the public could not be considered to constitute trespass. Members of the public had access to the land for the purposes of recreation ‘by right’ under the 1976 Act (and under the byelaws), but did this also apply to their use of the routes as ‘highways’ and so therefore prevent access ‘as of right’ under s. 31(1) of the Highways Act 1980?²¹.
- 9.17 There are two issues to consider. (i) The *Barkas* case is a Court of Appeal decision which will be superseded by a Supreme Court decision sometime in 2014. (ii) The case dealt with the status of Town and Village Green (TVG). Whilst many such cases are applied to rights of way by analogy, in this case the use as a TVG is very different to a highway right which describes passage from one place to another. Thus, with regard to the use of routes across the park it is reasonable to allege that this could have been ‘as of right’ for the purposes of a highway whilst remaining ‘by right’ for the purposes of recreation.
- 9.18 The remaining question is whether this also applied to the section S-T-B-R and B-Q which run through the school grounds. This land was purchased at the same time using the 1937 Act. An agreement was made between Reigate Council and SCC in November 1947 which allowed the County to use the Mansion temporarily for educational purposes under the Education Act 1944. This piece of land was appropriated out of the use for which it was purchased, into an educational use. No byelaws were applied under the 1875 or 1906 Acts to regulate use. Therefore it appears that any user would not have been ‘by right’ but ‘as of right’. The landowner or tenant could have viably challenged use. They did not however, so public rights could have been acquired under s. 31(1) of the Highways Act 1980 over S-T-B-R and B-Q.
- 9.19 I conclude that that public footpath rights are reasonably alleged to subsist over sections A-S-T-B-R-J-E-O-P-W-V-C and B-Q-F-X-Y-G-D on plan 3/1/37/H64.

²⁰ *R (Beresford) v City of Sunderland ex parte Beresford*, [2001] EWCA Civ 1218 [2001] JPL 1307, (House of Lords 2003) UKHL 60. Also see PINS decision FPS/M4510/7/2 2 November 2012.

²¹ See opinions of George Lawrence QC in his paper “Use by right of local authority land”. *Rights of Way Law Review*. September 2013, s. 15.3

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9.20 I recommend therefore that public footpath rights are recognised over both A-B-C and B-F-D as shown on the simplified plan **3/1/37/H64A**²² 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 these footpaths is approved. The routes will be known as public footpaths Nos. 632 and 633 (Reigate).

9.21 None of the other routes listed in paragraph 2.5 and indicated on the original plan **3/1/37/H64** by grey pecked lines should be added to the Definitive Map and Statement.

10. WHAT HAPPENS NEXT:

10.1 If Committee decide that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation. See Annex D.

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 different to the officer's recommendations then they should cite and record the reasons and evidence for that decision. This will make it easier to explain the Council's actions should the matter proceed to public inquiry or appeal.

10.4 A timeline (with accompanying flowcharts) of the processes leading up to and following the committee meeting can be found at Annex D.

10.5 All interested parties will be informed about the decision.

LEAD AND CONTACT

OFFICER:

Daniel Williams
Countryside Access Officer

TELEPHONE NUMBER:

020 8541 9245

E-MAIL:

daniel.williams@surreycc.gov.uk

CONSULTED:

See sections 2.8-2.35 and section 4

ANNEXES:

Annex A: Legal background
Annex B1: Drawing no. 3/1/37/H64, showing all alleged routes
Annex B2: Simplified drawing no. 3/1/37/H64A showing routes to be added to the definitive map and statement
Annex C: User evidence chart
Annex D: Timeline and flowcharts

SOURCES /

BACKGROUND PAPERS:

File 'CP534' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, user evidence, legal cases, site and aerial photographs, assorted mapping and historic and land management documents can be viewed by appointment.

²² Simplified plan indicating only the routes recommended to be added to the definitive map and statement.