

SURREY COUNTY COUNCIL**LOCAL COMMITTEE (GUILDFORD)****DATE: 24 SEPTEMBER 2014****LEAD****OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER****SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN SEALE LANE AND
PUBLIC FOOTPATH 338 (SEALE AND SANDS)****DIVISION: SHALFORD****SUMMARY OF ISSUE:**

Mr David Ross submitted an application for a Map Modification Order (MMO) to add a public footpath to the Surrey County Council Definitive Map and Statement (DMS), between Seale Lane, Sandy Cross and Footpath 338 (Seale and Sands).

It is considered that the evidence shows that a public footpath is reasonably alleged to subsist over the route. A legal order to modify the DMS should therefore be made.

RECOMMENDATIONS:

The Guildford Local Committee is asked to agree that:

- i. Public footpath rights are recognised over the route 'A' – 'B' on Drawing No. 3/1/64/H8 (**Annex B**) and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of the footpath is approved. The route will be known as Public Footpath No. 580 (Seale and Sands).
- ii. A MMO 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 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.

Following careful consideration of evidence submitted by users and the landowner, it is considered there is sufficient evidence for the order to be made.

1. INTRODUCTION AND BACKGROUND:

- 1.1 The County Council received an application, dated 13 April 2011, from Mr David Ross under the provisions of the WCA 1981 for a MMO to modify the definitive map and statement by the addition of a public footpath between Seale Lane, Sandy Cross and Footpath 338 (Seale and Sands). 13 user evidence forms accompanied the application. For legal background see **Annex A** to this report.
- 1.2 The claimed route is located between Runfold and Seale, to the south west of Sandy Cross, as shown on Drawing No. 3/1/64/H8 (**Annex B**). It commences at point A, which is located on the south side of Seale Lane opposite 'Kingswood' and proceeds in a generally southerly, then south easterly direction for 94m to point B where it meets Public Footpath No. 338 (Seale and Sands). There is no record of the route ever having been put forward for inclusion in the DMS since it was first published in 1952.
- 1.3 The route is currently blocked at the northern end by an uninterrupted close board fence and at the southern end by close board fencing either side of a locked gate. The fences and gate were erected in January 2011 and signs at either end currently read 'PRIVATE PROPERTY NO ACCESS TO THE PUBLIC'.

2. ANALYSIS:

STATUTORY TEST

- 2.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. In such cases the use must have been sufficient to raise a presumption that the landowner had intended to dedicate the route. A legal background to Map Modification Orders is attached at Annex A.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 2.2 13 user evidence forms were submitted with this application (for a total of 15 individuals), spanning a period of approximately 48 years from early 1963 to early 2011. These were not standard forms as normally supplied by Surrey County Council, but were as recommended by the Ramblers, resulting in some missing information. Initially the forms were not accompanied by annotated maps but these were later supplied by 11 individuals on request. Ten forms (11 people) showed use of the way for more than a 20 year period. Officers interviewed seven of these claimants. Mrs Ball (UEF 2) was referring to a different path on her form so this must be disregarded.
- 2.3 Individual use varied from around 10 times a year to daily use. Two users said they used the route 2-3 times per week while another said they used it on a regular basis. Two users stated some variation in the level of use, having used the way over a number of years but for period of time using it more or less frequently. All respondents used the way on foot with one user (UEF 2) also

claiming use with a bike and a pony although during an interview it was understood she was referring to public footpath No. 338.

- 2.4 9 people have evidence of use for a period in excess of 20 years. The longest individual period of usage was by B A Graham (UEF 5) who used the way between 1970 and 2011, around 10 times per year. Mr and Mrs Lackford (UEF 7) claim to have used the way twice daily for 33 years between 1978 and 2011. A bar chart summarising the evidence can be seen as Annex C.
- 2.5 The evidence forms suggest that the route was used for leisure, pleasure and recreation. Only one person mentioned using the way with a dog. One person used it to take their children to the woods to play whilst another used it for visiting people in the area, but the evidence does not suggest it was anyone who might have been in a position to give permission for use. Three people specifically stated they used the path to connect with Public Footpath 338.
- 2.6 None of the users had ever been challenged or told they could not use the way. Nor had anyone ever sought permission to use it. According to the user evidence forms, there had never been any gates or stiles, or any other obstruction to passage i.e. the path was open at both ends. Nor were there ever any notices challenging public use, until the notice appeared on the newly erected gate in January 2011. At interview Mrs May stated that a sign was put up at the Seale Lane entrance to the claimed path requesting that people stop dumping garden rubbish in the woods otherwise the woods would be fenced off. This suggests that at the time, no fencing was present although Mrs May did not specify when this warning notice appeared.
- 2.7 The path is of compacted earth, through woodland. Photographs taken on 15 February 2011 and 5 May 2011¹ (soon after the fence was erected) show the path still clearly visible with a width of approximately 1m. User evidence forms do not specify a used width but at interview Mr Reynolds (UEF 11) stated that the path was always well used and visible, perhaps 1 to 2 metres wide with no undergrowth on the path. Mrs Williamson (UEF 13) said that apart from very minor changes to the route to get around fallen brush etc. the path has always followed the same course.
- 2.8 At interview, Mr Lackford claimed that the route was also commonly used by non-locals who would walk along it. Mr Reynolds mentioned that it was not unusual to see 3 or 4 people and even the odd horse on the route.
- 2.9 During interview, Mrs May stated that her husband used the route in the 1950s. She used the route approximately 5 times a week from 1977 until 1999. Mr Williamson said his father-in-law used the route twice a day to walk the dog for 15 or 20 years, but it is not clear whether this was during the claim period.
- 2.10 The landowner's claim that the site was secured (see point 2.15 below) is contrary to evidence submitted by Mr Williamson who stated during interview 'when Hall Aggregates owned the land they never bothered with closing it off or stopping anyone from using it'. Mrs Williamson recalls that there may have been some old wire fencing along Seale Lane years ago (although she was not certain), but there was never any fence where one entered the path.

¹ See annex D

LANDOWNERSHIP EVIDENCE

2.11 The Land Registry details and subsequent correspondence with the landowner's agent, show that the land crossed by the alleged path is owned by Alan Roy Chandler and Vanessa Jane Chandler of Vere House, Binton Lane, Seale, Farnham, Surrey, GU10 1LG. They have held title absolute (SY344089) since 18 January 2001.

2.12 Hall Aggregates (SE) Ltd were the landowners prior to this. On 15 May 1998 they submitted a Section 31(6) Statutory Declaration, which showed the extent of their ownership and what public rights they accepted existed across the land. Such a deposit is normally recognised, in the absence of contrary evidence to be proof that the landowner had no intention to dedicate a right of way. It may also bring to an end a 20 year period of use as required by s. 31(1) of the Highways Act 1980.

2.13 Comments:

SCC has no record of having received a statement and plan prior to receipt of the statutory declaration, nor does the Declaration refer to any previously submitted statement and plan. No further deposit was received from Hall Aggregates by SCC after the Statutory Declaration was made. The legislation at the time prescribed a two stage process: first the deposit of a statement and plan and secondly, at any time within 6 years thereafter, the lodging of a statutory declaration. Given that the requirement for both stages of the process to be completed does not appear to have been met, it is questionable whether this deposit can be said to have any effect. In the case 'Godamanchester'² the House of Lords made it clear that, if a presumed dedication is to be avoided, either the landowners lack of intention to dedicate must have been communicated to the users or the statutory procedures in s. 31 must have been followed. An incomplete or flawed s. 31(6) deposit meets neither criteria³.

It seems then that the date the path was blocked (ie. January 2011) would become the date the public's right to use the path was called into question and evidence of use 20 years prior to this must be considered.

2.14 On 2 February 2012, Kerry Dames of Frederick Adam Ltd submitted a Section 31(6) Statement and Plan on behalf of the landowner. This followed an earlier deposit dated 29 April 2011, which was incorrectly made. This deposit has no impact upon the alleged rights, as it was made after the Schedule 14 application was received.

2.15 On 14 September 2013, Ms Dames wrote to explain her client's position and submitted evidence to rebut the claim, summarised as follows:

- i. During the claim period (1978 – 1998), use was not continuous and does not qualify 'as of right'.
- ii. The landowner during this time took sufficient steps to show that they did not intend to dedicate any routes over this land.

² R. (Godmanchester Town Council) v Secretary of State for the Environment Food and Rural Affairs and Cambridgeshire County Council and R. (Drain) v. Secretary of State for the Environment Food and Rural Affairs and Yattenden Estates Ltd [2007] UKHL 28,

³ Lewis, A (2007) *S.31(6) of the Highways Act 1980*. Rights of Way Law Review. November 2007 s. 6.3, p. 117.

- iii. During the claim period, Hall Aggregates extracted gravel from the land adjacent. The site had to be secure and the public were prevented from entering the land, including along the claimed route, by the erection of a fence. Parts of the fence are apparently still in situ although no evidence was found during SCC site visits on 5 May 2011 and 4 February 2014.
- iv. Notices were erected and maintained to prevent access to members of the public and to bring it to their attention that access onto the land without permission would be unlawful and that the land was private.
- v. During the period in question, the land was worked and some areas were left to overgrow, the alleged route was not maintained in any way and therefore, would have been impassable.
- vi. Hall Aggregates submitted a Statutory Declaration in May 1998 as a result of noticing that members of the public were seeking to unlawfully access the site.
- vii. There was an element of wandering across the land and use was not restricted to the use of the alleged route.

2.16 Comments:

- I. This is not supported by the user evidence.
- II. The steps outlined presumably relate to fences, notices and vegetation are discussed below.
- III. This fence is not mentioned by any of the users in their user evidence forms nor is it clear from site visits whether this fence existed or could have prevented or hindered use. Mr Chandler has confirmed that during his landownership he has never erected notices
- IV. No other evidence to support this claim, such as specific dates that the notices were present, or photographs of them, has been submitted and none of the users mention seeing any signs
- V. Many public rights of way are not formally maintained in any way and are kept open by users wearing down vegetation on the surface. Despite not being walked for about 3 years, when SCC visited on 4 March 2014, the route was still largely visible through the vegetation. Photographs taken in 2011 show the route very clearly on the ground⁴.
- VI. The validity of this document is questionable as discussed in section 2.13.
- VII. Whilst some users admit that the land was sometimes used like commonland, it is clear from the user evidence and evidence on the ground that there was much greater specific use of the alleged route. The existence of other lesser use across the same land does not detract from this.

2.17 A further letter from Frederick Adam Ltd, dated 29 January 2014, states that the former estates manager for Hall Aggregates advised that:

- i. The site was managed and fenced in accordance with company procedure. It claims that fences were in place to prevent unauthorised access by members of the public to areas that were subject to heavy machinery movements and aggregate extraction and to prevent any right of way being established. No documentary evidence has been presented to support this as the legal requirement to retain the appropriate paperwork has expired and so it has been destroyed.

⁴ See Annex D.

ITEM 12

- ii. Hall Aggregates employees might have used the path to access parts of the site, and this could explain its physical existence.

2.18 Comments:

- i. Again, this is contrary to user evidence. No user mentioned fences on their evidence forms or stated that fences prevented access. Historic mapping does not appear to suggest that the land over which the path is carried was subject to extraction during the period in question, nor is there evidence on the ground in the vicinity of the path that the land was cleared to allow vehicle movements. 1971 and 1988 aerial photographs show the relevant area covered by trees. At interview, one user stated that a sign was erected warning that unless rubbish dumping stopped a fence would be erected. This suggests no fence was present at the time but it is not clear exactly when the sign appeared.
- ii. This is considered unlikely given that the path crosses the site north to south with no apparent route towards the extraction area, approximately 100m to the west.

2.19 Frederick Adam request that should SCC determine that a public right of way exists over the land, that a different route, more convenient to the landowner, be added to the definitive map.

2.20 Comments:

This is not possible. SCC's duty is to consider what rights exist rather than what is convenient or desirable. The landowner could possibly apply for a diversion, although there would be no assurance of this being successful.

2.21 Mr Chandler also notes that he has over the years found it necessary to speak to many locals caught using their land as a cut-through or as a dumping ground for garden waste and rubbish. At such time "I informed them that the land is private property and there was no right of way".

2.22 Comments:

None of the users recall being challenged by the landowner.

ADDITIONAL EVIDENCE IN SUPPORT OF LANDOWNER

2.23 Christine and Steve Jennings, who live nearby at Grosvenor, Seale Lane, (which is approximately 300m west of the path), make the following observations in a letter dated 9 May 2011:

- i. They have lived in Seale Lane for 17 years.
- ii. They have never seen any signs to say there is a footpath or public right of way across the land. A friend of theirs who has lived in Seale Lane for 77 years has never seen such signs.
- iii. The path has been made by dog walkers walking through to the public footpath.
- iv. People have been seen dumping garden waste on the land.
- v. Mr and Mrs Jennings have always understood the land to be private property.

2.24 Comments:

These observations do not provide any evidence to show that the landowner had challenged public use and in fact do support the UEFs by confirming that use was taking place, for whatever reason.

DEFINITIVE MAP

2.25 A short section of the claimed path is visible as a 'physical surveyed feature' on base sheet 30 of the 1952 draft definitive map but is not indicated as a prospective right of way. It is not shown on subsequent definitive maps of 1952, 1959 or 1966 as a right of way.

HISTORIC EVIDENCE

2.26 The path does not appear as a feature on either the 1897 or 1916 Ordnance Survey maps, although both do show a track at the southern end of the claimed route.

2.27 The 1973 National Grid Plan (at a scale of 1:2500) shows the claimed route as a double pecked line. The base map accompanying Hall Aggregates' Statutory Declaration of 1998 shows the route (and public footpath 338) as a single pecked line at a scale 1:10,000. The route is also shown on the current Ordnance Survey Map (2007). This suggests that the path existed as a feature on the ground when these maps were surveyed and published.

2.28 It is not possible to tell from aerial photographs (of 1948, 1971, 1988, 1998 and 2006) whether a track existed at these times, largely due to the amount of tree cover obscuring the route. The 1971 and 1988 aerial photos do appear to show a linear clearing where the alleged path meets Footpath 338. Google Streetview (©2011, dated May 2009) shows a well worn gap in the hedge at the point where the path left Seale Lane before the erection of the fences. There is no sign of any old fences or notices.

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 who may direct us to make the order.

4. CONSULTATIONS:

4.1 Guildford Borough Council was contacted in May 2011 advising them of the claim. A response requesting additional information was received, but nothing

ITEM 12

further was heard once this was supplied. GBC was contacted again in November 2013 to request a response but none was received.

- 4.2 Seale and Sands Parish Council were formally advised of the claim in November 2013, although they were aware prior to this. An email from the chair of the Parish Council dated 28 February 2011 was sent to Guildford Borough Council requesting advice following the fencing of the property, as they had received 'many complaints regarding the closure of this path' which they stated '...has been used for many years as a route between Seale Lane and Footpath 338'. The landowner also wrote to the Parish Council on 24 March 2011 to explain their position. SCC has received no formal opinion or evidence from the Parish.
- 4.3 The British Horse Society, The Open Spaces Society, County Councillor Simon Gimson and Borough Councillor Tony Rooth were all consulted in May 2011, shortly after the application was made but none submitted any comments.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

If a MMO were to be made, the cost of advertising it would be approximately £1200 and would be met from the County Council's Countryside Access budget. If objections are received to any order and a public inquiry held, then costs in the region of £2,000 might arise. These costs are fixed by our duties under Schedule 15 of the Wildlife and Countryside Act 1981. If no order is made there are no direct costs to the Council as a result of this decision.

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 these are relevant considerations under the current legislation
Sustainability (including Climate Change and Carbon Emissions)	
Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	
Public Health	

HUMAN RIGHTS ACT 1988

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 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.
- 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 There appears to be no specific documentary evidence to indicate that public rights of any sort exist over the route, hence the claim must rely on user and landowner evidence either under statute or common law.
- 9.4 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".
- 9.5 The period of 20 years referred to in sub-section 2.1 above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether that is by a notice, by the making of a schedule 14 application, by blocking the route or otherwise.
- 9.6 The validity of Hall Aggregates' Section 31(6) Statutory Declaration in 1998 is questionable given that it does not meet the criteria of the relevant section of the act. If this document had been publicised on site by notices it might have indicated their lack of intention to dedicate additional public rights over their land. As it stands it appears legally ineffective. Therefore the public's use of the route was first challenged in January 2011 when fencing at the northern end, and fencing and a gate at the southern end blocked the path, and signs were erected stating 'PRIVATE PROPERTY NO ACCESS TO THE PUBLIC'. There is no

ITEM 12

evidence that the landowners took any measures in the 20 years preceding this to prevent public access or show their lack of intention to dedicate.

9.7 There are eight user evidence forms⁵ (for nine users), which correspond to the entire relevant 20 year period of 1991-2011. They collectively demonstrate a high level of use – an approximate minimum of 1648 uses per year, which is equivalent to 4.5 uses per day; or an approximate maximum around 2477 uses per year or around 6.7 uses per day. Those three users who had used it for less than the 20 years could add an addition 1347 uses per year.

9.8 It is concluded that it can be reasonably alleged that public footpath rights subsist over the route 'A' – 'B', between Seale Lane and Public Footpath No. 338 (Seale and Sands), on the basis of use by the public between 1991 and 2011.

9.9 The Guildford Local Committee is asked to agree that:

i. Public footpath rights are recognised over the route 'A' – 'B' on Drg. No. 3/1/64/H8 and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a footpath is approved. The route will be known as Public Footpath No. 580 (Seale and Sands).

ii. A MMO 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.

10. WHAT HAPPENS NEXT:

10.1 If Committee decides that an order 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.

Contact and Lead Officer:

Daniel Williams, Countryside Access Officer. Tel: 020 8541 9245

Consulted:

See Section 4.

Annexes:

A Legal Background

⁵ UEFs 4, 5, 7, 8, 9, 10, 11, 12, 13

- B Drawing No. 3/1/64/H8
- C User Evidence Summary chart
- D Photographs 2011 and 2014

Sources/background papers:

File 'CP545' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, user evidence, legal cases, assorted mapping documents can be viewed by both public and the committee by appointment with Mr Williams at the quoted number.

This page is intentionally left blank