

SURREY COUNTY COUNCIL

LOCAL COMMITTEE (MOLE VALLEY)



SURREY

DATE: 3 DECEMBER 2014
 LEAD OFFICER: ANDREW SAINT, COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN REIGATE ROAD
 AND FOOTPATH 56, DORKING
 DIVISION: DORKING HILLS

<p>SUMMARY OF ISSUE:</p> <p>An application has been received for a Map Modification Order (MMO) to add a public footpath running from Reigate Road to Footpath 56 (Dorking) to the Surrey County Council Definitive Map and Statement (DMS).</p> <p>It is considered that the available evidence is insufficient to show that a public footpath, or a right of way of any other status, can reasonably be alleged to subsist over the claimed route. As such no legal order to modify the DMS should be made.</p>
<p>RECOMMENDATIONS:</p> <p>The Local Committee (Mole Valley) is asked to agree that:</p> <ul style="list-style-type: none"> (i) No public rights of way are recognised over the route shown A-D-B-C on drawing no. 3/1/50/H49 and that the application for an MMO under section 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a public footpath is not approved. (ii) In the event of the County Council being directed to make an MMO by the Secretary of State following an appeal by the claimant, the County Council as surveying authority should adopt a neutral stance at any resulting inquiry or hearing or while the matter is being considered by written representations.
<p>REASONS FOR RECOMMENDATIONS:</p> <p>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. In this instance the evidence does not support the making of a MMO.</p>

1. INTRODUCTION AND BACKGROUND:

- 1.1 On 31 October 2010, the late Mr John Millie submitted an application on behalf of the Pixham Residents Association for a MMO. The application, which was made under the provisions of the Wildlife and Countryside Act 1981 ('the 1981 Act'), sought to amend the DMS by the addition of a public footpath.

ITEM 7

- 1.2 The alleged footpath begins on Reigate Road (A25) just to the east of Dorking. It then follows a metalled driveway downhill and round a bend to Castle Mill. Here it joins Footpath 56 which can be followed either into Pixham or over the mill stream and then the River Mole towards Box Hill. The route is shown A-D-B-C on plan 3/1/50/H49 (annexe A)
- 1.3 In addition to the claimed route, there is also evidence that some local people have used an additional route running south from the apex of the drive directly to the A25 (shown D-E on the plan and referred to as 'the spur' in the remainder of this report). Although this route was not part of Mr Millie's original application it is also considered in this report.
- 1.4 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".
- 1.5 A decision on this claim must be made on the legal basis set out in annexe B to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way exists. Other issues such as amenity, safety or convenience are irrelevant. Members' attention is particularly drawn to those parts of annexe B which refer to the provisions of section 31 of the Highways Act 1980 and common law.
- 1.6 Section 31 of the 1980 Act 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. A landowner is able to rebut a claim made under section 31 by showing that, at some point during the relevant 20 year period, they had demonstrated to the public that they had no intention of dedicating the route as a right of way.
- 1.7 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.
- 1.8 Based on the evidence available it is considered that neither a public footpath, nor a right of way of any other status, can reasonably be alleged to subsist over the route in question. Documentary evidence clearly shows that the route has physically existed as an access road to Castle Mill for many centuries. However this does not, in itself, mean that public rights existed over it during that time. Furthermore, while there is some evidence of more recent use, it is not considered to be sufficient to conclude that rights have been acquired either at statute or common law. It is for this reason that the recommendation of this report is that no legal order should be made to modify the DMS.

2. ANALYSIS:

HISTORIC/DOCUMENTARY EVIDENCE

- 2.1 The route is clearly very old. The earliest clear depiction of Castle Mill's driveway (over which the claimed path runs) is on Roques' commercial map of 1770 and it has consistently been shown on many other maps since that time. More recently there is photographic evidence of its existence since 1903.
- 2.2 However, most of the historic documentation merely shows the physical existence of a route on the ground. Such a route would clearly have been necessary as a private access to the Mill. Therefore the fact that it has existed for several centuries does not in itself demonstrate that there was a public right of way over it. Having said this there are two historic documents which do provide slightly more information than simply an indication that the route physically existed:
- i. A private map of the Deepdene estate (circa 1840) depicts the claimed route in a similar fashion to other roads in the area. Looked at in isolation this might suggest the existence of public vehicular rights. However, other routes which are very unlikely to have carried such rights, due to their width and gradient, are shown in an identical way. In light of this it is not possible to conclude that the estate map alone is sufficient to show that public rights existed over the claimed route.
 - ii. The route in question also appears on the Dorking Tithe Award of 1842. The fact that no number is attached to the land in question is an indication that it did not generate titheable produce and, in certain contexts, this can be evidence of the existence of public rights. However, in this case no reference to its status is made on the map or the apportionment. It is therefore equally plausible that the route was not titheable as a result of it being well used in a private capacity particularly as it continued to form the main access to the Mill itself.
- 2.3 In light of the above it is considered that, despite the fact that the claimed path has physically existed for several centuries, it is more likely than not that it acted as a private access to the Mill. None of the evidence is sufficient to suggest that it was well used by members of the public or that public rights had been dedicated over it. For the claim to be successful it would therefore need to rely on more recent user and landowner evidence either under section 31 of the Highways Act 1980 or common law.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 2.4 The application was supported by 13 'user evidence forms' (UEFs) demonstrating use over a period of 88 years between 1923 and 2010 (a summary of that use can be found at Annexe C). All of the claimants used the route on foot and four had also taken a bicycle along it. All but three of the claimants show use of the 'spur'. Of the 13 people who completed UEFs, four have been interviewed.
- 2.5 The frequency of use on foot varies from as little as five times per year to 100 times per year. A variety of reasons were given for that use including general recreation, dog walking and accessing local amenities such as the shops,

ITEM 7

golf course and bus stop. There is less evidence of use by cyclists. Those who did cycle typically used the route between 10 and 20 times per year.

- 2.6 Many of the claimants refer to notices, fencing and obstructions on the route. On further examination it seems that these are almost all referring to 'private, no rights of way signs' which were posted in 2010 and a rope/orange mesh which obstructed the path at the same time.
- 2.7 Other users note a gate at point B which they typically refer to as being left open. There is evidence to suggest that there was a gap next to the gate which, although at times had a large log across it, could be used by walkers.
- 2.8 The only other structure referred to within the user evidence is the fingerpost at point C. It seems to be generally agreed that this indicated the route of Footpath 56. However, there is some suggestion that it may once have had a third 'finger' pointing along the claimed route.

LANDOWNER EVIDENCE

- 2.9 The Register of Title held by the Land Registry confirms that the land crossed by the claimed path is owned by Mr and Mrs Harries. They purchased the property in March 2010. Shortly afterwards they erected the 'Private. No Right of Way' notices referred to in the UEFs. Since purchasing the property Mr and Mrs Harries have given express permission for members of the Dorking and District Angling Society and local residents to use the claimed route. In correspondence with Mr Harries he has stated that, when he initially purchased the property, the driveway was 'completely overgrown'.
- 2.10 Prior to 2010 the land had been owned by Mrs Adami since 1968. It was on Mrs Adami's death that the property was sold. On learning of the claim Mr Harries contacted both of Mrs Adami's sons who commented as follows:
- "...the drive was so overgrown there was only the fishermen using it".
 - "It has always been a private drive for sole use of CMHs [Castle Mill House]. The Mill and Lodge have never had any right of way over its use (although they did try some years back). It was always maintained by us, no contributions from others at any time"
 - "Bottom 5 bar gate at the yard end [point B] was put in place with the right hand gap some 30 years ago, it has always been locked and only occasionally used by cars since then. It was always intended to put a second gate at the top but we never got round to it".
 - "We believe there originally would have been a gate at the top as there were posts in place many moons ago".
 - "The fishing club who generally park on the verges along the road [the A25] next to the bus stop area were given permission to use drive, this has never been a problem. They used to walk straight down behind the bus stop and joined the drive on the bend. This was nothing more than an informal permission mutually respected as you would expect (no monies change hands). Note - they are not and have never been permitted to use the long drive down past the barn and lodge".
 - "The footpath signs in the yard next to the long cave have always been well maintained in directing people over the bridge. This always kept the general public going where the sign pointed them !!!!"

SECTION 31 OF THE HIGHWAYS ACT 1980

- 2.11 Section 31(1) 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”.
- 2.12 The period of 20 years referred to in section 31 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 an application such as the one made by Mr Millie, by blocking the route or otherwise.
- 2.13 In this case, it is considered that use of the path was called into question when notices stating ‘Private. No Right of Way’ were erected in 2010. At the same time it appears that orange mesh fencing and/or a rope was placed across the path at point A preventing it from being used. The relevant 20 year period which must first be considered is therefore 1990 to 2010.
- 2.14 Having established the relevant 20 year period it is necessary to determine whether there is sufficient evidence to show that the claimed route was used by the public during that time. In order to qualify that use must have been without force, secrecy or permission.
- 2.15 As mentioned above, 13 UEFs were submitted with the application form all of which recorded use of the route for at least part of the relevant 20 year period. From the information submitted by each of the users it is possible to estimate the total number of journeys per week which took place both at the beginning and the end of the 20 year period.

Year	Pedestrian		Cyclists	
	1990	2010	1990	2010
Average number of journeys per week	7.5	7.5	1.4	1.4

- 2.16 As the above table demonstrates, there has only been a minimal amount of bicycle use and certainly not enough to demonstrate that the public at large have been using it.
- 2.17 There has clearly been more use on foot than there has been by cyclists. However, despite the frequency of that use apparently remaining consistent throughout the 20 year period, at no point did it rise much above one journey per day. Furthermore, the use described in the above table was not all over a single route but was instead split between the main driveway (i.e. A-D) and the spur. Therefore, while all of the users will have used C-B-D, the collective use of D-A and the spur must have been significantly less than once a day.
- 2.18 The most frequent user, Mr Mansey, used the route approximately 100 times per year. However, he also states that he very rarely used A-D believing it to be private and not to be used. His use would therefore need to be deducted from the use of A-D leaving an estimated cumulative use of only 5.5 journeys per week over that section of the claimed route. Furthermore,

ITEM 7

this figure would almost certainly fall further given that most of the other claimants also used the spur for at least some of their journeys.

- 2.19 A similar argument can be applied to the spur. As a proportion of the total recorded use was over A-D then the level of use received by the spur must be reduced accordingly and would therefore be less than 7.4 journeys per week.
- 2.20 This level of use (i.e. significantly lower than one journey a day) is less than one would expect of a footpath located on the edge of an urban area and is not considered to be sufficient to bring home to a reasonable landowner that a right was being asserted. It is therefore concluded that there is insufficient use to represent the public in general.

COMMON LAW

- 2.21 For rights to be established at common law, it is necessary to provide evidence to show that the facts, taken as a whole, infer that at some point in the past the landowner had been willing to dedicate the way as public. It is also necessary to show that the public have accepted the route as a public right of way. Evidence of public use can be used to demonstrate both of these requirements. Unlike section 31 there is no minimum period of use that must be shown at common law, however the onus of proof lies with the party claiming that rights have been acquired. A landowner can rebut a claim if they can provide evidence that they did not intend to dedicate the route to the public or that the public use had been insufficient.
- 2.22 There seems to be general agreement that the claimed path has been gated at point B for many years. Although there was always a clear gap to the side of that gate there is no indication that it was left for use by the public. Furthermore, there is evidence to suggest that the landowner gave permission for the Dorking and District Angling Society to use the route. While that permission only extended to those in the Society itself, the very fact that it was granted at all is not consistent with the actions of someone who intended to dedicate the route to the public.
- 2.23 As mentioned above, in order for a right to be dedicated at common law, there must be evidence both that the landowner had intended to dedicate it and that that dedication was accepted by the public. In this case there has been very little public use and certainly not enough to make any reasonable landowner aware that the route was being used as if it were a public right of way.

3. OPTIONS:

- 3.1 The committee can agree with the officer recommendation, in which case no order would be made and the route would not be added to the DMS. Where the County Council decides not to make an order, the decision can be appealed to the Secretary of State. If such an appeal resulted in a public inquiry the County Council would normally take a neutral stance.
- 3.2 Alternatively, if the Committee is of the view that there is sufficient evidence to reasonably allege that public rights do exist, it may disagree with the officer's recommendation. However, it should be noted that the County

Council only has the power to make a MMO where it can be reasonably alleged that public rights exist. Therefore any alternative resolution would need to clearly indicate why the committee consider that public footpath rights have been established over the route. If, having made an MMO, objections were to be received the order would need to be submitted to the Planning Inspectorate who may hold a public inquiry. A member of the committee would ordinarily be asked to appear at the inquiry in order explain how the committee reached its decision.

- 3.1 The decision can only be made on the basis of the evidence submitted as interpreted under the current legislation. Matters such as security, privacy, safety or convenience are not relevant (see annexe B for further explanation).

4. CONSULTATIONS:

- 4.1 Mole Valley District Council, the British Horse Society, the Ramblers and various other user groups were all informed of the application. Only the Ramblers responded suggesting that it would be desirable to record the route as a footpath but not submitting any evidence to show that such rights exist.
- 4.2 Dorking and District Angling Society were also informed of the application. They have fishing rights on the north bank of the River Mole and used to lease the rights to fish the southern bank when it was owned by the Adami family. Although, to date they have been unable to supply a copy, they believe that there was an agreement in place permitting members of the society to use the claimed path in order to access the river. Since Mr Harries has purchased the property they have had a similar verbal agreement with him.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 5.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, when taken as a whole, is sufficient to reasonably allege the existence of a right of way.
- 5.2 Having said this, if the committee were to agree with the officer's recommendation that no MMO should be made there would be no direct costs to the County Council. If that decision were to be successfully appealed then the Secretary of State could order the County Council to make a MMO. This is likely to cost in the region of £1200, which would be met from the County Council's Countryside Access Budget. If objections were received a resulting public inquiry would cost in the region of £1000. This would 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 There are no equalities and diversity implications. These are irrelevant factors under the current legislation.

7. LOCALISM:

7.1 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 current legislation.
Sustainability (including Climate Change and Carbon Emissions)	
Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	

9. CONCLUSION AND RECOMMENDATIONS:

9.1 As mentioned above, the County Council has a duty to modify the DMS where evidence comes to light which shows that a right of way, which is not already shown on the map, exists or can be reasonably alleged to exist.

9.2 Despite there being plenty of evidence to suggest that the claimed route has existed for several centuries, this does not in itself demonstrate that it has carried any public rights. Based on the evidence that has been submitted, there has been insufficient use of the route to meet the requirements of either section 31 of the Highways Act 1980 or common law. Furthermore, none of the landowners have acted in such a way that would imply that they had intended to dedicate public rights. It is for these reasons that it is concluded that rights have not been acquired.

9.3 In light of the above the Local Committee (Mole Valley) is asked to agree that:

i) No public rights of way are recognised over the route shown A-D-B-C on drawing no. 3/1/50/H49 and that the application for an MMO under section 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a public footpath is not approved.

ii) In the event of the County Council being directed to make an MMO by the Secretary of State following an appeal by the claimant, the County Council as surveying authority should adopt a neutral stance at any resulting inquiry or hearing or while the matter is being considered by written representations.

10. WHAT HAPPENS NEXT:

10.1 All interested parties will be informed about the decision. If the recommendations are agreed no legal order will be made. The applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.

- 10.2 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.

Contact Officer:

Andrew Saint, Countryside Access Officer, 020 8541 9342

Consulted:

In addition to those organisation listed in section four and all relevant landowners, Surrey County Council's Senior Countryside Access Officer and Principle Highways Lawyer have also been consulted.

Annexes:

- A Drawing No. 3/1/64/H8
- B Legal Background
- C User Evidence Summary chart

Sources/background papers:

File 'CP542' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, user evidence, legal cases and assorted mapping documents can be viewed by both public and the committee by appointment with Andrew Saint (contact details above).

This page is intentionally left blank