



SURREY COUNTY COUNCIL

LOCAL COMMITTEE (TANDRIDGE)

DATE: 20 MARCH 2014
LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER
SUBJECT: ALLEGED PUBLIC FOOTPATH SOUTH OF TENCHLEYS WOOD, BETWEEN FP55 AND BW54, LIMPSFIELD
DIVISION: OXTED

SUMMARY OF ISSUE:

Mr Duncan Ferguson 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 FP55 and BW54 (Limpsfield) south of Tenchleys Wood.

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 Tandridge Local Committee is asked to agree that:

- i. Public footpath rights are recognised over the route 'A' – 'B' on Drawing No. 3/1/28/H43 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. 637 (Limpsfield).
- 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 31 March 2012, from Mr Duncan Ferguson 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 a public footpath between FP55 and BW 54 (Limpsfield) south of Tenchleys Wood. 17 user evidence forms accompanied the application. For legal background see **Annex A** to this report.
- 1.2 The claimed route is located to the east of Pains Hill, to the south west of Limpsfield Chart and to the south of Tenchleys Park, as shown on Drawing No. 3/1/28/H43 (**Annex B**). It commences at point 'A', which is located on Public Footpath No. 55 (Limpsfield), immediately south of a stile, and proceeds in a generally easterly direction for 400m to point 'B' where it meets Public Bridleway No. 54 (Limpsfield). 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 open at the western end, with a sign stating 'PLEASE KEEP TO PUBLIC FOOTPATH DO NOT TOUCH, APPROACH OR FEED ANIMALS KEEP DOGS UNDER CONTROL'. It is blocked at the eastern end with 1m high stock netting with a line of barbed wire above, and a sign states 'PRIVATE FARMLAND DO NOT ENTER'.
- 1.4 No Section 31(6) Statutory Declaration relating to the land in question has ever been received by Surrey County Council.
- 1.5 The land is currently mostly owned by Mr and Mrs Bellringer of Tenchleys Manor although part of the western end is unregistered.

2. ANALYSIS:

STATUTORY TEST

- 2.1 In order to establish a public right, it must be possible to show 20 years of use, 'as of right', that is, not by force, secrecy or with permission, and that the use was 'without interruption'. If this test can be satisfied, the Council must then decide whether this deemed dedication is rebutted by sufficient evidence to show that there was no intention on the part of the landowner during the relevant 20-year period, to dedicate the route. It has been difficult to determine the exact date the route was called into question as user evidence is unclear when barriers or notices were erected, but considering information from the landowner and based on the date of purchase (5 December 2007), it is believed to be late 2007/early 2008. The applicant wrote to the landowner on 26 July 2011 to request the path be reopened but never received a reply. It was after this that Mr Ferguson became aware of the DMMO process and subsequently submitted the claim.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 2.2 17 user evidence forms were submitted with this application, spanning a period of approximately 63 years from 1949 to 2012. 16 users walked the path within the 20 year claim period (1989-2008). Officers interviewed seven claimants to clarify their own personal use of the route. Copies of their statements from these interviews are available to view on request.

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- 2.3 Individual use varied from 3 times a year to 200 times a year. All respondents used the way on foot and believe the way to be a footpath.
- 2.4 16 people gave evidence of use for periods in excess of 20 years. The longest individual period of usage was by Mr Ferguson, who used the way 12 times a year between 1962/3 and 2012. Most frequent use was by Mr Grantham who walked the path 200 times a year between 1970 and 2008. A bar chart and summary of the evidence contained in the forms can be seen in **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.
- 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. There has never been any structure at the western end of the path. Some respondents mention a stile, but this is located on FP55 immediately north of the claimed route. Information regarding structures at the eastern end is contradictory. Mrs Wardlaw couldn't remember whether there had ever been a structure here but thought 'it was just open', while Mr and Mrs Mackay recall a metal gate into the field which they said was 'never locked and was easy to open and go through'. This is supported by Mr and Mrs Ferguson who recall a big gate which was never locked, and Mrs Nathan who remembers a gate on the edge of the field, before going up the bridleway and through another gate. Mr Brockes' evidence form states that 'where the gate was a fence has been erected' which suggests a gate was located on the claimed path. However, Mr Grantham who lives at a property immediately east of the claimed path stated that 'the gate on the bridleway was the only one'. Based on this evidence, it seems likely that there was a field gate across the claimed path, at the eastern end of the field but there is no evidence of a gate now.
- 2.7 Based on user evidence, it was difficult to determine exactly when the stock netting was erected at the eastern end of the claimed route. None of the interviewees could give a precise date, despite being asked specifically. Mr Grantham believes it may have been as early as 2006, but his evidence form claims use until 2008. He did believe it was after the land was divided up and bought and we know that Mr and Mrs Bellringer purchased the land in December 2007. Mr Ferguson thought it might be 'three to four years ago'. This is supported by Mr Brockes who felt it was probably around 2010 although Mrs Ellson's user form suggests 2008/9. Mr and Mrs Mackay said they continued to use the path after the fencing was erected by climbing over the gate further down.
- 2.8 13 user evidence forms mention a notice or notices which said 'Keep to footpath Keep to Farmland Do not touch farm stock' or similar. This is consistent with notices currently on site (see 1.3 above). According to the evidence forms, these could have been erected at some point between 2007 and 2010. The sign presently at the western end of the path appears to be directed at users of the claimed path, rather than users of Footpath 55, as it would face walkers as they turned onto the path. It could be interpreted that it is requesting that walkers stick to the claimed route, potentially reinforcing their belief¹ that they are in fact using a public way. Mrs Nathan and Mrs

¹ Although it should be noted that it is not essential for users of a claimed way to 'believe' it is a public right of way.

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Ellson recall notices in two or perhaps three languages – English, French and German or possibly Dutch. There is no evidence of these signs now but they may have been erected in 2008.

- 2.9 The site was visited by SCC officers in September 2011, and on 13 May 2014. At the eastern end, the path is carried along the northern headland of a field, at the top of a steep slope. To the west, the surface is grassy, and is no longer defined on the ground. The way becomes very wet in the middle section, where a spring erupts from the bank and flows south. At this point horse tape has been erected from north to south dividing the field in two. Mr Ferguson believes this has appeared within the last two years (it is not visible on 2012/13 aerial mapping). Horses were present in the eastern field. From here the field is terraced, and it is unclear on the ground where users might have walked. Interviewees recall walking both along the top of the terrace, immediately south of the woodland and fence, and at the bottom of the steep slope. The evidence forms do seem to indicate that most use was south of the terrace where it is possible to more easily cross the spring point.
- 2.10 Nine evidence forms specify a width for the way, varying from 3 foot to 20 foot, although the majority suggests approximately 8 foot/2.5m. Some forms observed that the path was not contained or fenced in any way. At interview Mrs Nathan recalled that it was a beaten well worn track with bare earth in places about 2 feet wide. The path was not restricted and allowed groups to walk side by side.
- 2.11 Mr Grantham felt the path was well used, including by people from the Caxton Home nearby and that at weekends one would see 2 or 3 people walking although there would be fewer during the week. As a result, the path was well trodden, exposing the soil.
- 2.12 The field has never contained crops but has frequently held livestock, usually sheep or cattle and more recently, horses.

LANDOWNER EVIDENCE

- 2.13 Land Registry details show that part of the the land crossed by the alleged path is owned by Charles Albert John Bellringer and Fiona Mary Bellringer of Tenchleys Manor, Itchingwood Common, Surrey, Surrey, RH8 0RL, who have held Title Absolute since 5 December 2007. The remainder of the path is unregistered.
- 2.14 SCC has no record of having received a Section 31(6) Deposit for the land over which the claimed path is carried.
- 2.15 Mr and Mrs Bellringer have resided at Tenchleys Manor since 1996 and claim that there has never been a footpath at the site, although they acknowledge that while it was owned by Mr Oliver Dennis ‘certain people took the liberty of walking, pushing children in pushchairs and even riding horses as they wished on the land’.
- 2.16 Mr and Mrs Bellringer purchased the field in question in December 2007 and erected fencing at the boundaries of the field to enable grazing for horses. These were pulled down but they were re-erected and the notice put up. Therefore, late 2007/early 2008 is the earliest date that use of the route could have been called into question.

DEFINITIVE MAP

- 2..17 The path is not visible as a feature on the 1952, 1959 or 1966 definitive maps, nor is it shown on any of these maps as a public right of way. There is no evidence that it has ever been put forward for inclusion on the definitive map.

HISTORIC EVIDENCE

- 2.18 The path is not shown on the 1869, 1897, 1912, 1914 or 1933 Ordnance Survey maps, nor is it shown on any historic maps prior to these. The Ordnance Survey National Grid Maps of 1964 and 1968 may show the claimed path along part of its length enclosed by a solid line between the field and the wood to the north and given its own parcel numbers.
- 2.19 Current OS mapping © 2007 appears to show a track at the eastern end of the claimed path.
- 2.20 Aerial photographs from 1971, 1988, 1998/99 appear to show some faint worn ground along the claimed route. This is less obvious but still visible in the 2006 photographs while it is largely obscured by shadows in the 2012/13 photographs.

3. OPTIONS:

- 3.1 The committee can agree with the officer recommendation, in which case an order would be made and advertised.
- 3.2 Where the County Council decides to make an order, the decision can be referred to the Secretary of State. Should this result in a public inquiry, the County Council would normally take a neutral stance.
- 3.3 Alternatively, if they are of the view that there is not sufficient evidence to reasonably allege that public rights exist the committee may disagree with the officer recommendation. Should this be the case a resolution will be needed indicating why the committee consider that public footpath rights do not exist over the route. This decision can be appealed to the Secretary of State by the applicant.
- 3.4 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 **Annex A**)

4. CONSULTATIONS:

- 4.1 Tandridge District Council was contacted in May 2013, to advise them of the claim. They responded in July 2013 stating that as they were not aware of any information regarding the history of the route, they had no comments to make.
- 4.2 Limpsfield Parish Council was formally advised of the claim in May 2013. A response was received stating that they had considered the matter and had no comment to make, and had no objection to the application by Mr Ferguson

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- 4.3 The Ramblers were formally advised of the claim in May 2013. Local Footpaths Secretary, Tony Pearson responded that although he had not walked the route he was aware that several local residents did so over many years. He believes the route would make an excellent addition to the local rights of way network as it provides a link between Footpath 55 and Bridleway 54.
- 4.4 The Open Spaces Society, and County Councillors Nick Skellett and Michael Sydney were also consulted but made no comment.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 5.1 If a MMO were to be made, the cost of advertising it would be approximately £1200 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.
- 5.2 If the route is added to the definitive map and statement as a public right of way by MMO then no future responsibility for maintenance is placed upon the Council.

6. EQUALITIES AND DIVERSITY IMPLICATIONS:

- 6.1 Such issues cannot legally be taken into account when making a decision if the public have acquired rights or not.

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 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 claims must rely on user and landowner evidence either by 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 16 of the 17 user evidence forms correspond to the entire relevant period and in fact, there is evidence of use for a much longer period. Average use during the claim period was just under one use per day. In late 2007/early 2008 the landowner erected a fence at the eastern end of the path and a notice at the western end bringing the right into question. No relevant evidence has been submitted from before this time by the landowner.
- 9.7 It is concluded, on the balance of probabilities, that public footpath rights can be reasonably alleged to subsist over the route 'A' – 'B', immediately south of Tenchleys Wood, between Footpath 55 and Bridleway 54 (Limpsfield), having been acquired as a result of statutory presumed dedication between the period of 1987 and 2007.

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- 9.8 The Tandridge Local Committee is asked to agree that:
- i. Public footpath rights are recognised over the route 'A' – 'B' on Drg. No. 3/1/28/H43 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. 637 (Limpsfield).
 - 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 Officer:

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

Consulted:

See Section 4.

Annexes:

- A Legal Background
- B Drawing No. 3/1/28/H43
- C User Evidence Summary

Sources/background papers:

File 'CP552' 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 appointment.
