

SURREY COUNTY COUNCIL**LOCAL COMMITTEE (SPELTHORNE)****DATE:** 23 APRIL 2015**LEAD OFFICER:** DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER**SUBJECT:** ALLEGED PUBLIC RIGHTS OF WAY BETWEEN THAMES STREET AND THE RIVER THAMES (SUNBURY)**DIVISION:** LOWER SUNBURY AND HALLIFORD**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. An application has been received for a Map Modification Order (MMO) to add a Byway Open to All Traffic (BOAT) between Thames Street and the River Thames, Sunbury to the Surrey County Council DMS as shown on the attached drawing 3/1/86/H16 (**Annexe A**).

It is considered the evidence is not sufficient to support BOAT rights but that public footpath (FP) rights can reasonably be alleged to subsist. As such a legal order to modify the DMS should be made.

RECOMMENDATIONS:

The Local Committee (Spelthorne) is asked to agree that:

- (i) Public Footpath rights are recognised over A – B – C, B – E & D – E – F on Drg. No. 3/1/86/H16 and that a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 be made to modify the Definitive Map and Statement. The routes will be known as Public Footpaths nos. 83, 84 and 85 Sunbury.
- (ii) 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 footpath rights are reasonably alleged to subsist, having been acquired under both statutory presumed dedication (under s.31(6) of the Highways Act 1980) and common law. Evidence suggests that landowners have not challenged users or taken sufficient actions to demonstrate their lack of intention to dedicate during the relevant period. A map modification order to modify the definitive map and statement by the addition of public footpaths as described above should be made under s. 53 of the WCA 1981.

1. INTRODUCTION AND BACKGROUND:

- 1.1 In March 2012, Mr Chris Wills of 'Mon Abri', Wheatley's Eyot, Sunbury on Thames submitted an application for a Map Modification Order (MMO) to add a BOAT, which runs parallel to Thames Street and the two associated access routes which run from Thames Street to the public landing stages at the river; one adjacent to 'Monksbridge' and the other adjacent to 'Kingfisher House' to the Surrey County Council DMS. The claimed route runs between points A – B – C, B – E and D – E – F as shown on Drg. No. 3/1/86/H16 (**Annexe A**).
- 1.2 The application was accompanied by 6 public way evidence forms showing use of the routes between 1975 and 2012 as a BOAT and FP. Documentary evidence in support of the application was also submitted. For the legal background for map modification orders see **Annexe B**. The relevant 20-year period for the claim is 1992 – 2012.
- 1.3 The claimed route forms an 'H' shape. The western spur runs from point A on Drg. No. 3/1/86/H16 at its junction with Thames Street, Sunbury on Thames, (between numbers 20 and 22a) in a southerly direction for 27 metres to point B. It continues for 16 metres to the River Thames at point C. The middle section of the route runs from point B in a north-easterly direction for 70 metres to point E. The eastern spur runs from Thames Street (point D) between number 8 and 'Monksbridge' in a south-easterly direction for 28 metres to point E, continuing for a further 45 metres to point F to the River Thames. Near point F there is a bench, a coal and wine tax post and a litter bin. Prior to the redevelopment of the land fronting the river the buildings formed Turks Boatyard, which was then sold to Horace Clark for his boating business. Since then the buildings along the river frontage have been developed as residential dwellings and for storage purposes.

2. ANALYSIS:

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 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.
- 2.2 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a "sufficient number of people who together may sensibly be taken to represent the people as a whole/the community in general". The House of Lords has ruled that the amount of user must be such as might have been reasonably expected if the route in dispute was an undoubted public highway. The necessary level of use must therefore be considered on a case by case basis.

- 2.3 There are 6 claimants: David Banks (1), Colleen Cuthbert (2), Robert Hayes (3), Joseph Scott (4), Paul Watts (5) and Chris Wills (6). All of the claimants have used the routes for the full 20-year period, all on foot, as well as claimants 1 and 6 on bicycles and claimants 3, 5 and 6 in a motorised vehicle. The total number of journeys per year ranges from 8 to 200 on foot with an average of 51 times a year amounting to once a week on average.
- 2.4 Mr Banks claims using the routes 20 times a year by bicycle and Mr Wills 50 times. Mr Hayes used the route A – B – E – D in a motorised car every day and now has established private vehicular rights in his deeds. Mr Wills used the public landing stages and the adjoining routes in a car to access his boat mooring approximately 12 times a year.
- 2.5 A summary of the user evidence can be found at **Annexe C**.

3. LANDOWNERS AND ADJOINING LANDOWNERS EVIDENCE

- 3.1 A Land Registry search has revealed that the majority of the land is unregistered. A section between points B – C is registered to Spelthorne Borough Council. The middle section of the 'H' is registered to Mr and Mrs Bartlett, Mr and Mrs Sheppard and Mr Griffiths.
- 3.2 Mr Griffiths' land ownership extends to the eastern edge of the old boathouse near point E. The claimed route extends up to his property boundary. Mr Griffiths bought the land from Mr and Mrs Sheppard 5 years ago. A brick wall has been erected running parallel to E – F within the width of the path outside of Mr Griffiths' landownership. As well as being an encroachment on the claimed route it has the effect of blocking the view of the weir from the bench at point F. The Environment Agency as landowner and the County Council as Highway Authority will seek its removal if the claimed route is added to the DMS. Mr Griffiths has been contacted but no response has been received.
- 3.3 Mr and Mrs Sheppard of 'The Boathouse', which is located east of Kingfisher House, until recently owned the middle section of the track between B – E. Last year they sold Kingfisher House, and the section of track north of it to Mr and Mrs Bartlett. Mr and Mrs Sheppard still own the middle section of track in front of 'The Boathouse'. They had owned all of the former Turks boatyard area next to the river for approximately 10 years. They state they have never turned anybody away who was walking though, but had turned away vehicles using it as a cut through. At one time the route became a bit of a 'rat run' for vehicles if traffic was slow on Thames Street. Mr and Sheppard confirmed that originally there had been no vehicular access to the backs of properties in Thames Street but over the years these had been established and recorded in property deeds as private rights. The sign at the corner of the old boathouses (point E) saying 'Private No Through Road Access Only' has been there as long as they remember. They do not allow parking on their land but access is allowed for residents and deliveries.
- 3.4 Mrs B Baker of nos. 22, 22a & 22b Thames Street, is an adjoining landowner on the western side, and has lived there since 1969/70. She says there have always been 'Private Road' signs up and that the routes used to be much narrower. She does not mind walkers going through but does not want vehicles as they already have parking problems. Mrs Baker

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states that the public have only ever had pedestrian access to the river. The path behind numbers 20 to number 8 Thames Street was a small footpath very frequently blocked by boats and was not for general public use.

- 3.5 Mike Pegram of M Pegram and Associates, 12 – 14 Thames Street has been freeholder of the property bounding the alleged route since 1997 and has lived in Sunbury since 1956. He states there has been free access to the claimed routes.
- 3.6 Mr and Mrs Hayes of 10 Thames Street bought their house in 1979 from Horace Clark, the original owner of the boatyard and holiday business. The house was the original residence of the boatyard owners. They and their neighbours accessed the rear of their properties by car over the claimed route A – B – E – D and vice versa, establishing private rights which have now been recorded in the deeds of their properties. Yellow lines have been painted at some time between D – E to discourage people parking there. It is not known who painted them. Mr Hayes said the boatyard business closed 20 years ago and confirmed there has always been public pedestrian access to the river.
- 3.7 Mr J Bartlett bought Kingfisher House and half the western end of the track between points A - B and approximately 30 metres east of point B in 2014. He states the road is used to serve the rear of some properties on Thames Street and Mr Sheppard's house as a private right of way only. Mr Bartlett claims the route has never been a public right of way and is not used as a public right but only for the adjoining owners to reach their properties. He wishes to keep the telegraph pole at the side of the track on his land, to ensure larger vehicles cannot use the private roadway at any time.

4. ENVIRONMENT AGENCY

- 4.1 The Environment Agency is the navigation authority for the freshwater River Thames by virtue of being the current statutory successor to the Conservators of the River Thames ("The Conservators"). As recited in the preamble to the Thames Conservancy Act 1857, the Mayor, Commonality and Citizens of the City of London ("The City Corporation") claimed to exercise rights of ownership on the bed and shores of the River Thames between Staines-upon-Thames to the west and Yantlet in Kent. Under section 50 of that Act, all the estate, right, title and interest of the City Corporation in the bed and shores of the Thames was transferred to the Conservators of the River Thames (now the Environment Agency). They are concerned to preserve existing public landing and river access points.
- 4.2 The claimed routes run partly over riverbed land reclaimed from the river in the 1860s. The upper eastern section between D – E has double yellow lines on the ground suggesting it has been treated as part of the highway network in the past although it is not included in the County's List of maintainable streets. There is a domestic notice outside one property saying "Private Parking" and not claiming that the road itself is private.
- 4.3 In 1967, the Conservators sold off the land running east-west (points B - E) to the boatyard proprietor Mr H C R Clark. This sale was reported to the Conservator's Board Meeting (13 February 1967). It was reported that an external valuation of the land had been assessed at (only) £68.10s 0d in the circumstances including that..."it would appear that the public have acquired

certain rights over the land, possibly with vehicles, although no formal dedication has ever taken place". The Environment Agency have stated that "the general public had been driving vehicles through that corridor of public land for some considerable time (i.e. prior to 1967) without there having been any notice or other form of challenge by the Conservators, as landowner".

- 4.4 The Environment Agency, who own part of the land between points B - C, consider that that section is a public footway only and has not been used by vehicles.

5. MAP EVIDENCE

- 5.1 The routes do not appear on the Definitive Map or in the Definitive Statement.
- 5.2 The Ordnance Survey maps of 1896, 1914 and 1958 show the routes in the positions they are today.
- 5.3 In the absence of any conclusive documentary evidence showing public rights the claim must rely on user evidence either by statute or common law.

6. HISTORIC EVIDENCE

- 6.1 The 'Lower Sunbury Conservation Area Preservation and Enhancement' document produced by Spelthorne Borough Council dated November 1992 contains various references to The River Thames and access to it. In the 19th century, visitors to Sunbury were attracted by the recreational boating facilities and the views both towards and from the Thames.
- 6.2 "Small areas of public access to the river occur immediately to the west and east of Turks Boatyard. The former is at present a rather overgrown area but it is potentially very attractive. It includes a horse chestnut tree, a seat and steps to the river. Between Turks Boatyard and Monksbridge, a public walkway leads to a paved area by the river with a river mooring and an old city tax post."(s.2.15).
- 6.3 "From the river the Turks site is a pleasant mixture of timber shingled buildings, boats and an important slipway, with large recreational boats available for hire."(s. 2.20). "There are small areas of riverside open space to either side of Turks Boatyard. To the west, clearance of an overgrown area and the replacement of a seat are needed to enhance a potentially very attractive spot opposite Sunbury Lock. To the east, the lane to the side of Monksbridge has been improved; two litter bins and a seat have been installed. The seat and litter bins are still in place today. Some further clearance and ongoing maintenance is needed to the planted area" (s.3.16).
- 6.4 "It is considered desirable where such opportunities may arise, to increase levels of access to the river and these will be pursued where redevelopment proposals come forward or access can otherwise be negotiated". (s.3.19).
- 6.5 Spelthorne BC Policy EV4 states "The Borough Council will seek to protect and enhance the views of the River Thames...."

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6.6 All of the above references add weight to the use by the public of the routes; from access for coal and wine deliveries, access to the former boatyards for recreational boating, and the provision of seating and litter bins for public use.

7. COAL AND WINE TAX POST

7.1 The above 1992 document also refers (s. 2.4) to the coal and wine tax post dated 1861 situated by the river in the lane to the south of Monksbridge. It says the post “is an important reminder of the previous use of the river and marks the place where duty was payable for the movement of those goods. (s.2.12) states that “the old passageways.....alongside Monksbridge....which were used to bring goods to and from the river also form important elements of the character of the area. They still provide important pedestrian routes today.” The post is statutorily listed – “Three foot high post of 1861 with City of London shield.” It was repainted by the British Trust for Conservation Volunteers in September 1992.

7.2 As far as the Environment Agency is aware, no other landing place in Sunbury has one, nor ever had one. This implies that in the 1860s when these posts were set up all around the edge of London, this public landing place at Sunbury was a recognised entry point into the area for waterbourne goods. They believe the tax post is extremely strong evidence of the lane itself having been a public lane and an officially recognised transport route in the 1860s. Until recently there were some concrete bollards in place for a few decades just south of point E that would have prevented vehicular use for a while. It is not known who put them in or removed them. However any historical rights prior to the erection of the bollards would still exist.

8. PUBLIC BYWAY RIGHTS

8.1 Three people claim vehicular use of the routes. Mr Hayes (3) used them to access the rear of his property. He has already established a private vehicular right recorded in his deeds. Mr Hayes would not in any case have been using all the routes, which would not have included the two spurs to the river. Mr Watts (5) used a vehicle to gain access to his boat mooring and as access to the side gate of Monksbridge for deliveries. Mr Wills (6) used them as a vehicular access to Turks boatyard and as a through route.

8.2 Although the application is to record the routes as BOATs it is considered that there is insufficient evidence of vehicular use. Mr Hayes has already established a private right, leaving only two claimants. Had there been sufficient evidence then sections 66 and 67 of the Natural Environment and Rural Communities Act would have restricted the ability of the public to acquire and then record new public vehicular rights.

9. OPTIONS:

9.1 The Committee may agree or disagree with the officer’s recommendation that footpath 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. 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 **Annexe B**).

- 9.2 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.

10. CONSULTATIONS:

- 10.1 Spelthorne Borough Council, The Ramblers, Cyclists Touring Club (CTC), British Horse Society, Tim Evans (County Councillor), The Open Spaces Society, Richard Walsh (County Councillor) and Legal Services have all been consulted on the application.
- 10.2 Mr Meek of The Ramblers was unable to offer any relevant information about the history of the route. John Brooks, Head of Planning at Spelthorne Borough Council confirms the statements set out in the 1982 Enhancement Plan and what appears to be a very long established public access to the riverside via the two footpaths either side of what was the Turks boatyard site. In respect of the connecting 'roadway' between the two footpaths, the way through appears from maps to be long established but the Council is unable to verify whether a 'right' of public access exists. No other responses have been received.

11. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 11.1 The cost of advertising a Map Modification Order would be approximately £1,200, 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 £4,000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

12. EQUALITIES AND DIVERSITY IMPLICATIONS:

- 12.1 There are no equalities and diversity implications. In any event these are irrelevant factors under the current legislation.

13. LOCALISM:

- 13.1 The recording of public footpath rights on the DMS would safeguard the routes for the future providing valuable recreational access to the River Thames in accordance with Spelthorne BC Policy.

14. 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)	
Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	
Public Health	

15. HUMAN RIGHTS ACT 1988:

15.1 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 1988. Primary legislation, of which the WCA 1981 is an example, may require the County Council to act in a different 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 under Article 8 of the Convention, the right to a 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 described in **Annexe B** of this report. As such the recommendation to Members is not considered to be in breach of the Act.

16. CONCLUSION AND RECOMMENDATIONS:

16.1 Any decision 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 security, privacy, safety or convenience are irrelevant.

16.2 Under Section 53 of the WCA 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 not shown on the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates".

17. STATUTORY TEST

17.1 Section 31 of the Highways Act 1980 states that:

1) "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) The period of 20 years referred to in sub-section (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 by a notice...or otherwise."

Calling into question

17.2 It is necessary to establish under Section 31 when the public's use was first brought into question and whether sufficient time has passed (20 years) since any previous challenge. Section 31(7A) of the HA 1980 provides that an application made under Schedule 14 of the WCA 1981 can be taken as a

‘calling into question’. In this instance the 20-year period must rely on the making of the Schedule 14 application by Mr Wills on 30 March 2012. The period in question therefore is 1992 – 2012.

- 17.3 Mr and Mrs Sheppard who owned the section B – E for 10 years have stated that they turned away vehicles attempting to drive through but did not prevent walkers. It appears there have not been any other attempts by landowners during the relevant 20-year period to prevent public footpath use.

Public use

- 17.4 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a sufficient “number of people who together may sensibly be taken to represent the people as a whole/ the community in general¹”. It is not necessary for all, or indeed any, of the claimants to have used the route for the whole 20 year period but the cumulative effect must be considered. In this instance all six claimants used the route for the whole of the 20 year period. This level of use during this 20 year period meets the statutory test, therefore raising the presumption that the routes had been dedicated as public footpaths.

Use ‘As of Right’ or ‘By Right’

- 17.5 Under the legislation use of the way must have been ‘as of right’, which means without force, secrecy or licence. It is not necessary for the user to have a belief that their use is ‘as of right’. Mr Hayes of 10 Thames Street is the only claimant using the route to access the rear of his house on foot and in a motor vehicle. He states that he has a private right in his deeds to use the roadway. However, he states that he also used the route for leisure purposes. When exercising a private right that use may not have been public but with permission (i.e. by right). Mr Wills used the route to access his boat mooring. Others would have driven and parked to access the Turks Boatyard to hire boats and were therefore there by permission of the landowner.
- 17.6 There appears to be nothing within the Highways Act 1980, case law or Government guidance which supports the conclusion that use by those who are accessing adjacent properties are necessarily exercising private rights (‘by right’). That said, it is accepted that, if any of those properties can be explicitly shown to have the benefit of a private right over the claimed route then none of the use associated with that property would be ‘as of right’.
- 17.7 In the circumstances it has been concluded that there is insufficient evidence for use in motorised vehicles or on bicycles to give rise to the acquisition of public byway rights. However, it is considered that public footpath rights have been acquired by virtue of section 31 of the HA 1980 and at common law (see below). A legal order should be made to add the routes shown on Drawing no. 3/1/86/H16 to the DMS.

¹ Paragraph 5.12 Planning Inspectorate’s Definitive Map Orders: Consistency Guidelines. April 2003.

Lack of intention to dedicate

17.8 A sign saying 'Private No Through Road Access Only' has been at the entrance to the boathouse for approximately 10 years. Mr and Mrs Sheppard bought all of the former boatyard area of land next to the river ten years ago, including the majority of the middle section of the track. It is not known when the sign was first put up but it was in place when they purchased the land. The wording of it is in any case unclear and would suggest that it relates to access by motor vehicles and not those on foot. Mr Sheppard has confirmed that he has never turned anybody away walking through, but had turned away vehicles. Mr and Mrs Sheppard said it was nice for people with dogs and kids on bikes to be able to walk through and access the river. They claim that at one stage it became a bit of a rat run for vehicles if the traffic was slow on Thames Street. Mr Sheppard had filled in pot holes over the years but left a telegraph pole in situ jutting out to try and discourage public vehicular use. Originally there had been no vehicular access to the back of properties in Thames Street but over the years private rights of access have been established and recorded in the property deeds.

18 COMMON LAW

18.1 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.

18.2 The historical use of the tracks by pedestrians to access the river for recreational purposes would have given rise to common law dedication. In addition the placing of the coal and wine tax post in the 1860's would suggest public access for commercial purposes. When The Conservators sold the land in 1967 they stated that "it would appear that the public have acquired certain rights over the land..." (see s.4.3 above).

18.3 Therefore notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, the County Council would also submit that, taken together, the facts imply that the landowners have been willing to dedicate the route as a public right of way.

19. CONCLUSIONS

19.1 In light of the above, it is the officer's view that pedestrian rights have been acquired over the routes under section 31 of the Highways Act 1980. Notwithstanding this, it is also argued that rights have also been acquired at common law.

19.2 This being the case the officer would submit that it can be reasonably alleged that rights have been acquired and that the routes should be recorded on the Definitive Map and Statement for Surrey as public footpaths.

20. WHAT HAPPENS NEXT:

- 20.1 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.
- 20.2 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.
- 20.3 If the Committee resolution is different to the officer's recommendation the reasons and evidence for the decision should be recorded. This will explain the Council's actions should the matter proceed to Public Inquiry or appeal.
- 20.4 All interested parties will be informed about the decision.

Lead Officer

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Contact Officer:

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Consulted:

See Section 10.

Annexes:

- A Drawing No. 3/1/86/H16
- B Legal background
- C User evidence summary

Sources/background papers:

File 'CP550' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.

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