

**SURREY COUNTY COUNCIL****LOCAL COMMITTEE (ELMBRIDGE)****DATE:** 7 December 2015**LEAD****OFFICER:** DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER**SUBJECT:** ALLEGED PUBLIC RESTRICTED BYWAY ALONG  
TURNERS LANE AND PART OF BURHILL ROAD,  
WALTON AND WEYBRIDGE**DIVISION:** HERSHAM**SUMMARY OF ISSUE:**

Mr Douglas Williams submitted an application for a Map Modification Order (MMO) to add a public restricted byway to the Surrey County Council Definitive Map and Statement (DMS) along Turners Lane and part of Burhill Road, Walton and Weybridge.

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

**RECOMMENDATIONS:**

The Elmbridge Local Committee is asked to agree that:

- i. Public restricted byway rights are recognised over the routes A-B-C (Turners Lane) and C-D (Burhill Road) on Drawings Nos. 3/1/78/H22 and H23 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 public restricted byway is approved. The routes will be known collectively as Public Restricted Byway No. 41 (Walton and Weybridge).
- 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 both user and historic evidence submitted

by users and adjacent landowners, it is considered there is sufficient evidence for the order to be made on the basis that it can be reasonably alleged.

It is deemed that full public vehicular highway rights came into existence by virtue of section 36(5)(a) of the Highways Act 1980 sometime prior to 1835. It is then deemed that the Mechanically Propelled Vehicular (MPV) element of these rights were not saved from extinguishment by section 67(1) of the Natural Environment and Rural Communities Act 2006 by any of the exceptions outlined in s. 67(2) or (3) of the act. The Council should therefore record a restricted byway on the DMS.

## **1. INTRODUCTION AND BACKGROUND:**

- 1.1 The County Council received an application, dated 6 February 2012, from Mr Douglas Williams under the provisions of the WCA 1981 for a MMO to modify the definitive map and statement by the addition of a public restricted byway along Turners Lane and part of Burhill Road, Hersham. 22 user evidence forms accompanied the application, with 2 additional forms received during 2013. For legal background see Annex A to this report.
- 1.2 The claimed route is located to the south-east of Hersham as shown on Drawings Nos. 3/1/78/H22 and H23 (**Annex C**). It commences at point A on Burwood Road opposite no. 86/88 and precedes in a south-south-easterly direction for 753 metres past point B to point C its junction with Burhill Road. It then turns in a mostly north-easterly direction along Burhill Road for 738 metres to point D to the north of 'no. 1, Sylvan' and its junction with the access road to Southwood Manor Farm. 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 available along its entire length but has (in part) changed significantly in character since the application was received in 2012.

## **2. ANALYSIS:**

### LEGAL 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.

Alternatively, documentary or historical sources may be sufficient evidence to show that the map should be modified<sup>1</sup>.

## PUBLIC USER EVIDENCE FOR THE ROUTE

2.2 24 user evidence forms were submitted with this application spanning a period of over 72 years from early 1941<sup>2</sup> to mid 2013. Officers interviewed ten of these claimants.

2.3 The mode of use varied considerably with use on foot, on horseback by bicycle and in a motorised vehicle. Individual frequency of use varied as follows:

	Min (per year)	Max (per year)
On foot	3-6 (22) <sup>3</sup>	500 (17)
On horseback	100 (19)	100 (19)
By bicycle	2-3 (2)	50+ (9)
In an MPV	1-2 (2)	250 (23- in part)

2.4 All respondents had used the way on foot, three on horseback<sup>4</sup>, 12 on a bicycle<sup>5</sup> and 12 in a mechanically propelled vehicle (MPV)<sup>6</sup>. Of those the following had used it for a period of 20 years or greater:

18 on foot<sup>7</sup>  
 2 on horseback<sup>8</sup>  
 5 by bicycle<sup>9</sup>  
 6 in a MPV<sup>10</sup>

The majority of user evidence forms indicate pedestrian use. This is supported by comments made by those who were interviewed:

*“Cars do occasionally go down there by accident as a result of their sat-navs, but access to the golf course is certainly better the other way”.* (8)

Bar charts summarising the evidence can be seen at Annex B and Bi.

2.5 The evidence forms suggest that the route was used for walking, dog walking and exercise, as an alternative access to facilities and shops in the village, for cycling off the main road, to access the golf course, to visit

<sup>1</sup> A legal background to Map Modification Orders is attached at **Annex A**

<sup>2</sup> User no. 24 indicates use since 1930 on her form, but a subsequent interview reveals that she had not used it until 1956 and that use since 1930 had been by her father.

<sup>3</sup> Throughout this report, each user has a number appearing in brackets and can be related to the bar chart at annex C.

<sup>4</sup> Users 12, 18 and 19.

<sup>5</sup> Users 2, 3, 6-9, 12, 13, 17, 19, 20, 24

<sup>6</sup> Users 1-3, 13-17, 19, 20, 23, 24.

<sup>7</sup> Users 4, 5, 8-11, 13-22, 24

<sup>8</sup> User 12, 17,

<sup>9</sup> Users 8, 9, 12, 17, 24

<sup>10</sup> Users 13-17, 24

friends, the stables and to the greyhound kennels. Many of these users lived locally, such as along Burwood Road. Comments on use include:

- *“The road was used by groups of Brownies, guides and cubs”. “*
- *“My sister had a horse down there from about the age of 8”*
- *“We also used it to take old newspapers down to the kennels”.*
- *“We also went down to the strawberry fields and the farm where you could get apples, plums and Christmas trees”. (13)*
  
- *“My main reason for walking the route is with the dogs. Over 30 of my walking years have been with them”. (17)*
  
- *“We used the path to walk around or look for bird’s nests as kids”. (8)*

2.6 All users claim to have used it openly and that it has always followed the same route. They note that historically it has been partially surfaced at the northern end of Turners Lane but that the rest of the claimed route was a rough rural lane, largely unmade often potholed with some hardcore laid down. It was deemed barely suitable for vehicles, although it was acknowledged that vehicles did use it. It was described as having a width of between 6 and 15 feet. Most guessed a width of about 10 feet; with others indicating that it was in parts only wide enough for a single vehicle. 13<sup>11</sup> of the users remember seeing a gate at some time, although it is clear that they are sometimes referring to gate leading off the route rather than across it. Mr Laney summed up the surface in the following way:

*“I don’t know when the top part of the road was concreted, although I can say they have never done any maintenance on it since I have known it. It has always been like that. As a child however it was rough all the way down”. (8)*

A number of users do refer to a gate across the route which was placed there sometime during 2011 near Burhill Kennels where the unmetalled section began but which was removed shortly thereafter. Mr Williams (17) suggested that this was:

*“...put in by Pidgeley<sup>12</sup> on 27 September 2011. I spoke to the workmen who put it in. They stated that he had said it was private land. I told them it was not. I have been told that Burhill Golf Course took action to get it removed”.*

This was supported by Mrs Dubarbier (24) in her statement. She also noted that:

*“you could still walk around the gate which may have been put there to prevent fly-tipping. This gate was locked at night for a period”.*

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<sup>11</sup> Users 1, 2, 4, 5, 8-14, 17, 18

<sup>12</sup> Long term resident of Burhill Road.

Mr and Mrs Patel (10, 11) stated:

*“There was a gate on the road quite briefly and I think you can still see two posts by the garage at the start of the concrete”.*

No other obstructions were seen.

- 2.7 Eight users<sup>13</sup> record that they had seen notices. Mr and Mrs Foster (4, 5) noted signs saying *“Dog Walkers Prohibited”* and *“No entry to Burhill Golf Course. On gate- since removed”*<sup>14</sup>. The latter was also confirmed by Mr and Mrs Patel (10, 11) in their statement. Mr Laney (8) stated that *“there have never been any notices saying either public or private”*.
- 2.8 Ms McEllsitrin and Mrs Dubarbier (23, 24) admitted that they worked on land adjacent to the track, although not necessarily for the landowner. Mr and Mrs Foster (4, 5) stated that they had met the landowner; although they went on to interpret this as Mr Pidgely who was resident at the end of Turners Lane. Six of the users admitted to having delivered items along the road at some time<sup>15</sup>.
- 2.9 Mr Duhig commented on this application but completed no form. He believed the route was a BOAT and had ‘driven down it a lot between 1985 and 1995 as it was a nice local lane without risk of damage no matter what the weather’.

## LANDOWNERSHIP EVIDENCE

2.10 The Land Registry records that the entirety of the land over which the claimed route runs is unregistered. No documents have been uncovered to confirm conclusively who owns this land. The land on both sides is however registered to several different landowners. Those who have commented are discussed below.

### 2.11 BURHILL

1. Of these, Burhill Golf and Leisure Ltd (BGL) and Burhill Developments Ltd (BDL)<sup>16</sup> object to the application to record the A-D as a restricted byway. They have made substantial submissions on the matter of both the highway status of the land and its ownership. They have urged Surrey County Council to find that public rights of way for mechanically propelled vehicles (MPVs) subsist along Turners Lane. Burhill’s headline submissions are summarised as follows:

<sup>13</sup> Users 4, 5, 8-10

<sup>14</sup> Photographic evidence is held of this from 2011.

<sup>15</sup> Users 1, 2, 8, 9, 23, 24.

<sup>16</sup> To be known cumulatively as ‘Burhill’.

- i. Turners Lane (then known as Mudtown Lane) was dedicated at common law as a carriageway in the 19<sup>th</sup> century; likewise, that part of Burhill Road that is the subject of the Application. Further or alternatively, public rights of way over for MPVs were dedicated at common law over at least Turners Lane before 1 December 1930 (i.e. when the Road Traffic Act 1930 came into force).
- ii. On 1 May 2006, Part 6 of the Natural Environment and Rural Communities Act (“NERCA”) 2006 came into operation with the following effects. All public rights of way for MPVs in England and Wales were momentarily extinguished on 1 May 2006: those over Turners Lane and Burhill Road cannot have been excepted. However, those public rights for MPVs were saved from extinguishment by operation of s. 67(2) NERCA 2006 as follows:
  - iii. Section 67(2)(b): Burhill Road from Burwood Road south to the turning to Southwood Manor Farm was according to SCC’s Highways Department, shown immediately before 1 May 2006 on the list required by SCC to be kept under s. 36(6) Highways Act (“HA”) 1980 (i.e. the list of highways maintainable at the public expense).
  - iv. Section 67(2)(e): a public right of way for MPVs, created by implied dedication at common law before 1 December 1930, subsists from Burwood Road, south along Turners Lane for its entire length to the junction with Burhill Road.
  - v. Section 67(2)(a): further or alternatively.... the main use by the public of Turners Lane, south of Burwood Road to its junction with Burhill Road, for the period of 5 years from 2 May 2001 to 1 May 2006 with MPVs.
  - vi. Further, Turners Lane is, by operation of s. 38 HA 1959 (now repealed) and s. 36(1) HA 1980, publically maintainable: ie. maintainable by SCC.
2. They support these key assertions with documentary witness evidence. Their key argument, is that Turners Lane was already a public carriageway by the beginning of the 19th century and that it has been used as such ever since. The documentary evidence submitted by Burhill will be considered under ‘HISTORIC EVIDENCE’ and NERCA will be considered in the conclusions.
3. Burhill assert that use of Turners Lane and Burhill Road with MPVs was consistent with common law dedication of rights for MPVs before 1 December 1930 for the following reasons:
  - They were both available for use as such with destinations making such use very probable: a members Golf Club, whose members

were undoubtedly high net-worth individuals; and farms, needing to transport produce.

- Burhill Golf Club's acquisition of MPVs to ferry members to and from Walton-on-Thames railway station, apparently prior to World War I.
  - The clear concern of Burhill Golf Club and Lord Iveagh/the Burhill Estate for the maintenance of, in particular, Turners Lane from before World War I.
4. Burhill submitted eleven witness<sup>17</sup> statements gathered to provide additional background to the history and use of the routes. They stress that the overwhelming response in their witness statements to the question "what was the main type of use of Turners Lane from May 2001 to May 2006?" was "MPVs". They also submit that this use was 'clearly of a public nature, consistent with dedication as a carriageway by the early 19<sup>th</sup> century and/or dedication of public rights for MPVs before 1 December 1930'. The following is a summary of the key points raised by these witnesses.
5. The witnesses indicate use or knowledge of the route since 1928-9<sup>18</sup> up to the present day with 6 indicating more than 40 years of use. The nature of their use was variable in terms of years, type of use and the length of the claimed routes used. The following is a summary of their key points.

#### Period of use:

*"I first went down Turners Lane as a boy- about 8 or 9 years old. In 1935 I started to work on the land as an employee..... I first went through Burhill Golf Course when I was about 16 or 17 years old"* (w1).

*"I bought the land to the south of...Turners Lane in the 1960s and have lived here ever since. In that time I have used Turners Lane daily, mainly by car".* (w1).

*"From when I was 7 or 8 years old until I was about 12 years old, Mud Town, at the southern end of Turners Lane, was like a playground for my friends and me: we used to play there a lot".* (w2).

*"From 1947 to 1953 I worked (?) for during my summer holidays with my brother at Riverside Farm, Hersham, which is off Burhill Road..".* (w2).

*"I first used Turners Lane in the 1960s. From 1974 to 2014, I have used Turners Lane to get to (my land) by car twice daily every day... to look after horses and donkeys, usually with my daughter.* (w3).

*"My daughter Nicole Bates, who is now 35 years old and I have been driving up and down Turners Lane from the Burwood Road at least twice daily to look after our horses since about 1990".* (w4).

<sup>17</sup> Although Statutory declaration no. 6 submitted by Wally Keet was referring to a section of Burhill Road not subject to the application made by Mr Williams.

<sup>18</sup> See Annex Bii.

## ITEM 10

*"In about 1941, when I was seven years old and at school, I started to use Turners Lane regularly". (w8).*

Nature of use and status:

*"I always thought of Turners Lane as a public road. It was open at both ends. It was used regularly by a lot of people: Golfers...Service vehicles...postmen...employees of golf club (mainly on foot or bike)...employees of farmers... Residents of Mud Town... People visiting kennels.... people visiting cemetery". (w1)*

*"...there was a period during, I believe the 1990s, when you could not get into Burhill Golf Club from Turners Lane and Burhill Road because that entrance had become overgrown". (w1)*

*"In the past 30 years or so most of the people using Turners Lane have done so in vehicles – more and more so as the years have gone on". (w1)*

*"...a number of other people used Turners Lane in cars, vans or trucks to get to (my land): Vets, feed lorries, farriers, slaughtermen...". (w3)*

*"... my observation is that the main use of Turners Lane has, however been with cars and other motor vehicles: that has been the case since 1974. (w3)*

*"There are a number of other yards along Turners Lane: at least five on the west side alone and one on the east side. Although mine is probably the busiest, there are a lot of people in vehicles going to and fro ...". (w4)*

*"Since I have rented (my land), my daughter and I have not ridden our horses along Turners Lane as frequently as we did in the 1990s: the road has become much busier" (w4).*

*"Since before 2000, I have seen many more people regularly using Turners Lane in cars and other motor vehicles than I have seen people using it on foot or on horseback. The main use is with motor vehicles". (w4)*

*"On an average day (between late 1990s and 2006 and post 2008) I get between three and ten people driving to my business with their cars for work to be done. The majority appear to come down Turners Lane from the Burwood Road direction. I also get deliveries to parts of the business by suppliers in vans and, two or three times a year, waste oil is collected with a big tanker". (w5)*

*"I look after some of the vehicles used by the greyhound trainers and am aware of quite a number of vehicles using Turners Lane to get to and from the greyhound kennels". (w5)*

*"The main use of Turners Lane that I have seen in the periods 1998/9-2006 and 2008 to date is with cars and vans". (w5)*

*"The main use of Turners Lane is by people driving cars and other motor vehicles. I do see local people walking their dogs, mainly at weekends, but there are not that many of them". (w7)*

*“During the 1940s, there were fewer motor vehicles using Turners Lane than later in the Twentieth century, but there were frequently vehicles going to and fro”.*

Condition of route:

*“In the 1940s, Turners Lane was muddy and rough. There were lots of potholes, but you could easily drive a car or a motorbike up or down there”. (w2)*

*“In the 1970s, Turners Lane was in regular use as a rear entrance to Burhill Golf Club- principally as the service entrance...”. (w8)*

*“From the 1970s, there have been about 50-80 horses kept in the paddocks around Turners Lane and Burhill Road. Then as now you have people going down Turners Lane, usually twice a day and mostly in cars..... security around Turners Lane has been terrible for the last 30 years: you cannot leave expensive kit like saddles, trailers, generators etc. Down there, so you end up driving (them) down in the car”. (w8)*

*“ have tried for completeness to list all the types of users that I have seen driving from Burwood Lane along Turners Lane in the period 1970-2012....: foreign lorries directed by satnavs; to and from Burhill Golf course, the Greyhound Kennels, Wimbledon Greyhound Welfare, Burvale Cemetery, TJ Autos, all other businesses; homeowners and visitors; use by public authorities and utilities”. (w8)*

6. These statements indicate a varied and consistent use since the 1940 in MPVs and suggest that this use has relatively speaking increased in importance to the present date. It also suggests that most of, if not all of this use is to visit adjacent land either as an owner/occupier or by some other form of invitation or permission.
7. In later legal submissions Burhill argued that public rights to use the routes pre-dated any of the recorded private rights. Therefore later subsequent use in mechanically propelled vehicles must all be classified as ‘public user’. The importance of this with regard to the five years preceding May 2006 will also be discussed in the conclusions.

## 2.12 OTHER FRONTAGERS

1. ‘Wimbledon Greyhound Welfare’ own land and kennels adjacent to Turners Lane. They had no information regarding ownership of the road, but did note that it was used by local people for leisure; dog walkers, horse riders, families with pushchairs or with young children on their push bikes and people just out for a stroll.
2. Mr Hussey of Riverside Farm had lived at the property for 50 years. The northern boundary of their land forms a short part of the southern edge of Burhill Road.
3. Mr and Mrs Gibbons own land fronting onto Turners Lane. They confirmed that Turners Lane had never been maintained by the local

authority and that it was recently resurfaced by Burhill Golf Course. They did not know who owned the road.

4. Norah McEllistram works at 5 Burhill Kennels. She noted that the natural track had been tarmacked with speed bumps and much vegetation cut down, along with infilling of the drainage ditch. Turners Lane has long been used for recreational purposes like walking, horse riding or cycling without fear of traffic. She had been there 60 years.
5. Elmbridge Borough Council own the cemetery that fronts onto Turners Lane but said that the claim would not affect them.
6. The witness statements submitted by Burhill include comments from various other frontagers which are discussed in 2.11 above.

## DEFINITIVE MAPS

2.13 The claimed route is visible as a 'feature' on the base sheet 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. There is no evidence to suggest that it has been put forward previously for inclusion on the definitive maps. They were not shown as rights of way on a map produced by Walton and Weybridge Urban District Council in 1938 under the 1932 Rights of Way Act.

## HISTORIC EVIDENCE<sup>19</sup>

2.14 *Historic maps and guides:* Part of the claimed route C-D is visible on historic maps from Senex (1729), Bowen (1749), Roques (1770), and Lindley Crosley (1793), although section A-C is less clear. The entirety of the claimed routes may appear on their current lines on maps produced by the by Faden (Late 1700s), Andrews (1777) Ordnance Survey (1811), Mudge (1816) and Greenwood (1823). The routes appear similar to other surrounding routes. The key to the Greenwoods map records the routes as 'CrossRoads'. The map by George Philip and Son of 1861 appears to show Burhill Road continuing through Burhill Estate but Turners Lane is not shown.

2.15 In Cary's Actual Survey of the Country Fifteen Miles Round London of 1786 and 1817, Burhill Road is clearly visible running from Hersham to towards Wisley, via Mount Latton. This is described as a road (open). The map also shows a route following a very similar line to that now followed by Turners Lane. In *Paterson's roads* by E. Mogg there is no direct reference to either route but properties lying alongside Burhill Road are referred to in the side notes in the descriptions for 'London to Chertsey'. *Edward Rydes Plan of the Parish of Walton on Thames* show the routes coloured in the same fashion as most other roads in the area. A Map produced circa 1700s of a land holding of Thomas Cooper clearly shows

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<sup>19</sup> See complete timeline of evidence At Annex D

Burhill Road on its current line and continuing west through the Burhill Estate. The land to its north is recorded as Hersham Common.

- 2.16 These maps and guides were largely produced for and sold to the public. The presumption might be then that all roads shown on these maps would mainly have been open to the public.
- 2.17 *Inclosure Award and map*: The entirety of both Turners Lane and Burhill Lane are shown on the map accompanying the Walton-on-Thames Inclosure Maps dated 1802 and 18 December 1804, as is Burwood Road. They are all coloured yellow to identify them as roads although there appears to be no distinction between public and private roads.
- 2.18 Although Burwood Road is specifically laid out as public in the award, the same is not true of either Turners Lane or Burhill Road; nor were private rights laid out along them. Turners Lane is referred to as 'road' in consequence of determining the extent of some of its adjacent allotments. This does not distinguish between public or private rights. This might suggest that those landowners requiring access already possessed private rights to their land or that public rights already existed. Overall this evidence is deemed neutral.
- 2.19 *Ordnance Survey Maps*: The routes appear clearly on 1:2500 Ordnance Survey maps from 1877, 1888, 1914, 1933 and 1959. On the 1877 and 1888 map A-D is shown by parallel solid lines enclosing parallel pecked lines- probably indicating a fenced route within which there is a clear demarcation between beaten track and verge. There is little development alongside the route; except for a few buildings at Mud Town. A-C is not named but C-D is labelled Bakerlee Lane. In 1914 A-C is labelled Mud Town Lane and C-D is labelled Burhill Road. By 1933 there are further buildings most (such as 'Burhill Kennels') between A-B. There is little change by 1959 although A-C is now labelled Turner's Lane. No conclusions regarding status can be drawn from these maps.
- 2.20 *Ordnance Survey Book of Reference*: The Ordnance Survey produced books of reference to the plans appearing on their first edition maps. The book for the Parish of Walton-Upon-Thames dated 1868 records the claimed route as plot Nos. 894 and 930. These are described as 'private roads'. In contrast the upper part of Burhill Road (919) and Burwood Road (755) are listed as 'public roads'. As part of the process of compiling these books the Ordnance Survey consulted local highway authorities and so this can be considered relevant if not conclusive evidence.
- 2.21 *Tithe Records 1843*: None of the claimed route A-D is shown on the Plan of Titheable Lands in the Parish of Walton on Thames contrary to the assertion made in the Burhill submission. No conclusions can be drawn from it.

2.22 *Ordnance Survey Object Name Books*: The Ordnance Survey also produced 'Name Books' which listed and described features which appeared on their maps. These were first collected in June 1912 and revised in 1932. The routes are listed as follows:

- Mud Town Lane (A-C) is described as a 'public lane extending from Burwood Road to Burhill Road.

And

- Burhill Road (formerly Bakerlee Lane) is described as a "public road extending from Burwood Road at Hersham Church to Burhill".

The authority for the spelling and status of both was obtained from 'R. Wilds', Civil Engineer and Surveyor for the Urban District Council who lived on Kings Road a little over a mile away. His status was confirmed by the 1911 Census. This is deemed to be convincing evidence of what its status was considered to be at the time.

2.23 *Finance Act 1910*: On the mapping produced for the 1910 Valuation Act the land over which the claimed way runs appeared uncoloured along its entire length indicating that it was not subject to tax and therefore presumed to be a public highway (of some kind) by the Inspector of Taxes. No indication of landownership is made although the land on the east side of Turners Lane is all owned by Lord Iveagh as is most of that on the west side. This is good but not conclusive evidence of the existence of public rights and may be considered as "simply one part of the jigsaw puzzle" to be considered with other relevant material particular to each case<sup>20</sup>.

2.24 The line A-D is clearly visible on *aerial photographs* from 1948, 1971, 1988, 1998/9 and 2006. It is largely lined by large hedgerow trees. Nothing about its status can be obtained from these photographs. *Site photos* from 2004, 2011, 2012 and 2013 show how the routes have changed significantly. Until 2012 a sign was visible at the entrance to Turners Lane saying "No access to Burhill Golf Club- Access of Burwood Road". A photo from 2005 shows a gate at the entrance to South Lodge Road and a little worn road, indicating that this entrance was little used at this time.

2.25 *Estate Plans*: That of Burhill Estate produced for an auction sale in 1849 shows a very small section of both Turners lane and Burhill Road. Later plans of 1905 and 1927 show the entirety of the claimed routes. In all cases they are uncoloured in their entirety, indicating that they were considered outside of the ownership of the estate. The same can also be said about the plan of the Burwood Park Estate (1876). No conclusions about status can be drawn from these plans.

2.26 *Private memorandums/correspondence*: The Draft Memorandum of Agreement between Viscount Iveagh and the Provisional Committee of

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<sup>20</sup> Paragraph 78 of *Fortune & Ors v Wiltshire County Council* [2012] EWCA Civ 334 (AS/18(a)).

the Burhill Golf Club (undated) refers to a “*proposed new footbridge to be thrown over Mole.... near the end of the private lane leading from Mudtown and Bakerlee Lanes*”. This might infer that the latter two lanes were considered public, but a later Memorandum of 1908 regarding the Joint Maintenance of Burhill Park Roads and Approaches, discusses their joint obligation “*to maintain between them the private roads leading to and through Burhill Park*”. There is no evidence here then that they were considered public. On the contrary it is clear that Burhill considered themselves to have a private obligation of maintenance. In 1925 correspondence between the Golf Club and a Colonel Addison noted that Mud Town Lane required urgent repairs and these were subsequently done and paid for by the Golf Club; suggesting once again that the Golf Club at least considered the roads private at this time.

2.27 *Conveyances*: Various conveyances between Earl of Iveagh and George Martin Chevau (1919) included the granting of various rights:

*“Together with the full right of passage of all persons, carriages and animals to and from the said pieces and parcels of land over the said roads called Mud Town Lane and Burhill Road.... The Purchaser will contribute and pay to the vendor one half of all expenditure which the Vendor may in his discretion from time to time incur or make in maintaining repairing and cleansing or making up Mud Town Lane which runs outside the western boundary of the property or until the same shall be taken over by the Local Authority and also will similarly contribute and pay a proportion of the expenses of maintaining, repairing and cleansing or making up Burhill Road such proportion to be apportioned to the frontage of the said piece of land to that Road and the Purchaser shall bear the whole cost of repairs and damage to the said roads which may have or may be caused by the use thereof by the Purchaser for the purposes of other than ordinary light traffic”.*

This suggests that the road was then not being publically maintained and that maintenance was clearly an issue. The conveyances across three titles applied to much of the land on the eastern side of Turners Lane. It is not wholly clear however whether the Earl of Iveagh had the capacity to make such a grant given that the land over which these roads run does not appear to fall within his estate other than by ‘assumption’ as adjacent landowner.

2.28A conveyance from Earl of Iveagh to the Burhill Estates Company Ltd was made in 1926. Burhill argues that this was to be expressed with the benefit of the 1919 covenant from Mr Chevau to contribute towards the maintenance of Turners Lane and Burhill Road, in return for the granting of a right of way. It goes on to say that this should occur “*until the same should be taken over by the Local Authority*”. This latter phrase indicates that the route was not considered publicly maintainable and therefore most likely private.

2.29A conveyance of 1929 between Burhill Estates Company Ltd (Vendor) and George Brotchie granted similar rights to the purchaser and heirs,

tenants, servants and others authorised by him. These documents underlie the uncertainty regarding its public status.

2.30A plan of the Walton and Weybridge, Burvale Cemetery (1936) does not distinguish between Burwood Road and Turners Lane and the plan shows that access could be had from both roads. It is not clear which entrance was for the public or which was for service access. The tracks and paths within the cemetery are also shown uncoloured. It is not known whether those working at or using the Cemetery were exercising a private right of way.

2.31A plan of a proposed caravan site (1955) to the west of Turners Lane shows access via Turners Lane. No conclusions can be drawn from this. It is common for such developments and planning applications to be proposed and considered where there is no existing access. This is also on land owned by the Urban District Council and thus may be subject to existing private rights.

2.32 *Histories of Hersham: Greenwood* (1966)<sup>21</sup> noted that by 1804 the whole area was replanned and the new allocations became law following the Inclosure Award of 1800-1804. This included the laying down of Burwood Road and the various access roads off it, such as Turners Lane and the realignment of Burhill Road. He suggests that Turners Lane was formerly called Moor Lane and roughly marks the western edge of the old Hersham Common whilst Burhill Road follows the course of the old road to Cobham along the edge of what used to be Hersham Common. No explanation is given regarding the omission of Turners Lane or Burhill Road from the Inclosure Award text.

2.33A *History of Burhill Golf Course*<sup>22</sup> outlines that Turners Lane was used for access to the Golf Club in past years. The reason given for this was that the approach road was not wide enough for two-way traffic. A one-way through system prevailed where departing vehicles then left on the existing main drive to Burwood Road. This confirms again that the route has been used as an 'access' to private land by invitation.

## PLANNING ISSUES

2.34 Whilst not directly relevant to this decision it may be useful for committee to be aware that retrospective planning permission was granted to Burhill Developments Limited for a 'pedestrian footpath along the west side of Turners Lane, vehicles crossing points, wooden bollards (120mm in diameter and 800mm above ground) set at various points to the west and east of Turners Lane and associated drainage works'. This was approved on 2 May 2014. This followed the substantial clearance, drainage works and surfacing undertaken by Burhill during early 2013. This has substantially changed the character of the southern half of Turners Lane,

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<sup>21</sup> Greenwood, G. B. (1966) *Notes towards a history of Hersham*. Walton & Weybridge Local History Society. p. 4, 19 and 23.

<sup>22</sup> *History of Burhill Golf Club*, chapter two, p. 75. Date and author unknown.

which was previously a much narrower dirt or roughly metalled track, which would have been much less appealing to vehicular traffic.

2.35A more recent planning application (2015) for a storage depot on land east of Turners Lane attracted 17 objections. One significant theme running throughout most of these is the conflict that increased vehicular use might have with the existing large numbers of pedestrians, cyclists and horse riders.

### 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 must be made on the basis of the evidence available. The recommendation is based upon the evidence discovered 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:

The following parties were consulted as part of this investigation and their responses summarised.

Margaret Hicks- County Councillor	Supported the application and said she had personally been walking dogs on the roads for over 24 years.
Elmbridge Borough Council	Confirmed that the application would not affect them. They have also confirmed that this road has never been scheduled for street cleaning by them. Elmbridge also own land fronting onto Turners Lane.
Rodney Whittaker (Ramblers)	He noted that the routes appear on old maps since at least 1877 and that they had probably been used by a substantial number of farm workers and others on a daily basis. In conclusion there was good evidence that public rights have existed over the whole of the claimed route for over a century.
British Horse Society	Jane Miller the local representative noted that she supported the application and had ridden the route several times in the 1980s. It was an important route for horseriders.
Open Spaces Society, CTC	No responses received.

Hersham Residents Association	The HRA supported the application to establish and secure this as a public right of way. The 'U' shaped tour is popular and well established route for walkers, cyclists and an amenity for local people. There are concerns that the character of the area could be changed if the route is more intensively used as an exit from Burhill Estate.
Transport Development Planning (SCC)	At the time of consultation (April 2014) TDP had no comments or information to add with regards to the planning history of the road
Highways Information Team	They confirm that Turners Lane and the claimed section of Burhill Road are considered private roads over which the nature and extent of highway rights, if any, are unproven. This was confirmed to Burhill Golf and Leisure Limited directly following enquiry regarding the status of Turners Lane from them in 2007. This advice was made without prejudice to the finding of the current investigations.

#### **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 £4,000 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.

Any future maintenance costs will be subject to the status decided and the typical traffic which would be likely to use it. These would be met from the Countryside Access Maintenance budget

#### **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.

<b>8. OTHER IMPLICATIONS:</b>
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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	

#### HUMAN RIGHTS ACT 1998

Local Authorities are required to act to uphold European Convention rights which are 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 9.2-9.7 and Annex A of this report. As such the recommendation to the Members is not considered to be in breach of the 1998 Act.

<b>9. CONCLUSION AND RECOMMENDATIONS:</b>
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9.1 A decision on this claim must be made on the legal basis set out in Annex A and that below.. The only relevant consideration is whether the evidence is sufficient to raise a presumption that public rights exist. It is then a matter of deciding what kind of right exists. 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) show 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 Both user and documentary evidence must be considered in this case to come to a conclusion. The user can be considered at both statute and common law.

#### USER EVIDENCE

9.4 **Statute Law:** 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 been actually 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. It is necessary to distinguish between different types of use for the purposes of identifying the relevant date.

9.6 *Date of challenge:* It does not appear that there was any clear challenge to public use by a landowner or anyone acting on their behalf prior to the making of the Schedule 14 application on 6<sup>th</sup> February 2012. This must be the date of calling into challenge of all types of user<sup>23</sup>. The gate erected for a short period during 2011 prevented use in an MPV during the night, but did not prevent other forms of use. It was not in place for long and was not seen by all users. It did not appear to have been erected for the purposes of challenging use, but probably as a means to improve the security of an adjacent landowner. The 20 year period is therefore 1992-2012. From the user evidence forms, 17 users on foot, 2 on horseback, 4 on bicycle and 6 in an MPV had used the route the whole of this 20 year period. An additional 7 pedestrians, 1 equestrian, 7 cyclists and 6 MPV drivers had used it for some of this period. All 24 user evidence forms therefore contribute relevant evidence. The 11 witness statements also contribute towards the body of ‘user’, both directly and by inference. This would normally be sufficient evidence to reasonably allege that MPV rights had come into existence between 1992 and 2012 under statute law.

9.7 **Common law:** 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. Evidence of public use can be used to demonstrate both of these requirements. Unlike section 31 there is no minimum period of use that

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<sup>23</sup> *Natural Environment and Rural Communities Act 2006. Section 67(6) added as 31(7A) of the Highways Act 1980.* For the purposes of section (3) an application under s. 53 of the WCA 1981 is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.

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.

- 9.8 In this case there is evidence of use running back to 1928 (W1). Significant numbers of users do not appear until the 1970s. The majority of user up to the 1990s is on foot, with small amounts of vehicular and cycle use. Nevertheless it seems likely that a reasonable owner would have been aware of it. It seems that no actions were taken to prevent use, so acquiescence by the landowner might be sufficient to suggest dedication on foot. The case for higher rights at common law is less convincing. There were 12 users on bicycle and 3 on horseback since the 1940s on the evidence forms. The witness forms provided by Burhill both show and infer more substantial vehicular use and might also infer that MPV rights have been acquired at common law.
- 9.9 The following issues must also be considered when considering statute or common law dedication.
- 9.10 ***'As of right' v 'by right'***: It is necessary to consider whether the evidence demonstrates use 'as of right' or 'by right'. Under s. 31(1) of the Highways Act 1980, dedication of a public right of way can be inferred where a way had been "actually enjoyed by the public as of right"; that is, without force, secrecy or permission. It has been common over the years for use by landowners, frontagers and their guests and services to be dismissed from any user evidence on the assumption that this would have constituted the exercise or acquisition of a private right. This view must be treated carefully but it is at least accepted that, if any of those properties can be shown to have the benefit of a private right over the claimed route, then the use associated with that property ought to be 'by right', not 'as of right'. The consequence of this is that much of the MPV use outlined in the evidence forms and the witness statements might not contribute towards the acquisition of a public right. The importance of this will be discussed further below.
- 9.11 The pedestrian use outlined in the user forms appears to be mostly of a recreational nature, although in some cases it was also to visit the fruit farm, stables or golf club. In contrast vehicular use was mostly to adjacent properties or services along the routes. Mr and Mrs Naresh (10, 11) specifically mention that there were not many cars, mostly farm vehicles and that there were fewer vehicles before 2006. This seems likely given (1) the rough nature of the lower half of Turners Lane before it was surfaced, (2) the signs saying 'no access to Burhill Golf Course', which would most likely have given rise to much fewer vehicular movements. The witness statements supplied by Burhill support the position that most vehicular use would have been in the exercise of private rights to access adjacent land either as owner, tenant or invitee. These users are outlined in detail by the various witnesses (see para. 2.11). Such non-qualifying use may be either because of a private right, a revocable permission or a

statutory right. Given the rights extended to many of the frontagers as outlined in their title deeds by express easement, it seems likely that most of this use would not qualify as 'public' for the purposes of the Highways Act. Furthermore, the necessity of adding these rights by conveyance to the various land titles confirms the belief by the landowner and/or the frontagers that no public rights existed by which to access their land. Similarly, the few horseriders seem to have been stabled on either Turners Lane or Burhill Road, so it might be argued that this use was also exercising private rights as outlined above. It appears that both MPV and equestrian use could be dismissed at both statute law and common law.

9.12 It is more difficult to distinguish what kind of use was made by cyclists but much appears to be recreational. A bridleway is more likely to arise than a restricted byway given the decision known as *Whitworth 2010*<sup>24</sup> which stated that use prior to 1968 and post 2006<sup>25</sup> would contribute to restricted byway, but between those times only a bridleway would arise. 11 used the routes on bicycle within the relevant period 1992-2012 of which only 5 have used for the full 20 years. 4 of these did not note how often they used the route and two others only stated 'regularly'. This use is slightly supported by the witness forms. The majority of this use falls between 1968 and 2006 so a bridleway is most likely to have arisen at either statute or common law.

#### HISTORICAL EVIDENCE

9.13 It would appear from the available documentary evidence, when examined in its entirety that both Turners Lane (A-C) and especially Burhill Road (C-D) have existed since at least the 18<sup>th</sup> century. They appear to have been laid out prior to the Inclosure of the area and were not granted rights (public or private) during this process in the early 1800s. Amongst other evidence they have appeared on commercial maps since the 1700s and by the early 20<sup>th</sup> century they were shown excluded for the assessment of tax in the Finance Act 1910 and probably regarded as vehicular highways. By 1912 the Local Engineer and Surveyor for the Urban District considered that these routes were public roads for the purposes of the Ordnance Survey Names Books.

9.14 Although no single piece of evidence demonstrates status conclusively, the general picture they present is that the routes have long been considered historical public highways and so therefore it can be reasonably alleged that public rights, including use with vehicles had been established.

9.15 All of the above conclusions are affected however by the below Act which is discussed in detail.

#### NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

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<sup>24</sup> *Whitworth and others v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA Civ 1468

<sup>25</sup> See para 9.33 (s. 68 NERCA)

- 9.16 The Natural Environment and Rural Communities Act 2006 (NERCA) has a significant impact upon the acquisition of vehicular rights, their extinguishment and the exact challenge date should it subsequently be considered that the public could have acquired MPV rights as a result of long use. This is also of key importance should it be discovered that historical evidence supports that some kind of public right exists.
- 9.17 S.66(1) of the Act provides that no public right of way for MPVs is created after commencement of NERCA (2 May 2006) except on express terms or by construction of a road for such vehicles under statutory powers. If the most likely date of challenge is 2012 (see para. 9.6) then no 20 year period of MPV use could be found. After 2006 no further MPV rights could have been acquired. Any claim on the basis of public MPV use must therefore be on 'common law' prior to 2006. The statute law conclusions in para. 9.6 must therefore be incorrect. Lesser rights could however still be found.
- 9.18 S.67(1) then extinguished those vehicular rights which were not shown on the definitive map and statement at the commencement of the act or were shown only as a footpath, bridleway or restricted byway. This general rule is subject to a number of exceptions and conditions outlined in s. 67(2) and (3) of the act, none of which are deemed to apply in this case. The burden of proving that MPV rights have not been extinguished falls upon the user. These exceptions are :
- 9.19 Subsection 67(2)(a) – excepts ways “*whose main lawful use by the public during the period of 5 years ending with commencement was use for MPVs*”.<sup>26</sup>
- 9.20 This should not impact the Definitive Map. The Wildlife and Countryside Act 1981 s. 66(1) states that 'BOAT': “*...means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpath and bridleways are so used*”.
- 9.21 If the way was 'mainly (lawfully) used by the public in motorised vehicles' then vehicular rights might be reserved, but such a route could not be recorded on the DMS and therefore an MMO should not be made. A report commissioned by Burhill<sup>27</sup> in relation to Turners Lane concluded that it “attracts a relatively high vehicular use... relative to its nature, location, size and use of land accessed”. The report stated it could not “*comment directly on its use between May 2001 and May 2006, in the absence of survey data but it should be emphasised that many of those characteristics... are not likely to have changed nor, so far as I can see*

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<sup>26</sup> E.g. That 'the public' have used lawfully more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the 'ordinary roads network'.

<sup>27</sup> Undertaken by Steven Williamson BEng MCIHT

*from the information available to me, have they changed over the last 10-15 years*". These conclusions seem flawed given that the southern half of Turners Lane was completely reconstructed and surfaced with drainage installed during 2013. Photographs taken by officers in 2004<sup>28</sup> support this. Prior to 2013, MPV access south of the greyhound kennels and along Burhill Road would have been unappealing to the public as made clear in the witness statement of Suzie Hegarty (w9). The applicant (Mr Williams) states that the report is grossly inaccurate given the recent changes and that prior to 2013 there was no MPV access to the Golf Club via Turners Lane. In addition he states that most pedestrian access tends to be in the spring/summer/autumn period. The report does not record exactly where the mechanical 'counter' was located but indicates that it was at the junction of Turners Lane with Burwood Road and so would largely record use to the kennels, the cemetery and adjacent businesses (along the concrete section) but have little to say about continued use south along the road or along Burhill Road where levels of use are likely to be much lower. Nor does the survey have anything comparative to say about other types of use.

- 9.22 Burhill argue also that a right of way by the public does not destroy a previously existing private right, but the private rights must previously exist. They suggest that where no pre-existing private right of way can be proven then use of the lane by owners and occupiers of the land abutting the lane would be in exercise of the historic public right subsisting along it. Their argument is that this is case along Turners Lane. In addition they also express doubts that Lord Iveagh had the authority to grant express rights over the lane. Their conclusion being that all use in vehicles during the relevant period was lawful use by the public.
- 9.23 Whilst this argument seems initially convincing, the advice notes issued by DEFRA<sup>29</sup> explicitly state that for the exception to apply, the main lawful use must have been *"by the public... it is irrelevant for the purposes of this test that the way might have been used during the relevant period by landowners or their visitors under any form of licence or easement by any means whatever, whether on foot, horseback or MPV"*. If this was not the intention of the Act then there would have been no reason to include the protections at 67(3)(c) and (5) detailed below. This makes most sense when the reasons for the inclusion of s. 66 and 67 in NERCA are considered. These were to minimise the establishment of rights for recreational vehicles based on historic use in non-mechanically propelled vehicles.
- 9.24 Subsection 67(2)(b) – excepts ways if *"immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under s. 36(6) of the Highways Act 1980 (c.66) – known as "list of highways maintainable at public*

<sup>28</sup> Photographs were taken in May

<sup>29</sup> Paragraph 28, A guide for local authorities, enforcement agencies, rights of way users and practitioners. Version 5, May 2008.

*expense*". This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network'. This route is not and never has been recorded on the Surrey List of Streets.

- 9.25 Subsection 67(2)(c) – excepts ways ... "*created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles*". There is no evidence to suggest that the route was expressly on such terms for motor vehicles (under statutory powers).
- 9.26 Subsection 67(2)(d) – excepts ways "*created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles*" (MPVs). There is no evidence to show that this is the case.
- 9.27 Subsection 67(2)(e) –excepts from extinguishment, ways "*..created by virtue of use by such vehicles during a period ending before 1<sup>st</sup> December 1930*". I.e. That they been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.
- 9.28 No evidence has been submitted to show that long-use by the public in MPVs occurred prior to 1930. Such a right must have been created by inference of dedication at common law through use by MPVs before 1 December 1930. Most inference of user in the evidence seems to refer to 'private' rather than public use, or use by licence and does not satisfy the tests required for common law dedication<sup>30</sup>. Even if all use could have been considered public, in all likelihood historic rights would have been created by virtue of use by non-mechanically propelled vehicles.
- 9.29 Section 67(3)- provides that existing rights are preserved if:
- a. Before 20 January 2005 the way had been the subject of an application under the Wildlife and Countryside Act 1981 to add it to the DMS as a BOAT;
  - b. Before 2 May 2006 the County Council had made a determination in relation to such an application;
  - c. Before 2 May 2006, an application to add it had been made by a person with an interest in the land where the way was reasonably necessary to access their land.

None of the above apply.

- 9.30 Section 67(5) of NERC provides a private right for mechanically propelled vehicles for those persons who have reasonable need for access by MPVs to land in which they have an interest, in all cases

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<sup>30</sup> See para 9.7.

where a public right of way for MPVs is extinguished under s. 67(1) of the Act.

Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies-

- a. was reasonably necessary to enable a person with an interest in land to obtain access to the land, or
- b. would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

9.31 This private right extends to landowners, occupiers and tenants. It also includes lawful visitors to the person who has an interest in the land, including businesses, trade or professional visitors, postal or other deliveries, the highway authority; and utility companies. The test of 'reasonably necessary' has not yet been clarified by the Courts, an issue which concerns Burhill, but a pragmatic viewpoint must be that this would extend to any landowner or frontager who had reasonable need. DEFRA guidance suggests that the words would have their normal, everyday meaning and the outcome would depend upon the facts. The Act is silent regarding the Council's responsibility to record or defend such rights

9.32 Section 67(7) For the purposes of subsections (3)(c) and (5), it is irrelevant whether the person was, immediately before commencement, in fact-

- exercising a public right of way, or
- able to exercise it.

9.33 Section 68 of the Act inserted new subsections into s. 31 of the Highways Act 1980 providing (after commencement) for the dedication of a way as restricted byway after public use for 20 years in non-mechanically propelled vehicles.

9.34 Section 70(1) allows for the recording on the DMS of a 'restricted byway'. This type of highway was first provided for under the Countryside and Rights of Way Act 2000. Section 70(1) means that restricted byways can be established and recorded on the Definitive Map on the basis of either historic evidence or evidence of use. The implication of this is that if a route carries historic vehicular rights, but the MPV rights are extinguished by s. 67 of the NERC Act, it will be possible to record that route as a restricted byway, rather than a BOAT.

9.35 Much of the use in MPVs appears to be in the exercise of a private right or has otherwise since been extinguished in 2006 by NERCA. The volume of use as described in the various user evidence forms, the witness statements and (extrapolating) from Mr Williamson's report (not to mention inferences based on reputation which can be drawn from

documentary evidence) suggest that any reasonable landowner would have known about the volume of use and could have taken action to prevent it. That they did not, does not necessarily mean that they believed that all users were exercising a private right, or indeed that the users believed that they were. Guidance from DEFRA has however made it clear that such use would be disqualified. On the basis of 'qualifying' user evidence alone then, this route could at most be reasonably alleged to be a public bridleway, both at statute and common law.

9.36 Paragraphs 9.13-14 demonstrate how the routes have long been considered public highways and were most likely established prior to the middle of the 19<sup>th</sup> century, as argued in relation to the documentary evidence, or at least by the early 20<sup>th</sup> century.

9.37 Subsequently, it is deemed that the MPV element of those rights has been extinguished by s. 67(1) of NERCA 2006. None of the exceptions outlined have been met.

9.38 Given the above discussion at para. 9.34 it is concluded that it can be reasonably alleged that public restricted byway rights subsist over the route A-B-C and C-D.

9.39 The Elmbridge Local Committee is asked to agree that:

- i. Public restricted byway rights are recognised over the routes A-B-C (Turners Lane) and C-D (Burhill Road) on Drawings Nos. 3/1/78/H22 and H23 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 public restricted byway is approved. The routes will be known collectively as Public Restricted Byway No. 41 (Walton and Weybridge).
- 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

9.40 The committee's attention is again drawn to paras. 9.30-9.32 and that no duty is placed upon the County Council to either record or enforce any such private rights. This decision does not impact upon any existing or claimed private rights of access.

9.41 Where a public vehicular highway can be shown to exist pre- 1835<sup>31</sup> then it is maintainable at public expense. The loss of public rights for MPVs does not undo this, but our duty would be to continue to maintain for the purposes of the ordinary traffic using it. In this case non-mechanically propelled vehicles, horses, bicycles and pedestrians. This

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<sup>31</sup> Highways Act 1835

does not prevent the way being maintained to a higher standard by a landowner or frontagers so long as this does not interfere with the recorded public rights.

**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.

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**Contact and Lead Officer:**

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

**Consulted:**

See Section 4.

**Annexes:**

- A Legal Background
- B User Evidence Summary charts
- C Drawings Nos. 3/1/78/H22 and H23
- D Timeline of Evidence
- E Photos

**Sources/background papers:**

File 'CP549' 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 Surrey County Council Merrow Depot in Guildford by calling the quoted number.