


**SURREY COUNTY COUNCIL**
**LOCAL COMMITTEE (WAVERLEY)**
**DATE: 11<sup>th</sup> DECEMBER 2015**
**LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER**
**SUBJECT: ALLEGED PUBLIC RIGHT OF WAY BETWEEN TILFORD ROAD (RUSHMOOR) AND BRIDLEWAY 108 (THURSLEY) AT KETTLEBURY HILL**
**DIVISION: WAVERLEY WESTERN VILLAGES**
**1. SUMMARY OF ISSUE**

- 1.1 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 public footpath between Tilford Road, Rushmoor and Bridleway 108 Thursley at Kettlebury Hill to the Surrey County Council Definitive Map and Statement (DMS).
- 1.2 It is considered the evidence is sufficient to allege that a public bridleway subsists over part of the route claimed. As such a legal order to modify the DMS should be made.

**2. RECOMMENDATIONS**
**2.1 The Local Committee (Waverley) is asked to agree that:**

- (i) Public Bridleway rights are recognised over the route A-B on Drawing No 3/1/10/H29 (**Annexe A**) and that an MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 be made to modify the Definitive Map and Statement. The route will be known as Public Bridleway No.587 (Frensham).
- (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.

**3. REASONS FOR RECOMMENDATIONS**

- 3.1 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 supports a modification.
- 3.2 In this instance the evidence submitted in support of the application is considered sufficient to establish that public bridleway rights are reasonably alleged to subsist over part of the claimed route, having been acquired by virtue of bicycle use under both statutory presumed dedication (under s.31(6) of the Highways Act 1980) and common law. Evidence suggests that

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landowners have not challenged users or taken sufficient actions to demonstrate their lack of intention to dedicate during the relevant period.

### 4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 16th March 2013, from Mr Simon Richards under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the addition of a public footpath from Tilford Road, Rushmoor to Public Bridleway No.108 Thursley. 43 User Evidence Forms accompanied his application.
- 4.2 The claimed route is shown on drawing 3/1/10/H29 (**Annexe A**). It commences at point A on Tilford Road and proceeds along the northern boundary of a field in a south-easterly direction for 186 metres to point B where the path leaves the field and crosses onto land known as Hankley Common. From point B the claimed route continues in a south easterly direction for 130 metres to point C where it turns to continue in an easterly direction for 60 metres to point D at the Parish boundary. The claimed path then continues in an easterly direction in the parish of Thursley for 367 metres to point E where it joins Public Bridleway No. 108, Thursley. There is no record of the route ever having been put forward for inclusion in the DMS since it was first published in 1952.
- 4.3 The route is currently unavailable between points A and B, but open and useable from B-E.

### 5. ANALYSIS

- 5.1 PUBLIC USER EVIDENCE FOR THE ROUTE 1993 – 2013  
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. For a public right of way to become established at common law it is necessary for there to have been a dedication by the landowner and acceptance by the public. A dedication may be inferred if either: a) landowners show acquiescence by knowing about and ignoring use by the public or b) the use is so great that the landowners (whoever they are) must have known and taken no action. There is no minimum time period over which use must have occurred for rights to be established at common law. The background to Map Modification Orders is attached at **Annexe B**.
- 5.2 43 user evidence forms were submitted with the application, all of which detailed use by foot of the claimed route. 20 of the forms also indicated that use had been made of the claimed route on bicycle, and one user indicated that they had used the route on a horse. A number of the user witnesses were approached and 20 agreed to be interviewed about their use and their recollections of the route claimed.
- 5.3 The date upon which the public's right to use this route was challenged has been taken to be the date when the current landowner of the field at the western end of the path nailed shut the gates that he had erected at points A

and B as shown on the map in **Annexe A**. There is a difference of opinion in the user evidence as to the exact date that this is, however discussion with the landowner in comparison with the dates given by users has indicated that 2013 is a reasonable date to take as the challenge date. The relevant 20 year period therefore runs from 1993 – 2013.

#### 5.4 Route used

The route claimed in this application is for a single path running from Tilford Road, along a field edge and then across Hankley Common to join the existing Public Bridleway, as shown in the plan at **Annexe A**. In their user evidence forms (UEFs) all of the users claimed that they had used the section of path between A and B, along the field edge. Most of the users (33 out of the 43 UEFs) indicated that they also used the route between B and E, from the field directly up to the bridleway, as claimed in the application. The remaining 10 users drew a path on the plan only between A and B, however in their forms they referred to using the path to get to Hankley Common. The field at the western end of the claimed path (A-B) is owned by Mr Turner, the remainder of the land (B-E) is owned by the Ministry of Defence. Although the land (over which the claimed path runs B-E) has the name of Common it is not, in fact, registered as common land under the Commons Registration Act 1965, nor is it recorded as Open Access Land under the Countryside and Rights of Way Act 2000 (by virtue of the fact that it is covered by MOD byelaws). It is however a SSSI, and is a popular place to visit for recreation. Hankley Common is a large area of land over which there are numerous paths, and so it is possible that these additional 10 users who only claimed use of route A-B on their UEF actually did use the remainder of the route B-E as well, but for whatever reason felt they did not need to record the route on Hankley Common. It is possible that other routes may have been used over Hankley Common that have not been claimed in the UEFs.

5.5 All of the users that were interviewed confirmed that they used section A-B every time they went out in that direction as it was their main access to Hankley Common. They admitted however, that the section B-E may not have been used as frequently as the section A-B as there were many circular routes that could be taken from B, some of which may not have included the claimed path up to the bridleway at E. In section 5.11 below, consideration is given to how the variety of paths used might affect the frequency of use for this section of the claimed path.

#### 5.6 Use on foot

Many of the users, such as Mr Young (UEF 43) and Mrs Richards (UEF 30) referred to the fact that they frequently walked circular walks that encompassed the claimed route (either walking B-E, or E-B). Other users referred to the walk up to the bridleway as the “standard walk” (Mrs Woodhouse UEF 42) or the “normal route” (Mr & Mrs Raynes UEF 28&29). Mr & Mrs Johns (UEF 17 & 18) stated that “going up to Kettlebury Hill is a favourite spot”. It seems that although other routes were open, available and indeed used from point B, it is appropriate to consider the claim route B-E as being capable of being a linear route over which rights might have been acquired, as all of the users refer to that being one of the main routes that they have used.

#### 5.7 Years of Use (on foot)

The relevant period for the purposes of Section 31 of the Highways Act 1980 has been determined as being 1993 – 2013. The chart in **Annexe C** shows

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the use that has been made by the users on foot and the years over which this use took place. When interviewed a couple of the users amended the dates that they had used the path<sup>1</sup>, but the majority were consistent between UEF and interview. Of the members of the public that gave evidence 18 of the 43 indicated that they used the path for the full 20 years (or longer). The evidence indicates that at the start of the relevant period there were 23 people using the path, and that this increased over the years to a maximum of 35 users in the year 2010. This is a substantial amount of people using the route each year, and supports what some of the users have said about the route being one of the main access ways onto the common for the inhabitants of Rushmoor. The longest period of use, of over 50 years, is by Mr Johns (UEF 17), Miss Jenny Orbell (UEF 24) and Miss Wills (UEF 40).

### 5.8 Frequency of Use A-B (on foot)

As mentioned in section 5.6 above, the users stated that they always used the section of claimed path that runs between A and B to access the common.

5.9 There are 6 users (8, 9, 17, 18, 40, 41) whose use of this section is more than twice a week for the full 20 year period, and an additional 2 (1, 5) whose use is once or twice a week for the full 20 year period. Just taking these users into account, this makes a potential number of occasions where someone was walking the path as 22 occasions in a week (6 x 3 & 2 x 2)<sup>2</sup>.

5.10 In addition there are another 13 users whose use is as frequent, albeit not for the full 20 year period (UEF 15, 16, 20, 21, 22, 27, 30, 33, 36 and 37, at more than twice a week, UEF 6, 31 and 43 at once or twice a week) which means that there are some years where use was considerably greater than this. For example in 2008, if just the users with over 2 or 1-2 uses per week are taken into account, there was about 52 occasions per week of people using the path A-B. On top of these users there are the remaining users that have also used the path, albeit not as frequently as weekly, and this will mean that the actual number of people using the path would be more than the 52 instances of people walking this section as described above.

### 5.11 Frequency of Use B-D (on foot)

Once point B has been reached there are a number of different routes that people can walk, not all of them including the section B-D. The fact that users have walked more than a single linear route means that their evidence needs to be treated with a certain amount of care. If, for example, a user has completed the written part of the UEF to say that they have used 'a route' three times a month over a period of time, but have drawn three different routes on the plan it may be that they have only actually walked each individual route once a month, or each route with a differing frequency. A relatively frequent level of claimed use may apply to all of the paths collectively whereas their use of the single, linear route claimed in the application may be much less frequent. This sort of situation would have a significant impact on the total amount of use each individual path has received.

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<sup>1</sup> Mrs Jordan's use began in the late 1990s rather than in 1970, Mr Strudwick stopped walking the route in about 2000, Mrs Paice's use ceased in about 2005 rather than 2012.

<sup>2</sup> For the purposes of this calculation 'more than twice a week' has been calculated as 3 times a week, and 1-2 times a week at 2 times a week.

- 5.12 However, as discussed in section 5.6, the claimed route B-D was one of the most popular routes, with many people including it as part of a circular route. Mr Field (UEF 9) explained that he probably used the route up to the bridleway about 25% of the time. If we take this as an indication of the amount of use that this section of the claimed path received, (which is likely to be an underestimate for many) then this would mean that, just counting those that are out more than 2 times a week and 1-2 a week, there are perhaps 13 instances per week of people using the route, (52 ÷ 4). In addition there are those that claimed less frequent use over all, which would mean again that the actual number of people using the path B-D would be more than the 13 instances per week of people walking this section as described above.
- 5.13 Alternative Method of Use (vehicle, horse, bicycle)  
All of the UEFs refer to use of the claimed route on foot, and this is the use that has been considered in sections 5.1 – 5.12 above. However on some of the forms or at a subsequent interview reference is made to use of the claimed route in a motor vehicle, on horseback or on bicycle.
- 5.14 **Motor vehicle:** Use by motor vehicles could give rise to Byway Open to all Traffic rights over the claimed route (if it was found that certain exceptions to the Natural Environment and Rural Communities Act 2006 applied). None of the UEF refers to motor vehicle use by the public; however Mr Smale did indicate in his interview that he had used a section of the claimed route (A-B) on a quad bike to access ponds. This is insufficient to be regarded as use by the public, and public motorised vehicle rights cannot be considered to exist as a result.
- 5.15 **Horse riding:** Use by horse riders could give rise to bridleway rights over the claimed route. One person (Mr Bryn Morgan UEF 21) indicated on their UEF that they used the route on horseback during the period 1998 – 2001, approximately 10 times a year. This is insufficient to be regarded as use by the public, and public bridleway rights cannot be considered to exist by virtue of horse riding use as a result.
- 5.16 **Bicycle use:** Since 1968 bicycles have been able to use public bridleways legally. Recent case law (Whitworth & others v Secretary of State for Environment, Food & Rural Affairs, [2010] EWCA Civ 1468) has clarified the impact of this legalisation on the status to be recorded where there is sufficient evidence of use by bicycles to record a public right. The case states that bicycle use since 1968 could lead to bridleway rights as a landowner, on seeing bicycles using a route would conclude that they were exercising the rights given to them in the 1968 Act to cycle on a bridleway.
- 5.17 Another piece of legislation that has an impact on the rights to be recorded by virtue of bicycle use is the Natural Environment and Rural Communities Act 2006 (NERC) which states that bicycle use after 2006 leads to restricted byway rights.
- 5.18 The result of the legislation and case law appears to be that:
- Bicycle use before 1968 leads to carriageway rights (BOAT or RB);
  - Bicycle use between 1968 and 2006 leads to bridleway rights;
  - Bicycle use after 2006 leads to restricted byway rights.

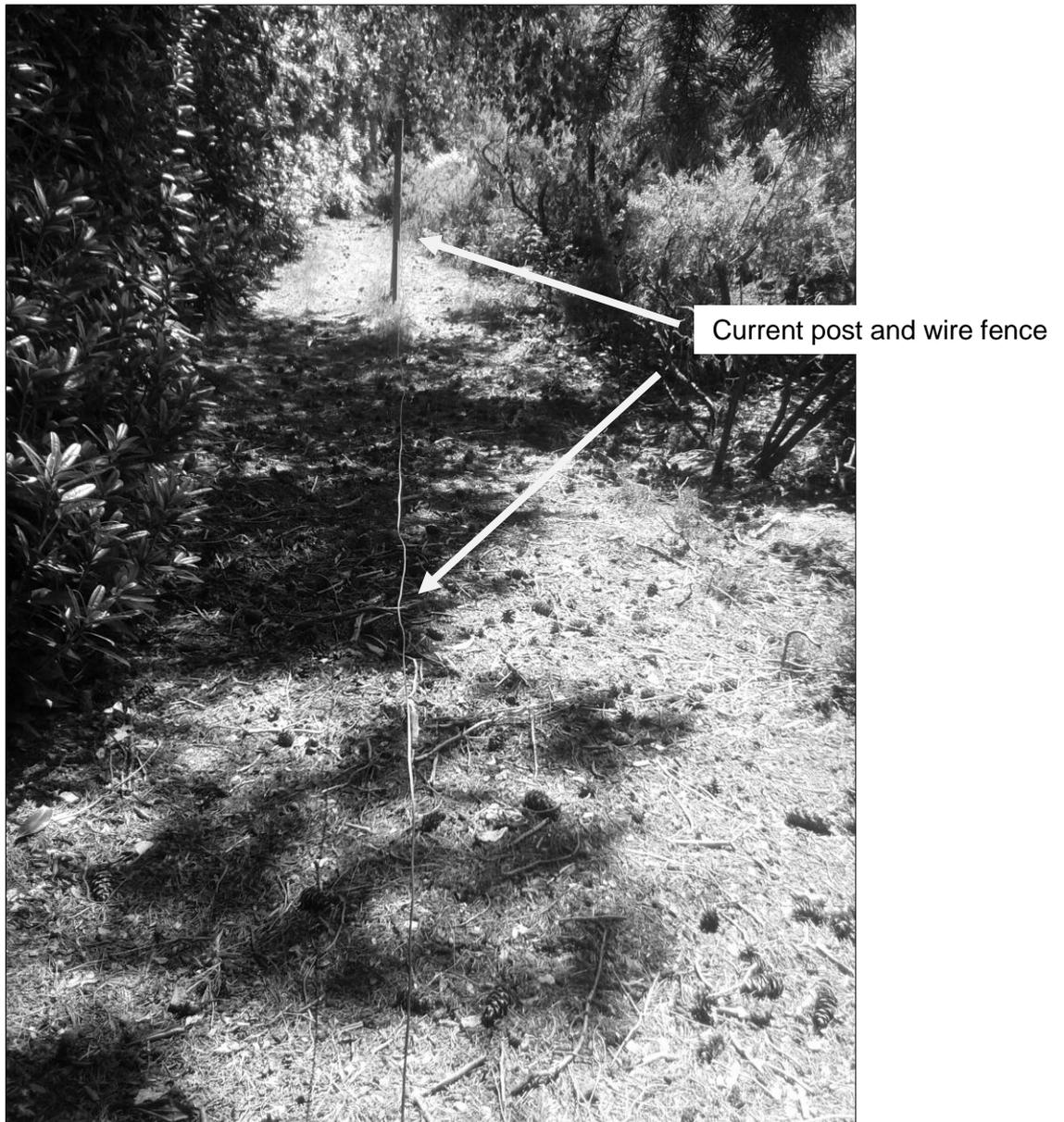
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- 5.19 In situations where the relevant 20 year period spans both sides of one of these dates (as in this case – with the 20 year period being 1993- 2013), it appears that some bicycle usage will qualify as evidence for bridleway (1993 – 2006) and some for restricted byway (2006 – 2013). However, if we consider all subsequent usage to be using the right created by the first usage, it seems logical to conclude that it is the first usage that counts. This would mean that, if there is sufficient evidence of use by bicycles during the relevant period or at common law then a public bridleway should be recorded.
- 5.20 Years of use (on bicycle)  
The relevant period for the purposes of Section 31 of the Highways Act 1980 has been determined as being 1993 – 2013. The chart in **Annexe E** shows the use that has been made by the users on bicycle and the years over which this use took place. 20 of the UEFs referred to use made of the claimed route by bicycle, 8 of which for the full 20 year period (1, 2, 3, 4, 5, 19, 24, & 29) or longer. The evidence indicates that at the start of the relevant period there were 8 people using the path, and that this increased over the years to a maximum of 18 users in the year 2010. This is a substantial amount of people using the route each year on a bicycle.
- 5.21 Frequency of use (on bicycle)  
Use of the route is not as frequent on bicycle as it is on foot. However, of the 8 people who claim to have used the route on a bicycle for the full 20 years, 4 were using it less than once a month (2, 3, 5, 19), 2 were using it once or twice a month, (1, 29) and one was using it 2-4 times a month (4). One (24) did not state how frequent her use was.
- 5.22 Mr Richards and Mr Stevens have the most frequent use, claiming 75 or 100 times a year respectively over part of the relevant period. In the case of Mr Richards, his use is over more than half of the relevant 20 year period.
- 5.23 If one considers the year 2010, when there were 18 people using the route on a bicycle, and take the minimum number of uses claimed (i.e. if a person has claimed use of 1-2 per month, this is taken as 12 per year; once or twice a week is taken to be 52 per year. Less than once a month is taken as 6 per year) it can be seen that there were about 298 journeys per year on bicycle, which is roughly about 5 per week.
- 5.24 Use by other people  
When asked if they had used the route with others, or if they were aware that others were using the path, many users indicated that they frequently came across other people using the route and that they considered the path to be a very well known way of accessing Hankley Common. Mr Johns stated that “you rarely went down it without someone else using it too; it was pretty much used by the whole of Rushmoor”. Mrs Jordan stated “it is not unusual to see other people using the path”. Mrs Richards added “I have met lots of people using the path...it was not unusual to see people walking the path”. Mr Young referred to there being older people who used the route very frequently. Mrs Corridan stated that “it was a very well used path, if the landowner knew the land they would have known it was a footpath, no-one encroached onto the field, we stuck to the path to get to the common; that was the reason we used it”.

5.25 Surface/boundary/width

Users referred to the route (A-B) as being part of the field, uneven but not difficult to walk. Mr Johns described it as grass and dirt, Mrs Jordan as an earth, stony track. Mr Strudwick described it as being gorse and bramble underfoot and as a trodden-down path. There is consensus among the users that the boundary between the field and the property called 'Winding Wood' has always been a sound wooden fence. Some of the users do not recall there being a boundary on the field side of the path, whilst others refer to a post and wire fence. Mrs Baldwin recalls that the previous owner, Mrs Gilbert, kept horses in the field and kept the path fenced from the rest of the field, whilst still allowing access to the path (A-B).

- 5.26 The width given by users varies between 1.5 metres to 4.5 metres with the most frequent width given as between 2.5 and 3 metres. When people have described the width in relation to what it 'feels like', they have used terms such as 'wide enough to walk two abreast', 'sufficient to walk', 'single track footpath', 'depends on foliage', Mrs June Orbell (UEF 25) recalls that at one time the route was wide enough to get a horse and cart down; other users have made reference to the fact that they thought the route had been put in by the Canadian Army to access the common for training purposes and was therefore wide enough to take army vehicles. At the current time there is a post and wire fence which is approximately 1metre away from the boundary fence of Winding Wood, leaving a path of up to 1 metre width running alongside the boundary. There is a substantial amount of gorse and scrub separating the path from the rest of the field, however there are places where, if it wasn't for the post and wire fence, the land available to use would be wider than 1m.



5.27 The path across the common (B-E) is described as being wider than that through the field, and not bounded on either side; rather it is open to the common. This is still the case now and the route is a well defined, sandy track that leads up to the bridleway at point E. Users indicated that its current appearance is how it has historically been.

5.28 Gates

All of the users refer to the relatively recent installation of gates at points A and B by the current landowner; however there is a difference in opinion among the users as to whether there have historically been gates at these points. Mrs June Orbell, who is perhaps the oldest resident of Rushmoor recalls that gates were installed at points A and B after the war, but that they fell into disrepair. Mr Johns can't remember there being a gate, while Mrs Johns remembers an old rickety one. Miss Wills, another long term resident

of the area remembers there being gates at either end of the section A-B, but that they were never closed. Mr & Mrs Raynes both refer to a gate at point A, which was never closed, whilst Mr Strudwick doesn't remember any gate. Although there is a difference in opinion as to whether there were gates at points A and B in the past the evidence suggests that nothing ever stopped the public from using the path and that even if gates were in situ, they were never locked. The topic of gate will be returned to in section 5.38 and 13.8. There is no evidence of any gates on the section B-D.

5.29 Notices

None of the users recall there ever being notices at any point along the claimed route until the current owner of the field bought the land, at which point a number of different notices were put up. Mr Raynes refers to a notice telling people to shut the gate and a subsequent one that stated that the landowner was entitled to close the path for maintenance. None of the users refer to there being notices on any gates at points A or B during the time prior to the present owner buying the land. Mrs Orbell recalls a footpath sign at the Tilford Road end of the path but is unclear about the details, and Mrs Corridan refers to there having been a footpath sign, although she cannot remember where it was now.

5.30 Permission

None of the users indicated that they had ever sought or been given permission to use the route A-B.

5.31 In this instance the land known as Hankley Common over which the claimed path runs between points B and E is owned by the Ministry of Defence (MOD). The MOD have in force the Surrey Commons Military Lands Byelaws 1978, in which permission is given to the public to access the land 'for the purposes of open-air recreation at all times providing such access does not inhibit the military use of such lands...' (see **Annexe D**). On their website, the MOD describes Hankley Common and states that "open access on foot is available in those areas delineated by the managed access symbol on Ordnance Survey Explorer maps". The use that has been made by the public over the part of the route claimed between B and D is therefore with the permission of the landowner, and cannot be regarded as being use 'as of right', regardless of the volume of use or length of time.

5.32 PUBLIC USER EVIDENCE FOR THE ROUTE PRIOR TO 1978

As discussed above in section 5.31, the land over which the majority of the claimed route runs (B-D) is owned by the MOD and has been subject to the Surrey Commons Military Lands Byelaws since 1978. The effect of this has been to grant permission for public access on foot since that date. However, it is necessary to briefly consider whether a right of way might have come into being prior to 1978. If this were the case, it could be argued that a MMO should be made to reflect rights that pre-existed the Byelaws.

5.33 Evidence from the chart at **Annexe C** shows that there is evidence of 11 people (1, 4, 17, 18, 22, 23, 24, 28, 29, 35, and 40), using the claimed path on foot in the 20 years prior to 1978. However for the first 6 years of that 20 year period there were only 3 users; it wasn't until the last few years of the 20 year period that users amounted to more than 10 people. Although four of the users in this period were using the route more than once a week, the quantity of the user evidence is not considered sufficient to have established a public

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right of way on foot prior to the Surrey Commons Military Lands Byelaws in 1978.

- 5.34 Evidence from the chart at **Annexe E** shows that there is evidence of 4 people (1, 4, 19, 29) using the claimed path on bicycle in the 20 years prior to 1978. The quantity of the user evidence on a bicycle is not considered sufficient to have established a public right of way prior to the Surrey Commons Military Lands Byelaws in 1978.

### 5.35 LANDOWNERS EVIDENCE

- 5.36 **Current landowner A-B:** The land, over which the claimed path runs between A and B, is in the ownership of Mr Turner, who has owned the land since 2012. Mr Turner was contacted and he confirmed that when he bought the land he was aware that there was a path running between A and B on his land. He indicated that there was a dilapidated barbed wire fence separating the path from the field which he replaced with smooth wire in approximately the same location for safety. Mr Turner believes that the path was a permissive path, and that members of the local community had been using the route with the permission of the previous owner.
- 5.37 Mr Turner stated that he put gates at either end of the path as it runs over his field, but ensured they were easily opened. He stated that he only decided to exclude people from the path after a series of acts of vandalism. He indicated that he screwed the gates shut in approximately 2013.
- 5.38 Mr Turner drew attention to a dilapidated gate near point A, within the boundary of his land. According to Mr Turner, this had been the gate that had been at point A on the claimed path when he bought the land. The gate had the following sign fixed to it:



This is not a Public Right of Way

But the owners allow the public to use it until further notice.

No Horses

No Cycling

- 5.39 Mr Turner believes that this is evidence to show that the path had been used with permission of the previous landowner and therefore rights could not have been acquired. Mr Turner has never met the previous landowner and there is no reference in his deeds to the path.
- 5.40 **Previous landowner A-B:** It has been reported that the previous owner of this section was Mrs Linda Gilbert. It has not been possible to locate Mrs Gilbert during this investigation.
- 5.41 **Previous tenant A-B:** Miss Pointer leased the field from Mrs Gilbert for 10 years from approximately 1998. In her opinion the path was a public right of way; her lease was for the field only and didn't include the path. She maintained the fence line between the field and the path and never queried the use of the path by the public. She stated that she saw many people use the path, and that it was quite normal to see people using it. She states that there were no gates at point A and B during the period when she was leasing the land.
- 5.42 **Current landowner B-E:** The remainder of the land over which the claimed path runs from B-E is owned by the Ministry of Defence. The claim was discussed with a representative of the MOD prior to the investigation starting. On making the application, notice was served on the MOD by the applicant, and they were consulted twice during this investigation. No written response was received from them, however the Surrey Commons Military Lands Byelaws 1978 apply to this land and the impact of this has been discussed in section 5.31 above.
- 5.43 Evidence of Public Rights at common law  
An inference that a way has been dedicated for public use may 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. A dedication may be inferred if either: a) landowners show acquiescence by knowing about and ignoring use by the public or b) the use is so great that the landowners (whoever they are) must have known and taken no action. There is no minimum time period over which use must have occurred for rights to be established at common law.
- 5.44 The evidence of the users and of Miss Pointer indicates that the previous landowner, Mrs Gilbert, managed the land between A and B at least for some of the time as a horse field. The evidence is that when she first acquired the land there was trees/scrub over the land and she spent some time rooting these out to make the field a paddock. Once she had achieved this, it would appear that she then fenced the path that people have claimed to use between A and B, to keep the horses away from the people using it. Had she not wanted the public to continue to use the route this would have been an opportunity to exclude the public from her land. However she did not do so, in fact she took steps to ensure that the public could continue to use this way to reach the common. This action could be considered as evidence of acquiescence which, together with the volume of public use could be considered as evidence of public rights having been acquired at common law over the section A-B.

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- 5.45 As landowners the MOD have similarly taken steps to allow the public's use of the claimed path, by providing car parking and advertising the area as a place for open air recreation. However, in this instance they have made it clear through the Surrey Commons Military Lands Byelaws 1978 that the use that is being made of this area is with the permission of the landowner. A public right of way over this land could not therefore be claimed at common law.
- 5.46 The evidence of use of the land prior to 1978, as discussed in sections 5.32 - 5.34, is considered insufficient to be considered "so great that the landowners (whoever they are) must have known and taken no action". A public right of way over this land could not therefore be claimed at common law over the route B-D.
- 5.47 DEFINITIVE MAP  
No public rights appear on the Definitive Map or in the Definitive Statement. It does not appear on any earlier versions of the Definitive Map dating back to 1952 nor has it ever been put forward for inclusion on any of these maps.
- 5.48 HISTORIC EVIDENCE
- 5.49 **Ordnance Survey County Series Map 1:2500 dated 1872, 1897 & 1916 (sheet 37.7):** There is no indication of a path in the area of the claimed route on any of these maps.
- 5.50 **Ordnance Survey 6 inch Maps dated 1898 & 1920 (sheet 37.NE):** There is no indication of a path in the area of the claimed route on any of these maps.
- 5.51 **Ordnance Survey 1:10,000 dated 1978 & 1993 (SU 84 SE):** A path is shown as a single pecked line in the location of the claimed route from A-B and labelled 'Path'. A double pecked line is shown in the location of the claimed route B-E, labelled 'Track'. The depiction of a path or track on an Ordnance Survey map can be used to confirm the physical presence on the ground at the time of surveying. It is no indication of the status of that path or track, or whether that route carries public rights or is a private right of access.
- 5.52 **Aerial photographs:** The 1948 aerial photograph of the area clearly shows a path in the location of the claimed route (**Annexe F**), at this time the field at the western end appears to be wooded, but the path (A-B) appears clearly as a light coloured strip along the border. The path A-B is less clearly delineated on the 1971 photo, although there is a spur leading west from point B that suggests the path. By the time of the 1998/9 photo the land at the western end has been cleared of trees, and there is a suggestion of a path A-B. In the 2006 and 2012 photo a path from A-B is not visible. In all of the photos Hankley Common is shown with a number of paths crossing it, one of which is in the location of the claimed path (B-E). The paths over the common appear wider than that across the field. Although no conclusions can be drawn about the status of the path from these photos, it is evidence that a path existed on the ground in the location of the claimed path throughout the period 1948 - 2012.
- 5.53 **Other historic evidence:**  
The investigation incorporated a search of the Surrey History Centre and has considered evidence for the claimed path on Inclosure, Tithe and other

relevant documents. There is no other historical evidence for the claimed path.

- 5.54 In the absence of any conclusive documentary evidence showing public rights the claim must rely on user evidence either by statute or common law.
- 5.55 **IMPLICATION OF PERMISSIVE USE OF HANKLEY COMMON**  
Despite the inability of the claimed route B-E being able to be considered as a public right of way there remains the section of claimed path A-B over which members of the public have claimed use in order to access the common.
- 5.56 A public right of way is generally considered to run between two places of public access, usually two other public highways. However, there is no rule of law that states that a way cannot be public if its termini are not both at other public highways, and there are examples across the country of other cul-de-sac paths leading to, for example, viewpoints, ferries now non-operational and sea foreshore. In *Moser v. Ambleside U.D.C.* (1925) 89 J.P. 118, it was determined by Lord Justice Atkins that:
- “One of the first questions that one always has to enquire into such a case as this is from whence does the highway come and whither does it lead? It has been suggested that you cannot have a highway except in so far as it connects two other highways. That seems to me to be too large a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway”*
- 5.57 It would appear that a public right of way must serve the purpose of reaching a place that the public may legitimately wish to reach, but that that place need not be a public highway. In this instance Tilford Road, Rushmoor (point A) is a public highway, but point B is not; being the boundary of a field and the MOD-owned Hankley Common. A route recorded A-B would therefore appear to be a cul-de-sac path on the Definitive Map.
- 5.58 Hankley Common is an area to which the public have open access, as described in section 5.4 above. It is a well-known and well-used area of land upon which the MOD as landowners have provided areas of parking for the public which they advertise on their website. It is suggested that Hankley Common would fit the description of a *place of popular resort* as referred to by Atkins LJ above and that therefore a cul-de-sac path could be recorded on the Definitive Map (providing the legal tests are met) as a result.

## **6. OPTIONS**

- 6.1 The committee may agree or disagree with the officer’s recommendation. Alternatively, they may decide that the evidence submitted shows that the route should be of a different status to that recommended, or that rights exist over a greater length 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

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such as convenience, amenity, security or safety are irrelevant (see **Annexe B**)

- 6.2 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.

### **7. CONSULTATIONS**

- 7.1 The District Bridleway Officer for The British Horse Society responded indicating that she had walked the route herself. She went on to describe actions that the current landowner had taken which she considered to imply that he was happy for the public to use the route over the field. She indicates that there are clear indications of a well used, meandering route, further away from the boundary (than that which the landowner has recently fenced off). She refers to the section over the Common as an existing well defined path.
- 7.2 No responses were received from The Open Spaces Society, Borough, Parish or County Councillors.

### **8. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS**

- 8.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, taken as a whole, is sufficient to reasonably allege the existence of a right of way.
- 8.2 Having said this, the cost of advertising a Map Modification Order would be approximately £1800, 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 £4000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

### **9. EQUALITIES AND DIVERSITY IMPLICATIONS**

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

### **10. LOCALISM**

- 10.1 This issue is not relevant and cannot be considered under the current legislation.

### **11. OTHER IMPLICATIONS**

<b><i>Area assessed:</i></b>	<b><i>Direct Implications:</i></b>
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	

## 12. **HUMAN RIGHTS ACT 1988**

12.1 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.

## 13. **DISCUSSION, CONCLUSION AND RECOMMENDATIONS**

### 13.1 **DISCUSSION**

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.

13.2 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".

13.3 Section 31 of the Highways Act 1980 states that: "Where a way over any land other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

13.4 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."

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- 13.5 **Calling into question:** 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. In this instance the 20-year period has been taken to be the point at which Mr Turner, as a new landowner, nailed shut gates that he had erected at point A and B on the claimed route. This was taken to be 2013; the period in question therefore is 1993 – 2013.
- 13.6 **Public use:** 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". 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 the 43 people that have completed UEFs and given evidence are residents local to Rushmoor, all living within a 1km radius of the claimed path and it is appropriate therefore to consider that they represent the people as a whole/the community in general.
- 13.7 **Use 'As of Right':** Under the legislation use of the way must have been 'as of right', which means without force, secrecy or permission. It is not necessary for the user to have a belief that their use is 'as of right'. As discussed above in section 5.31 the land over which the claimed path runs from B-E is covered by the Military Byelaws and as such any use is with the permission of the MOD. It cannot therefore be said to be 'as of right'.
- 13.8 In the case of the path A-B there is no evidence to suggest that the use was with force or in secrecy during the relevant 20 year period. The only evidence to suggest that the use of the path was with the permission of the landowner is the notice on the gate (section 5.38 & 5.39). The wording of the notice quite clearly states that use is with the permission of the landowner; however none of the users refer to ever having seen it. In addition on a site visit in January 2013 an officer from the County Council walked the claimed path and observed a dilapidated gate lying on the ground. A photograph was



January 2013

taken of the gate and it is clear from this photograph that there was no sign present on the gate at that point (see photo above). The gate in the photo below is how a gate appeared in June 2015. The gates in the two photos were found in approximately the same place and appear to be the same gate, it is not clear, therefore, at what point the sign was put on the gate, or who



June 2015

by.

- 13.9 ***Lack of intention to dedicate:*** The issue of the permission granted with respect to the path B-E has been discussed above in section 5.31. With regard to the path A-B the only evidence of a lack of intention to dedicate is the sign on the gate at point A. It has not been possible to accurately determine who erected the sign, or when and it was not mentioned by any of the users. It is suggested that this sign was not on site during the relevant period and therefore it is not sufficient to demonstrate a lack of intention to dedicate.
- 13.10 ***Sufficiency of use on foot and on bicycle – statutory deemed dedication:*** Volume and frequency of use of the claimed route has been discussed in section 5.7 – 5.12 and 5.20 – 5.23. It is considered that there is sufficient evidence of use during the relevant 20 year period to reasonably allege that there has been a deemed dedication of the route A-B as a bridleway, having been used by a significant number of people on foot and by bicycle during the relevant 20 year period.
- 13.11 ***Evidence for use prior to 1978:*** Consideration was given to whether a public right of way could have come into existence through use prior to the coming into effect of the Surrey Commons Military Lands Byelaws 1978. Although there was evidence of some use of the claimed route it was not considered sufficient in quantity to lead to rights having been acquired.

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- 13.12 **Common law:** 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. In this instance use has been ongoing by members of the public for a considerable time, in high numbers and with high frequency, as set out in section 5 above. During that time steps were taken by the landowner to ensure that the public could continue to have free and easy access over the route A-B, actions which could be viewed as acquiescence by the landowner. The existence of the Byelaws means that since 1978 no public rights could have been acquired at common law over section B-D, and it is not thought that the use made of this section prior to 1978 could be considered so great that the landowner must have known and taken no action.
- 13.13 **Cul-de-sac route:** If it is accepted that rights cannot have been acquired over the section B-E then the resulting path A-B would be a cul-de-sac. Such paths are acceptable on the Definitive Map if they lead to a place that the public may legitimately wish to reach. Hankley Common, being an area of open access can reasonably be argued as such a location and it is thought, therefore, that there is no issue regarding the recording of a cul-de-sac path over the section A-B.
- 13.14 **Width:** The width of the path has been discussed in section 5.25 & 5.26. It is suggested that recording a width of 2m would adequately reflect the evidence.
- 13.15 **Gates:** There is a difference in opinion among the users as to whether there have historically been gates at points A and B. However, as none of the witnesses refer to having been obstructed in their use of the route in any way it is clear that the use of the route has been without the need to open or close gates and it is submitted that no gates should be recorded on the Definitive Statement as a result.
- 13.16 **CONCLUSION**  
In light of the above, it is the Officer's view that, by virtue of the use by the public on bicycles, bridleway rights have been acquired over the route from A to B under section 31 of the Highways Act 1980. Notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, it is also submitted that, taken together, the facts imply that the landowners have been willing to dedicate the route as a public right of way and that rights exist under Common Law.
- 13.17 The width to be recorded should be recorded as 2m, being the width most frequently specified by users and being the distance on the ground between the fence line of Winding Wood and the evidence on the ground, in places, of a path.
- 13.18 **RECOMENDATION**  
This being the case the Officer would submit the route between A-B should be recorded on the Definitive Map and Statement for Surrey as Public Bridleway No.587 Frensham, with a width of 2 metres.

**14. WHAT HAPPENS NEXT?**

- 14.1 Committee can agree with the officer recommendation, in which case an order would be made to add Public Bridleway No. 587 Frensham to the DMS. If objections to the order were received the County Council would submit the case to the Secretary of State for determination.
- 14.2 Alternatively, committee may be of the opinion that rights can be acquired over the section of claimed path B-E and could direct the officer to make an order to record the full path A-E on the Definitive Map as a bridleway. If objections to the order were received the County Council would submit the case to the Secretary of State for determination.
- 14.3 Alternatively, committee may be of the opinion that bicycle use cannot lead to the acquisition of public bridleway rights and that the route A-B or A-E should be recorded as a public footpath, in which case an order would be made to add the route to the DMS. If objections to the order were received the County Council would submit the case to the Secretary of State for determination.
- 14.4 Alternatively, if committee are of the view that there is insufficient evidence to reasonably allege that public rights exist; it may disagree with the officer recommendation and direct that no order be made.
- 14.4 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.
- 14.5 The decision can only be made on the basis of the evidence submitted as interpreted under the current legislation. Matters such as security, privacy, safety or convenience are not relevant (see **Annexe B**).
- 14.6 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.
- 14.7 All interested parties will be informed about the decision.

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### **Lead Officer**

Catherine Valiant, Countryside Access Officer, Tel. 020 8541 9342

### **Contact Officer:**

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### **Consulted:**

See Section 6.

### **Annexes:**

A Drawing No.3/1/10/H30

B Legal background

C User evidence summary – foot use

D Extract from the Surrey Commons Military Lands Byelaws 1978

E User evidence summary – bicycle use

F Aerial photograph of area of claimed route (1948)

### **Sources/background papers:**

File 'CP556' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.