

**SURREY COUNTY COUNCIL****LOCAL COMMITTEE (WAVERLEY)****DATE: 18 MARCH 2016****LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER****SUBJECT: APPLICATION TO RECORD A PUBLIC FOOTPATH FROM PUBLIC FOOTPATH NO.181 (FARNHAM) TO PUBLIC FOOTPATH NO.7 (FARNHAM)****DIVISION: FARNHAM****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 FP181 (Farnham) and FP7 (Farnham) to the Surrey County Council Definitive Map and Statement (DMS).
- 1.2 It is considered that the evidence is sufficient to reasonably allege that a public footpath subsists over a route between FP181 (Farnham) and FP7 (Farnham). 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:
- 2.2 Public Footpath rights are recognised over the route A-B-C-D-E on Drawing No 3/1/18/H85 (**Annexe H**) 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 Footpath No.300 (Farnham).
- 2.3 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 on balance supports a modification.
- 3.2 In this instance the evidence submitted in support of the application is considered sufficient to establish that public footpath rights are reasonably

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alleged to subsist over a route, having been acquired by virtue of public use under statutory presumed dedication (under s.31(1) of the Highways Act 1980). Evidence suggests that landowners have not sufficiently challenged users or taken sufficient actions to demonstrate their lack of intention to dedicate during the relevant period.

4. INTRODUCTION AND BACKGROUND

- 4.1 In 2003 the County Council received a letter from Mr & Mrs Carr-Archer of Farnham who stated that they were writing on behalf of a large number of local residents. They wished to report that the landowner/tenant of land adjacent to Crondall Lane and to the north of Beavers Lane had fenced off land and that the public had been prevented access to previously well walked paths. The author of the complaint letter indicated that the routes had been well walked for over 20 years and were, therefore, to be considered as public rights of way. A site visit was undertaken, photos taken and advice given to the complainants regarding how to go about making a claim to record a public footpath on the Definitive Map. No application was received as a result of this enquiry.
- 4.2 Some 10 years later the County Council received an application (16th January 2013) from Mr Dennis Banks (a committee member of North West Farnham Residents Association) 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 FP181 (Farnham) to FP7 (Farnham). 10 User Evidence Forms accompanied his application. The claimed route was one of the routes that had been referred to 10 years earlier by Mr & Mrs Carr-Archer.
- 4.3 The claimed route is shown on drawing 3/1/18/H84 (**Annexe A**). It commences at point A on FP181 (Farnham) and runs in a north-easterly direction for approximately 340 metres to join FP7 (Farnham) at point D. There is no record of the route ever having been put forward for inclusion in the DMS since it was first published in 1952.
- 4.4 The claimed route is currently open and available from point A where it leaves FP181 (Farnham), crosses through some scrub land to point B where it emerges into a large field and continues in a straight line, crossing the field to point D where there is a metal field gate. This gate is chained shut and blocked by logs and other obstacles. At the current time the public are managing to get around the obstructions, and the path continues to be walked. There are also accesses onto the field and the claimed path at two points, marked by crosses on the plan in **Annexe A**. These have locked gates across them, although the adjacent fences have been cut and bent back to allow access onto the field.



Path leads through scrub from FP181 (Farnham)



Path passes onto large field



Path crosses field



Path ends at chained and barred metal field gate at FP7 (Farnham)

5. ANALYSIS

- 5.1 It is the normal procedure, in reports such as this, to outline the evidence for public use of the path first. However in this case actions taken by the landowner have a significant impact on the period of time over which user evidence needs to be considered. In this instance, therefore, it is necessary to outline the landowner's evidence first.

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5.2 LANDOWNER EVIDENCE

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. Public use might also lead to the acquisition of public rights at common law. Although 20 years uninterrupted use by the public establishes a presumption that the way has been dedicated to the public, this can be contradicted by evidence showing that the landowner did not intend to dedicate public rights during that time. A landowner could demonstrate the lack of intention to dedicate a right of way through physical action on the ground (notices, locked gates, challenging people) or by submitting a statement and declaration under the Highways Act 1980 (or its predecessors). Evidence of interruption of the public's use of the way would have to be shown to have been both effective in preventing public use and clearly known to the public.

5.3 The background to Map Modification Orders is attached at **Annexe B**.

5.4 Until very recently the landowner of the whole of the land over which the footpath runs was Mr A.C.F Evans, who resided in Canada and who employed a tenant farmer and a land manager. Mr A.C.F. Evans unfortunately died earlier this year and the land is now held in trust by Mr D Evans (Mr A Evans' son) and his mother. It continues to have a tenant and a land manager. The land has been in the Evans family for many years, having previously been owned by Mr A Evans' grandfather and great grandfather. The land has been consistently tenanted and managed with the owners residing in Canada. Until the mid 1970s the land was cultivated as hop fields. Since then the land has been used for the production of hay.

5.5 Mr A.C.F Evans submitted evidence to counter the claim that public rights of way exist over the land which are not shown on the Definitive Map and Statement. Some of the key pieces of evidence that he referred to are a series of documents which he stated were submitted to the County Council from 1977. These documents can be found at **Annexe C** and are summarised below.

Legislation under which document produced	Type of document	Date submitted	Years since previous document submitted
s.34(6) Highways Act 1959	Statement and Plan	1 st September 1977	n/a
Statutory Declarations Act 1835	Statutory Declaration	5 th April 1984	7
s.31(6) Highways Act 1980	Statutory Declaration	Undated but with an annotation to indicate it had been accepted in January 2003 (see section 5.6 below)	19

s.31(6) Highways Act 1980	Statutory Declaration and Plan	16 th November 2012	9
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- 5.6 The first, second and fourth document above are to be found in the County Council files. The third document above, submitted by Mr Evans in his evidence is an unsigned and undated s.31(6) Highways Act 1980 statutory declaration. The County Council does not have a signed and dated version in its records, however it does have a s.31(6) statement and plan dated 6th January 2003 for the land in question (see **Annexe D**). It is not clear the reason for the difference in the two documents although had the landowner tried to submit the Statutory Declaration in the form in which it appears in the landowner's evidence, the County Council would have pointed out that too long had passed since submission of the previous statutory declaration and that a new Statement and Plan would need to be lodged, so this might be the reason for the difference.
- 5.7 S.34 (6) HA59 was a precursor to s.31(6) HA80 and they both deal with the ability of the landowner to deposit with the local authority a statement, followed up by a declaration identifying his land, acknowledging any rights that might already be recorded and stating that he does not accept that there are any other public rights of access on the land. It is a two part process, landowners must submit a statement and map first and follow it up by a declaration. Correctly made these deposits act as evidence of a lack of intention to dedicate on the part of the landowner and would be sufficient to negate a claim for a public right by long user throughout the duration of the documents (6, 10 or 20 years between the date of the first statement and subsequent declarations(see below, section 5.8).
- 5.8 Legislation clearly set out the process by which the statements and declarations should be made, and in particular the maximum time that should elapse between initial statement and subsequent declarations. In 1977 when the first statement in relation to the land over this claim was made the legislation demanded that the subsequent declaration should be made within 6 years. This period of time was extended by virtue of the Countryside and Rights of Way Act 2000 to 10 years (backdated to deposits made from 1998) and again by virtue of the Growth and Infrastructure Act 2013 to 20 years (for deposits made after 1st October 2013).
- 5.9 The first statement under this legislation was submitted in 1977 and therefore should have been followed up by a statutory declaration within 6 years – that is, by 1st September 1983. In fact an additional 7 months passed before a declaration was submitted in 1984. This means that the requirements of the legislation were not met and that the documents cannot be used to rebut evidence of an intention to dedicate. There was then a gap of 19 years before the second statement was lodged with the County Council, again this length of time fails to meet with the requirements of the legislation.
- 5.10 The statement dated January 2003 however (**Annexe D**) was correctly made to start the process again, and was followed up by a statutory declaration after 9 years (in 2012); well within the 20 years required in the legislation at that time. The result of this is that if no public rights had been established by 2003 then subsequent use by the public since 2003 (regardless of how much or how frequent) could not give rise to a public right of way. The landowner

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has 20 years from 2012 to make a subsequent declaration to ensure the requirements of the legislation are met.

- 5.11 It is the case, therefore, that the 2003 statement and subsequent declaration are the first documents that meet the requirement of the legislation and provide sufficient evidence to negative the intention of the landowner to dedicate a public right of way. This means that when considering the evidence of use under s.31 of the Highways Act 1980 the relevant period extends from 1983 – 2003. Evidence of use will be discussed further in section 5.28 – 5.54 below.
- 5.12 Although the early s.31(6) / s.34(6) statement and subsequent deposit cannot be used together as evidence of a lack of intention to dedicate a public right of way over Mr Evans' land they might still be used, in conjunction with other evidence of actions taken by the landowner, to counter any claim that the route was a public footpath by virtue of long use. Other steps taken by the landowner pre-1983 will now be considered.
- 5.13 In the evidence submitted by the landowner to counter the claim made in the application he refers to a number of factors/actions which he asserts show that he had no intention of dedicating the route as a public footpath, and that he had instructed that steps be taken to ensure that the public were made aware of this fact.
- 5.14 ***Use of the land prior to 1977*** – Until the mid 1970s the land over which this claimed footpath runs was farmed as a hop field. Mr Evans has suggested that such a land use would be incompatible with the public using the land as a public right of way and that the public would have been incapable of walking through the land due to the hop plants, poles and trellises. He has submitted photos of what hop farming looked like as evidence of this. This might be an important fact, and one that will need to be addressed when looking at the user evidence if it emerges that it is not possible to consider statutory presumed dedication during the relevant 20 year period (1983 – 2003).
- 5.15 ***Statements and declarations made under the Highways Act 1959 & 1980:*** As discussed above the 1977 statement and 1984 declaration cannot be used together as sufficient evidence to negative the intention of the landowner to dedicate a public right of way in the same way as the later 2003 & 2012 documents can because they don't comply with the requirements of the Act. However, they do provide evidence of the views of the landowner on those particular dates. These documents were private, known only to landowner (and agent) and the relevant Authority at the time. They were not made known to the public, and users of the path would have been unaware that they existed. In themselves, therefore they are not sufficient to be considered evidence of interruption of the public's use of the way.
- 5.16 ***Tenancy agreement – 1933:*** A tenancy agreement dated 1933 between the then landowner (Mr A.H. Stevens) and the then tenant (S. Bide & Sons. Ltd) has been submitted in which there is the following clause:
- “(vii) ...nor to permit any encroachment or systematic trespass upon the premises and to use its best endeavours to prevent the acquisition of any new rights of way public or private or easements over any part of the premises”

- 5.17 The current landowner has stated that the terms of this 1933 tenancy agreement were passed on to subsequent tenants (Mr K Kenward from 1983 – 1997 and Mr M J Luard from 1997), and that this clause remains in the tenancy agreements. Mr Luard has submitted a witnessed statement in which he confirms that his tenancy agreement benefits from the same clause (see section 5.18 below). Assuming that this is correct, this means that during the relevant period the landowner has made it clear to the tenant that he is responsible for ensuring no further rights are acquired over the land. The tenancy agreement is private, known only to landowner (and agent) and the particular tenant. It was not made known to the public, and users of the path would have been unaware of the clause within it. In itself, therefore it is not sufficient to be considered evidence of interruption of the public's use of the way.
- 5.18 **Mr Luard's witnessed statement as tenant farmer** – The current tenant farmer has submitted a statement dated 13th August 2012 in which he states that he has “had and continue to suffer considerable problems with the public not staying on the official public footpaths. They vandalise the fences erected by me and drive on the Land. I regularly repair the fences and put up notices and also pay for the Land to be ploughed.” Mr Luard has tenanted the land since 1997, so for the last 6 years of the relevant period. He has acknowledged that the public have been using routes over the land during that time. It is unclear from this statement which routes these are, and whether they include the claimed route, although it seems likely. He has implied that the steps that he has taken are evidence that he is showing a lack of intention to dedicate. Whether the actions taken have been sufficient to bring this home to the users is something that needs to be considered.
- 5.19 **Letters mentioning trespass** - The landowner's evidence contains copies of correspondence that refer to trespass occurring over the land. The first is dated 20th June 1977 and says:
- “The tenant has advised the Agents to point out to you that considerable trespass is going on over the land...the danger is that if it is allowed to continue, the public may acquire rights of way”
- 5.20 The advice was to erect fencing and gates to minimise trespass and to make a statement under the Highways Act. Other such letters are dated 1984, 1989 and 1997 and indicate that there have been members of the public using routes over the land over a substantial period of time. Initial advice to the landowner and tenant was around fencing the land and submitting Highways Act deposits, and there is evidence to show that the tenant and landowner have made some attempt to follow the advice that has been given (see 5.21 below).
- 5.21 **Evidence of work on site** – Apparently in response to advice on how to deter trespasses a letter dated 22nd August 1977 refers to the purchase and installation of a 12ft field gate (although it does not indicate where it was erected) and the submission of the Highways Act statement and plan mentioned in section 5.5 above. Further correspondence during November 1977 refers to the erection of fencing. Also submitted in the landowner's evidence are a number of pieces of correspondence indicating that the tenant was taking care of the land that he was renting, there is reference to the trimming and pollarding of trees in 1980 and 1995, the inspection of the site by the land manager in 1986, fencing around the land in 1986, further fencing

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work being carried out in 2003. Mr Evans asserts that this is evidence that the tenant was looking after the land well and that he was trying to prevent trespass onto the land. Whether the actions taken were sufficient to bring this home to the users is something that needs to be considered when the user evidence is analysed.

- 5.22 **Signs** – There are a few references in the landowner’s evidence to indicate that signs had been erected on site in the past relating to the rights of way. The 1984 Statutory Declaration states:

“my tenant Mr Keith Kenward and I are trying to prevent them [the public] using such brown paths¹ by putting up notices to show the line of the official public footpaths, which have been already dedicated...”

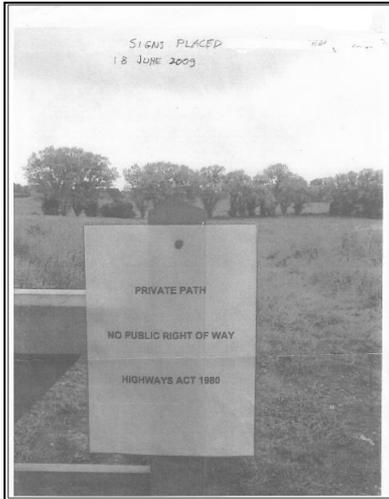
- 5.23 In the 2003 Statutory Declaration (which is undated and not in the County Council records) the following sentence is found (a reiteration that in 1984 the tenant was erecting signs):

“In the year 1984...I recorded the fact that my tenant Mr Keith Kenward and I were trying to prevent the unauthorised use of such brown paths by putting up notices to show the line of the official public footpaths...”

- 5.24 There is no photographic or additional evidence to confirm the erection of notices in 1984.

- 5.25 Further evidence submitted by the landowner indicates that advice was sought in 2009 about how to prevent trespass, with Carter Jonas advising on the posting of appropriate signage on site in accordance with the Highways Act 1980. Photographic evidence submitted suggests that signs were erected in 2009 and that further notices were erected in 2010 and again in 2011. Other evidence is submitted to show that further signs that were erected in 2011 were vandalised and some removed and that barricades that the tenant had installed had been moved. It would seem that actions taken by the tenant from 2009 onwards to prevent access were repeatedly and consistently attacked by people wanting to assert their perceived right to use the route. There also appears to be an increase in the frequency with which the tenant is seeking advice about how to deal with trespassers since about 2009.

¹ The brown paths were shown on a map and included the approximate location of the claimed route as well as additional routes over the land



2009 notice



2010 notice



2011 notice

- 5.26 During 2011 it appears that the site had an incursion of travellers move onto the land and as a result the tenant blocked up all entrances to the field. From 2011 there seems to have been a more concerted effort by the local inhabitants to assert their perceived right to use the claimed route which has included organised walks across the land. When a recent site visit (2015) was made the notices were still visible on site, although partially overgrown and defaced and the blockage at point D was still in situ, although a route has been created around it.
- 5.27 There is evidence from the landowner, tenant and land agents that acknowledges that there has been use of the land by the public over a period of time.
- 5.28 All of the landowner's evidence, together with the evidence of action by tenant and land agent, will need to be carefully weighed against the evidence submitted by the users of the claimed path to determine whether there is sufficient evidence of the lack of intention to dedicate a public right of way over his land.

5.29 PUBLIC USER EVIDENCE FOR THE ROUTE

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 'as of right' – that is without force, secrecy or permission. Public use might 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 use by the public and doing nothing to prevent it and/or b) the use is sufficient 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.

5.30 The relevant period (when considering evidence of statutory deemed dedication) for the purpose of this investigation has been determined to be 1983 – 2003, as described above in section 5.11.

5.31 10 user evidence forms were submitted with the application, and during the course of the investigation a further 23 forms were submitted, which gives a total of 33 user evidence forms in total. All forms indicated that use had been on foot. Three of the forms also indicated that use had also been on a bicycle. A number of the user witnesses were approached and 7 agreed to be interviewed about their use and their recollections of the route claimed.

5.32 User evidence forms

After analysing the evidence from these forms it was necessary to discount forms 11, 12, 19, and 22 as they are duplicates. It was also necessary to discount form 27 as this is from an eye witness, rather than a user witness. Her comments can be noted as anecdotal evidence (see section 5.51); however, they cannot be used to establish evidence of use by the public. Two users (23 & 30) did not complete the map accompanying the user evidence form; however their period of use falls outside the relevant period so may only be relevant if statutory deemed dedication is considered unsuccessful and use at common law is considered. This leaves 26 forms in total (28 if the years pre-1983 are to be considered).

5.33 Route walked

The route that has been claimed in this application is for a straight line path running from FP181 (Farnham) to FP7 (Farnham) as shown on the plan in **Annexe A**. However, the evidence given on the user evidence forms suggests that a number of different paths have been walked. The plan at **Annexe E** shows the different routes that have been claimed and the users which have claimed them. From this plan we can see that the pink and green routes have only been claimed by one person (24 & 2 respectively) and the purple route by only 3 people (16, 24, and 25). Only 4 people have claimed use of the yellow route (10, 16, 24, and 25). Five people claimed use of the blue route (3, 5, 8, 9 and 10).

5.34 The red route is the route most frequently described/drawn on the user evidence forms (19 of the 26 users); however it is the blue route that most closely resembles the route claimed in the application.

- 5.35 Due to the lack of users for the green, yellow, purple and pink routes, these routes will be discounted as potential rights of way. Two of the UEFs refer solely to use of one of these routes (16 & 25 to yellow and purple), so these UEF have been discounted from the total, leaving 24 forms that refer to either blue or red routes² Consideration will be given to the blue route, despite the lack of users claiming the route, due to the fact that it is the route claimed in the application.
- 5.36 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 might be that they have only actually walked each individual route once a month, or each route with a differing frequency which when considered together amounts to 3 times a month. A relatively frequent level of claimed use might apply to all of the paths collectively whereas their use of the single, linear route claimed in the application might be much less frequent. This sort of situation would have a significant impact on the total amount of use each individual path has received. The impact of this will be referred to again as the evidence is considered below.
- 5.37 On the face of it there is considerable similarity between the red and the blue routes, the main difference being whether walkers walked around the edge of the field for the whole walk, or cut straight across the field from FP181(Farnham). On two separate site visits the investigating officer noticed that the beaten line in the field had changed. On the first visit the beaten line was next to the hedge in the field between points C and D (**Annexe A**), while at the second visit it was about 10 metres out from the hedge line into the field. On neither visit did it appear that the section of the red route between A and C (continuing around the edge of the field) was well walked, the beaten lines were straight across the field from FP181(Farnham) to FP7(Farnham) rather than following the edge of the field. When considering which route or routes have been established as public rights of way, however, it is not the current use that we need to consider. It is the route that has actually been used by the public during the relevant 20 year period (1983 – 2003). For this information we have to turn to the user evidence forms, the routes drawn on the maps and evidence from aerial and contemporary site photos. **Annexe F** shows the length of time and frequency of the use of the blue route, while **Annexe G** shows the same information in relation to the red route.
- 5.38 Years of use - **The Blue Route**
There are 7 users (3, 5, 8, 9, 10, 23, and 30) who have claimed that their use is of the blue route, 4 of which have claimed use for the full 20 years. For 17 of the 20 years 6 users were walking the path. The longest use has been by Miss Wooderson who, in using the route since 1968 has been walking the route for 47 years.
- 5.39 Frequency of use - **The Blue Route**
There is 1 user (9) whose use of this section is more than once a day for the full 20 year period, and an additional 2 users (5, 10) whose use is daily for the full 20 year period. One user claimed use of once a week for the 20 years (8) and one several times a week for 17 years. If we assume that more than

² Plus Mrs Banks (23) and Mrs Turbefield (30) who have not drawn any path on their map.

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once a day is twice, and that several times a week is three times then there have been approximately 32 journeys made over the blue route for much of the 20 year period³.

5.40 Years of use - The Red Route

There are 21 users who have claimed that their use is of the red route, 12 of which have claimed use for the full 20 years. Throughout the 20 year period there is never less than 13 users claiming use of the path in any one year, and for the first 8 years of the relevant period there are 16 users in any one year.

5.41 There are 10 users whose use has been for longer than 30 years, and the longest use has been by Mr Guy who, in using the route since 1940 has been walking the route for 75 years.

5.42 Frequency of use - The Red Route

There is 1 user (6) whose use of the red route is more than once a day for the full 20 year period, and an additional 5 (2, 4, 13, 15, 24) whose use is daily for the full 20 year period, in addition Mr Blencowe's use (1) is one year short of 20 years at this level of frequency. Making the same assumptions as stated in section 5.38, and also assuming that once or twice a month is about 0.5 per week, then taking into account only those users that have walked for the full 20 year period, there have been approximately 56 – 57 journeys made over the red route per week during the 20 year period⁴ (rounding the 0.5 as a half journey cannot be made). In addition to this we need to include the years where there are additional users (those that walked the route for less than the full 20 years) – so there will in effect have been more weekly journeys than this.

5.43 Although the frequency of use of those claiming the blue route is high, the number of users is not. This is of particular note when we consider the amount of use that has been made of the red route in comparison and also when we consider the location of the claimed route. Had the path been in a remote countryside location the evidence might have been sufficient to allege a path in the location of the blue route, however with such a large body of housing in the vicinity of the path one would expect more than 5 users to claim to have used the path, as is the case with the red route. It may be that some users did not accurately plot their walked route on the map – arbitrarily drawing a straight line when in fact they actually walked around the edge of the field. It may also be a possibility that the route walked has changed to the blue route in the more recent past when the existence of the correctly made .31 (6) statement and declaration would be considered sufficient evidence of a lack of intention to dedicate.

5.44 Width/surface/boundary

There are a variety of widths given for the path, and not all users gave a specific width. Some of the words used to describe the route include: "Trodden down part of field" (1), "Well trodden paths" (24), "Pathway worn by constant footfall" (3) and "Narrow footpath alongside hedge" (13). Where given users have recorded paths in a mixture of imperial and metric and they vary from 1 foot wide (5), to between 1.5 and 3m (3). Amalgamating similar

³ $14 + 7 + 7 + 1 + 3 = 32$

⁴ $14 + (5 \times 7) + 1 + (2 \times 3) + 0.5 = 56.5$

answers, and converting the answers to metric, the following is a table to show the widths which those that gave a measurement claimed:

Width	Number of people claiming the width
Not given specifically	8
Less than 1 metre	9
1 – 2 metres	8
Over 2 metres	1

5.45 The surface is consistently described as being a trodden down path through the field, no surfacing is mentioned and on site visits it was apparent that paths are being created by virtue of foot traffic only. There is no mention of the path ever being fenced out of the field, the northern boundary of the path is open to the field, and the evidence suggests that the southern boundary has been the hedge line of the field with the path either running alongside it (red path) or through the field at a distance from it (blue path).

5.46 The width of the claimed path is difficult to pinpoint with any accuracy due to the nature of the land over which it runs. Photographs taken in 2003 (at the very end of the relevant 20 year period) show a beaten path some distance from the hedge, probably more than 2m wide in total. Those users that did mention a measurement referred to sizes up to 2m, and certainly 2m would be a wide enough path along the edge of the field for two people to walk side-by-side. Without further information it would seem appropriate to consider the path to be 2m wide.

5.47 Gates/Stiles

A number of the users referred to a stile at the Crondall Lane end of the claimed path. During the interviews this was clarified as being the stile on FP 181, which has since been changed into a kissing gate. There is no mention of any stile or gate where users have been leaving FP181. Many of the users referred to a metal barred gate being erected at the eastern end of the path, onto FP7. Mr Cleland (3) indicated that this was about 10 years ago and that it was sometimes open and sometimes closed. Mr Guy (13) agreed that the gate was erected in about 2005. Miss Jordan (4) and Mrs Larby (28) thought that the gate was erected about 7 years ago, and mentioned that it was often left open and a gap was left to one side. Mr & Mrs Russ (7&8) indicated that the gate was put up in response to the trespass by travellers. Evidence from the landowner indicates that travellers moved onto the site in the summer of 2011 and that following their removal the tenant re-secured the gate and blocked other gaps with logs.

5.48 The majority of users that mentioned a date for the erection of the gate at the eastern end suggested that it was first put up in about 2005 – they certainly are not evident in the site photos from 2003. The current bales of hay, logs and other obstructions which are on site at the eastern end appear to have been put in later. Users considered that these obstructions were put in place to try to stop travellers gain access to the site. This means that during the relevant period 1983-2003 there were no gates or stiles on any of the claimed route, and therefore any rights have been acquired without the limitation of a gate. If the route were to be added to the Definitive Map and Statement the

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landowner could apply for a licence to keep or replace the field gate at the eastern end of the path, if he were to keep livestock in the field.

5.49 Notices

Section 5.25 above details the landowner's evidence regarding signage. None of the users referred to having come across signs as far back as 1984, as suggested in the statutory declaration. However, many of the users admitted to having seen signs in the last few years which indicated that the land was private and that there was no public right of way. This corresponds with the landowner's photographic and other evidence that signs were erected in 2009 and again in 2011. A number of the users confirm the landowner's observations that the signs were vandalised very soon after being installed. None of the users referred to any signs on site prior to 2009 or during any of the relevant period.

5.50 Use by bicycle

Use by the public on bicycle can lead (since 1968) to the acquisition of bridleway rights, and since 2006 to restricted byway rights⁵. Three of the user evidence forms (5, 25 & 26) indicated that use had also been made of a route on bicycle. User evidence form 25 relates to use of the purple route (see section 5.32), user evidence form 5 relates to the blue route and user evidence form 26 to the red route. With only one user per route, there is considered insufficient evidence to have established bridleway or restricted byway status on any of the routes either through statutory deemed dedication or at Common Law.

5.51 Comments made – evidence of repute

In addition to the evidence of specific users of the path, one of the user evidence forms (27) was completed by a lady who had witnessed people using the way. She indicated that between the years 1971 and 1977 she visited a person in 34b Beavers Close and witnessed people walking across the field from Crondall Lane in the direction of the college, to the rear of the property. She refers to there having been a single track in the field. Although this goes to support the personal use from those that completed user evidence forms, it cannot be used as evidence of use because the lady cannot have known the purpose of the journeys being made.

5.52 Use by right

Without force – There has been several assertions by landowner, tenant and land agent that members of the public have used force to access the claimed route. They have indicated that fencing that has been put over the path has been cut by persons unknown which has then allowed other members of the public to access the claimed paths. Three of the user evidence forms (2, 3 & 8) also referred to fences having been cut, or removed soon after being erected by persons unknown. There is no evidence that the people that completed user evidence had to cut or break down fences themselves in order to access the claimed route. Their use, therefore, was not through personal force.

Without secrecy – There is no indication from the users that they had been using the route clandestinely, and evidence from the landowner and tenant indicates that they were aware that people were using the route.

⁵ Bicycle use on a bridleway was made legal in 1968 and the Natural Environment and Rural Communities Act 2006 stated that bicycle use after 2006 leads to restricted byway rights.

Without permission - None of the users indicated that they had ever sought or been given permission to use the route.

5.53 Evidence of Public Footpath at Common Law

As stated in section 5.28, in addition to considering statutory dedication of public rights of way by virtue of s.31 of the Highways Act 1980 it is customary to consider whether there has been a dedication at Common Law.

5.54 The same requirement to show use 'as of right' applies when considering whether there has been a dedication at common law, and this has been discussed in s.5.52 above. There is a substantial amount of evidence of use for the red route, but significantly less use for the blue and other routes.

5.55 As with statutory deemed dedication, a claim at common law could be rebutted by evidence of a lack of intention to dedicate. Consideration has to be given then to what acts the landowner and tenant carried out to show to the public that the route was not so dedicated. These actions have been discussed above in section 5.2 – 5.28.

5.56 DEFINITIVE MAP

No public rights appear on the Definitive Map or in the Definitive Statement in the location of the claimed route. There are none in the location of the claimed route on the 1932 Rights of Way Act Map, or 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.

5.57 HISTORIC EVIDENCE

5.58 ***Farnham Tithe Map 1839:*** There is no indication of a path in the area of the claimed route on this map.

5.59 ***Ordnance Survey County Series Map 1:2500 dated 1872, 1897, 1916, 1936 (sheet XXX.5):*** There is no indication of a path in the location of either the blue or the red route.

5.60 ***Ordnance Survey 6 inch Maps dated 1898, 1920, 1934 & 1938 (sheet):*** There is no indication of a path in the location of either the blue or the red route.

5.61 ***Ordnance Survey 1:10,000 dated 1979 (sheet):*** There is a pecked line running from the approximate location of the gate on Crondall Lane, parallel to the field boundary along the rear of the houses on Beavers Road and joining up with the approximate location of the gate on FP7 Farnham. The route is labelled 'track'. There is no indication that this track joins up with Footpath 181 Farnham, or in the location of the red route.

5.62 ***Ordnance Survey 1:25,000 dated 1980 (sheet):*** There is a pecked line in the same location on this map as on the earlier 1:10,000 map, although on this scale map the route is unlabelled.

5.63 Although part of the red route is shown on the later Ordnance Survey maps this can only be used to indicate that at the date of the map the surveyors discovered a physical feature on the ground. They cannot be used to ascertain the status of that route or whether use was being made by the public, as of right.

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- 5.64 ***Aerial Photographs dated 1949, 1971, 1988, 1998, 2006, and 2012/13:***
The 1949 aerial photograph of the area is not of sufficient clarity to identify a path in the location of the claimed route, the red route, or any of the other routes.
- 5.65 In the 1971 photograph there is a clear track running around the field edge, and it is possible to see the lines of the hops in the field. The track is in the approximate location of the pecked line labelled 'track' on the 1979 1:10,000 Ordnance Survey Map. There is no route running across the field in the location of the blue route as claimed in the application. Mr Evans has submitted this photograph as part of his evidence, pointing out that there is no path where the claimed path is and drawing attention to the hops through which he asserts it would have been difficult to pass. Mr Evans suggests that the track that is visible running around the edge of the field, in the location of the red route as claimed in user evidence forms is a grass border for tractor access. He asserts that the photograph indicates that there is no access at point D onto FP7 Farnham.
- 5.66 The 1988 photograph is not very clear but there does not appear to be a path in the location of the red route and there is only a vague impression that there is a route in the location of the blue route. However, by 1998 the red route is more clearly visible running around the edge of the field, and cutting off the corner at point C. There are also other, diagonal paths visible running from the southern corners of the field to a field boundary at the top of the photograph. By 2006 there are several paths running over the field and there is now a path visible running east to west along an approximation of the blue route. The red route is also still visible running around the southern boundary of the field. By 2012/3 the paths are very clearly delineated across the field. The blue route has become very obvious, whilst the red route has decreased in visibility considerably.
- 5.67 Although no conclusions can be drawn about the status of the paths from these photos, it is evidence that paths have existed over the field and that some of them have coincided with the location of the claimed path, the red path and some of the other paths shown on user evidence forms at different times throughout the period 1949 - 2012.
- 5.68 ***Land Registry Title Deeds:*** During the course of the investigation one of the users (Mr Stone) submitted plans which form part of the Land Registry Title Deeds for two properties which back onto the field over which the claimed path runs (24 & 14 Beaver Close ref: SY450988 & SY472069). The plans are dated 1969, are at a scale of 1:1250 and are based on Ordnance Survey plans for the area. They show a single pecked or double pecked line in the field in the approximate location of the red route, with the exception that it does not join up with Public Footpath No.181 Farnham at point A but meets the field boundary further south at the location of a field gate into the field from Crondall Lane. The plans used by Land Registry are legal documents in so far as they relate to the parcel of land edged (usually) in red and described in the deeds. The fact that there appears to be a track on the ground in the adjacent field can only be used to confirm that, at the time the base map was drawn up, there was a physical feature in this location. No evidence of status can be drawn from the existence of a track on this document.

- 5.69 **Street Plan and Guide to Farnham, Aldershot and Haslemere:** During the course of the investigation one of the users (Mrs Kirkwood) submitted the above document which, although undated, she dates at some time before 1980. On this plan there is a single and double pecked line annotated FP (presumably to indicate footpath) in the approximate location of the red path. This plan indicates that there was a physical feature on the ground at the time it was drawn up which the map makers believed was a footpath. It does not, however, assist in determining the status of the path, or indicate whether the path was one over which the public had a right to use.
- 5.70 **Conveyance 1963:** Mrs Kirkwood also submitted a conveyance dated 15th June 1963 in relation to the sale of a property on Beavers Road known as Cobfield (number 32). The conveyance contains a plan similar to those included in the Land Registry Deeds mentioned above in section 5.68. A double and single pecked line annotated 'track' is shown in the location of the red route (again linking to the Crondall Lane rather than FP181 Farnham). This plan indicates that there was a physical feature on the ground at the time it was drawn up which the map makers believed was a footpath. It does not, however, assist in determining the status of the path, or indicate whether the path was one over which the public had a right to use.
- 5.71 **Other historic evidence:**
The investigation incorporated a search of the Surrey History Centre and has considered evidence for the claimed path on Enclosure records and other relevant documents. No other historical evidence for the claimed path could be located.
- 5.72 In the absence of any conclusive map evidence showing public rights the claim must rely on user evidence either by statute or common law.

6. OPTIONS

- 6.1 The Committee might agree or disagree with the officer's recommendation. Alternatively, they might decide that the evidence submitted shows that the route should be of a different status to that recommended, or that rights exist over a different or additional route to that recommended. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see **Annexe B**)
- 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 Farnham Town Council responded to the consultation by email and stated:

The Strategy and Finance Working Group had considered a letter from Surrey County Council about an alleged footpath from

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Cron dall Lane to the Field exit on Footpath 7 (CP554). Members were aware that the footpath had been in existence for decades.

RESOLVED: That the Town Clerk write to Surrey County Council confirming that a Public Footpath had existed for decades from Cron dall Lane to the Field Exit on Footpath 7 (CP554)

- 7.2 No responses were received from The Ramblers, The Open Spaces Society, The British Horse Society, Borough, 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 £1200, 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**

<i>Area assessed:</i>	<i>Direct Implications:</i>
Crime and Disorder	None of these are relevant considerations under the current legislation
Sustainability (including Climate Change and Carbon Emissions)	
Corporate Parenting/Looked After Children	
Safeguarding responsibilities for vulnerable children and adults	
Public Health	

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, might 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 might 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 might 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."
- 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 date of challenge has been taken as 2003, the date on which a correctly made and followed up statement under s.31(6) Highways Act 1980 was made; the period in question therefore is 1983 – 2003.

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- 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 might 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 people that have completed UEFs and given evidence are residents local to Farnham, all living within the vicinity of the path now or having lived in the area some years ago, 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 they were legally entitled to use the route. The landowner and tenant have suggested that there might have been some use ‘by force’ in that they assert that measures that have been taken to block off the paths that were being walked over the land were vandalised, with fences being cut, gates being climbed and notices being defaced. However, there is no direct evidence of users cutting the fences; none of the users stated that they had ever had to use force to use the route.
- 13.8 **Lack of intention to dedicate:** The only evidence of a lack of intention to dedicate during the 20 year period is the statutory declaration made to the Local Authority in 2003 which is being used as the point at which the public’s right to use the route was brought into question. Other actions taken by the tenant are not considered sufficient to make the users aware that the landowner had a lack of intention to dedicate.
- 13.9 **Sufficiency of use – statutory deemed dedication:** Volume and frequency of use of the various routes claimed by users has been discussed in section 5.37 to 5.42 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 red route as a footpath, having been used by a significant number of people on foot during the relevant 20 year period with sufficient frequency. It is considered that none of the other routes referred to in the evidence have been used by sufficient number of people on foot during the relevant 20 year period for there to have been a deemed dedication of public rights.
- 13.10 **Common law:** In this instance it is thought that there is sufficient evidence of use, coupled with no clear act of contrary intention prior to the 2003 s.31(6) deposit for rights to have been acquired over the red route at common law. There is insufficient evidence of use for a dedication of a public right to be inferred over the other routes claimed. However, it is felt that there is sufficient evidence of statutory deemed dedication for common law not to have to be relied upon.
- 13.11 **Width:** The width of the path has been discussed in section 5.43 – 5.44 above. It is suggested that recording a width of 2m would adequately reflect the evidence or use.
- 13.12 **Gates:** The main gate on the path now is at point C onto FP7 Farnham, although the evidence suggests that this was installed after the end of the 20 year period. None of the witnesses refer to having been obstructed in their

use of the route in any way during the 20 year period and it is submitted that no gates should be recorded on the Definitive Statement as a result.

13.13. CONCLUSION

In light of the above, it is the Officer's view that, by virtue of the use by the public on foot, footpath rights have been acquired over the route referred to as the red route in this report and shown on plan reference 3/1/18/H85 at **Annexe H** from A to E under section 31 of the Highways Act 1980. It is the Officer's view that no public rights should be recorded over any of the other routes referred to in this report.

13.14 The width to be recorded should be recorded as 2m, being the width that would most adequately reflect the evidence of users.

13.15 RECOMMENDATION

The Officer submits that the route which has been referred to as the red route and is shown between A-E on plan reference 3/1/18/H85 at **Annexe H** should be recorded on the Definitive Map and Statement for Surrey as Public Footpath No.300 Farnham, with a width of 2 metres.

13.16 The Officer submits that no Order should be made in relation to any of the other routes described in the report.

14. WHAT HAPPENS NEXT?

14.1 Committee may agree with the officer recommendation, in which case an order would be made to add Public Footpath No.300 (Farnham) 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 form the opinion that rights have been acquired over different or additional routes and could direct the officer to make an order to record these on the Definitive Map. If objections to the order were received the County Council would submit the case to the Secretary of State for determination.

14.3 Alternatively, if Committee are of the view that there is insufficient evidence to reasonably allege that public rights exist, it might 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**).

14.5 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.

14.6 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:

Debbie Prismall, Senior Countryside Access Officer Tel. 020 8541 9343

Consulted:

See Section 7.

Annexes:

- A Route claimed in schedule 14 application
- B Legal background
- C Landowner's s.31 (6) deposits
- D Additional s.31 (6) deposit
- E Plan to indicate routes claimed
- F Blue Route User evidence
- G Red Route User evidence
- H Route recommended to be shown on Definitive Map

Sources/background papers:

File 'CP554' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.