


SURREY COUNTY COUNCIL
PLANNING AND REGULATORY COMMITTEE
DATE: 8 JUNE 2016
LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER
SUBJECT: APPLICATION TO UPGRADE TO BRIDLEWAY THE PUBLIC FOOTPATHS NUMBERED 129 BYFLEET, 3 WISLEY (PART) AND 566 WISLEY (KNOWN AS MUDDY LANE)

PLANNING AND REGULATORY COMMITTEE
<p>This case involves the claim for a change in status of an existing public right of way which crosses the Borough Council border of Guildford and Woking. It would be usual to take Rights of Way cases to the Local Area Committee however, because it would involve two Committees we have been advised to bring it to Planning and Regulatory Committee instead. This is in accordance with section 9.2 of the Surrey Code of Best Practice in Rights of Way Procedures.</p>
1. SUMMARY OF ISSUE
<p>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 upgrade to a public bridleway the public footpath that runs from Sanway Road, Byfleet to the Byfleet/Wisley parish boundary (Public Footpath No.129 Byfleet) and the public footpaths from the Byfleet/Wisley parish boundary to Wisley Lane, Wisley (Public Footpath No.3 (part) and 566 Wisley), as shown on the Surrey County Council Definitive Map and Statement (DMS).</p> <p>1.2 It is considered that the evidence is sufficient to reasonably allege that the claimed route should be recorded as a public bridleway.</p>
2. RECOMMENDATIONS
<p>2.1 The Planning and Regulatory Committee is asked to agree that:</p> <p>2.2 A Definitive Map Modification Order be made to change the status of Public Footpaths Numbered 129 Byfleet, 3 Wisley (Part) and 566 Wisley to public bridleway as shown on drawing 3/1/75/H25 (Annexe A).</p> <p>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.</p>
3. REASONS FOR RECOMMENDATIONS
<p>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.</p>

3.2 In this instance the evidence submitted in support of the application is considered sufficient to reasonably allege that the route should be recorded on the Definitive Map as a public bridleway.

4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 1 June 2013, from Woking Cycle Group represented by Carole Frost and Elmbridge Cycle Group represented by George James. The application was made under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the upgrade to a public bridleway the public footpath that runs from Sanway Road, Byfleet to the Byfleet/Wisley parish boundary (Public Footpath No.129 Byfleet) and the public footpaths from the Byfleet/Wisley parish boundary to Wisley Lane, Wisley (Public Footpath No's 3 (part) and 566 Wisley). The route is known locally as Muddy Lane, and will be referred to as such during this report. The application was supported by 45 User Evidence Forms (UEF), supporting statements from users, map extracts relating to the area and copies of documents from a file held by the Surrey History Centre about the area. One of the user evidence forms was a duplicate and will be discounted. During the course of the investigation 8 additional UEFs were submitted. In total, therefore, there is evidence from 52 people in relation to the use of the claimed route.
- 4.2 The claimed route is shown on drawing 3/1/75/H25 (**Annexe A**); photographs are at **Annexe B**. Public Footpath No129 Byfleet commences at point A on Sanway Road and proceeds in a south westerly direction as a metalled road to point B where there is currently a metal barrier and kissing gate across the width of the path (picture 1). There is a wooden fingerpost indicating public footpath which also has "No Horse Riding" signs attached. From this point the path continues in a south westerly direction as a surfaced path with a wide bramble/vegetation verge to the east and a hedge line to the west. The path curves to the right where it passes over a bridge (point C – picture 2) with metal railings either side over Broad Ditch; a tributary to the River Wey, and enters the Parish of Wisley where it continues as Public Footpath No.3 Wisley. Shortly after the bridge the path curves to the left and passes under the M25 (point D – picture 3). Underneath the M25 there are two levels, one section continues at the same level as the path preceding the bridge, the other is at a higher level, separated from the lower level by a series of bollards (the County Council considers both these levels to form part of the Public Footpath at this point). As the path emerges from under the M25 the higher level is obstructed by metal fencing, whilst the lower level passes through the remnants of a kissing gate (picture 4 & 5). There is a sign on the fence saying "Pedestrian access only. No cycles motorcycles" (point E). After passing under the M25, Public Footpath No.3 Wisley branches off to the south east through bollards (point F) and the claimed bridleway continues as Public Footpath No.566 Wisley in a south westerly direction (picture 6 & 7) with a hedge to the east to point G where there is another metal barrier and kissing gate, similar to the one at point B (picture 8). This barrier has a sign stating "Pedestrian access only. No cycles/motorcycles". The path then continues as a surfaced lane past a row of houses on the south east and a cottage on the north west side to meet Wisley Lane at point H where there is a finger post stating "Public Footpath. No cycling. No horse riding" (picture 9 & 10).

- 4.3 The route is currently open and available on foot over its entire length. Barriers & gates at points B and G make it difficult, but not impossible for cycles to pass. Apart from the barriers and gates it is physically possible to cycle along the claimed route, although use of the route by cycles and horses is actively discouraged by the owners of some of the land to the south of the M25 underpass (Mr Salaman & Mr Garland).

5. ANALYSIS

LEGAL TEST

- 5.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. 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. Alternatively, documentary or historical sources may be sufficient evidence to show that the map should be modified. The background to Map Modification Orders is attached at **Annexe C**.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 5.2 As indicated above in section 4.1 user evidence forms covering the use of the route by a total of 52 people were submitted during the course of the application and all of the users gave evidence to show that they had used the route on a bicycle. Almost half (24) of the users had also used the route on foot and 9 indicated that they had used the route in a mechanically propelled vehicle. A number of the user witnesses were approached and 10 agreed to be interviewed about their use and their recollections of the route claimed.
- 5.3 User evidence will be discussed more fully in the following sections, but before analysing it, it is necessary to establish the point at which the public's use was first challenged. The application was made as a result of actions taken by the current landowners of some of the land to the south of the M25 (Mr Salaman and Mr Garland) who purchased the land in 2006. Mr Salaman was interviewed as part of the investigation and stated that in the early days of their ownership, on the rare occasion they saw cyclists, they would stop them to tell them that it was a footpath only. When interviewed users refer to having been physically stopped by landowners and also having been stopped by the locking of barriers and by observing that notices were erected indicating that bicycles & horses were not permitted. Although none of the user witnesses refer to having been stopped as early as 2006 (the majority of users indicate that the practice started between the years of about 2010 and 2013) it would seem appropriate to take 2006 as the challenge date, as this was the start of Mr Salaman & Mr Garland's ownership.

- 5.4 With the date of challenge being 2006, the relevant 20 year period for user evidence would be 1986 – 2006.
- 5.5 Method of use
When considering the use that has been made of a route by the public it is necessary to consider by what means the public have used the route in order to establish what rights should be recorded. It is clear that use on foot could give rise to public footpath rights; use on horseback could give rise to public bridleway rights and use in horse and cart could give rise to Restricted Byway rights. Use in mechanically propelled vehicles does not (as a result of Natural Environment and Rural Communities Act 2006 (NERCA)) result in Public Byway status anymore; although there are some exceptions (see section 5.47 below).
- 5.6 Since the Countryside Act 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 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.
- 5.7 Another piece of legislation that has an impact on the rights to be recorded by virtue of bicycle use is the NERCA which states that bicycle use after 2006 leads to restricted byway rights – these allow use on foot, horseback, leading a horse, bicycle and any non-motorised vehicle.
- 5.8 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.

This would mean that, if there is sufficient evidence of use by bicycles during the relevant 20 year period (1986 – 2006) or at common law then a public bridleway should be recorded.

- 5.9 Use of footpaths or bridleways by mechanically propelled vehicles has been illegal since the 1930s. Sections 66 and 67 of NERCA put a stop to the implied creation of new public rights of way for mechanically propelled vehicles, preventing post-1930 use of a way by a mechanically propelled vehicle from giving rise to any future public right of way. The Act contains a series of exceptions to protect certain highways from such extinguishment and these are considered in greater depth in section 5.47 below.
- 5.10 Use by bicycles during relevant 20 period
Annexe D contains a graph indicating the use that has been made of Muddy Lane by bicyclists as claimed in the user evidence forms. It shows duration of use and frequency. In order to gain an overview of the frequency the amount specified has been grouped into ranges and are shown colour coded. However, when it comes to analysing the use in section 5.11-5.13 below, the actual number stated has been used.

5.11 Number of users

As indicated above in section 5.2 there are 52 users that have completed user evidence forms to indicate that they have used Muddy Lane by bicycle. Twelve of those have used the route outside of the 20 year period – in the main their use started after the 20 year period finished (users: 6, 9, 12, 15, 18, 33, 34, 35, 40, 41, 51), although Mr Jeggo's use (user 19) was wholly prior to the 20 year period commencing. Their evidence of use will not therefore be considered when looking at the requirements for statutory deemed dedication. If it is necessary to consider use at common law it may be that their use can be included in that discussion.

5.12 Of the 40 users who stated they had used the route on a bicycle over the relevant 20 year period, 14 indicated that they had used the route for the full 20 year period and a further 13 had used the route for 50% or more of the relevant period. At the start of the period, there were 20 people using the route, by the end of the period there were 38 users.

5.13 Frequency of use

Frequency of use ranges from just once a year to many hundreds of times a year. If we look at the start of the 20 year period there were about 347 trips taken by bicycle along Muddy Lane per year¹. By 2006 this frequency had risen to 551 trips per year. If we consider just the 14 users who have used the route for the full 20 years, they were making a combined total of approximately 235 trips per year. In fact the number of trips will be higher than these as five of the users did not quantify with a number the amount they used it, rather they used qualitative text, such as 'many', 'several' or 'lots' which have not been included in the calculations for yearly trips.

5.14 Reason for use

Users stated that they were using Muddy Lane on a bicycle for recreational bicycle rides/ as a leisure pursuit or for exercise. One user (1) explained that Muddy Lane is "the only direct route from Byfleet to Wisley. For cyclists the alternative involves a 4 mile detour via West Byfleet and Pyrford, including a stretch of Parvis Road on which 2 cyclists have been killed in the last 3 years". A few destinations were repeatedly given by users such as RHS Wisley (11 of the users stated that they used Muddy Lane to visit the Gardens) and the Anchor Pub at Pyrford (10 users indicated that the pub was their destination). Although the fact that Muddy Lane provides a short cut between Byfleet and Wisley, avoiding the main roads cannot be a reason for making an MMO to record the route, it does provide a good explanation for why the route has been used so extensively.

5.15 Limitations

At the present time there are two barriers with adjacent kissing gates across Muddy Lane which prevent unhindered access of the route on bicycle or horseback. In addition there is one partial kissing gate that, together with the metal palisade fence, obstructs part of the width of the footpath at the M25 bridge. It is necessary to determine how long these or other limitations have been in place and whether any use acquired over Muddy Lane during the relevant 20 years was with the limitations in place.

¹ Total reached by addition of number of trips per year given in UEFs – where range given, lowest number taken.

- 5.16 The existing barrier at point B was installed by Surrey County Council's Rights of Way Officer in 2007. In addition, at this time, signs saying 'no cycles' were installed. The area, particularly that section near to the M25 underpass had a long history of misuse including the dumping of vehicles, fly tipping, petty vandalism and incursions by both motorbikes and 4x4 vehicles. The erection of the barriers, with the consent of the landowner and adjacent landowners was an attempt to stop this. It is unclear exactly when the vehicle barrier at point G was installed, or by whom.
- 5.17 It is believed that the pallisade fence and kissing gate (now only partially present) at the M25 (point E) were erected in 2010 by Mr Salaman in order that further protection may be afforded to the landowners and adjacent landowners against anti-social use of Muddy Lane by motor vehicles. The County Council believes they constitute an obstruction to the public footpath and is working to resolve the situation.
- 5.18 The kissing gates adjacent to the barriers at point B and G were installed by Surrey County Council, in 2012, to discourage anti-social use of Muddy Lane by motorcycles, an issue that had resulted in altercations on Muddy Lane.
- 5.19 With reference to the barriers and gates at B and G, users have indicated that even when locked they have not stopped them gaining access along the route on their bicycles. Mr Falck-Therkelson indicated that "I could lift my bike over, or slide my bike under the barrier or the kissing gate. It was quite easy to do". Mr Stevensen stated; "to get round the barriers we would put our bikes up on end and wheel them through".
- 5.20 There is evidence to suggest that there had been a barrier/gate erected across Muddy Lane prior to those put in by the County Council in 2007 & 2012. Users indicated that this was not locked and in fact was usually left open, so that it did not hinder passage. For example, Mr Chapman stated;
- "After a car was burnt out on Muddy Lane under the M25...gates were put in to stop vehicular access. Initially the gates were locked, but the locks were removed. Then some bollards went in and the gates were unlocked and chained back so you could drive through again. This was about 15 years or so ago" [Mr Chapman gave this statement in 2015, so he is referring to about 2000]
- 5.21 Several users referred to an initiative that had focused on Muddy Lane in about the year 2000, called the Safer Guildford Initiative (SGI). This was an earlier attempt to dissuade anti-social behaviour and included Surrey County Council, Guildford Borough Council and Wisley Parish Council. Mrs Boardman, the then Clerk to Wisley Parish Council recalls:
- 5.22 "It was agreed as part of the SGI that staggered barriers on the footpath [the continuation of FP 3 adjacent to the river] would stop motorcyclists and horse riders going down the footpath and that Muddy Lane itself would be cleared and resurfaced with a surface that was suitable for cyclists to use. I remember that the surface was definitely decided upon so that it would be better for cyclists. In addition we had gates put in by the M25 bridge and further towards Wisley Lane to stop cars going through; they had padlocks on so that emergency services could still get through if necessary. The gates were vandalised very quickly however, and replaced. As part of this initiative

there was a proper Muddy Lane road sign put in at the Wisley Lane end, though we didn't ask for that. There were no other signs that I remember along the lane, and before our gates went in there were no gates or obstructions along Muddy Lane at all. The gates that were installed as part of the SGI nearest to Wisley Lane left a gap to one side that was big enough for walkers/cyclists and I suppose horse riders as well".

- 5.23 It would appear that gates have been present on Muddy Lane since at least 2000, possibly much longer, but that these did not hinder passage on bicycle along the route.
- 5.24 It is clear that there have been problems along Muddy Lane with vandalism and anti-social behaviour in the past and the County Council has had a part in installing furniture to militate against this. The barriers installed by the County Council were so erected under s.66 Highways Act 1981 in order to safeguard the persons using the highway.
- 5.25 The County Council maintains that the palisade fencing and partial kissing gate at the M25 underpass remains an obstruction to the right of way, and should not therefore be recorded as a limitation on the Definitive Statement in the event that an Order is made to upgrade the route's status.
- 5.26 Width
The width described by users varied between 1.5m and 3.0m. Others described the width in relation to the size of a vehicle (1½ cars, wide enough for a car to pass, wide enough for agricultural vehicles). There are boundaries to Muddy Lane on site, in some places more obvious than others. These are more or less overgrown depending on the time of year, and there is evidence to suggest that these have got more overgrown in more recent years.
- 5.27 The existing Definitive Statements for the routes describe them as:
- Byfleet 129: 15' fence to fence with a surface of 10' (bridge being 12')
 - Wisley 3: 3.6m fence to fence with a surface of 2.0m
 - Wisley 566: 20' fence to fence with a surface of 8'-10'
- 5.28 The section that passes under the M25 is split into two sections. The lower part is at the same level to the path immediately either side of the underpass, and is the section most used. However, there is also an upper section which is accessible to users of the route when the lower section is flooded, as it does periodically particularly in the winter. The side roads order associated with the construction of the M25 is discussed in further detail below (section 5.99). It is the County Council's view that both the upper and the lower section constitute part of the Public Footpath as it passes under the motorway.
- 5.29 With regard to the potential upgrade of the status as a result of user evidence, attention needs to be given to where members of the public have actually ridden their bicycles. The question was not adequately addressed in the generic user evidence forms, and so it was put to the 10 users that were interviewed. 8 of those interviewed indicated that their use was of the lower path under the M25 only. One user considered the lower path to be a road,

and the upper path a footpath. Another user did not clarify which section he used. Some of those interviewed indicated that they had a similar view to the County Council, in that the upper path was there in order that access could be maintained even when the route was flooded. It would seem appropriate to conclude that use on bicycles has been of the lower section only, rather than the upper section which would be difficult to use on a bicycle having a reduced head room. This would mean that, if it is concluded that there is sufficient user evidence for an MMO to change the status, the width to be recorded for the M25 underpass section would be the width of the lower section.

5.30 Qualitative Evidence

Statements given on user evidence forms or in interview can add extra information about the way that Muddy Lane has been used and what status should be recorded.

5.31 Mr Chapman: "Muddy Lane has always been open to vehicular access all the way from Byfleet to Wisley. My grandfather used to drive a horse and cart along Muddy Lane to take building materials to Horsley; that must have been about 100 years ago. The farmer who had the land that is now the golf course used Muddy Lane to take a cartload of milk churns to Byfleet & New Haw Station very frequently. It was just open to all; it is called "Muddy Lane", not "Muddy Footpath"

5.32 Mr Kaile: "Muddy Lane was just always known as a route through to Wisley. Quite a lot of people used it as a vehicular route through from Byfleet to Wisley".

5.33 Mr Stevenson: "People in Byfleet would use Muddy Lane to cycle along, it is the most obvious way if you want to get south".

5.34 Mr Strong: "People used to use that route to get to Wisley Gardens as it was much quicker. Muddy Lane has always been open and easy to use, people would take cars down there, fishermen would park near the M25 bridge".

5.35 Mrs Pomfret: "There used to be a shop in Wisley – 'Nanny Wickingtons' and we used to cycle down Muddy lane to get there from Byfleet, it was used as a grocers shop by the people in Sanway Road as it was easier to get there than the shops in Byfleet. Lots of people would have used it that way".

5.36 Letters/emails in support

In addition of the user evidence forms which were completed to show evidence of use by bicycles of Muddy Lane, a series of email and letters of support were received by the applicants who then included them in the supporting documents of their application. A few went on to complete user evidence forms, but a number just lent support to the application with an email. The following are the main comment that each sent.

5.37 Phil Wilson (footpaths officer for the Byfleet, West Byfleet & Pyrford Residents association) – I have cycled on Muddy Lane a number of times without challenge.

5.38 Jeff Sechiari – Some years ago I used to drive through here, as many others did.

- 5.39 Terry Lowe – I have cycled along Muddy Lane many times since 2000.
- 5.40 Ian Bonnett – My wife and I live in Weybridge and have periodically cycled down Muddy Lane over the last 15 years when travelling to Wisley.
- 5.41 Stephen Bairfelt – I have cycled along the land many times from 1988 to 2009.
- 5.42 Jeremy Parkin – My son and I have certainly used this path between Wisley and Byfleet over the last 10 years. My wife and I have used it to cycle to Wisley. We have also used this route to go for a drink in the Anchor in Wisley.
- 5.43 Tony Kirkby – I do not recall exactly when I used this first as I have been regularly cycling in the area since I moved here in 1980.
- 5.44 Niall Maynard - I have used the route several times in the past fifteen years for leisure cycling. It is one of the few safe ways across the M25 and we use it to get to Wisley Common where our District [Scout] Campsite is located.
- 5.45 Judy Laney – I have cycled the Lane on numerous occasions, quite often with my grandsons.
- 5.46 Paddy McLaughlin – I have ridden this route some years ago (pre 2005).
- 5.47 Vehicular use of Muddy Lane
 Nine of the user evidence forms submitted in support of this application referred to use made of Muddy Lane in motorised vehicles (4, 5, 7, 13, 23, 29, 47, 50, and 52). In addition in the year 2000 a set of nine user evidence forms was submitted detailing use of the route in motorised vehicles by members of the public. At the time the evidence was considered insufficient to make a Map Modification Order, however they are still evidence of use and can be considered alongside additional evidence submitted as part of this application. One of the older forms was from a user that went on to complete a UEF for this application, and one only referred to use on foot. These forms have been discounted. In total, therefore, there are 16 forms relating to use of the route in MPVs.
- 5.48 As mentioned in section 5.9, use of footpaths or bridleways by mechanically propelled vehicles has been illegal since the 1930s. Sections 66 and 67 of NERC put a stop to the implied creation of new public rights of way for mechanically propelled vehicles, preventing post-1930 use of a way by a mechanically propelled vehicle from giving rise to any future public right of way. There has been no user evidence submitted to show use by mechanically propelled vehicles on Muddy Lane prior to 1930, and so the evidence of use, or documentary evidence for Byway rights could only be used to establish Byway rights if one of the exceptions set out in the NERCA applies. These exceptions are:
- Subsection 67(2)(a) – excepts ways that ‘the public’ have used lawfully more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the ‘ordinary roads network’. If the way was ‘mainly (lawfully) used by the public in motorised vehicles’ then vehicular

rights might be reserved, but such a route could not be recorded on the DMS and therefore an MMO should not be made. Advice notes issued by DEFRA² explicitly state that for the exception to apply, the main lawful use must have been “by the public... it is irrelevant for the purposes of this test that the way might have been used during the relevant period by landowners or their visitors under any form of licence or easement by any means whatever, whether on foot, horseback or MPV”. If this was not the intention of the Act then there would have been no reason to include the protections at 67(3)(c) and (5) detailed below. This does not apply to Muddy Lane as during the 5 years preceding commencement the route was not used more by motor vehicles than other users (Muddy Lane being gated at this time and therefore inaccessible to motor vehicles).

Subsection 67(2)(b) – excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and not recorded on the DMS as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’. This does not apply to Muddy Lane as it is not recorded on the “list of streets”

Subsection 67(2)(c) – excepts ways that have been expressly created or constructed for motor vehicles. There is no evidence to suggest that Muddy Lane was expressly created or constructed for motor vehicles (under statutory powers).

Subsection 67(2)(d) – excepts ways that have been created by the construction of a road (under statutory powers) intended to be used by mechanically propelled vehicles. There is no evidence to show that this is the case.

Subsection 67(2)(e) –excepts from extinguishment, ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road’. Such a right must have been created by inference of dedication at common law through use by MPVs before 1 December 1930. There is anecdotal evidence of long use of the route in motor vehicles; however no direct evidence of user has been submitted for the period prior to 1930.

Section 67(3)- provides that existing rights are preserved if:

- a. before 20 January 2005 the way had been the subject of an application under the Wildlife and Countryside Act 1981 to add it to the DMS as a BOAT;
- b. before 2 May 2006 the County Council had made a determination in relation to such an application;
- c. before 2 May 2006, an application to add it had been made by a person with an interest in the land where the way was reasonably necessary to access their land.

5.49 None of the above applies.

² Paragraph 28, A guide for local authorities, enforcement agencies, rights of way users and practitioners. Version 5, May 2008.

- 5.50 It is reasonable to conclude, therefore that none of the exceptions in NERCA apply to Muddy Lane and that, therefore, a Public Byway cannot be recorded over the route by virtue of user evidence.
- 5.51 However, section 70(1) allows for the recording on the DMS of a 'restricted byway'. This type of highway was first provided for under the Countryside and Rights of Way Act 2000. Section 70(1) means that restricted byways can be established and recorded on the Definitive Map on the basis of either historic evidence or evidence of use. The implication of this is that if a route carries historic vehicular rights, but the MPV rights are extinguished by s. 67 of NERCA, it will be possible to record that route as a restricted byway, rather than a BOAT. This will be returned to when the documentary evidence is considered.

LANDOWNERS' EVIDENCE

- 5.52 There are a number of different landowners that own or front the claimed route. All landowners/frontagers were contacted and given the opportunity to give their evidence during the investigation. **Annexe E** shows the owners of the land, and adjacent land over which the claimed bridleway runs.
- 5.53 Mr Salaman & Mr Garland
Mr Salaman & Mr Garland submitted objection letters in 2014 detailing the actions they had taken since owning the land and were interviewed in the course of the investigation in 2015.
- 5.54 Mr Garland wrote to object to the application and confirmed that he had been the joint owner of land over which the claimed route runs (with Mr Salaman) since 2006. He stated that there has never been any express or implied dedication for use as a bridleway. He indicated that the path has always been signposted by the Council itself as a footpath and that the evidence submitted in support of the previous unsuccessful application clearly confirms that, going back to the 1930s, the land was private and not a bridleway.
- 5.55 In his letter and statement Mr Salaman indicated that he owned the land over which the Public Footpath 556 Wisley runs from the M25 to Wisley lane jointly with Mr Garland (along with other, adjacent land). He stated (in 2015) that he had owned the land for just under 10 years and that he has spent the time since purchase cleaning the land up. The field to the west of Muddy Lane is now leased to the Surrey Wildlife Trust for grazing.
- 5.56 Although Mr Salaman has only owned the land for the last decade, he stated that he has been visiting the site for some considerable time, was aware of the lane and had only ever seen walkers using it. He stated that when he first moved to Bayan (the cottage at the end of Muddy Lane) you could be on site all day and not see a single cyclist. He confirmed that on occasions when he did see a cyclist he would let them know that the route was footpath only, and that no bikes were allowed.
- 5.57 Mr Salaman referred to a number of signs that he alleges were in place on site prior to his purchase of the land that made it clear that Muddy Lane was for pedestrians only. He mentioned signs that said No Entry, Access Only, Private – Footpath Only, No Cycling – No Horses. He goes on to mention that

once they bought the land they put up large notices saying 'pedestrian access only – no cycles – no motorcycles' on the fencing by the M25 underpass.

- 5.58 Mr Salaman states that he can recall only one incident with horse riders, and he wrote to the person involved telling them that they shouldn't be there. He refers to the results of a Freedom of Information request that he made to the County Council which he states indicated that very few cyclists had complained about being stopped from using Muddy Lane. He asserts that this implies that very few people were actually using the path on bikes over a long period of time.
- 5.59 He states that his actions clearly show that they did not permit or acquiesce in the use of the footpath as a bridleway or that any intention for such a dedication can be implied.
- 5.60 Secretary of State for Transport
Mr Paul Finn from Property Enquiries Team at Highways Agency responded to the initial consultation by stating that the Highways Agency has not taken any steps to prevent public use of the land within their ownership at Muddy Lane.
- 5.61 Mr & Mrs Woodruff
Mrs Woodruff sent two letters detailing her knowledge of the route and expressing her opinion about the application. She indicates that the lane had been used safely by prams, cyclists and cars for hundreds of years until the installation of kissing gates. She stated that her family had been using the lane for hundreds of years, although she was not aware that she had a private right over it. Mrs Woodruff confirmed that people were being stopped from using the route by the landowners at the property called Bayan, and that she had received a letter from Mr Salaman stating that her son should not cycle down the lane. Mrs Woodruff indicated that they had historically used the lane to take children on ponies from their stables, citing the ability to take them off-road as a particular advantage for special needs children to gain confidence. She states that she fully agrees that cyclists should be allowed access as they have always used Muddy Lane.
- 5.62 The Wisley Golf Club PLC
The Wisley Golf Club did not respond to consultation from the County Council on this application, however they had responded to the applicant in June 2013. They stated that they have no immediate concerns relating to the change and that as the intended modification would not cross their land or interfere with their business, they held no opposition.
- 5.63 Adjacent landowners were also consulted but did not respond to the consultation.
- 5.64 Other letters received
- 5.65 Mr Drummond – 1 Council Cottages, Wisely Lane: - In November 2014 Mr Drummond wrote in support of Mr Salaman's view that Muddy Lane is nothing more than a footpath. He stated that, having lived at his property for over 40 years, he knows the route well and stated that Muddy Lane was only ever a footpath and has only been used as such. He adds that the route has always been clearly signposted only as a footpath, both by the County

Council and the owners of Muddy Lane. He also wrote in June 2013 to object to the application due to the removal of the barriers which he believed would have a negative impact on the lane.

- 5.66 Mr David Greasley – 23 Sanway Road, Byfleet: - In June 2013, Mr Greasley wrote to state that he was supportive of the barriers that had been erected and did not feel that the route should be changed from a footpath. He referred to the fact that the installation of the barriers had stopped the anti-social behaviour and that the route had been improved as a result. He goes on to state that he, and his neighbours, have no objection to the route being used by cyclists. It would seem that Mr Greasley's main concern is that the barriers remain.
- 5.67 Mr Smith & Mrs Holden Smith – 21 Sanway Road, Byfleet: - In June 2013, Mr Smith & Mrs Holden Smith wrote to say that they were very concerned about the proposal to change the status of Muddy Lane to bridleway. They stated that they do not have any problem with cyclists wanting to use the route but were mainly concerned that this would result in the removal of the barriers. They were worried that this would result in the return of fly tipping and anti-social behaviour that had previously been experienced. They added that they have seen a number of cyclists, even of advanced years, managing to easily negotiate the barrier, climbing either over or under it without difficulty.
- 5.68 Mr Pugh – 11 Sanway Road, Byfleet: - In June 2013 Mr Pugh submitted a comment form to the County Council indicating that he objected strongly to the application. He indicated that the barriers had put a stop to all the fly tipping and anti-social behaviour and that they should not be removed.
- 5.69 Mr & Mrs Fewings – 22 Sanway Road, Byfleet: - In June 2013 Mr & Mrs Fewings wrote to state that whilst they had no objection to cyclists using Muddy Lane by lifting their cycles over the barrier, they object to the barriers being removed. They referred to the previous fly tipping and anti-social behaviour that had been stopped as a result of the barriers.

DOCUMENTARY EVIDENCE

- 5.70 In addition to the evidence of use, documentary evidence can also be used to determine what status a route should be recorded as on the Definitive Map and Statement. In the course of the investigation the Surrey History Centre and other archives were searched to determine if there were any historical documents that could assist in determining the correct status of the claimed route³. The archives discovered are listed below.

DEFINITIVE MAP

- 5.71 1952 Draft Map, 1952 Definitive Map & 1959 Definitive Map: All of these editions of the Definitive Map show Public Footpath No.129 Byfleet and Public Footpath No.3 Wisley as the current Definitive Map does. There is no annotation on the maps to indicate that the remainder of Muddy Lane is a public right of way of any description.

³ SHC = Surrey History Centre, NAK = National Archive Kew, SCC = the Countryside Access Team's own archive, GBC = Guildford Borough Council,

- 5.72 1966 Definitive Map, 2008/2014 Definitive Map: These two editions depict the addition of Public Footpath No.566 Wisley, leaving the curve of FP3 to the south of the M25 and running down Muddy Lane to Wisley Lane. The current edition of the Definitive Map for the area uses a base map that shows the M25 and a slightly realigned route as a result, whilst all other versions of the Definitive Map use editions that pre-date the M25.
- 5.73 Documents in connection with the recording of Wisley FP566: A letter dated 30.01.65 from Byfleet, West Byfleet & Pyrford Residents' Association (BWB&PA) indicates that it was them that first identified that no right of way had been recorded on the first iterations of the Definitive Map for Muddy Lane (from Wisley Lane to FP3 Wisley). The letter states that the matter had been discussed at a Parish Council meeting and that the minutes indicate "The matter was then discussed and various older parishioners recalled that in the past the pathway had been open to both wheeled and pedestrian traffic. The path had been closed to wheeled traffic by locking a gate on one day a year, but a kissing gate had allowed pedestrians to pass on this day". The Association goes on to ask the County Council to consider recording the route on the Definitive Map.
- 5.74 As a response to this letter the County Council requested that user evidence forms be completed in order that they could consider the evidence for the path when the Definitive Map was reviewed
- 5.75 The BWB&PA then submitted 9 user evidence forms and stated that conversations with local residents have "expressed amazement that it is not recognised as a right of way. A number vaguely remember a stile and a gate but not within the last 20 years or more".
- 5.76 The report on the consideration of the claim suggest that Wisley Parish Council had responded to consultation on the matter by saying "throughout [the] Parish there was no particular feeling on the alleged right of way between Church Farm and Sanway, Byfleet in fact it was a little distant for use by the nucleus of the Wisley population"
- 5.77 An extract from the Minutes of the Highways (Rights of Way) Sub-Committee held on 14th September 1966 indicates that it was resolved to include Muddy Lane as Public Footpath No.566 Wisley on the revised Definitive Map and Statement.

HISTORIC EVIDENCE

- 5.78 A number of commercial maps and private estate maps of the area are available dating from 1749, most of which are quite small scale. These maps show a through route from Wisley Lane through to Byfleet. The route is shown in the same manner as the other highways on the maps.
- 5.79 Commercial maps and guides were largely produced for and sold to the public. The presumption might be that all roads shown on these maps would mainly have been open to the public, however they do not expressly say so.
- 5.80 1800 Byfleet enclosure & apportionment (SHC: QS6/4/9, 4541): The area of land to the south of what is now Sanway Road up to and abutting Broad Ditch

and the River Wey appears to be plots numbered I & II. Although the condition of the map is poor there is a line between the two plots which continues from the end of what is now Sanway Road to Broad Ditch, which appears to be in the approximate location of Muddy Lane. The apportionment indicates that the plots are bounded by a 'private carriage road no.18' in the location of the claimed route. The apportionment goes on to describe private carriage road no.18 as is described as having a width of 25ft and running to the parish boundary of Wisley.

- 5.81 The enclosure and apportionment appear therefore to describe an occupation road or private carriageway of 25ft leading from the end of what would become Sanway Road to the parish boundary with Wisley, in the location of what would become known as Muddy Lane.
- 5.82 1841 Byfleet Tithe Map & apportionment (SHC: 864/1/21 & 864/1/22): This plan shows Sanway Road shaded to the end of the neighbouring plots of land (numbered 68 and 210). From the end of the shaded road a double pecked line continues over plot number 211, the double pecked line route is shaded between the pecked lines in the same colour as the road. It is shown crossing Broad Ditch and continuing into Wisley parish. The apportionment indicates that the plot 211 is owned by a James Spokes esq. and is occupied by a Henry Dennett. It is described as Pipers Hill piece in common field and as being a meadow. There is no reference made to what the double pecked line is or who can use it.
- 5.83 Wisley Tithe: This plan shows Muddy Lane leaving Wisley Lane and running in a north east direction for the length of one field to the approximate location of the cottages on the south-east of Muddy Lane. It has solid boundaries, is coloured the same as Wisley Lane and is numbered 210. From the approximate location of the current cottages there is a single pecked line running parallel to the field boundary for the length of the next field (which is numbered 4). There is no indication of a route over the third field which runs up to Broad Ditch and the parish boundary. The tithe apportionment indicates that the first part of Muddy Lane, with the solid boundaries is recorded as Commons and Waste and is described as 'road over common'. The field numbered 4 is recorded as horse pasture, owned by the Rt Hon William, Earl of Lovelace. There are no comments in the apportionment regarding the pecked line that corresponds to Muddy Lane.
- 5.84 1896 Ordnance Survey County Series Map 1:2500 (SCC: sheet 17:7): This map shows the claimed route as a single pecked line from the end of Sanway Close, adjacent to a boundary (hedge or fenceline) running to Broad Ditch. The claimed route then crosses Broad Ditch and proceeds as a double pecked line in a generally south-westerly direction, alongside a boundary feature to a point approximately where the modern day barrier crossing the route is located. At this point the route is shown as an enclosed lane to Wisley Lane. The lane to Wisley Lane has its own hereditament number (7), and has a single pecked line running across the southern corner of it, perhaps indicating a change of surface. The OS Field Book relating to Wisley describes plot 7 as 'Private Road'. For the remainder of the route the pecked line crosses plots of differently numbered land (369, 29, & 3). Where the pecked line runs across plots of land there are bracings to indicate that the plot of land continues both sides.

- 5.85 1914 Ordnance Survey County Series Map 1:2500 (SCC: sheet 17:7): This map shows the claimed route in the same fashion as the 1896 edition. The difference being that the adjacent field to the east of the route has now become the site for the Byfleet & Pyrford Sewage Works.
- 5.86 1934 Ordnance Survey County Series Map 1:2500 (SCC: sheet 17:7): This map shows the claimed route in the same fashion as both the 1896 and 1914 versions. The sewage works has grown in size since 1914 and FP No.3 Wisley which runs adjacent to the River Wey is now annotated FP. The area of enclosed lane as it joins onto Wisley Lane has now got a continuation of the double pecked line running along it, splaying out to a Y shape as it meets Wisley Lane.
- 5.87 Although the OS maps are good evidence of the existence and appearance of Muddy Lane since 1896, they do not assist in determining the status of the route.
- 5.88 1910 Finance Act Maps (NAK: IR/25/3/36 & IR58/34143): The base Ordnance Survey map used to annotate the finance act information shows the route of Muddy Lane (pre-M25). From this map we can see that the route runs over two coloured plots, numbered 52 (north of the river) and 862 (south of the river). Both of these plots are large and cover more land than the fields over which Muddy Lane runs (in the case of plot 52 there are a number of smaller plots all numbered 52 which together amount to a much larger area of land, including a plot to the east numbered 400 on the OS base map and called Common Meadow).
- 5.89 The rest of Sanway Road, north of point A is uncoloured on the map, indicating that it was not subject to taxation – most likely because it was considered a public road. Muddy Lane, by comparison forms part of the two plots over which it runs.
- 5.90 The valuation books that accompany the maps show that, in relation to the coloured plot numbered 52 there was an entry adjacent to the heading 'Fixed Charges, Easements, Common Rights and Restrictions' which reads: 'a right of way foot passengers & cars run through No.369'. The number in this statement refers to the Ordnance Survey Field Numbers which appear on the base map and in particular No.369 is the plot over which Muddy Lane runs from A to the then location of Broad Ditch. Later on in the entry for plot 52 there is an entry under the heading 'Charges, Easements, and Restrictions affecting market value of Fee Simple' which reads: 'Rights of Way thro' land: 400 = £5'. The OS field numbered 400 is another of the plots of land that form part of the larger Finance Act plot 52. Finally there is the annotation of 'less public footpath £5' when the valuation is being calculated, and it is not clear whether this is referring to the route that has been described running over plot 369 (Muddy Lane) or that running over plot 400 (the Common Meadow part of plot 52).
- 5.91 The valuation book in relation to plot 862 (south of the Broad Ditch) makes no reference to any deductions for Rights of Way.
- 5.92 There is a suggestion from this evidence that at least the northern stretch of Muddy Lane (from point A to Broad Ditch) may have been considered a right of way on foot and in carts. If the path recorded over plot 400 is that which has had the tax deduction applied, then it could be concluded that the fact

that no tax deduction has been made for the route over plot 369 means that it wasn't considered public. The evidence is, however, far from conclusive on this matter and will need to be considered in conjunction with all other pieces of evidence.

- 5.93 Aerial photographs (SCC): The 1948 & 1971 aerial photographs show the site prior to the construction of the M25. They show the continuation of Sanway Road crossing Broad Ditch and curving round to run in a south easterly direction and joining up with Wisley Lane opposite Church Farm. The junction with Wisley Lane is shown as a wide splayed area in the 1971 aerial photo and both photos shows a tree line on at least the eastern side of the lane and possibly on the western side also. It is not possible to see barriers or gates on the lane due to the scale of the photo. By the time of the 1998/9 aerial photograph the M25 has been constructed, however Muddy Lane is still clearly a lane running from Sanway Road through to Wisley Lane. Again the clarity is not sufficient to ascertain whether there are barriers or gates along the route at this stage. The route meets Wisley Lane with a wide splayed area as in 1971. It appears that there are fewer trees lining Muddy Lane by this time, although that could be a result of the photograph being taken at a different time of year. The 2006 and 2012 photographs are similar to the 1998/9 photographs and show a lane through to Wisley Lane from Sanway Road.
- 5.94 The fact that it is possible to identify the surface of the track in places in all of these photographs indicates that the lane has had some surface dressing, or metalling over the years. Comparing the earlier, pre M25 photos with the later ones it is clear the extent to which the route altered as a result of the construction of the motorway.
- 5.95 Woking Urban District Street Plan
This plan showing the streets in the Woking area depicts Muddy Lane in part, and not as a through route. Sanway Road ends just short of the parish boundary and is drawn as a dead end. From the southern end a route is shown leaving Wisley Lane opposite Wisley Church Farm and proceeding in a north easterly direction, stopping short of Broad Ditch and the parish boundary. This part of the route is shown with a solid line on the southern side and a solid line that changes to a pecked line on the northern side.
- 5.96 Out and About – promoted cycle route
One of the users provided evidence for a 15 miles guided cycle route that had been published in a local publication under the heading 'Out and About'. It described the route as turning "right by Byfleet Church into Sanway Road. Where the road bends sharp left go straight ahead and follow the road and then the footpath, which goes back underneath the M25...". It is accompanied by a map showing the route passing along Muddy Lane and is acknowledged as having been supplied by Woking Cycle Users' Group.
- 5.97 Safer Guildford Initiative – works done to improve area
Some of the users interviewed referred to work that had been done to improve Muddy Lane in 1999/2000. An officer from Guildford Borough Council was able to provide evidence to show that the work was done under the Safer Guildford Initiative and was funded through a grant from SITA (using landfill tax money). The project was known as "Environmental & Access Improvements, Muddy Lane", it was worth £6000 and was described as 'cycle/pedestrian path linking Wisley Village and West Byfleet'.

- 5.98 The works included clearance of foliage, removal of graffiti, cleaning of watercourses, planting near the sewerage works and work to improve the surface including lifting the surface and filling holes. There is also evidence that gates were to be erected and locked. The evidence suggests that those that were working on the project considered that the route was used by bicyclists, and that they were making the route easier for use on foot and on bicycle, whilst trying to stop anti-social use by motorbikes and fly tipping. The work done on the lane was reported in the local paper as a successful improvement to the area for cycles and pedestrians.
- 5.99 The M25 (Chertsey – South of Byfleet Section Side Roads) Order 1978
This Order was made in relation to the improvement, stopping up and creation of rights of way (public and private) to accommodate the building of the M25. Schedule 5 refers specifically to the section of Public Footpath No.3 (Wisley) and indicates that 85 metres of the footpath was stopped up where it lies within the motorway. In addition a private means of access was also stopped up to Byfleet and Pyrford Sewage Works for 85 metres where it lies within the motorway. New routes (routes B (footpath) and 1 (access)) were created for the public and private users that were affected by the stopping up. The plan is small scale and therefore difficult to interpret, but it is annotated with the note: “New route of public footpath labelled B to be co-existent with new private means of access labelled 1 and subject to those private vehicular rights”.
- 5.100 In a letter from the Departments of the Environment and Transport dated 10 January 1986 the writer explains:

The length of raised footpath No. 3 that runs near the M25 bridge was added to the contract at the request of a local Councillor and is only intended to be used when the river is in flood.

The normal footpath has a tarmac surface with the required headroom of 2.3 metres.

The raised section of footpath running under the M25 was put in to the maximum height consistent with a pedestrian of average height still being able to walk upright under the bridge.

- 5.101 The M25 side roads order, the physical appearance under the bridge, the local knowledge of the flooding that occurs in this area and this letter are what leads the County Council to believe that the full width (upper and lower) under the M25 is public footpath. The M25 side roads order does not preclude any higher rights having been acquired over all or part of the definitive route since the route was constructed.
- 5.102 There is no conclusive documentary evidence to show that the claimed route should be recorded with a status higher than footpath. There are, however, certain pieces of map evidence that are suggestive of higher rights, and they are discussed below in section 13.15-13.17. The documentary evidence helps to build a picture which can lend support to a claim based on user evidence by statute or common law.

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 along a different line. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence discovered and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see **Annexe C**)
- 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 Ramblers Association – Andrew Bowden; Guildford East Footpath Secretary: - Stated that he had no knowledge of the historical use of Muddy Lane but that the path is wide and well founded and he considered it well suited to becoming a cyclist route, particularly as they connect Byfleet and Wisley and will permit cyclists to avoid several miles of busy roads. He stated that he welcomes the proposal to upgrade them to Bridleway status.

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

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

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 C** of this report. As such the recommendation to Members is not considered to be in breach of the Act.

13. DISCUSSION, CONCLUSION AND RECOMMENDATIONS

DISCUSSION

- 13.1 A decision on this claim must be made on the legal basis set out in **Annexe C** to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that public rights, other than those already recorded on the Definitive Map and Statement, exist. It is then a matter of deciding what kind of right should be recorded. Other issues such as amenity, safety or convenience are irrelevant.
- 13.2 Under Section 53 of the Wildlife and Countryside Act 1981, "the authority shall make such modifications to the Definitive Map and Statement as appear to them to be requisite in consequence of the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates".
- 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 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. In this instance the date of challenged has been taken as 2006, the date when Mr Salaman and Mr Garland bought the land to the south of the M25 and started to challenge users on bicycle. The period in question therefore is 1986 – 2006.
- 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 come from quite a wide range of places, mostly they are from Byfleet, Wisley or Weybridge, however there are some further afar places such as Teddington, Egham and Staines. The furthest away is a gentleman from Bridport, Devon (37) who used the route several times a year between 1996 and 2012. 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. There is no suggestion that users, during the relevant 20 year period, were using force to use the route. Neither is there any evidence that the use was with secrecy or permission.
- 13.8 Lack of intention to dedicate: It is very clear that since purchasing part of the land in 2006 the landowners Mr Salaman and Mr Garland have made it very clear that they have no intention to dedicate the claimed route as a public right of way with higher status than footpath. They have suggested that there were clear signs on the fingerposts and gates when they purchased the land which indicated that the route was not considered one for cycles or horse riders. This evidence is not supported by any of the users. Other than this reference to signs by the current landowners there is no evidence of a lack of intention to dedicate throughout the relevant 20 year period.
- 13.9 Sufficiency of use – statutory deemed dedication: Volume and frequency of use has been discussed in section 5.11 – 5.12. 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 as a bridleway, having been used by a significant number of people on bicycles during the relevant 20 year period with sufficient frequency.
- 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 2006 for bridleway

rights to have been acquired over the claimed route at common law. In addition it is thought that the actions of the Safer Guildford Initiative to improve the surface specifically with a view to cycle use is an indication of acquiescence and lends support to evidence at common law for a public bridleway along the claimed route.

- 13.11 Width: The width referred to by the users varied greatly, with some users indicating as little as 1.5m and others 3.0m wide – or potentially wider as they have referred to vehicles being able to pass each other.
- 13.12 The existing Definitive Statements for the routes describe them as:
- Byfleet 129: 15' fence to fence with a surface of 10' (bridge being 12')
 - Wisley 3: 3.6m fence to fence with a surface of 2.0m
 - Wisley 566: 20' fence to fence with a surface of 8'-10'
- 13.13 For the majority of the route, it would seem appropriate, therefore, to maintain the widths described in the current definitive statements. However, there is evidence that the section used by the public on bicycle underneath the motorway bridge was only that of the lower section. It would be appropriate for this section, therefore, to be recorded as having a width of 5m (being the width between the bollards on the eastern side of the lower path and the bridge posts on the western side). Footpath rights would be maintained over the upper section of path underneath the motorway.
- 13.14 Gates: The evidence indicates that from about 2000 there have been barriers and/or kissing gates at points B and G (Annexe A). These were put in to prevent the anti-social use of the route by motorbikes and vehicles, rather than to prevent bicycle use. The use of the route with the gates in place has only been for approximately the last 6 years of the 20 year period, so for the majority of the time members of the public were using the route without any limitations. The gates were installed (at least in part) under s.66 Highways Act, and it is therefore not thought appropriate to record the gates as limitations on the Definitive Statement. The gates, however, should remain for as long as safety remains an issue in this location.
- 13.15 Evidence for Byway or Restricted Byway status: Due to changes in the legislation as set out in section 5.47 above, it is not possible for use by mechanically propelled vehicles to give rise to vehicular rights over the route so the route cannot therefore be considered a Byway.
- 13.16 There is some evidence to indicate that the route may carry public rights of higher status than bridleway. There are numerous maps dating from the 1700s which depict the route as a through route connecting Byfleet and Wisley. They are not conclusive evidence but are suggestive that the route would have been available for the public to use. There is also the Wisley tithe which refers to the southern section of Muddy Lane as a 'road over common', and the finance act maps which may show a deduction for rights of way which could indicate a public route. In addition there is some anecdotal evidence from member of the public, such as Mr Chapman, that suggests the route was used as a cut through between Byfleet and Wisley by members of the public in horse and cart.

13.17 However, there is also evidence to indicate that the route was a private occupation road (Byfleet enclosure & OS Field Book), and whilst the evidence for higher rights is suggestive, it is not thought that it is sufficient to reasonably allege that the route should be recorded with Restricted Byway status.

13.18 CONCLUSION

In the light of the above, it is the Officer's view that, by virtue of the use by the public on bicycle, public bridleway rights have been acquired over the route claimed and shown between A-H on plan reference 3/1/75/H25.

13.19 RECOMMENDATION

The Planning and Regulation Committee is asked to agree that:

- Public Bridleway rights are recognised over the route more particularly delineated on the plan in Annex A and described as Public Footpath No.129 Byfleet, Public Footpath No.3 (Wisley)(part) and Public Footpath No.566 Wisley, and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside is approved. The routes will be known as Public Bridleway No.129 Byfleet, Public Bridleway No.3 Wisley and Public Bridleway No. 566 Wisley.
- A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation

14. WHAT HAPPENS NEXT?

14.1 Committee can agree with the officer recommendation, in which case an order would be made to add the routes described above 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, if committee are of the view that there is sufficient evidence to reasonably allege that public restricted byway rights exist they could direct that such an order be made. 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 any additional public rights (other than those already recorded) 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 C**).
- 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.
- 14.8 If additional public rights are added to the definitive map and statement no additional responsibility for maintenance is placed upon the Council.
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Lead Officer

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Contact Officer:

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Consulted:

See Section 7.

Annexes:

A – Plan to show route

B – Photographs of route

C – Background to MMOs

D – Graph to show evidence of use on bicycle

E – Landownership

Sources/background papers:

File 'CP560' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.