

**SURREY COUNTY COUNCIL****LOCAL COMMITTEE (WAVERLEY)****DATE:** 22 September 2017**LEAD OFFICER:** Debbie Prismall, Senior Countryside Officer**SUBJECT:** Alleged Public Footpaths between Clock Barn Lane, New Road and Public Footpath No. 178, Busbridge**DIVISION:** Waverley Eastern Villages**SUMMARY OF ISSUE:**

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence that can be reasonably alleged to support a modification. Three linking applications have been received for Map Modification Orders (MMO) to add Public Footpaths between Clock Barn Lane, New Road and Public Footpath No. 178, Busbridge to the Surrey County Council DMS as shown on the attached drawing of 3/1/3/H13 (**Annex A**).

It is considered that the evidence shows that neither a public footpath, nor a right of way of any other status, can reasonably be alleged to subsist over the routes. As such no legal order to modify the Definitive Map and Statement should be made.

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

- (i) No Public Footpath rights are recognised over the routes shown as:
  - (a) Claimed footpath no. 574 between points A – B – C – D - E on Drg. No. 3/1/3/H13
  - (b) Claimed footpath no. 559 between points C – H – F – D, H – I and F – G on Drg. No. 3/1/3/H13 and
  - (c) Claimed footpath no. 565 between points B – J on Drg. No. 3/1/3/H13

and that the applications for MMOs under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of footpaths is not approved.

- (ii) In the event of the County Council being directed to make a MMO by the Secretary of State following an appeal by the claimant(s), the County Council as surveying authority will adopt a neutral stance at any Public Inquiry, making all evidence available to help the inspector determine the case.

**REASONS FOR RECOMMENDATIONS:**

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which on balance supports a modification. In this instance it is considered the evidence does not support the making of a MMO.

**1. INTRODUCTION AND BACKGROUND:**CLAIMED FOOTPATH APPLICATION (CP) No. 574

- 1.1 In March 2016, Ian Wilks of 2 Mary Vale, Godalming, Surrey GU7 1SW submitted an application for a Map Modification Order (MMO) to add a public footpath from the junction of New Road with Salt Lane to Clock Barn Lane. The claimed route runs between points A – B – C – D - E on Drg. No. 3/1/3/H13 (**Annex A**).
- 1.2 The application was accompanied by 15 public way evidence forms showing use of the route on foot between 2014 – 2016.

CLAIMED FOOTPATH APPLICATION (CP) No. 559

- 1.3 In June 2013, Graham Cornick of Nutwood Cottage, New Road, Hydestile, Godalming GU8 4DJ submitted an application for a MMO to add a network of public footpaths from Salt Lane along New Road through woodland to Clock Barn Lane with two spurs running towards Hydon Hill Cheshire Home. The claimed routes run between points A – B – C – D – E, C – H – F – D, H – I and F – G on Drg. No. 3/1/3/H13.
- 1.4 The application was accompanied by 15 public way evidence forms showing use of the routes on foot and on bicycle between 1984 – 2013.

CLAIMED FOOTPATH APPLICATION (CP) No. 565

- 1.5 In January 2015, Ian Wilks of 2 Mary Vale, Godalming, Surrey GU7 1SW submitted an application for a MMO to add a public footpath from Salt Lane along New Road to public footpath no. 178, Busbridge. The claimed route runs between points section A – B – K – J on Drg. No. 3/1/3/H13.
- 1.6 The application was accompanied by 6 public way evidence forms showing use of the route between 1955 – 1960 (UEF 5) and 1972 – 2016. Use varies between 2 – 5 times a year with one user (UEF 4) claiming use every day.

**2. ANALYSIS:**

## PUBLIC USER EVIDENCE FOR THE ROUTES:

- 2.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can

also lead to the acquisition of public rights at common law. In such cases the use must have been sufficient to raise a presumption that the landowner had intended to dedicate the route. For the legal background for map modification orders see **Annex B**.

- 2.2 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a “sufficient number of people who together may sensibly be taken to represent the people as a whole/the community in general”. The House of Lords has ruled that the amount of user must be such as might have been reasonably expected if the route in dispute was an undoubted public highway. The necessary level of use must therefore be considered on a case by case basis.
- 2.3 Six of the claimants have been interviewed about their use of all the claimed routes. Mrs A Barney (UEF 1) has lived at her property since 1994 and started walking along New Road eastwards through the woodland to Clock Barn Lane and then onto Hydons Ball or Juniper Valley and then walk back past the Cheshire Home as part of a circular route. In the early years they would also take their sons on their bikes on the paths. Neighbours had told them about it and they just assumed it was a public path as there was an opening in the woodland as well as a well trodden path. Mrs Barney has seen other people from the locality using the routes, usually either with dogs or children. She says there have never been any restrictions and has never seen the landowners.
- 2.4 Mr M Guerrini (UEF 8) and Ms C Wakeman (UEF 13) have lived in New Road since 2000. At that time the pathway through the woodland had no barriers at either end. They would walk, run and cycle through with their young sons approx. 60 times a year. They have never been stopped and told they couldn't use the path. The people we bought the house from originally told us about the path through the woodland. They say there were never any signs on the path from the western end of New Road to Public footpath 178 until the current owners of Busbridge Copse Farm moved in and put some up in 2013. Mr Guerrini used the path occasionally to walk to Milford station. The width has always been only one person wide and when the bamboo at the side grew up people used to cut it back. Their property has the benefit of a right of way over the road known as New Road leading into Salt Lane granted by a Deed.
- 2.5 Beatrice (UEF 5) and Peter Gardner (UEF 15) moved into their house in New Road in 1984 and have used the claimed routes through the woodland to Hydons Ball and part of circular routes. They say that in those days the care assistants from Hydon Hill Cheshire Home would walk through the woodland and along New Road to get to the Hydestile Social Club. That has since closed and been renamed “Hunters”. We used the path when our neighbours invited us to the Summer Fair at the Cheshire Home shortly after they moved in. They say they used to see neighbours and dog walkers using the path from New Road to Clock Barn Lane. It was safer for their sons to cycle through the woodland than along Salt Lane. Walking to the west from New Road they walk down a path next to Hydons and on a path parallel to Station lane to Milford Station almost all off road. They state they have never asked for or been granted permission to use the paths.
- 2.6 Graham Cornick (UEF 3 and the applicant for CP 559) moved into New Road in 1978 and started walking the west to east route through the woodland twice a day minimum to walk their dogs to Clock Barn Lane Hydons Ball. He says they always saw other people using the route. There were never any signs up

[www.surreycc.gov.uk/waverley](http://www.surreycc.gov.uk/waverley)

and nobody told him he couldn't use the paths. The barrier at the western end off New Roads was put in about 4 – 5 years ago by the current landowner. They sometimes use the liking paths to do a circular walk or visit the Cheshire Home but not as frequently.

CLAIMED FOOTPATH APPLICATION No. 574

- 2.7 Fifteen user evidence forms have been completed showing use of the route on foot. Twelve of the users have walked the route once in 2016 as part of a rambling group on an organised walk. The other 3 have used it on average 1 – 5 times a year during the period 2014 – 16.

CLAIMED FOOTPATH APPLICATION No. 559

- 2.8 Fifteen user evidence forms have been completed showing use of the routes on foot and on bicycle. Four of the claimants show use on bicycle with only one for the full 20-year period. Twelve of the claimants live in New Road and the other 3 in the adjoining Salt Lane. Two of the claimants have used the routes for the full 20-year period. Use varies between daily on foot to 30 times a year. The average use on foot is 179 times a year. Average use on bicycle is 50 times a year. Only 3 of the claimants have used the routes for the full 20-year period

CLAIMED FOOTPATH APPLICATION 565

- 2.9 Six user evidence forms have been completed showing use of the route on foot. Only 2 have used the route for the 20-year period. One user (UEF 4) claims daily use whilst the other claimants' use varies between 2 – 5 times a year.

LANDOWNERS EVIDENCE

- 2.10 All of the landowners have been contacted. The section J – K is owned by Mr and Mrs J Power of Busbridge Copse Farm. When they bought the property in July 2013 they put up notices at either end of the path saying:

*“POLITE NOTICE*

*Permissive Path*

*This alleyway is private property and is not a public right of way. Use by the residents of Hydestile is permitted by the owner at their own risk. The owner accepts no liability for any incidents relating to its use. On the 1 December each year this path will be closed for planned maintenance.”*

They say when they bought the property they understood it was a permissive path for local residents and they are happy for local people to continue to use it as such.

- 2.11 The previous owners of Busbridge Copse Farm, Mr and Mrs J Hindley lived there from 1983 to 2013. They say that the path “was unfenced when we bought the house” and as far as they “were concerned the path was a permissive path that we allowed our neighbours to use and we never intended to dedicate it as a public footpath. We believe that the path was originally a short-cut for residents on New Road to get to the old social club adjoining Busbridge Copse Farm. The social club closed around 1997 and

was converted into a house that is now called 'Hunters'. After the club closed we continued to allow it to be used by the neighbours so that they didn't have to go on Salt Lane. We didn't put up a sign stating it was not a public right of way. In our minds there was no need as it was used only by neighbours on New Road. As far as we were aware it was never habitually used by anyone else. When ramblers on footpath 178 asked for directions we certainly never directed them to the alleged footpath through our then garden."

- 2.12 New Road (sections A – B – K) is a private road owned by the Mcpherson family. James Mcpherson has lived at 6 New Road for around 30 years. He objects to the alleged footpath. He states "I am not aware that the general public have been using New Road as a public footpath to make a cut through to footpath 178 as per your drawing. The only people I am aware of who walk up and down New Road are a few of our neighbours, who sometimes use the short cut through to footpath 178 with the permission of the owners at Busbridge Copse Farm. The path across Busbridge Copse Farm was originally a cut through from New Road to the Social Club that was adjacent to Busbridge Copse Farm. I believe that the social club closed around 1998. The previous owners of Busbridge Cope Farm allowed their neighbours to use the path so that they didn't have to walk the long way around and along Salt Lane. Since then the few residents on New Road continued to use it as a cut through to the footpath that runs down to Clock Barn. I have used the path on occasion over the past 20+ years but have always considered that I am doing it with the permission of my neighbour. I certainly wouldn't walk through someone's garden otherwise. When the current owners of Busbridge Copse Farm moved in they discussed with me that they were considering putting a gate on the path but had no objection to their neighbours using it. This reinforced to me the principal that they considered it their garden and that if I was to use it, it would be with their permission."
- 2.13 The woodland between New Road and Clock Barn Lane (sections B – C – D – E, C – H – F – D, H – I and F – G) is owned by Mr R Favell and Ms L Hampson. They bought it in 2013 from Mr P Boddington and his daughter Ms K Keightley. Before that it was owned by the Bill Myer Trust. They say that the main east to west route has always been quite clear and the other routes are more like meandering animal tracks. When we bought the wood there was some old barbed wire fencing that had been broken down all along the woodland/ road edge with Clock Barn Lane. In 2013/14 we replaced the fencing along the eastern and northern boundaries. When they bought the land they chose not to fence off the paths but left a gap at the eastern end and installed a staggered barrier just east of point B. Mr Favell and Ms Hampson bought the woodland for their own use and in 2013 offered a private licence to local residents for them to be allowed to walk through. They haven't stopped anybody walking through so far but would like to keep the flexibility of being able to close the footpath when they need to for woodland management. The offer of a licence prompted Mr Cornick to submit his claim for public footpath rights supported by a number of public user evidence forms from some local residents.
- 2.14 Mr Boddington and Ms Keightley bought the woods in 1990 as community land. Mr Boddington has stated that "From 1990 to 1997 we lived at Hydon Heath Corner, Salt Lane. I very regularly walked in the woods during this period and drove past every day but never encountered anybody or evidence of paths. The woods have always been private property as was known locally and we never gave permission to anyone to walk there and since then I have

[www.surreycc.gov.uk/waverley](http://www.surreycc.gov.uk/waverley)

## ITEM 10

made visits and still seen nobody.” They never closed the woodland for maintenance work. Mr Boddington has stated that “The woodland was fenced down the side of Clock Barn Lane and at the boundary to the Cheshire home. There was also a wooden sign which read ‘Private Woodland’.

- 2.15 In addition, Mr P Gardner who has lived on New Road for 33 years since June 1987 has written saying that he has always considered the path at the end of the road as private property. He is concerned making it an official footpath would result in a large number of people using the road and path to the detriment of the security of the area.

### MAP EVIDENCE

- 2.16 The routes do not appear on any editions of the Definitive Map or in the Definitive Statement. The paths are not shown on the 1871, 1897 and 1918 Ordnance Survey maps. New Road is shown on the 1938 edition but not the cut through from its western end to Busbridge Copse Farm or any path through the woodland to the east. The 1972 edition shows the cut through from the western end of New Road but no path in the woodland.
- 2.17 In the absence of any conclusive documentary evidence showing public rights the claim must rely on user evidence either by statute or common law.

### **3. OPTIONS:**

- 3.1 The Committee may agree or disagree with the officer’s recommendation that footpath rights have not been acquired. Alternatively, they may decide that the evidence submitted shows that the routes should be included on the Definitive Map and Statement as public footpaths. 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 **Annex B**)
- 3.2 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.

### **4. CONSULTATIONS:**

- 4.1 Waverley Borough Council, Busbridge Parish Council, Mrs Victoria Young County Councillor, Cycling UK, Auto Cycle Union, British Driving Society, British Horse Society, Open Spaces Society and The Ramblers have all been consulted. No responses have been received.
- 4.2 Legal Services have been consulted and approved this report.

### **5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:**

- 5.1 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.

**6. EQUALITIES AND DIVERSITY IMPLICATIONS:**

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

**7. LOCALISM:**

- 7.1 If it is agreed that no Map Modification Order should be made it is likely that the landowners will continue to allow use by local residents on a permissive basis. The private rights of residents of New Road to access their properties are unaffected.

**8. 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	

**9. HUMAN RIGHTS ACT 1988:**

- 9.1 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.
- 9.2 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.
- 9.3 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 **Annex B** of this report. The recommendation to Members not to make Map Modification Orders is not considered to be in breach of the Act.

**10. CONCLUSION AND RECOMMENDATIONS:**

- 10.1 Any decision must be made on the legal basis set out in **Annex 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.

- 10.2 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”.

**STATUTORY TEST**

- 10.3 Section 31 of the Highways Act 1980 states that:
- 1) *“Where a way over any land other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*
  - 2) *The period of 20 years referred to in sub-section (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice...or otherwise.*
- 10.4 In respect of CP 574 the relevant 20-year period is 1996 – 2016. As discussed in for CP 559 the relevant 20-year period is 1993 – 2013 and for CP 565 the relevant 20-year period is 1996 – 2016.
- 10.5 As discussed in 2.7 above in respect of CP no. 574, the evidence provided only covers a two year period rather than 20 as required under the legislation. Therefore the statutory test is not met.
- 10.6 The evidence for CP 559 is that only 2 people have used the routes for the full 20-year period, The remaining user evidence will add to the cumulative use of the routes. However, the overall use is considered insufficient to meet the statutory test.
- 10.7 In respect of CP 565 there are 6 claimants of which only 2 have used the route for the 20-year period. Three of the claimants have only used the route for 4 years between 2011 – 2014. It is also likely that the majority of claimants have been exercising a private right along New Road. Therefore, it is considered there is insufficient use to meet the statutory test.
- 10.8 The conclusions also relate to insufficient evidence for use on bicycle to give rise to any higher rights.

**Calling into question**

- 10.9 It is necessary to establish under Section 31 when the public’s use was first brought into question. A period of 20 years must be calculated retrospectively from the date when the right of the public to use the way was brought into question whether that was by a notice, by the making of a Schedule 14 application, by blocking the route or otherwise. With all 3 applications the relevant callings into question are the dates of the Schedule 14 applications.

### Public use

- 10.10 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a sufficient *“number of people who together may sensibly be taken to represent the people as a whole/ the community in general”*<sup>1</sup>. 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 level of use during the previous 20 year periods does not meet the statutory test and therefore the routes have not been dedicated as public footpaths.

### Common law

- 10.11 An inference that a way has been dedicated for public use may also be drawn at common law where the actions (or lack of) by the landowner indicate they intended a way to be dedicated as a highway and where the public have accepted it. Dedication may be express or implied from evidence of use by the public and of acquiescence to that use by the landowner. The period of use required to give rise to dedication at common law has never been defined and will depend upon its own facts.
- 10.12 In this instance the owners of Busbridge Copse Farm and New Road have stated that the route was provided for use by local residents and they were the only people they saw walking through. With reference to CP 559 (UEFs 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, & 15) it is assumed that the claimants who live in New Road have a private right of access to their property and therefore they may have been exercising a private right along New Road rather than a public right before entering the woodland. Their evidence of use is considered insufficient to meet the common law test.

### Use ‘As of Right’ or ‘By Right’

- 10.13 Under the legislation, use of the way must have been ‘as of right’, which means without force, secrecy or licence. It is not necessary for the user to have a belief that their use is ‘as of right’
- 10.14 The majority of the claimants for CP 559 live in New Road and have been exercising a private right of way along the road to go to and from their homes to get to the woodland to the east, public footpath no, 178 to the west or Salt Lane. It is considered there are insufficient numbers of claimants who are not residents to have acquired use ‘by right’. Furthermore, Mr Boddington and Ms Keightley say that the woodland was fenced along its boundary with Clock Barn Lane and the Cheshire Home and there was a ‘Private Woodland’ sign. Mr Favell and Ms Hampson have confirmed that when they bought the woodland in 2013 there was an old barbed wire fence that had been broken down along Clock Barn Lane. They replaced it with wooden fencing leaving a gap for the path. None of the claimants recall the path having a fence across it but if a barbed wire fence had been broken down in the past this may mean that originally the path was used ‘with force’ and therefore use would not have been ‘by right’.

---

<sup>1</sup> Paragraph 5.12 Planning Inspectorate’s Definitive Map Orders: Consistency Guidelines. April 2003.  
[www.surreycc.gov.uk/waverley](http://www.surreycc.gov.uk/waverley)

**Lack of intention to dedicate**

- 10.15 There is no evidence that any landowner prevented pedestrian use during the relevant periods although the landowners for New Road and Busbridge Copse Farm were aware that local residents were using the route on a private or permissive basis and the owner of the woodland during the relevant period has stated he didn't see any use and therefore took no action.

**CONCLUSIONS**

- 10.16 In light of the above, it is the Officer's view that footpath rights have not been acquired either by virtue of section 31 of the Highways Act 1980 or at common law.

**11. WHAT HAPPENS NEXT:**

- 11.1 If the recommendations are agreed no legal order will be made. The applicants will have an opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 11.2 If the committee decides that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 11.3 If the Committee resolution is different to the officer's recommendation the reasons and evidence for the decision should be recorded. This will explain the Council's actions should the matter proceed to Public Inquiry or Appeal.
- 11.4 All interested parties will be informed about the decision.

---

**Lead & Contact Officer:**

Debbie Prismall, Senior Countryside Access Officer Tel. 020 8541 9343  
debbie.prismall@surreycc.gov.uk

**Consulted:**

See Section 4.

**Annexes:**

Annex A Drawing No. 3/1/3/H13  
Annex B Legal background

**Sources/background papers:**

Files 'CP559', 'CP565' & 'CP574' including all relevant correspondence and documents can be viewed by appointment at Surrey County Council Merrow Offices.

---