

**SURREY COUNTY COUNCIL****LOCAL COMMITTEE (WAVERLEY)****DATE:** 9 March 2018**LEAD OFFICER:** Debbie Prismall, Senior Countryside Access Officer**SUBJECT:** Alleged Public Footpath between New Road and Clock Barn Lane, 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. An application has been received for a Map Modification Order (MMO) to add a Public Footpath between Salt lane and Clock Barn Lane, Busbridge to the Surrey County Council DMS as shown on the attached drawing of 3/1/3/H13a (**Annex A**). Members will recall deferring a decision on the application at their last meeting.

It is considered that the evidence shows that a public footpath can reasonably be alleged to subsist over the section B – C – D – E only and as such a legal order to modify the Definitive Map and Statement should be made. It is considered that there is insufficient evidence to show that a public footpath can reasonably be alleged to subsist over the section shown A – B on New Road.

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

- (i) Public Footpath rights are recognised over the route shown B – C – D - E on Drg. No. 3/1/3/H13a and that a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement be made. The route will be known as Public Footpath No. 602, Busbridge.
- (ii) If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- (iii) Public Footpath rights are not recognised over the route shown A – B on Drg. No. 3/1/3/H13a and as such no MMO be made.

**REASONS FOR RECOMMENDATIONS:**

The evidence submitted in support of the application is considered insufficient to prove that public rights are established over A – B but sufficient to establish that public footpath rights are reasonably alleged to subsist over B – C – D - E, having been acquired under both statutory presumed dedication (under s.31(6) of the Highways Act 1980) and common law. It is considered that the landowners have not taken sufficient actions to demonstrate their lack of intention to dedicate the section B – C – D – E during the relevant period. Therefore, a Map Modification Order to modify the Definitive Map and Statement by the addition of a public footpath as described above should be made under s. 53 of the WCA 1981.

**1. INTRODUCTION AND BACKGROUND:**

- 1.1 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. Members will recall resolving at their meeting on 8 December that no public rights were recognised over the two spurs. A decision on the claimed route shown A – B – C – D - E on Drg. No. 3/1/3/H13a (**Annex A**) was deferred and is the subject of this report. New Road is a private road and further time was needed to investigate the implications under the legislation of the possibility of the claim effectively being a cul-de-sac if public rights were found to exist from B – C – D – E but not over the section shown A – B on Salt Lane.
- 1.2 The application was accompanied by 18 public way evidence forms showing use of the routes on foot and on bicycle between 1978 – 2013.
- 1.3 The claimed path runs from point A at its junction with Salt Lane in a northerly direction along New Road for 50 metres to point B. It then turns in a generally easterly direction for 314 metres through woodland to points C – D and E, to its junction with Clock Barn Lane.
- 1.4 Members will also recall at their December meeting rejecting the application to recognise public footpath rights over the section of New Road from point B westwards to Public Footpath no.178 at Busbridge Copse Farm. It was considered there was insufficient evidence of use. There were 6 claimants of which only 2 had used the route for the 20-year period. Three of the claimants had only used the route for 4 years rather than a 20-year period as required under the legislation.

**2. ANALYSIS:****Public User Evidence for the Route**

- 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. In this instance the relevant 20-year period for

the claim is 1993 – 2013. 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 Eight of the claimants, as well as pedestrian use, show use on bicycle. Only two people have used the route on bicycle within the full 20-year period. This is considered insufficient to establish public bridleway rights based on bicycle use.
- 2.4 Eighteen user evidence forms have been completed showing use of the route on foot and on bicycle. Fourteen of the claimants live, or have lived, in New Road and the other 4 in the adjoining Salt Lane. Six of the claimants have used the route for the full 20-year period (UEFs 3, 5, 15 & 16). 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.
- 2.5 Six of the claimants have been interviewed regarding their use of the claimed route. Mrs A Barney (UEF 1) has lived in New Road since 1994 and has walked from her property eastwards through the woodland to Clock Barn Lane and then onto Hydons Ball or Juniper Valley as part of a circular route. In the early years her and her husband would also take their sons on their bikes on the paths. Neighbours had told them about the route through the woodland. They just assumed it was a public path as there was an opening in the woodland with a well trodden path. Mrs Barney has seen other people from the locality using the routes, usually with either dogs or children. She says there have never been any restrictions and she has never seen the landowners whilst walking the route.
- 2.6 Mr M Guerrini (UEF 8) and Ms C Wakeman (UEF 13) have lived in New Road since 2000. They say that 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. 40 times a year. They have never been stopped and told they couldn't use the path. They say that the people they bought the house from originally told them about the path through the woodland. Their property has the benefit of a private right of way over the road known as New Road leading into Salt Lane granted by a Deed dated 30 December 1964.
- 2.7 Mrs B Gardner (UEF 5) and Mr P Gardner (UEF 15) moved into their house in New Road in 1984 and have used the claimed route through the woodland to Hydons Ball since then as part of circular routes. They say that they also 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. They have never asked for or been granted permission to use the path.
- 2.8 Mr G Cornick (UEF 3 and the applicant) 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 and Hydons Ball. He says he has always seen other people using the route. There were never any signs up

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and nobody told him he couldn't use the paths. He states the barrier at point B at the western end off New Road was put in about 4 – 5 years ago by the current landowners.

- 2.9 In addition, Ms S Bell-Wilson who lives in Salt Lane has emailed describing walking the path through the woodland from 1977 and playing there with friends most days through to 1990. When she was older she walked neighbour's dogs and from 1987 to 1990 her use would have been approximately 150 times a year.

### **Landowners Evidence**

- 2.10 New Road (section A – B) is a private road owned by the Mcpherson family. James Mcpherson has lived at number 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 .....The only people I am aware of who walk up and down New Road are a few of our neighbours."
- 2.11 The woodland between New Road and Clock Barn Lane (sections B – C – D - E) 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. Mr Favell and Ms Hampson say that the main east to west route has always been quite clear. "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 say they 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 applicant Mr Cornick has stated that the offer of a licence prompted him to submit his claim for public footpath rights supported by a number of public user evidence forms from some local residents.
- 2.12 The previous owners, Mr Boddington and Ms Keightley say they 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 for anyone to walk there and since then I have 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'.

### **Busbridge Parish Council Comments**

- 2.13 The Parish Council has commented on the applications. They say all of the paths and tracks have a considerable history of usage which can be traced back to the time of the London Blitz in WW2. The King George V Hospital was originally built in 1922 on the opposite side of Salt Lane with a second hospital, the Third Australian Serviceman's Hospital, built to the east. Some staff were

billeted to houses in the surrounding area and many of those living in Clockbarn Lane would have used the paths to get to and from work.

- 2.14 With the hospitals, shop, social club and even buses now long gone the footpath usage is now quite different. The paths do not form part of any particular long distance route as most walkers going from Godalming to Hydon's Ball simply continue along FP 178 and cross over Salt Lane straight onto Hydon Heath. The New Road section is used by New Road residents who mostly carry on up to the woods and towards Juniper Valley rather than down towards FP 178. The main woods section B – C, which runs parallel to Salt Lane definitely does get regular use as the path is well defined, well worn and not at all overgrown.
- 2.15 The Parish Council is keen to preserve the existing network of public footpaths and where appropriate expand it. They support the application because in their opinion it is regularly used and provides a safe alternative to walking along the ever busier and dangerous Salt Lane.

### **Map and Photographic Evidence**

- 2.16 The route does not appear on any editions of the Definitive Map or in the Definitive Statement. The path is not shown on the 1871, 1897 and 1918 Ordnance Survey maps. New Road is shown on the 1938 edition but no path through the woodland is indicated.
- 2.17 A 2009 Google Street view photograph shows no fencing along the woodland edge with Clock Barn Lane.
- 2.18 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 been acquired on the section B – C – D – E only and not on the section A – B. Alternatively, they may decide that the evidence submitted shows that the route should not be included on the Definitive Map and Statement as a public footpath or of a different status. 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, The Ramblers and all relevant landowners have all been consulted.
- 4.2 Legal Services have been consulted and approved this report.

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

- 5.1 The cost of advertising the making and confirmation of 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 a Map Modification Order should be made it will continue to allow use of the alleged footpath through the woodland. Any private rights of New Road residents to access their properties are unaffected whether a MMO is made or not.

**8. OTHER IMPLICATIONS:**

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

**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. 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.
- 9.2 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 **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.

<b>10. CONCLUSION AND RECOMMENDATIONS:</b>
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- 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, convenience or safety are irrelevant. The safety of walkers using Salt Lane as an alternative route to the claimed paths is not a relevant factor in considering whether public footpath rights have been acquired.
- 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 The evidence for the claim is that 18 people have submitted UEFs claiming use of the route from New Road through the woodland to Clock Barn Lane, shown A - B – C – D – E. Six people (UEFs 3, 5, 15 & 16) have used the route for the full 20-year period, with the remaining users adding to the cumulative use of the routes. From interviewing a number of users who live in New Road it is clear that they walk from their property, along New Road, through the woodland to Clock Barn Lane and then return by the same or another route. The majority of them will have been exercising a private right along New Road. Therefore, it is considered there is insufficient use of a public nature to meet the statutory test from points A - B.
- 10.5 It is considered there is insufficient evidence for use on bicycle to give rise to any higher rights.

### **Calling into question**

- 10.6 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. There has been no physical blocking of the route and therefore, the date of the Schedule 14 application has been taken to be the calling into question.

### Public use

- 10.7 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 it is considered the level of use during the previous 20 year period meets the statutory test and therefore the route has been dedicated as a public footpath.

### Common law

- 10.8 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.
- 10.9 No evidence has been provided that there has been any action by the landowners to prevent public use. Therefore, notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, officers would also submit that, taken together, the facts imply that the landowners have been willing to dedicate the route as a public right of way.

### Use ‘As of Right’ or ‘By Right’

- 10.10 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’
- 10.11 Sixteen people have completed UEFs of which 14 of them live, or have lived, in New Road. Seven of the claimants’ property land registry details have been examined, which has confirmed that they have a private right of way to access their property from Salt Lane along New Road. The wording in their Land Registry Register differs but states that the land has the benefit of a right of way over and along the land tinted brown on the filed plan.
- 10.12 The accompanying Title Plan shows New Road tinted brown to the relevant property. It is highly probable that other properties have the same right. Under section 31 of the Highways Act 1980, “Where a way over any land..... has been actually enjoyed by the public **as of right** and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.” As in this instance, if there is express permission to use a route then the use is not ‘as of right’.
- 10.13 The claimants walking to and from their properties along New Road will be using the section A – B with permission i.e. ‘by right’ and not ‘as of right’. Therefore, because they already have a private right they are unable to

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<sup>1</sup> Paragraph 5.12 Planning Inspectorate’s Definitive Map Orders: Consistency Guidelines. April 2003.

acquire a public right to use the section A – B. The remaining 4 claimants are considered an insufficient number to establish a public right.

### **Cul-de- sac route**

- 10.14 If it is agreed that a MMO should be made to recognise public footpath rights from B - E the route would be a cul-de-sac at point B, as it would end on a private road (New Road). Under the legislation a public right of way is required to follow a defined route and to have fixed termini, which in most cases are other public rights of way or public roads. In *Attorney-General v Antrobus (1905)* Farwell J stated "... the want of a terminus ad quem is not essential for the existence of a public road." In addition "A landowner may by express words, or by conduct...be shown to have dedicated even a cul-de-sac to the public." This means that only one end needs to be on another public highway, which in this case will be Clock Barn Lane.

### **Lack of intention to dedicate**

- 10.15 Mr Bodington and Ms Keightley state that when they bought the woodland that it 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. There was clearly a well trodden path at that time enough for them to recognise it as a route and to leave a gap in their new fencing.
- 10.16 None of the claimants in their UEFs and those interviewed recall the path having a fence across it. If a barbed wire fence had originally 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'. However, none of the claimants recall seeing a fence during the relevant 20-year period. Therefore, it clearly did not prevent their use or was made obvious to them that a right to walk there was being challenged.
- 10.17 There is no evidence that any landowner prevented pedestrian use during the relevant period

### **Conclusions**

- 10.18 In light of the above, it is the Officer's view that footpath rights have been acquired by virtue of section 31 of the Highways Act 1980 and at common law.

## **11. WHAT HAPPENS NEXT:**

- 11.1 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.
- 11.2 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.

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- 11.3 If the committee resolve not to make an order the applicant will have an opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 11.4 All interested parties will be informed about the decision.
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**Lead & Contact Officer:**

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**Consulted:**

See Section 4.

**Annexes:**

- A Drawing No. 3/1/3/H13a
- B Legal background

**Sources/background papers:**

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

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