



OFFICER REPORT TO LOCAL COMMITTEE (ELMBRIDGE)

ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC (BOAT) ALONG ESHER PARK AVENUE, Esher – CP540

10 SEPTEMBER 2012

KEY 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 which on balance supports a modification and where arises under section 31(1) and (2) of the Highways Act 1980 (HA 1980) an unrebutted presumption of dedication of a way as a public right of way as a result of 20 years of use without force, secrecy or permission, the 20 year period ending with the date when the right of the public to use it was brought into question.

SUMMARY

Mrs Joan Liefer submitted an application for a Map Modification Order (MMO) to add the above public BOAT running along Esher Park Avenue (EPA) from point A-J as shown on drawing 3/1/77/H21, to the Surrey County Council DMS.

It is for the party who asserts that a highway exists to prove its existence and extent. Land can become a highway either by statutory process or by dedication by the landowner and acceptance by the public. Dedication and acceptance can be express or implied. To find implied dedication there must be evidence from which an intention to dedicate can be reasonably inferred or presumed. Acceptance of dedication by or on behalf of the public can be established by use, or in appropriate circumstances by other evidence. Evidence can be documentary and/or user evidence. The evidence submitted in support of the application is considered sufficient on the balance of probabilities to establish that public BOAT rights subsist or are reasonably alleged to subsist having been acquired by statutory presumed dedication under s. 31(6) of the Highways Act 1980 between 1972 and 1992. In this case however the mechanically propelled vehicular (MPV) element of those rights have since been extinguished by s. 67(1) of the Natural Environment and Rural Communities Act (NERCA) 2006. It is

therefore considered that only a public restricted byway is reasonably alleged to subsist over the route. A map modification order to modify the definitive map and statement by the addition of a restricted byway should be made under s. 53 of the WCA 1981.

OFFICER RECOMMENDATIONS

The Elmbridge Local Committee is asked to agree that:

- i. Public restricted byway rights are recognised over A-J on plan 3/1/77/H21 and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a restricted byway over a route along Esher Park Avenue (EPA), from point A at Littleworth Avenue, past its junction with Sandown Avenue at H to point J, just before its junction with Old Church Path, Esher is approved. The route will be known as public restricted byway No. 94 (Esher).
- ii. A legal order 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.

1 INTRODUCTION AND BACKGROUND

- 1.1 In January 2010 the County Council received an application from Mrs Joan Maclean Leifer of 1 Littleworth Avenue, Esher (dated 9 January 2010) under the provisions of the WCA 1981 for a MMO to modify the definitive map and statement by the addition of a public BOAT along (part of) EPA shown A-J on plan 3/1/77/H21. A total of 168 user evidence forms were submitted in support of the application and two maps dated 1940 and 1957. For legal background see **Annex A** to this report.
- 1.2 The route is located in the town of Esher commencing from point A on the order plan located about 12 metres north west of the junction of EPA with Littleworth Avenue in a generally north westerly direction past junctions with Rosebriars (B and C), Broomfields (D), Acorns Way (E), Cranford Rise (F) to point G. It then continues in a generally northwesterly direction past its junction with Sandown Avenue (H) and I to point J, 10 metres south of Old Church Path.
- 1.3 There are currently gates located at points A, G and J. A and G are constructed in two parts with only one half closed. The other is generally left open. The gates at A and G were erected during 2011 to replace existing gates and have the potential to be electronically controlled by sensor. The gate at point J is of an older, wooden, non-electric design. Only one half is in position at the current time. It is not known if the other half was removed or never installed, but was not there in February 2010. Before their replacement the gates at A and G were also of this design, with a swinging bar (mostly) always open.
- 1.4 The way consists of a well maintained metalled surface, grass verges and a separate footpath, mostly surfaced with shingle or similar loose surfacing. The total width from fence to fence over all three sections is on average about 15 metres. The route is lined by large residential properties and has junctions with several cul-de-sacs. There are several speed humps in place, a variety of informative and warning notices¹ and closed circuit television cameras at points A and G.
- 1.5 A large body of evidence has been submitted in rebuttal of this claim by Pennington's Solicitors LLP on behalf of the Esher Park Avenue Residents Association (EPARA) and of Esher Estates Limited (EEL). This includes 163 bespoke questionnaire forms completed by residents and their guests and two bundles of historical and observational material.
- 1.6 This report considers all of the evidence submitted and that uncovered by the County Council and then reviews how this should be interpreted in the light of the NERCA 2006.

2 ANALYSIS

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 168 people completed public user evidence forms, collectively showing use of the route from 1935-2011. A total of 76 years. Officers interviewed five claimants.
- 2.2 The mode of use varied considerably with use on foot, bicycle and in a motorised vehicle. There was no clear indication of use on horseback. The distribution of use through time is as follows, although substantial use in MPVs did not begin until the 1960s.

On foot	1935-2011
By bicycle	1945-2011
In a MPV	1945-2011

There was also a wide distribution in the frequency of use as follows:

	Minimum use	Maximum use
On foot	2 (Form 8)	520 (Form 126)
By bicycle	10 (Forms 43, 121)	140 (Form 27)
In a MPV	4 (Form 28)	400 (Form 127)

- 2.3 The status actually claimed by users did not always coincide with their actual use. All users claimed the status of BOAT except for users 129 and 157 who claimed footpath.
- 2.4 The way was used for a combination of business and pleasure. Many users commented that it was a short-cut between Claygate and Esher High Street and other facilities such as the Library, shops, banks, surgery and church. Others used it to get to school or merely for the pleasure of walking, visiting friends and exercise. All had used the route openly and remembered that it had always followed the same route.
- 2.5 It was described generally as a sealed or tarmac road with grass verges and shingle or gravel footpath. It was noted that latterly it had speed humps. Several of those who had used it for a longer time indicated that it was once unmade. Other comments included that it was previously badly surfaced; unmade and unsurfaced; driveable with care; never disastrously pot-holed; required moving from side to side; never terrible and quite easy to drive along.
- 2.6 All of the users (who completed the question) mentioned that they had seen both gates and signs. Most referred to the predecessors of the current double gates at 'A' and 'G'. These are generally referred to as having been there for around 20 years or since 1990. Only one user, Mrs Harty [31] ever records that these were closed for the street party in 2009. She states that plastic tape was put across the way at this time. Other comments included that the gates were replaced recently; that users were never stopped from going through them; that the gates are never closed; that there were no gates years ago; and that there were no gates in the 1960s.

- 2.7 Many of the users referred to various signs and notices which have been erected and approximately when they appeared. The signs stating 'private road' and 'no parking' were widely referred to as having always been there, but at least 30 of the forms indicate that the 'no public right of way' signs were not there until (summer) 2009. Several also noticed signs regarding the safety of children. Other comments regarding notices include that there had been nothing to challenge use except the private signs; that the route had always been used so the signs were never a concern and that notices could not be recalled.
- 2.8 These comments suggest that what notices were there did not deter use by the public and were not deemed to be a challenge to use. It also seems clear that the number and 'strength' of the notices has increased in recent years.
- 2.9 Not all users provided detailed information to indicate their levels of use. Many who claim to have cycled the route did not provide any details of 'how often'. It is possible however to examine the levels of use on foot and in a MPV². Over the average year it appears that EPA is used 9216.5 times on foot, which equates to an average of 25.25 uses per day. The route is used 16109 times in a MPV, which equates to an average of 44.13 uses per day. This latter number seems quite substantial, but if for example it takes 1.27 minutes for the average car driver to travel the claimed length of EPA (at 20mph) which is 764 metres, this is only 56 minutes of the day when the route is being used by the public, or approximately 3.75% of the possible time. Given that it is likely that some use will be simultaneous then this percentage will be smaller still. The chances that the landowner and frontagers would regularly see users and have opportunity to challenge them therefore seems quite low.
- 2.10 Please see Conclusion and recommendations for a discussion of user numbers and NERCA 2006.
- 2.11 A bar chart and summaries of the evidence contained in the forms can be seen in **Annex B**.

LANDOWNERS EVIDENCE

- 2.12 Section A-G of EPA has been owned by EPARA since 2001. Section G-J is owned by Esher Estates Limited with the current title dating to 2005 but with origins in the early 1900s. EPA is fronted by approximately 50 properties, some of which are split into flats.
- 2.13 A bundle of evidence was submitted by Penningtons Solicitors LLP in June 2011 on behalf of EPARA and EEL consisting of documentary and observational material including 3 witness statements, 1 statutory declaration. 163 questionnaire forms were also completed by residents and their invitees in rebuttal of the claim. These supplemented an earlier bundle submitted in March 2010. I summarise below their objections to the claim:

² Some interpretation of the numbers is required however given that some users provide a 'range' of numbers whilst others refer generally to, weekly, daily etc.

2.14 SECTION 67 OF THE NERCA 2006: The effect of s. 67(1) Natural Environment and Rural Communities Act 2006 is that any public right of way over the Avenue claimed by the applicant would have been extinguished.

2.15 USER EVIDENCE FORMS: There are a large number of material and very substantial inaccuracies in the forms submitted, in particular the road signs have been inaccurately described and dated.

2.16 INTENTION TO DEDICATE A PUBLIC RIGHT OF WAY: There must be an intention on the landowner to dedicate a right of passage over that land to the public at large. Steps have been taken to evidence a lack of intention.

2.17 NOTICES

- I. During WW2 existing gates were taken down to allow military and emergency access but signs stating "Private" and "private road" were put in place to show no intention to dedicate.
- II. Signs displayed to the public at both the Sandown Avenue and Milbourne Lane ends of the Avenue.
 - A large white sign on the right hand side of the road stating "PRIVATE/PLEASE DRIVE SLOWLY/LOOSE SURFACE/LOOK OUT FOR CHILDREN" (for at least 50 years).
 - A red sign on the left hand gate, stating "PRIVATE ROAD/STRICTLY NO PARKING" (Since April 2006).
 - An information sign showing "NO THROUGH ROAD FOR VEHICLES" (since 1993).

And in addition only at the Sandown End.

- A white sign under on the no through road for vehicles signs, stating "NO PUBLIC RIGHT OF WAY". (since 1992 at the latest).
- III. Mr Ekberg, the former chairman of the EPARA also demonstrates in his correspondence that:
 - ...in April 1992 signs stating "no public right of way" were made and placed at either end of the Avenue".
 - In 1998 modified versions of the notices above were erected.
 - In 2002 "no parking" signs were put up.
 - In 2004 "private road" signs erected at Littleworth Road end.
 - In 2006 larger "private road/strictly no parking" signs were erected.

2.18 GATES

- I. It is alleged that gates were in place prior to WW2 but were taken down for access reasons. No evidence has been supplied to support this. The current gates were installed in April 2011 to replace gates installed during 1991-1992.
- II. There are double-gates at both ends across the road. Before those installed in 2011, the previous gates had a five-bar white wooden gate on the left hand side with a red sign erected on it. These were always closed permanently except to allow entry to rubbish disposal lorries. The right side has a single bar which meets the other gate when closed, but which is normally left open to allow access for residents.

2.19 RESTRICTIONS ON ACCESS

- I. Gates were closed for one day in September 2009 and June 2010 for residents street parties
- II. From June 1992 the gates were closed at residents request at the Milbourne end to prevent increased traffic during widening works on Claremont Lane. The works took 6-9 months and the gates were closed throughout. It
- III. Efforts have been made to restrict parking, for example by writing to those involved and explaining that parking and access are not permitted.
- IV. From time to time directors have told people (and schools) not to use EPA by stopping cars, alerting owners of parked cars and informing non-residents consistently that EPA is a private road with no public rights of way over it.

2.20 ROUTE PLANNERS/SAT-NAV: EPA is not depicted as a public highway on satellite navigation equipment nor by route planners.

2.21 CORRESPONDENCE WITH ELMBRIDGE BOROUGH COUNCIL (EBC): In 1993 and 1998 letters were exchanged between EBC and EPARA. In these letters EBC considers that full highway rights exist along EPA and complained about the erection of new signs. EPARA responded replying that it was not accepted that public rights existed and that any proceedings would be vigorously defended. EPARA also stated that there had never been an intention to abandon the right of way over EPA and it should never have been inferred.

2.22 EPARA sought advice from Lord Denning and has thereafter followed his advice which is summarised below:

- Elbridge as Borough Council are not the Highway Authority and are wrong to claim they are acting as agent of the County Council who's responsibility it is to assert and protect public rights. The opinion of the Borough was therefore irrelevant.

- With regard to the Highways Act 1980 the evidence was clear that Esher Park Avenue was a private road and that notices and gates had been erected to assert this. He thought this was sufficient to establish Esher Park Avenue as a private road not a highway.
- They should contest any suggestion that the Avenue is not private and continue to maintain it as a private road.

2.23 COMMUNICATIONS AND PUBLICATIONS:

- I. A letter was sent and published on 8 July 1992 to Esher News and Mail setting out the background to the signs and gates and the lack of intention to dedicate EPA as a public right of way.
- II. A note was prepared for discussion by EPARA directors on 16 June 1992 regarding the status of EPA and the responses which might be made should complaints be received from members of the public.
- III. EPARA wrote to Mr J Maguire following an article in the residents magazine concerning EPA, outlining to him their lack of intention to dedicate.
- IV. In May 1994 the Liberal Democrats published a leaflet including a section regarding the status of EPA. EPARA wrote to Councillor Heaney confirming that private notices had been in place since at least 1945 and were sufficient to demonstrate their lack of the intention to dedicate.
- V. Letters objecting to planning applications from 2006 stated that EPA was a private road.

2.24 THREE WITNESS STATEMENTS supporting and contributing to the above evidence were submitted. In addition to the evidence already outlined they added the following:

- I. Mr John Bentley, Director of Esher Estates Limited;
 - *As a child (in the 1950, 60s and 70s) EPA was very quiet except for deliveries.*
 - *Sleeping policemen were installed in 1995-96.*
 - *The road remains quiet except during the school run.*
 - *A sign that children were playing in the road went up in about the 1950s.*
- II. Mr Laurence Guy Greaves, Chartered Surveyor.
 - *Sandown Road was made up during the war but EPA wasn't until 1987/8.*
 - *I do not recall there being gates on EPA since the war...the gates were introduced as a traffic measure.*
 - *The roads at each end were better quality and not busy so EPA and Sandown were rarely used as through routes. People did walk along it as a short-cut to Claygate however.*
 - *Traffic increased after 1987 due to the increase in the number of residents.*

- III. Mr Paul Dominic Hamill, resident of EPA and former Director of EPARA
- *Reference is made in the minutes of Esher Estates to the “construction of the new road connecting both ends of Esher Park on 22 December 1913. It is described as in bad repair by 22 October 1914.*
 - *Complaints were received about the road in 1930 and 1946.*
 - *The Estate was closed to the public one day in 1907, 1913, 1920, 1934, 1936 and 1938. The District Council was informed.*
 - *Some of the evidence forms claimed access before 1988 but I doubt this is the case as it was in such poor condition.*
 - *A postcard photo taken between 1940-60 shows the rough state of the road and a lack of traffic.*
 - *Mr Freeman of EBC confirmed on 24 May 2010 that EPA was a private road.*

2.25 A STATUTORY DECLARATION was also submitted by Jennifer Reid, Penningtons Solicitors LLP.

- I. The Director of Esher Estates who was also the chairman of the EPARA wrote to Elmbridge in 1984 enclosing a brief title “Future Developments in Esher Park Avenue” which stated that it should remain a gravel road but re-graded and levelled, but with some speed restricting capability.
- II. EBC contributed to the cost of the reconstruction of the road as confirmed by their letter of 13 October 1988.
- III. An article in the Esher News and Mail on 7 January 1987 explained actions by residents of EPA to non-residents parking in their road. This includes a photograph of a notice stuck on a windscreen stating: “Do not park. Esher Park Avenue is private...please do not park here in future”
- IV. This position was confirmed by the deputy town clerk of EBC on 22 May 1990: “...measures initiated by the Association must not affect the section of EPA west of Church Path as this is regarded as public highway and parking is already controlled by means of waiting restrictions and parking bays. The same of course applies with regard to the erection of any gates...other their erection would amount to an obstruction of the highway..”.
- V. The EPARA replied that “the committee have also now agreed to erect a gate which again will not affect the Church but will be on our section of private road”.
- VI. A letter from Ian Hendrie to Roy Ekberg of EPARA dated 31 January 1991 explained that on erection of the gate that it: “...be closed, with padlock from say 7am-1pm and from 2pm to 6pm in the first three days (or week) after installation. Thereafter the gate be left open at all times. If it is found that local traffic uses the open half then, for a further period of time the gate should be shut, without padlock”.

2.26 163 USER QUESTIONNAIRES AGAINST THE CLAIM: were completed by individuals and submitted with the intention to rebut the user evidence forms and show that whilst use was made it cannot have been as of right. Nine of those who filled in these questionnaire forms were also interviewed. The main points from these are summarised below.

- I. All 163 of those who completed the form believed that it was a 'private road'.
- II. None thought there were any public rights, although seven then contradicted this and said it was a public footpath. Some are clearly not opposed to the recording of public pedestrian rights.
- III. The volumes of use were as follows:

On foot	1985-2011 [total 39]
By bicycle	1990-2011 [total 39]
In a MPV	1955-2011 [total 149]

	Maximum use
On foot	730
By bicycle	365
In a MPV	1800

- IV. The main reasons for using the route were to get to and from home; to visit friends and relatives; to visit shops or services in Esher, to get to work or for leisure and exercise.
- V. Every person had seen gates and notices along the route. All of them had seen notices which said 'private' and 'no public rights of way'. The earliest dates on which the signs were seen are as follows: Private: 1985; No public right of way: 1986; No through road: 1986, although the dates varied widely from 1985-2006.
- VI. 115 mention that the gates had been closed, most commonly for the street parties of 2009 and 2010 but also for road works in the early 1990s. 30 however did not recall the gates being shut at all.
- VII. Many stated that they were either residents, guests of residents or working for residents and that either meant they had implicit (or explicit) permission or that they did not need permission.
- VIII. Two individuals claim that they had been stopped whilst using EPA, one in the early 1980s.
- IX. EPA was referred to widely as a private road with access for residents, guests and contractors and no rights for the public although a very few believed there were public rights for pedestrians.

DEFINITIVE MAP

2.27 A map (1/47) prepared in 1947 for the purpose of the Rights of Way Act 1932 by Esher Urban District Council depicts all the rights of way considered by the Rural District Council to be public. There are NO public rights recorded over the route in question.

2.28 There are no records to suggest that the path was amongst those put forward for consideration at any stage in the compilation 1952 Definitive Map and Statement or any of the subsequent revisions in 1959 or 1966.

HISTORIC EVIDENCE

2.29 The route is not visible on Lindley Crosley's (1793), Colonel Mudge's (1816) or Greenwoods (1823) maps. No route equating to Esher Park Avenue is visible on any of these maps.

2.30 On the 25" 1869 1st Edition 1:2500 O.S. County Series map (XII:10) there is no sign of the route. There does appear to be an exit onto Claremont Lane from St. Georges Chapel south of 'the Bear' public house.

2.31 The County Series 1896 2nd edition shows a route closely equating to EPA. This runs from Milbourne Lane in a largely north-westerly direction from the point at which the current footpath 39A (Esher) meets the road. It has a junction with what later becomes Sandown Avenue and then continues to St. George's Chapel. The map does not indicate whether there is access beyond this point to Claremont Lane but double-pecked lines suggested some kind of route continues to the north of the chapel through to the High Street. At both ends the route is closed by solid lines which may indicate the presence of gates. The middle section of EPA (D-H) is not the same as that laid out today. It follows a more gently curving line throughout the whole of this length. The road is shown bounded by solid lines along its entire length with a fence to fence width approaching 10 metres. Within these solid lines are double pecked lines probably indicating a separation between verge and beaten track. A route following a similar but not identical line to Sandown Avenue is visible at this time. This runs eastwards to a lodge on New Road opposite the cricket ground.

2.32 The County Series 1913 edition shows an unchanged line but that some changes have occurred along its length and most particularly at both ends. The route now appears to run all the way through from Claremont Lane (from an exit next to The Bear public house) to Milbourne Lane. Both ends are now only enclosed by pecked lines which suggest a change of surface rather than the presence of gates. The road itself appears to have increased in width slightly (to 12m) at both ends but to have narrowed in a central section equating to D-G on the plan 3/1/77/H21. Some of the route is now bounded on its northern side by pecked rather than solid lines indicating that it is unfenced. Most of the route remains undeveloped. Sandown Avenue has been reconstructed to follow a more north-easterly route.

2.33 The 1938 edition shows significant changes. The central section of the route between D-G has been re-routed to initially run in a westerly and then a more northerly line to form a right angled bend. This has been accompanied by a widening of this section to a width similar to the two ends of the road (about 12 metres). Much of the route is lined by properties and other enclosed plots. The access points at both ends remain unchanged from the 1913 maps.

- 2.34 On the Ordnance Survey National Grid maps of 1957 (TQ 1364, 1464) the route remains unchanged as do the junctions it has with other roads. Once again there are pecked lines at each junction, but no indication of fixed gates. Considerable development has taken place along the route with several large properties. The mapping continues to show that a distinction was possible within the width of the route between track and verge.
- 2.35 Bacon's Large Scale Road Atlas of London and Suburbs (revised edition 1913) shows the claimed way in its pre-diversion state. EPA is not distinguished from any surrounding routes. The map contains no information about the status of the road. The Collins Bartholomew Map of circa. 1940 also shows the route in an identical fashion to those around it albeit shown along the newer diverted route.
- 2.36 On the mapping produced for the 1910 Valuation Act the land over which the claimed way runs appeared uncoloured along its entire length indicating that it was not subject to tax and therefore presumed to be a public highway by the Inspector of Taxes. It is the pre-diversion route which is shown uncoloured rather than that used today. The Ordnance Survey base map used appears to be an intermediate map between 1896 and 1913. Sections D-G on the plan 3/1/77/H21 are enclosed within hereditament 147 whilst A-D and G-J are uncoloured and little changed compared to the present day.
- 2.37 Maps prepared for the purposes of the Esher Tithe Act 1847 do not show the route.
- 2.38 The route is visible on the 1948, 1971, 1988, 1998 and 2006 aerial photographs although little can be interpreted about its status, although it appears little different from surrounding roads. The scales are insufficient to make out the presence of any notices. Gates can be identified on the 1998/9 and 2006 photograph at points A, G and J in the half closed position as they exist today.

DISTRICT/BOROUGH COUNCIL MINUTES

- 2.39 Over the years both EBC and its predecessor authority Esher Urban District Council (EUDC) have made attempts to formalise the status of EPA and other adjacent roads in the area. They have also taken actions to prevent the obstruction of these routes and develop formal policies towards them.
- 2.40 In minutes of the EUDC Highways Works committee dated 17 July 1952 the issue of car parking at the north-eastern end of EPA was considered. The committee was informed that EPA was a private street and that the Council had no power to incur expense on the maintenance or improvements thereof, except in their capacity as frontager.
- 2.41 On 7 April 1965 the same committee heard complaints from residents of EPA "concerning the annoyance and inconvenience caused to residents by the parking of cars therein". This was followed up on 19 January 1966 by a report indicating that the situation had got worse.

2.42 It is reported to the EUDC committee on 7 July that processes were underway to make a Traffic Regulation Order for (part of) Esher Park Avenue and that negotiations with the Commissioner of Police for an extension of any such order to its junction with Sandown Avenue was made but rejected.

2.43 In September 1968 “ as a result of the dangerous condition of the above mentioned two private streets” (Sandown and EPA) notice was served on certain frontagers requiring urgent repairs to be carried out in accordance with s. 204 of the Highways Act 1959”.

2.44 On 19 September 1974 Elmbridge Highways Committee considered a report regarding the position of the authority towards the closing of private streets and the erection of obstacles and notices. This confirmed that through the agency agreement with Surrey County Council they had a duty to (i.) Assert and protect the rights of the public and enjoyment of any highway in their area and (ii.) to prevent the stopping up or obstruction of a highway in the Borough. The report states that ‘power is granted under s. 124 (of the Highways Act 1959) to ... a district council which maintains the highway under the Local Government Act 1972’.

2.45 In October 1977 it was reported that “complaints had been received regarding the condition of EPA which provides access to the library and Council Offices. The road is a privately maintained one although it is probable that the public have gained vehicular rights over the entire length between the Bear and its Junction with Sandown Avenue”. It is not explained why they felt rights had only been acquired as far as Sandown Avenue.

3 OPTIONS

3.1 The committee may agree or disagree with the officer’s recommendations that rights have been acquired. Alternatively, they may decide that the evidence submitted shows that the routes should be of a different status to that recommended. Decisions can only be made on the basis of the evidence available. The above 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 A).

4 CONSULTATIONS

4.1 No responses were received from EBC, Claygate Parish Council nor from the relevant County or Borough Councillors.

4.2 No responses were received from the following organisations/groups: Ramblers, British Horse Society, Open Spaces Society, Autocycle Union, Byways and Bridleways Trust, Green Lane Association (GLASS), Range Rover Register, Trail Riders Fellowship, Surrey Byways User Group, Land Access & Recreation Association, British Driving Society

- 4.3 Ms Sally Swain, former Development Control Engineer at EBC and Surrey County Council noted that she had received calls from residents expressing concerns about vehicular rights. She acknowledged that existing gates had been closed on occasions for events. She also notes that in 2002 she received complaints that the gates at the northern end of EPA were closed. At that time EBC took the view that full vehicular rights existed over EPA.

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 £1000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the Wildlife and Countryside Act 1981.

6 EQUALITIES AND DIVERSITY IMPLICATIONS

- 6.1 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 1998. Primary Legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular 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 (paragraph 2.12) under Article 8 of the Convention, the right to a private and family life and Article 1 of Protocol 1, the right to 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 detailed in paragraph 8.2, 5 and 6 and Annex A of this report. As such the recommendation to the Members is not considered to be in breach of the 1998 Act

7 CRIME AND DISORDER IMPLICATIONS

- 7.1 This route has been in use for a substantial period of time. It is unlikely that legally recording it will have significant crime and disorder implications. Such issues cannot be taken into account when making a decision whether the public have acquired rights or not.

8 CONCLUSION AND RECOMMENDATIONS

- 8.1 A decision on this claim must be made on the legal basis set out in ANNEXE A to this report. The relevant consideration is whether the evidence is sufficient to

raise a presumption that public BOAT rights exist. Other issues such as amenity, safety, security or convenience are irrelevant.

- 8.2 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”.
- 8.3 The documentary evidence shows the existence of the claimed route since at least 1896, although part of the route was diverted between 1913 and 1938. The Finance Act 1910 suggests that the route was considered to be public highway but this is not conclusive evidence. Other documents provide information regarding gates, notices and privately held intentions but are not definitive in establishing its status. The claim must rely on user evidence either by statute or common law.

Statutory test

- 8.4 In order to establish the rebuttable presumption, a claimant must show 20 years of use, ‘as of right’, that is not by force, secrecy or with revocable permission, actual or implied, and that use was ‘without interruption’ (i.e. without interference from the landowner by overt or identifiable acts preventing or significantly deterring passage). If this test is satisfied, the council must then decide whether deemed dedication is rebutted by sufficient evidence that there was no intention on the part of the landowner during the 20 year period that the route should be dedicated. This must be determined by examining the evidence.
- 8.5 Section 31 (1) of the Highways Act 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”.
- 8.6 The period of 20 years referred to in sub-section (1) above is calculated retrospectively from the date when the right of the public to use the way is brought into question, in this case by the erection of ‘no public rights of way’ notices in 1992.

Common law dedication

- 8.7 An inference that a way has been dedicated for public use may be drawn at common law where the actions (or lack of) by the landowner indicate they intended a way to be dedicated as a highway and where the public have accepted it. 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.

8.8 Any recommendation must ultimately be made on the balance of probability³ but where there is conflicting evidence the council “must bear in mind that an order made under s. 53(2) WCA 1981 following a Schedule 14 application still leaves both the applicant and the objectors with the ability to object to the order under Schedule 15” and that “conflicting evidence can be heard and those issues determined following a public inquiry”⁴.

Calling into question

8.9 The erection of ‘no public right of way’ signs in 1992 appears to be the most reliable challenge to the public to date. Prior to this the works, notices and gates were not clear in their intention and the public could not have been aware of discussions between the Council, EPARA or others. In *Fairey v Southampton CC* (1956)⁵ Lord Denning stated that in order for the right of the public to have been ‘brought into question’ the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged, ‘so that they may be apprised of the challenge and have reasonable opportunity of meeting it’. Notices saying ‘private’ ‘might’ have been sufficient to challenge use but it is not certain. These views were recently underlined in the *Godmanchester*⁶ case where actions such as writing a letter to the local authority were shown to be insufficient; could not have come to the attention of the users and do not satisfy the methods of negating an intention to dedicate as shown by section 31 of the HA 1980. Similarly the *Paterson*⁷ case indicated that “... *signs in such terms as ‘Private’ or ‘Private, No tipping’ did not unambiguously provide sufficient evidence or notice that there was no intention that a path be dedicated to public use*”.

8.10 If the point of challenge to the public’s use of the route is taken as 1992 then the relevant 20-year period is 1972-1992. 131 people had used it for some period during this time by some mode of transport. 77 people had used it in a motorised vehicle for some of this period and 42 for the whole period. 69 had used it on foot for some of the period and 43 for whole period. Cycling numbers were 38 and 20 respectively. Taken together the user evidence is sufficient, on the balance of probabilities between 1972 and 1992 to give rise to a presumption of dedication as a public byway open to all traffic (between A-J). The use need not therefore be considered at common law.

Natural Environment and Rural Communities Act 2006

8.11 The Natural Environment and Rural Communities Act 2006 changes any conclusions, reached on the above evidence. Section 67(1) extinguishes any pre-existing rights for mechanically propelled vehicles if it is over a way which:

a. *was not shown in a definitive map and statement or*

³ As clarified in *R. v Secretary of State for the Environment, ex parte Bagshaw and Norton* [1994] and *R. v Secretary of State for Wales, ex. Parte Gordon Emery* [1997]; that is whether or not, on balance, public rights subsist or are reasonably alleged to subsist. If they do, the status, the width of the path and any limitations must also be determined. Annex H²

⁴ *R. v Isle of White CR v O’Keefe* [1990] *JPEL*; (1989) 59 *P&CR* 283,

⁵ *Fairey v Southampton CC* [1956] 2 *QB* 439

⁶ *R (ex parte Godmanchester Town Council) v Secretary of State* [2007] *UKHL* 28

⁷ *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010), *EWHC* 394 (Admin).

b. was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

8.12 But the above is subject to subsections (2) – (8) of the act, which contain provisions where subsection (1) of the act may not apply or is only applied conditionally.

8.13 None of these exceptions can be found to apply in this case under section (2) for:

1. It cannot be shown that the main lawful use by the public during the period of 5 years ending with commencement⁸ was use for mechanically propelled vehicles. If this were the case, then the route might not be dedicated as a BOAT as it would not fit the description of a BOAT⁹ as outlined in section 27(8) of the Countryside Act 1968 and s. 66 of the Wildlife and Countryside Act 1981.
2. It was not shown on the list of streets maintainable at public expense before commencement.
3. It was not created by an enactment or instrument, or otherwise as expressly for mechanically propelled vehicles.
4. It was not created by construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.
5. It was not created by virtue of use before the period ending 1 December 1930.

8.14 Similarly under section 67(3) the application was not made before the relevant date nor determined before commencement.

8.15 The frequency of use shows that between 1972 and 1992 it was used slightly less on foot than in a motor vehicle, both in terms of absolute numbers and frequency. If this was indeed so the way would not fit the description of BOAT and so ought not be added to the Definitive Map and Statement at all. Nevertheless, under NERCA it appears that the vehicular rights would subsequently be extinguished by 67(1) on 2 May 2006. The remaining rights could then be recorded on the Definitive Map and Statement as restricted byway as allowed by s. 70(1) of NERCA.

8.16 I conclude that there is sufficient evidence, on the balance of probabilities to show that vehicular rights have been acquired by the public over route A-B-C-D-E-F-G-H-I-J on plan 3/1/77/H21, but were extinguished by NERCA on 2 May 2006 and so the appropriate status is that of restricted byway. A map modification order should be made to modify the definitive map accordingly.

8.17 If such an order is made and confirmed then the legal status of the gates along EPA must be considered. The evidence suggests that rights were acquired before the installation of the gates at any point along EPA; it therefore follows that the right must have been acquired without these limitations. The gates would therefore constitute an illegal obstruction. The Council has both a common law and a statutory duty under section 130 of the HA 1980 to assert and protect the

⁸ Which in this case is May 2006 with the relevant effective date of 20 January 2005.

⁹ A BOAT is a carriageway with vehicular rights but one which is mainly used for the purposes for which footpath and bridleways are used.

rights of the public to the use and enjoyment the highway and also to prevent, as far as possible, the stopping up or obstruction of the highway.

9 WHAT HAPPENS NEXT

- 9.1 If Committee decide that an order should be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 9.2 If Committee decides that no order be made, the applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 9.3 If the Committee resolution is different to the Officer's recommendations then they should cite and record the reasons and evidence for that decision. This will make it easier to explain the Council's actions should the matter proceed to public inquiry or appeal.
- 9.4 All interested parties will be informed about the decision

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BACKGROUND PAPERS: All documents quoted in the report. File may be viewed upon request.

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