



SURREY

SURREY COUNTY COUNCIL

LOCAL COMMITTEE (TANDRIDGE)

DATE: 22 JUNE 2018

LEAD OFFICER: DEBBIE PRISMALL, SENIOR COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC RIGHTS OF WAY BETWEEN BLUEHOUSE LANE AND SILKHAM ROAD, OXTED

DIVISION: OXTED

1 SUMMARY OF ISSUE

- 1.1 The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which can be reasonably alleged to support a modification. Two applications have been received for Map Modification Orders (MMO) to add public footpaths on land north of Bluehouse Lane, Oxted to the Surrey County Council DMS as shown on the attached drawing 3/1/31/H11 (**Annex A**)
- 1.2 It is considered that the evidence is sufficient to allege that public footpaths subsist over the claimed routes. As such a legal order to modify the DMS should be made.

RECOMMENDATIONS:

1.3 The Local Committee (Tandridge) is asked to agree that:

- (i) Public Footpath rights are recognised over the routes shown on Drawing no. 3/1/31/H11a as:
- a) Claimed footpath no. 612 between points A – A1 - B – C – D – E – L – M – K – N - F
 - b) Claimed footpath no. 613 between points G – H – D and E – I – I1 - J
 - c) Claimed footpath no. 614 between points H – C and B – I
- and that a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 be made to modify the Definitive Map and Statement for Surrey.
- (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, the County Council as surveying authority will adopt a neutral stance at any Public Inquiry or Hearing, making all the evidence available to help the inspector determine the case.

REASONS FOR RECOMMENDATIONS:

- 1.4 The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which on balance supports a modification.
- 1.5 In this instance the evidence submitted in support of the application is

www.surreycc.gov.uk/tandridge

ITEM 8

considered sufficient to establish that public footpath rights are reasonably alleged to subsist over the claimed route, having been acquired by virtue of use by the public on foot under statutory deemed dedication (under s.31(6) of the Highways Act 1980). Evidence suggests that landowners have not sufficiently challenged users or taken sufficient actions to demonstrate their lack of intention to dedicate during the relevant period.

2. INTRODUCTION AND BACKGROUND

2.1 The County Council received two applications, dated 20 November 2013, from Mr Peter Giles on behalf of the Oxted and Limpsfield Residents Group (OLRG) under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the addition of public footpaths on the land to the north of Bluehouse Lane, Oxted. Claim application no. 563 (alleged footpath no. 612) was supported by 33 user evidence forms (UEF) and claim application no. 564 (claimed footpaths nos. 613 and 614) was supported by 49 UEFs. Twenty-nine of the users are the same for both claims. Two of the UEFs (CP 563 – UEF 24 & CP 564 – UEF 34) also claim use of the alleged paths on bicycle. The use is not considered sufficient to acquire any higher right than footpath. The footpaths claimed in the applications are shown on Drg. No. 3/1/31/H11a at **Annex A**.

2.2 Alleged footpath no. 612

The path commences at point A at its junction with Bluehouse Lane and runs in a northerly direction along a driveway to a gate at point A1 and then enters a field at point B. It continues along the field edge to point C, cuts across the field to point D and then continues along the field edge to point E. The path goes through woodland to point L and then continues around a field edge to points M and K where it then runs along a track through woodland. It then turns south-westerly along a field edge to a gate at point N and then continues along a tarmaced path to join Silkham Road at point F.

2.3 Alleged footpath no. 613

The path commences at point G at its junction with Chichele Road in a north-easterly direction along a track to point H and then continues along a field edge to its junction with claimed footpath no. 612 at point D. It then recommences further north from point E and runs in an easterly direction along the field edge to point I, where it turns north-easterly through woodland to point I1 at the parish boundary where it then continues to meet Public footpath no. 75, Limpsfield at point J.

2.4 Alleged footpath no. 614

The path commences at point H in a south-easterly then north-easterly direction along a field edge to point C to meet claimed footpath no. 612. It then recommences further south from point B in a generally north-easterly direction following the field edge to point I and its junction with claimed footpath no. 613.

3. ANALYSIS

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

also lead to the acquisition of public rights at common law. For a public right of way to become established at common law it is necessary for there to have been a dedication by the landowner and acceptance by the public. A dedication may be inferred if either: a) landowners show acquiescence by knowing about and ignoring use by the public or b) the use is so great that the landowners (whoever they are) must have known and taken no action. There is no minimum time period over which use must have occurred for rights to be established at common law. Alternatively, documentary or historical sources may be sufficient evidence to show that the map should be modified.

- 3.2 For the whole of the length of alleged footpath 612 there are two dates of challenge to public use. In January 2012, Mr and Mrs Berryman, the owners of the section L – M – K - N, made a Deposit of a Statement and Plan and a Statutory Declaration to Surrey County Council under section 31(6) of the Highways Act 1980 declaring that there were no existing public rights of way and that they did not recognise any public rights of way across their land. At the same time they also erected new barbed wire fencing and notices saying 'Private Land No Public Right of Way Court Farm'. For the northern section of the alleged footpath (between points L - N) the relevant 20-year period is therefore 1992 – 2012. A year later in March 2013, the owner of the land south of point L erected gates and hoarding across the entrances to the fields at points N, G and B. The relevant 20-year period is therefore 1993 – 2013. However, for the purposes of this report the evidence is considered as a whole for all of the path for many of the claimants for both applications are the same.
- 3.3 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. In this instance the people that have completed UEFs and given evidence are residents from the local area and it is appropriate therefore to consider that they represent the people as a whole/the community in general. The background to the legislation relating to Map Modification Orders is attached at **Annex B**.

PUBLIC USER EVIDENCE FOR THE ROUTE

Alleged Footpath no. 612

- 3.4 Thirty-three user evidence forms have been completed showing use of the route on foot between 1971 and 2013. Nine of the claimants have used the route for both full 20-year periods (i.e. 1992 – 2012 & 1993 – 2013). All of the users in their evidence forms have completed their forms for the whole path A – F. For clarification, the evidence will be examined for the whole route.
- 3.5 Frequency of use and reason for use
Use by walkers varies between 5 times a year to every day. The total use in a year adds up to 3585 with an average of 108 times a year. This equates to users on average walking the path twice a week. Thirteen users walk the path over a 100 times a year. The reasons for using the alleged footpath have been stated as: exercise & scenery, dog walking, collecting kids from school, shopping, leisure and fitness, seeing friends in Gordons Way, Central Way and Bluehouse Lane from Chichele Road, walking for fun/ enjoyment, fresh air and exercise, for a run, for getting to the North Downs, visiting family, running on the North Downs, exploring the surrounding areas and nature observing.

ITEM 8

3.6 Gates and fences

It is understood that historically there have always been gates at points N and A1. All of the claimants in their UEFs have ticked 'yes' on the form to the question asking whether they have ever seen any stiles or gates across or beside the way? Nineteen of the users have commented on the gates saying for example, 'general access to side of gates' (UEF 6), 'both beside the path so not impeding access' (UEF 12), 'gates with paths around them' (UEF 7), 'there have always been gates with gaps next to them' (UEF 9), 'open gates with used paths at the side' (UEF 10), 'gates easy to bypass or pass through' (UEF 18), 'there has been an open gateway from the Silkham Road end..' (UEF 22) and 'all gates seen have well used gaps beside them' (UEF 25). When interviewed, Mrs Jackie Wren (UEF 33) confirmed "There were no restrictions at the gate at point N – either the gate was open or I walked around it as there was no fencing across at the side."

3.7 Width of alleged path

The width described in the UEFs ranges from 1 to 6 metres. The different sections of alleged paths will have differing widths depending on whether they are enclosed by boundaries, run across open land or along field edges. In this instance, walkers will have had access to a greater width along the driveway to Hazelwood School, which ranges between 4 – 5 metres. The rest of the alleged footpath is unrestricted around the field edges, and across land between points C – D. The UEFs describe a trodden path of generally 1 – 3 metres. In this instance it is appropriate to record a width of 4.0 metres for the section A – B, 2.0 metres for the field edge paths and section C – D.

Alleged Footpaths nos. 613 & 614

3.8 Forty – nine UEFs have been completed showing use of the alleged footpaths on foot between 1971 and 2013. Eleven of the claimants have used the routes for the full 20-year period, 1993 – 2013. Users in their evidence forms have specified their use of 3 different circuits and the years for that use.

3.9 Frequency of use and reason for use

Use by walkers varies between twice a year to every day. Ten of the users have only used one or two of the three circuits. The reasons for using the alleged paths have been stated as: exercise & scenery, recreation, dog walking, to link up with walk to Titsey Estate, school drop off, keeping fit, leisure and fitness, as a short cut, visiting friends, exercise on the North Downs and nature walks.

3.10 Gates

All users state in their UEFs there have been gates across but none that prevented use: "Chichele Road has one, two are on Bluehouse Lane exit" (UEF 2), "gates either open or a path around the gate" (UEF 8), "these were open or openable gates, or paths around the gates" (UEF 10)," there have always been gates as field originally had cows in it" (UEF 11), "gates either in disrepair or open" (UEF 13), "gates open throughout the years I walked there" (UEF 17), "always a gate but always access" (UEF 28), "there was never any need to open a gate until barricades erected in 2013" (UEF 36).

3.11 Fences

All of the users state there were no fences across the paths until 2013: "Not until 2013 and short time in 2004" (UEF 8), "Building contractors working for St Mary's school erected security fencing across Chichele Road entrance to field during summer 2004 while using area as project office/ for storage" "March 2013 hoarding, fencing and barbed wire across entrances to field at Chichele Road and north of All Saints Church (Blue House Lane)" (UEF 11) temporary fence

during building for short period in 2004 “Not before footpaths were obstructed in 2013” (UEF 36)

3.12 Width of alleged paths

The width described in the UEFs ranges from 1 to 6 metres. The different sections of alleged paths will have differing widths depending on whether they are enclosed by boundaries, run across open land or along field edges. In this instance, walkers will have had access to a greater width along the former entrance beside St Mary’s School and the entranceway beside Silkham Road. The rest of the alleged footpath is unrestricted around the field edges. The UEFs describe a trodden path of generally 1 – 3 metres. In this instance it is appropriate to record a width of 4.0 metres for the section G – H and 2.0 metres for the other sections.

3.13 A bar chart showing a summary of the years of use is attached at **Annex C**.

User Interviews

3.14 Some of the users, generally those that had used the paths for the greatest number of years, were contacted and offered the opportunity to take part in an interview to learn more about their knowledge and use of the claimed paths. Ten of those responded and have been interviewed providing more detailed evidence:

3.15 Mr and Mrs Parfremont : “In 1975we had a garage in the block near point N...The gate at point N led to farmland/ grassland behind and it was the obvious place to start exploring the countryside...In the 1970s the fields were generally open. At times cattle (approx.30) were kept there and sometimes the fields were cultivated but nothing intensively...The cattle were driven through points H – G to Chichele Road and then down Bluehouse Lane to the milking sheds...In the summer the cattle were kept in the lower field. The cattle were there up to about 1975/76..Once the cattle had left we had access to the fields. There have always been gates at points G and N. At point N there was a gap beside the gate...We always kept to the Country Code of keeping to the edges. Nobody ever complained about us being there and there were no ‘Keep Out’ signs. The paths were always well walked and we frequently saw other people using them.”

3.16 Mr and Mrs Giles: “There was never any fencing across the alleged footpaths. The land was open and there was no way you ever had to enter the land illegally by breaking anything down or climbing over anything. The paths were well used.”

3.17 Mr Bunce: “I have walked all of the alleged paths using them, for example, to walk up to the Downs. I always saw other people using them. They were open routes like bridleways, well-trodden with no notices or fences across. No one ever challenged me walking the routes so I assumed the landowner was happy with the public’s use. I always thought I had a public right to use them. There was nothing to prevent people going onto the land at any point. There was an open exit at point J. At point N there was no restriction or signage; it was always open.”

3.18 Mrs Cole: “At point G there was a clear path around a field gate. From there it was a very well defined path and wasn’t overgrown like it is now. When I got in there I found other routes and saw other people using them. They were very well worn paths...There were no restrictions on the land and any gates were always open.”

ITEM 8

- 3.19 Mrs Wren: "In all the many years I have walked the paths I have never been challenged. There have never been any obstructions and there have always been clear routes of access across the land."
- 3.20 Mrs Keeson: "I don't remember any fences across the routes...At point G there was an open trackway. Children who went to St Mary's School would walk back from school that way if it was a nice day and dry."
- 3.21 Mr Sweeting: "I discovered the alleged footpaths from walking around as I was always looking for routes to run, which I do 3 times a week. I used the routes every week normally at 7am for about an hour, going a little later at weekends...The paths were very well trodden around the edges of the fields and the only one that cut across was the section C – D...There was a gap in the top NE corner of the field near point I, which was never blocked by a fence...I occasionally used the entrance at point N. I think there was always a gate there and I don't think it was ever locked. I certainly didn't have to climb over it. There were no fences across any of the routes – most definitely not. I can say absolutely categorically that the routes were completely open with no barriers across in the period I used them. There were never any notices denying access. I always considered them as public rights of way."
- 3.22 Mrs Grimes: "When we first moved here the fields were completely free. I used to walk from point A, which was completely open, around the fields and up to the Downs...The gate at point N was open most of the time but I didn't walk that way very often...I hadn't noticed any fencing before the new fencing was put up in 2013. In some places there was rusty wire in the overgrown grass in the wooded area but we didn't walk over any barbed wire. I am a farmer's daughter and would never have broken down fencing...Lots of people used the paths and I always met someone when I was there."

LANDOWNERS' EVIDENCE

- 3.23 The land affected by the applications is owned by three separate landowners:
- 3.24 Tandridge District Council own the section F – N shown on the drawing at **Annex A**. Mark Bristow, Infrastructure & Partnerships Officer, has stated "As landowners we are adopting a neutral response and neither support or object." He confirms "I have no historical evidence before me which would suggest or deny public access has taken place at any of these points for a period of 20 years." Tandridge District Council has never taken action to prevent public use of their section of land.
- 3.25 Mr and Mrs J Berryman of Flint Hall Farm, Godstone own the section N – K – M - L. They bought the land in January 2012 from Mr P Tory. They say the land had previously been part of a dairy farm but had been derelict for about 10 – 20 years when they purchased it. Mr and Mrs Berryman state that when they bought the land the gate off Silkham Road at point N was locked with a broken down barbed wire fence across the gap beside it. There was also a barbed wire fence across where it exits their land at point L. They say someone had put rubber sheathing on it to make it easier to climb through. When they purchased the land, Mr and Mrs Berryman replaced the broken down barbed wire with new barbed wire fencing, and put up notices on site saying no public access. They say the notices have since been continuously torn down. Mr and Mrs Berryman also made a Statutory Declaration and Deposit under the Highways Act 1980 in

January 2012 confirming they recognised no public rights of way across the land.

- 3.26 Mr C Tory has confirmed that his family had previously farmed the land since approximately 1952 as tenants, the land being bought by his father in the 1970's. He states that fences were continually erected and repaired but cut continually within a few hours or days. Permission was never given for anyone to trespass or use the 'alleged' paths. Whenever a trespasser was spotted on the land they told them they could not use the paths, however not being resident on site this was not possible to do all the time. Mr Tory states that the gate at N was locked and fenced alongside but continually cut. He states that the land was used for livestock until the mid to late 1990's when they were forced to abandon due to trespassing and dog fouling. It was then used for arable/ set aside. Mr Tory says he was aware that walkers were using the land but the land was regularly ploughed and the fences repaired when what he describes as vandalism was noticed. The alleged footpath between points G to H was completely closed by industrial fencing when used as a construction site to expand St Mary's school and before and after the gates were locked and wrapped in barbed wire and side panels fenced but regularly cut. Mr Tory has confirmed that the Tory family hold 50% of the shares in Oxted Residential Limited.
- 3.27 Oxted Residential Limited own the sections A – B – C – D – E – L, G – H – D, H – C, B – I – E & I – J. They bought the land in January 2008 from Sunley Estates Limited who had purchased it in 1987 from Eric Tory, Alan Everitt and Christopher Hodges. They strongly object to the applications and the claims that footpaths have been created over their land. Their Counsel's opinion is that it is clear from the evidence that any alleged use cannot have created rights of way and that the landowners have sufficiently rebutted dedication. Significant weight ought to be afforded to the actions of the landowners in fencing, cultivating the land and turning trespassers away.
- 3.28 They state that according to the evidence from Mr Tory and Mr Rapoport that:
- Fences were continually erected on the Land and repaired during the 20 year period, but were, equally continually, cut down within a few hours or days.
 - Permission was never given for anyone to trespass or use the alleged paths on the Land
 - Whenever trespassers were spotted on the Land, they were told to leave.
 - When harvesting contractors were employed to plough the field comprised by the Land they were instructed to plough anything that looked as though it might be used as a footpath and to inform anyone seen that in it that it was private property and that they were trespassing.
 - The field was continuously ploughed up until around 2010.

"In short, the relevant evidence is to the effect that residents entered on to the Land to use the alleged paths (insofar as they were in fact used...) by a combination of force and stealth, and not 'as of right'."

- 3.29 In addition, they state there are important inconsistencies in the residents' evidence as to whether the field was "ploughed/ cultivated" at various times or from time to time. Some commenting that it was nonetheless still accessible whilst others state that it was not. Mr Tory's and Mr Rapoport's evidence is that it was continuously ploughed and cultivated during that time up until 2010. They say that the only plausible explanation is that some residents did not in fact use

ITEM 8

the field for dog-walking or for any other purpose, or did so only infrequently. “This consideration bears out the proposition that the OLRG’s applications amount to a blatant attempt to obstruct the development of the Land, rather than to preserve any public rights of way which its members and/or supporters genuinely believe to exist.”

- 3.30 Their Counsel states that there are discrepancies in a number of the UEFs as regards the period in which the persons who did so claim to have used the alleged paths, and the details of their address according to the Land Registry. In her view the Council should not place any weight on the evidence contained in the UEFs in question.
- 3.31 Furthermore, she states that a significant number of claimants have either expressly stated that they would not be prepared to attend a public inquiry, or declined to confirm they would. No weight should be placed on these forms.
- 3.32 Their Counsel also states that there are other anomalies in the UEFs relating to dates of use, reason for use and width.
- 3.33 Finally, “as a matter of law, a right of way is required to have fixed termini and to follow a defined route: there is no ‘right to wander’...Accordingly, unless it can be established, on the balance of probabilities, that residents... habitually walked from point A to point B, rather than simply meandering about or taking different routes.... the requirements for recognition of a public right of way over the Land will not be met.”
- 3.34 Mr W Peters, Farms Manager, Pitchfont Farms has submitted a Statement dated 24/1/18 saying “I have been involved with the management of the enclosure known as “school field” under various arrangements with the Tory family and their associates for about the last fifteen years. During that time, whenever I have found members of the public walking in this field I have told them that there was no public right of way. Many would choose to continue on their way ignoring my advice.”
- 3.35 Mr D Rapoport, Director of Oxted Residential Ltd has submitted a Statement dated 30/1/18. He says he obtained some of the information from Charles Tory who was unable to make a statement at the time. Mr Rapoport has submitted aerial photographs taken in September 1999, August 2005 and May 2008 claiming they show the land as cultivated. He states Mr Tory has advised him “that in or around 2004, the land adjacent to the illegal access way at Chichele Road was used as a works site for improvements to St Mary’s School. This completely closed up access to the field. Once the works had been completed, the gate and fence were secured with barbed wire fencing. The top of the gate was wrapped with barbed wire, the gate was locked with a chain and padlock and an earth bund at the field end of the entrance was left as a supplementary barrier.” He says since their ownership they have continued to try and maintain the fences and mend them when torn down. ORL has carried out some research of Land Registry records and the Electoral Roll. They have identified people who are not shown on official records as having owned or been registered to vote at the address on their UEF. This casts some doubt on the veracity of their evidence.
- 3.36 Mr Rapoport also refers to the OLRG as a local protest group and political party whose principal aim appears to be to fight against new building and development in the district.

- 3.37 Mr M Lyons has written saying that during the years 2007 – 2015 he had permission from the farmer Charles Tory to shoot over the land from the M25 to Chichele Road. He states “Mr Tory advised that he had had problems with damage to fences and people trespassing on the land and asked me to advise these people to leave the land when I saw them, which I did. As I was living in Barnett Shaw very close to the land and shot there very frequently and often approached people pointing out that they should not be there and asked them to leave, with mixed results.”
- 3.38 Sunley Estates Limited has been written to for any information regarding the alleged footpaths during the period of their ownership, 1987 – 2008, but no response has yet been received.

DOCUMENTARY EVIDENCE

- 3.39 *Definitive Map*: No public rights appear on the Definitive Map or in the Definitive Statement. It does not appear on any earlier versions of the Definitive Map dating back to 1952 nor has it ever been put forward for inclusion on any of these maps.

4. OPTIONS:

- 4.1 The Committee may agree or disagree with the officer’s recommendation that footpath rights have been acquired. Alternatively, they may decide that the evidence submitted shows that the routes should be of different status to that recommended or along different lines. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence discovered and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see **Annex B**)
- 4.2 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 or Hearing the County Council would normally take a neutral stance.

5. CONSULTATIONS:

- 5.1 Tandridge District Council, Oxted Parish Council, Limpsfield Parish Council, County Councillor Cameron McIntosh, SCC Legal services and the Ramblers.
- 5.2 Oxted Parish Council responded in January 2018 saying that at a Parish Council Planning meeting, Councillors confirmed that, to their knowledge, the area in question has been used as a public footpath, without interruption, for many years although none of the councillors could confirm if this was in excess of 20 years. Tandridge DC’s response is in 3.14 above. Limpsfield Parish Council has responded verbally saying it does not affect them. No response has been received from the Ramblers.

6. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 6.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, taken as a whole, is sufficient to reasonably allege the existence of a right of way.
- 6.2 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.

ITEM 8

7. EQUALITIES AND DIVERSITY IMPLICATIONS

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

8. LOCALISM

8.1 This issue is not relevant and cannot be considered under the current legislation.

9. 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	

10. HUMAN RIGHTS ACT 1988

10.1 Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1988. Primary legislation, of which the WCA 1981 is an example, may require the County Council to act in a different way. While the Council must interpret primary legislation in a way that is compatible with Convention rights that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended to members touches on a Convention right. The making of this order may affect the rights of the landowner/ occupier under Article 8 of the Convention, the right to a peaceful enjoyment of one's possessions. The Act makes it clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law and as such the recommendation to Members is not considered to be in breach of the Act.

11. CONCLUSION AND RECOMMENDATIONS

11.1 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.

11.2 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

11.3 Section 31 of the Highways Act 1980 states that "Where a way over any land

other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. 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”.

- 11.4 Calling into question: It is necessary to establish under Section 31 when the public's use was first brought into question and whether sufficient time has passed (20 years) since any previous challenge. As set out in section 3.2, the Deposit of the Statement and Plan and Statutory Declaration in 2012 for the land now owned by Mr and Mrs Berryman and the erection of fences in 2013 for the land owned by ORL had the effect of calling any public rights into question. It appears that a section of claimed path no. 613 from the Chichele Road end (point G) was blocked in 2004 for a few months whilst work was carried out at St Mary's School. However, this is not seen as an action by the landowner (the school do not own the land) to block the route to prevent public access but simply action taken by the building company to make use of the land to facilitate their works. Access onto the land was still available at points A, F and J.
- 11.5 Public Use: Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a sufficient “number of people who together may sensibly be taken to represent the people as a whole/the community in general”. It is not necessary for all, or indeed any, of the claimants to have used the route for the whole 20-year period but the cumulative effect must be considered. All of the users that have completed UEFs live in the Oxted/ Limpsfield area. This would be considered as use by the public. Any claims that the address details on the UEFs are inaccurate need to take into account that Land Registry documents only provide a “snap shot” of the title at a particular date. They do not show the history or background. For instance, a property in joint ownership will be changed when the ownership then transfers to one of the parties. The Land Registry will not show the name of a person renting a property or indeed if it is being let. In relation to the electoral register any voters can elect not to be on the published copy. A change of surname or a property move locally would mean previous details would have to be investigated. It is considered that there is no evidence to show that any of the UEF address details misrepresent use of the alleged paths.
- 11.6 Use 'As of Right': Under the legislation use of the way must have been ‘as of right’, which means without force, secrecy or permission. It is not necessary for the user to have a belief that their use is ‘as of right’. The current landowner and one of the previous owners/ tenant claims that fences were erected at entrance points and continuously broken down. If this did occur at various times it could indicate that there has been an element of force used in order to use the claimed paths. However, it has not been identified who undertook any forced entry onto the land. This contrasts with all of the users stating there were never any fences across the paths they were using. In section 3.10 users refer to gates as either being open or with gaps beside them. Any cultivation or ploughing of the land does not appear to have prevented public use. In addition, there does not appear to have been any secrecy involved in the use of the path. Users indicated that they were doing so openly. Furthermore, no users or landowners have stated that anybody was individually granted specific permission to use the claimed paths. Therefore, there is no evidence

ITEM 8

to suggest that use of the paths was with force, secrecy or permission.

- 11.7 Lack of intention to dedicate: A landowner wanting to rebut a claim for a public right of way through long use must be able to demonstrate that they have done something that has brought their lack of intention to dedicate home to the users. The land south of point L was owned by Sunley Estates between 1987 and 2008. This equates to 15 years of the 20-year period. There is no evidence that they, as landowners, took any steps to prevent public use of the land. However, Mr Peters and Mr Tory claim they had tenancy agreements during that time and took action by way of erecting fences and verbal challenges to public use. Similarly, whatever action was taken on the land north of point L during the ownership of the Tory family it does not appear to have been made clear to the public that the landowner was taking steps to prevent public access. In answer to the question on the UEF "Did you ever met the "landowner, his employees or family", all of the users for all of the alleged paths have said "No". None of the users mention being restricted in any way. Therefore, it is concluded that the landowners have not demonstrated a sufficient lack of intention to dedicate to negate the use made by the public of the claimed paths over the relevant 20-year period.
- 11.8 Motive of applicant: The ORL claims that the OLRG are a protest group/ political party opposed to development in Oxted and that the applications amount to an "orchestrated attempt to frustrate any such development". In response, the OLRG has stated that they are a legitimate residents association with over 2,000 members. The County Council has a statutory duty to examine the evidence presented to it and the motive of the applicant is not relevant to its consideration.
- 11.9 Attendance at Public Inquiries and weight given to evidence: Only 2 of the 33 users for CP 563 and 9 of the 49 for CP 564 have stated on their forms that would not be prepared to give evidence in person at a Public Inquiry. All of the UEFs are completed, signed and dated. It is considered that the evidence contained in their forms should not be treated any differently to those who have ticked 'yes'. The inspector will invariably give less weight to the evidence of those who do not attend to be cross examined. The weight given is a matter for the inspector.
- 11.10 Sufficiency of use: It is considered that there is sufficient evidence of the volume and frequency of use during the relevant 20 year period to reasonably allege that there has been a deemed dedication of the alleged footpaths.
- 11.11 Common law: 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.
- 11.12 Notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, due to the period and frequency of use officers would also submit that the facts imply that the landowners have dedicated the routes as public rights of way under common law.

12. CONCLUSION

- 12.1 In light of the above, it is the Officer's view that public footpath rights have been acquired over the routes under section 31 of the Highways Act 1980. Notwithstanding this it is also argued that rights have also been acquired at common law.
- 12.2 This being the case the Officer would submit that it can be reasonably alleged that rights have been acquired and that the routes should be recorded on the Definitive Map and Statement for Surrey as public footpaths.

13. WHAT HAPPENS NEXT:

- 13.1 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.
- 13.2 If Committee decides that no order be made, the applicant will have the opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 13.3 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.
- 13.4 All interested parties will be informed about the decision.

Lead & Contact Officer:

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

Consulted:

See Section 5

Annexes:

- A Drawing No. 3/1/31/H11a
 B DMMO Background information
 C UEF bar chart

Sources/background papers:

File 'CP564 & 564' including all relevant correspondence and documents can be viewed by appointment at SCC Countryside Access Merrow Office

This page is intentionally left blank