

SURREY COUNTY COUNCIL

LOCAL COMMITTEE (WAVERLEY)

DATE: 21 SEPTEMBER 2018

LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC RIGHTS OF WAY ACROSS LAND AT WINKWORTH ARBORETUM, BUSBRIDGE & BRAMLEY.

DIVISION: WAVERLEY EASTERN VILLAGES

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. An application has been received for a Map Modification Order (MMO) to add a public footpath on National Trust owned land at Winkworth Arboretum, in the parishes of Busbridge and Bramley.

1.2 It is considered that the evidence is sufficient to reasonably allege that a public footpath subsists over the claimed route. As such a legal order to modify the DMS should be made.

2. RECOMMENDATIONS:

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

2.2 Public Footpath rights are recognised over the route A-B on Drawing No. 3/1/13/H16, **Annex H** and that an MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 be made to modify the Definitive Map and Statement for Surrey. The route will be known as Public Footpath No.559 (Busbridge), with a width of 1.5m.

2.3 A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

3. REASONS FOR RECOMMENDATIONS:

3.1 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.

3.2 In this instance the evidence submitted in support of the application is considered sufficient to reasonably allege that public footpath rights 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), and at common law.

4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 17th July 2011, from Anthony S.B. Singer under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the addition of public footpath between Public Footpath 165 Bramley and Public Footpath 166 Busbridge over land in the ownership of the National Trust at Winkworth Arboretum. The application was supported by 9 User Evidence Forms (UEF) and a number of pieces of documentary evidence consisting primarily of walking and cycling guides to the area. Further UEFs were submitted and in total the amount submitted in support of the claim amount to 55.
- 4.2 On 24th February 2018 Mr Singer wrote to inform the County Council that he was unable to proceed as applicant due to a change of address but that he had passed on the role to Mr Ian Wilks (Ramblers' Local Footpath Secretary), and a countersigned letter was appended from Mr Wilks accepting this role.
- 4.3 The path claimed in the application is shown A-B on the plan at **Annex A**. Photographs of the claimed path as seen in 2017 are located at **Annex B**. It became clear from the UEFs that some of the users were walking another route between the two already recorded PROW, a little further to the west. This is also shown on the plan in **Annex A**, with photos in **Annex B**.
- 4.4 The main path claimed in the application (which for ease of reference in this report will be referred to as the eastern path) commences from point A on Public Footpath 165 Bramley and proceeds in a southwesterly direction for 453 metres to point B on Public Footpath 166 Busbridge. When walked in 2016 there was no access across the boundary at point A, however in 2017 when revisited the boundary fence had been broken down and there was a single strand wire fence which would provide a limited deterrent to determined users of the claimed path. The rest of the path is open and available for use. The path is roughly surfaced with stone and in 2017 was very muddy. The eastern path borders the wetland area (previously a lake), and part way along there is a bench which affords views over it. The path is unenclosed and varies in width between approximately 1.5m and 2.0m
- 4.5 The other claimed path (which for ease of reference in this report will be referred to as the western path) runs between A and B along a route further to the west of the first path and is approximately 507 metres long. It is similar in appearance to the eastern path but is more steeply sloped in places and in 2017 was considerably muddier. It also varies in width between approximately 1.5m and 2.0m.
- 4.6 Once on National Trust land the area is open to the paying public and free of charge to National Trust members via an entrance booth with access permitted on many paths, including the claimed paths. There is a Public Footpath (No.166 Busbridge) already recorded over National Trust land.
- 4.7 There is no record of either of the routes ever having been put forward for inclusion on the DMS since it was first published in 1952.

5. ANALYSIS

5.1 LEGAL TEST

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 called into

question. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. For a public right of way to become established at common law it is necessary for there to have been a dedication by the landowner and acceptance by the public. A dedication may be inferred if either: a) landowners show acquiescence by knowing about and ignoring use by the public or b) the use is so great that the landowners (whoever they are) must have known and taken no action. There is no minimum time period over which use must have occurred for rights to be established at common law. Alternatively, documentary or historical sources may be sufficient evidence to show that the map should be modified. The background to Map Modification Orders is attached at **Annex C**.

5.2 PUBLIC USER EVIDENCE FOR THE ROUTE

As indicated above in section 4.1, user evidence forms covering the use of the routes by a total of 55 people were submitted during the course of the application. User evidence will be discussed more fully in the following section, but before analysing it, it is necessary to establish the point at which the public's right to use the routes were first called into question.

- 5.3 There is a consensus in the evidence that actions that had the effect of calling into question the right to use the route occurred at the northern end of the claimed path, at point A. Apart from this point the path is open and available for use along its entire length and, as far as the evidence presented to this investigation is concerned, this has always been the case. It is access onto National Trust land at point A which has been prevented and which has therefore called the status of the path into question. It is important, therefore, to establish in what year the access at point A was first closed.
- 5.4 There is no clear date recorded in the user evidence forms. Users have referred to a number of actions at point A that have taken place that caused them to be unable to continue to use the route, and to question whether the route was in fact public. From the evidence in the UEFs it would seem that from about the year 2000 the National Trust began to close a gap in the perimeter fence at point A. Some users reported that this stopped them from continued use of the path, whilst others indicated that the brash that was used to stop up the gap was not always present and their use could continue. A few users reported that during the Foot and Mouth outbreak in 2001 footpaths were closed, and that this included the claimed path. The users that referred to this happening indicated that once paths were reopened after F&M, the claimed path was not reopened. There are other references to the path being blocked over the years since 2000, particularly in relation to work being done on what was a lake and what is now a wetland area. Some users are vague in their memory of when they found the route blocked, referring to it having occurred 'in the recent past'.
- 5.5 The National Trust have submitted evidence from a previous property manager (Mr E Barrs) who cannot recall there having been any gaps in the fence during his employment (1979-2003). They also refer to a stock proof fence having been erected by a neighbour in 1988. With regard to this fence they have stated that they believe that there has been no substantial period of time when a hole has remained unrepaired since 1988. They have, however, referred to a survey in 2004 of the boundary which discovered evidence of incursions through the fence at point A which they then took steps to close. There is a conflict of evidence between the users, who have claimed long unimpeded access of the path via a gap at point A and the landowners who

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have claimed that there have never been gaps for any length of time.

- 5.7 Balancing the evidence from the National Trust with the evidence of the users, therefore, it is thought appropriate to take 2000 as the date of challenge. This being the date from which many users have identified that the National Trust's actions brought it home to them that the claimed route was not recorded as a public right of way. This would make the relevant 20 year period for the purpose of the Highways Act 1980 as being 1980-2000.
- 5.8 However, if one takes the date from which the National Trust state that there was erected a perimeter fence through which there had been no substantial period of time when a hole remained unrepaired (1988) as being the 'calling into question' date, then the relevant 20 year period for the purpose of the Highways Act 1980 would be 1968-1988. Both of these time periods will be considered below. 1980-2000 will be referred to as the later relevant 20 year period, and 1968-1988 will be referred to as the earlier relevant 20 year period.
- 5.9 The evidence in two user evidence forms (number 47 & 52) indicates that they did not use either of the paths and are therefore excluded from the rest of the investigation, leaving 53 relevant users.
- 5.10 **Routes Used:** **Annex A** shows the two main paths referred to by the users. The eastern path is that which was claimed in the application, the western path is one that was also referenced in some of the UEFs. Out of the relevant UEFs, 46 stated that they used just the eastern path, one mainly the western path (44) and six stated that they used both paths (5¹, 6, 7, 8, 37, and 55) (number 22 used the western arm until 1960 and the eastern arm since 1960 and has been included with the eastern path users).
- 5.11 **Later relevant 20 year period (1980-2000)**
Out of the relevant 53 users there were 8 whose use fell outside the later 20 year period (8, 23, 29, 32, 34, 40, 54 & 55), leaving 45 users that have submitted evidence of use of either the western or the eastern path during the later relevant period.
- 5.12 **Western Path:** There are 5 users (5, 6, 7, 37, 44) who have claimed use of the western path during the later relevant 20 year period. 4 of the users claimed to have used the path for the full 20 year period (5, 6, 7, 37), with the 5th (44) using it for 19 of the later 20 years. Of the 5 users, 2 were using the path very frequently (6 & 7 used it 200-300 times a year), with number 5 describing her use as 'very many times'. 200 times a year would equate to about 4 times a week. So over the later relevant 20 year period there were potentially 3 people walking the route perhaps 4 times a week, with an additional 2 people with much more infrequent use (maximum of 10 times a year – less than once a month).
- 5.13 **Eastern Path:** The graph in **Annex D** shows the length and frequency of use of the path. There are 44 users to have claimed use of the eastern path during the later 20 year period (discounting number 44 whose use was mainly of the western path). Of these 44, 23 users have claimed use of the path for the full 20 years, with a further 13 claiming use of 10 or more years during the 20 year period. At the start of the 20 years there were 31 users claiming use of the path, at the end there were also 31 (some different). The maximum number of users claiming use at any one time was in 1990 when there were 38 users claiming use of the path.

¹ User no.5 (Mrs Girling) indicated on her UEF that her use had been solely of the western route however she later provided a statutory declaration in which she clarified that her use had been of both routes, at different stages of her life.

- 5.14 Frequency of use, Eastern Path: The graph shows the frequency of the use, by categorising the use into numbers of time per year. By taking the smallest number in a range and multiplying it by the numbers stating that range it is possible to estimate the minimum number of uses per year, and by extrapolation per week, the path was experiencing:

E.g. in 1980:

Not specified = 2 (discounted for purpose of this equation only),
Less than once a year = 3 (discounted for purpose of this equation only as too infrequent),

| Number of times per year | Number of users | Using minimum number of times per year; number of uses per year |
|-------------------------------------------------|-----------------|-----------------------------------------------------------------|
| 1 a year | 2 | 2 |
| 2-15 per year | 19 | 38 |
| 1-2 a week (52-104 per year) | 2 | 104 |
| Up to 4 a week (105 – 208 per year) | 1 | 105 |
| Up to 6 a week (209-312 per year) | 2 | 418 |
| Estimate minimum number of uses per year | | 667 per year |
| Estimate average number of uses per week | | 13 per week |

Using this method it can be estimated that in 1980 the minimum number of uses the path was receiving was in the vicinity of 13 per week, while in 2000 this had increased to 17 per week. In reality the numbers using it is likely to be higher, as minimum numbers have been used in calculations.

- 5.15 **Earlier relevant 20 year period (1968-1988)**
 The number of users whose use fell outside the earlier 20 year period is 10 (3, 8, 13, 35, 36, 40, 46, 50, 51, 54), leaving 43 users that have submitted evidence of use of either the western or the eastern path during the earlier relevant period.
- 5.16 Western Path: There are 5 users (5, 6, 7, 37 and 44) to have claimed use of the western path during the earlier relevant 20 year period. Of these, 1 user claimed to use the path for the full 20 year period (5), 2 for almost 50% of the time (6 & 7) and 2 less than 50% of the time (37, 44). Of the 5 users, 3 were using the path very frequently – numbers 6 & 7 using it 200-300 times a year, and number 5 describing her use as very many times. The other 2 users had infrequent use of not more than 4 times a year. 200 times a year would equate to about 4 times a week. So over the earlier relevant 20 year period there were potentially 3 people walking the route perhaps 4 or more times a week, with an additional 2 people with much more infrequent use.
- 5.17 Eastern Path: The graph in **Annex D** shows the length and frequency of use of the path. There are 42 users to have claimed use of the eastern path. Of these 42, 6 users have claimed use of the path for the full 20 years, with a further 18 claiming use of 10 or more years during the 20 year period. At the start of the 20 years there were 6 users claiming use of the path, at the end there was 36; the maximum number of users during the earlier relevant 20 year period.

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5.18 Frequency of use, Eastern Path: The graph shows the frequency of the use, by categorising the use into numbers of time per year. By taking the smallest number in a range and multiplying it by the numbers stating that range it is possible to estimate the minimum number of uses per year, and by extrapolation per week, the path was experiencing:

E.g. in 1968:

Not specified = 2 (discounted for purpose of this equation only),

Less than once a year = 0

| Number of times per year | Number of users | Using minimum number of times per year; number of uses per year |
|-------------------------------------------------|-----------------|-----------------------------------------------------------------|
| 1 a year | 1 | 1 |
| 2-15 per year | 3 | 6 |
| 1-2 a week (52-104 per year) | 0 | 0 |
| Up to 4 a week (105 – 208 per year) | 0 | 0 |
| Up to 6 a week (209-312 per year) | 1 | 209 |
| Estimate minimum number of uses per year | | 216 per year |
| Estimate average number of uses per week | | 4 per week |

Using this method it can be estimated that in 1968 the minimum number of uses the path was receiving was in the vicinity of 4 per week, while in 1998 this had increased to 19 per week.

5.19 **Information pertaining to both relevant 20 year periods**

5.20 Method of use: All of the users referred to use by foot only along a clearly defined linear route, there is no indication that the route has been used as anything other than a footpath or that users were wandering freely across the land.

5.21 Reason for use: All users walked the path for recreational purposes.

5.22 Limitations: The claimed path has always been open and available along its full length with no limitations to use. The exception to this is at point A and there are references to there having been a stile here in history. It is not present now, and the user evidence suggests that if there ever was one it was very historic. It is likely therefore that during neither of the relevant 20 year period was there a stile present at point A, rather there was just a gap in the fence through which the public accessed the path.

5.23 Width: Users are vague over the width of the path, with some referring to it having been just a metre wide, others stating it was 10 foot wide. It is difficult to get a consensus from the evidence provided as to the width that has

historically been available. Currently the paths are between 1.5m and 2m in width.

5.24 Membership of National Trust

Users were contacted and asked whether they were members of the National Trust when they were using the path. 20 responded with the majority saying they were members for all or part of the time that they were using the path. However, many were keen to point out that despite their membership of the NT, they were not accessing the path through the main entrance and did not consider their use to be as a consequence of their membership. They considered their use to be that of a member of the public accessing a public footpath. They didn't wear any badge or other identification labels to show that they had gained entrance by membership or by paying to go through the gate.

5.25 User interviews

As part of the investigation users were contacted six were interviewed; Mr & Mrs Knights, Mr Hall, Mrs Stedall and Mr & Mrs Singer (UEF 45,7, 16, 14). These interviews can be seen in full at **Annex E**.

5.26 **Mr & Mrs Knights** described the path as having been a broad, well established, well-worn beaten earth path a couple of metres wide. They indicated that they would access the path via a stile at point A. They referred to a point in the 1990s when the path was obstructed and there was a notice stating something to the effect that the path was temporarily closed. This gave them the impression that it was a legitimate path. Mrs Knights referred to an incident where she rang and spoke to someone at the National Trust who assured her that the path would be reopened. Instead the Knights spoke of how the barriers were then reinforced and made impenetrable and the path was signed as being diverted out onto the lane that leads to the arboretum.

5.27 **Mr Hall** described the path as being open and available during his use of it (1979 onwards), but he did not recall a stile, he referred to just walking off the public footpath onto the claimed path. Mr Hall recollected the first time that he came across the path being closed was during the Foot and Mouth outbreak in 2001 and that the path was closed then. Mr Hall did not recollect any signs.

5.28 **Mrs Stedall** spoke about work that had been done to the lake in 2003/4 and about how the National Trust had redirected people away from the lake during that time. Mrs Stedall spoke of her long association with the path and her recollection of having been taken there during her life. She recalled there being a gap at point A, and not a stile.

5.29 **Mr & Mrs Singer** referred to the fact that you could just walk onto the path from the public footpath; there was no stile at that point during the time that they were using it. They also referred to the path being closed during the Foot & Mouth outbreak and when the lake was being drained and work carried out in the 2000s. Mr & Mrs Singer recall how barriers were put up by the National Trust when the work was being carried out but that people would just pull them down and resume walking.

5.30 The user interviews tend to corroborate the view that since the 2000s the National Trust have taken a more proactive role in trying to stop free access onto the path at point A, and that members of the public have tried to continue

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to use the route sometimes removing obstructions and barriers that have been erected.

5.31 USE PRIOR TO NATIONAL TRUST OWNERSHIP

The National Trust were gifted the land which is now Winkworth Arboretum in two phases, in 1952 and then in 1957. The second of these gifts was for the land over which the claimed footpath runs. The impact of National Trust ownership on the ability for a path to be acquired through use will be discussed in section 13. It is appropriate, however, to consider whether a right had come into existence prior to the change of ownership (i.e. pre-1957), in case it is shown that ownership by National Trust would result in either a lack of capacity to dedicate or sufficient evidence of itself to constitute a lack of intention to dedicate.

5.32 Number of users & years of use prior to National Trust ownership: There are 6 people who completed user evidence forms whose use spans some time prior to 1957 (5, 16, 23, 31, 54 and 55). 5 of these users have given statutory declarations regarding their use of the path. In addition telephone conversations were held with 2 further members of the public who had not completed UEFs but who had a long history in the area and who could particularly talk to the time prior National Trust ownership. Notes from these conversations (TC1 & TC2) and the statutory declarations are attached in **Annex F**.

5.33 The following table indicates how much user evidence there is for the period of time prior to the National Trust acquiring the land over which the claimed footpath runs.

| Timespan | Amount of users | User number |
|-------------|-----------------|---------------------------|
| 1934 – 1948 | 2 | 5, TC1 |
| 1948 - 1950 | 4 | 5, TC1,16, 54 |
| 1950 – 1952 | 5 | 5, TC1,16, 54, 31 |
| 1952 – 1954 | 6 | 5, TC1,16, 54 ,31, 23 |
| 1954 – 1957 | 7 | 5, TC1,16, 54 ,31, 23, 55 |

This indicates that for the first 14 years of the pre-1957 20 year period (1937-1957) there is evidence of 2 users (UEF5 & TC1). The maximum number of people for which we have evidence of use is from 1954 to 1957 where there were 7 people having used the path. This could be because few people used the route or it could reflect the fact that this is now quite an historic period that it being considered.

5.34 Frequency of use prior to National Trust ownership

Frequency of use from the majority of these users is quite low – with numbers 23, 54, 55 stating that they used it up to 6 times a year, and with number 31 stating just twice a year. For users 5 and 16 it has been difficult to quantify the frequency, although they have indicated that it was quite frequently. Mr Barrs use (TC1) was much more frequent than this – he talked of having walked the area several times a week during the summer months when he was a child (he was born in 1934).

- 5.35 The 5 statutory declarations give a lot of detail to illustrate the use they made of the claimed path. The question is then whether this use is sufficient to reasonably allege that the path is a public footpath through statutory deemed dedication or at common law (see below for common law discussion), prior to the ownership of the land by the National Trust.
- 5.36 **LANDOWNER'S EVIDENCE**
The National Trust's representative (Birketts Solicitors) have written to explain the history of the Arboretum and to set out their position as they see it with regard to the claim for a public right of way over National Trust land. In particular they have stated that:
- 5.37 The land was purchased from the Thorncombe Estate in 1937 by Dr Fox who laid it out as an Arboretum. He then gifted the site to the National Trust in two portions in 1952 and 1957. It was this later gift that included the land over which the claimed paths run. The Trust introduced a pay barrier in 1964, entry by donation for non-members. In 1984 an entry charge was introduced for non-members.
- 5.38 Birketts have provided evidence from Mr Eric Barrs (Property Manager between 1979 and 2003) consisting of an annotated map of the northern end of the claimed path. In this evidence Mr Barrs contends that throughout his period of employment the boundary fence was well maintained and he can recall no incidents of it being cut or damaged. He also states that there was no opening through the fence into Trust land along this boundary. He has pointed out where he recalls there being the remnants of an old gate which may have served as vehicular access to the boat house and landing stage at an earlier date.
- 5.39 In 2004 a surveyor (Alan Bowness) employed by the Trust conducted a boundary survey which identified a hole in the boundary fence (described by Alan Bowness as "Deer fence/bw cut for unofficial access") to the north west of the point at which the claimed path joins the Public Footpath. The report goes on in some detail showing the boundary as it continues towards Phillimore Cottage. Point A on the claimed footpath is marked on the map as having a c.4.0m wide dead wood barrier.
- 5.40 An additional survey carried out in May 2015 identifies the numerous types and styles of boundary at the northern boundary. On it has been identified a point at which there had been a previous break in which had since been repaired, and three other places where the fence had been cut. Two of these were historic places that had since been repaired, the third was a cut that remained open and would, presumably therefore need fixing to maintain the boundary. These four locations are spread out along the boundary, indicating that there are at least four different locations where access onto the site has been achieved. Birketts believe, therefore that the Trust has adequately maintained a fence line around their property and that whenever gaps have been identified they have been blocked up.
- 5.41 Other arguments put forward by Birketts Solicitors to support their contention that there are no public rights over the claimed routes include:
- 5.42 A defined route: they contend that the evidence of various access points along

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the northern boundary shows that there is no one point of access and, therefore, no one route walked, and that once inside the Arboretum members of the public are free to wander freely. They do not believe that it is credible that members of the public confined themselves to one defined route, once they had gained access to the site, and that therefore there is limited evidence of use of a defined route from which a statutory presumption of dedication can be drawn.

- 5.43 Use by the public 'as of right': they argue that, because Winkworth Arboretum is open for public access during prescribed hours (subject to either membership or payment of the entry fee), by permission, it would be expected that there would be members of the public walking on the site, including on the claimed routes. As there is no means of distinguishing between those that have gained access 'legitimately' and those that have gained access from point A, there is no opportunity for the Trust to resist the assertion of right made by those accessing the claimed path from point A.
- 5.44 In addition, the land is subject to National Trust byelaws which they state are posted on site. These byelaws prohibit the causing of any damage to any structure or the climbing of any boundary wall, fence or hedge. Their argument is that access in breach of the byelaws is not use as of right, and therefore could not give rise to a public right of way.
- 5.45 Lack of intention to dedicate: The Trust has provided a photograph of a sign erected on National Trust land near Public Footpath 166 stating 'Please Stay out of This Area', which they contend indicate that this is sufficient to demonstrate a lack of intention to dedicate a public right of way across the land. They cannot state when these signs were erected.
- 5.46 **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.
- 5.47 **HISTORIC EVIDENCE**
- 5.48 **Busbridge Quarter Sessions Records, Midsummer, 1888 enrolment (Surrey History Centre)**: This document details an early public highway diversion which diverted a path that ran in the approximate location of the claimed path to a route that is an early iteration of Public Footpath No.166 Busbridge (this route itself then being diverted at a later date to its current location). The route that is being diverted in this quarter sessions document appears to reflect that which is shown on the 1872 1:2500 Ordnance Survey First Edition Map. The effect of this document is to prove that, where the claimed route and the route to be diverted as shown in the quarter sessions records coincide, public rights were legitimately diverted in 1888 and therefore any claim for public rights along this route would have to rely on evidence since 1888.
- 5.48 **Ordnance Survey County Series Map 1:2500 dated 1872, 1912 & 1916 (sheet 38:4)**: There are dashed or double dashed lines on these maps in the approximate location of some or all of the claimed paths. There is a path shown going to the boundary at A, on the opposite side of which there is another path.

It is reasonable to assume that there would have been a way across the boundary; either a stile or a gate. The depiction of a path on the Ordnance Survey does not indicate that the route is public, merely that there is a feature on the ground which is capable of being depicted on a map.

- 5.49 **Ordnance Survey 6 inch Maps dated 1895 (sheet XXXVIII.NE):** This map shows the same detail as the 1:2500 scale.
- 5.50 **Aerial photographs 1948, 1971:** As the area is so wooded, the later aerial photographs show little of the path. However, the earliest photo dating from 1948 appears to show a path along the claimed route, near to the edge of the then lake. The clarity is insufficient to see what sort of structure, if any, is at point A.
- 5.51 **Walking Guides and National Trust Guides:** Waverley Borough Council published a walking guide which described using the claimed path as part of its 2 Winkworth Walks. The implication from these guided walks is that the route described is public access and that therefore the path through the Arboretum and out onto Bramley FP166 is part of the public right of way network.
- 5.52 The National Trust have published at least three guides to Winkworth Arboretum, all which refer to the path and which include it as a path that is open to the public visiting the site. None of the maps in these documents show the path giving access onto Bramley FP166, however. The implication from these documents is that the National Trust were aware of and encouraged people to use the claimed path as an internal path on their land.
- 5.53 **Other historic evidence:**
The investigation incorporated a search of the Surrey History Centre, the Godalming Museum and Surrey County Council internal records and has considered evidence for the claimed path on Inclosure, Tithe and other relevant documents. There is no other historical evidence for the claimed path.
- 5.54 In the absence of any conclusive documentary evidence showing public rights the claim must rely on user evidence either by statute or common law. Documentary evidence does add a certain degree of corroboration to the user evidence, however, by showing that the path was both physically available on the ground and open for public use.

6. OPTIONS

- 6.1 The committee may agree or disagree with the officer's recommendation. Alternatively, they may decide that the evidence submitted shows that a route should be recorded of a different status to that claimed or along a different line. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence discovered and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see **Annex C**)
- 6.2 Where the County Council decides not to make an order, the decision can be appealed to the Secretary of State. If such an appeal resulted in a Public Inquiry the County Council would normally take a neutral stance.

7. CONSULTATIONS

- 7.1 Waverley Borough Council, Busbridge and Bramley Parish Councils, Dr Povey County Councillor, British Horse Society, LARA, British Driving Society, Trail Riders Fellowship, Auto Cycle Union, The Ramblers and all relevant landowners have been consulted. Waverley Borough Council and the TRF both responded to say they had no comments to make. Mr Holmes the then local Ramblers representative responded to say that he was aware of the path and that he had discussed the closure with the local manager in 2000. He indicated that he had consulted the Godalming and Haslemere Ramblers Group and had handed out user evidence forms to capture some of their evidence. He indicated that the Ramblers would be supporting the application.

8. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 8.1 The cost of making an order is not a relevant factor in this decision. The County Council is under a duty to make a MMO to add a route to the DMS where evidence is discovered which, taken as a whole, is sufficient to reasonably allege the existence of a right of way.
- 8.2 Having said this, the cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council's Countryside Access budget. If objections are received and a Public Inquiry held, additional costs of around £4000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

9. EQUALITIES AND DIVERSITY IMPLICATIONS

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

10. LOCALISM

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

11. OTHER IMPLICATIONS

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

12. HUMAN RIGHTS ACT 1988

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

13. DISCUSSION AND CONCLUSION

- 13.1 Any decision must be made on the legal basis set out in **Annex C** to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way subsists or is reasonably alleged to subsist. Other issues such as security, privacy, safety or convenience are irrelevant.
- 13.2 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".
- 13.3 Section 31 of the Highways Act 1980 states that "Where a way over any land other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- 13.4 The period of 20 years referred to 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".
- 13.5 Calling into question: Users have given evidence to indicate that they have used the claimed path over a long period of time, accessing the route via a gap in the fence at point A, until a time from around the year 2000 when they were stopped from doing so. This gives the relevant 20 year period to be 1980-2000. However, it is possible that the public's right to use the way was

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called into question earlier than 2000, when the National Trust have indicated that there was a more robust boundary fence. It has been suggested that this was from about 1988, which would make the 20 year period 1968-1988, and this relevant period has also been considered.

- 13.6 Public Use: The users that have completed UEFs live across a wide area, mainly in Surrey with most living in Godalming and the surrounding villages. There are two users who have now moved away, and now live at some distance. This would be considered as use by the public.
- 13.7 Route walked and access at A: For a right of way to be recorded along the claimed route there must be consistency in its location.
- 13.8 Users consistently recorded the same point on the maps in the UEF as their access from footpath 165, and for the most part the same route once in the Arboretum (see paragraph 5.10 above regarding east and west paths). However, the National Trust have pointed out that over the years there have been a number of different holes that have been filled in or re-fenced and they indicated that they believe that any access from footpath 165 has changed over time. They have also referred to the fact that they find it inconceivable that members of the public stuck to one route once in the Arboretum, as there are many paths open and available to them.
- 13.9 The existence of other gaps in the fence does not prevent there from having been a gap at point A as well. It is also possible that even with multiple gaps in the fence, users continued to use the gap they were most familiar with which gave access to the path that they habitually walked. None of the users have claimed to have used these other gaps, although conceivably they may on occasion have done so without recollection. Although there is an element of uncertainty about the access point on footpath 165 it is thought that there is enough consistency in the user evidence forms to conclude that for the majority of the use the access point is as claimed, at least for the purposes of the test at order making stage.
- 13.10 The route walked once in the Arboretum has been discussed in section 5 above. Although there are other paths in the Arboretum, once you have gained access at A members of the public are unlikely to strike off through the undergrowth; they are likely to keep to the path laid out in front of them, and in this case at point A there are two options – the east and west paths. The majority of users have stated that they walked the eastern route from point A. This is a single linear route between two other rights of way and therefore capable of being added to the DMS as a public right of way (providing the other requirements are met). There is substantially less evidence submitted for the western path and it is thought that there is not enough to reasonably allege that the route is a public footpath.
- 13.11 Sufficiency of use – statutory deemed dedication 1980-2000: Volume and frequency of use of the claimed route has been discussed in section 5.11 – 5.14. It is considered that there is sufficient evidence of use during the relevant later 20 year period to reasonably allege that there has been a deemed dedication of the route as a footpath, having been used by a significant number of people on foot during the relevant 20 year period 1980-2000.

- 13.12 Sufficiency of use – statutory deemed dedication 1968-1988: Volume and frequency of use of the claimed route has been discussed in section 5.15 – 5.18. It is considered that there is sufficient evidence of use during the relevant earlier 20 year period to reasonably allege that there has been a deemed dedication of the route as a footpath, having been used by a significant number of people on foot during the relevant 20 year period 1968-1988.
- 13.13 Sufficiency of use – statutory deemed dedication 1937 – 1957: Volume and frequency of use of the claimed route prior to the ownership of the land by the National Trust has been discussed in section 5.31 – 5.35. It is considered that there is not sufficient evidence of use during this 20 year period to reasonably allege that there has been a deemed dedication of the route as a footpath.
- 13.14 Sufficiency of use – Common Law during National Trust Ownership: 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. In this instance use during the ownership of the land by the National Trust has been ongoing by members of the public for a considerable time, in high numbers and with high frequency as set out in section 5 above. Even if we take 1988 as the date of calling into question, there is considerable evidence prior to this to suggest that a right of way had been acquired at common law.
- 13.15 Sufficiency of use – Common Law prior to National Trust Ownership: Use by the public prior to National Trust ownership could also be considered under common law. There is no evidence that Dr Fox did anything to stop members of the public using the paths over his land. Evidence from the pre-1957 users suggest that use was open and unhindered, and indeed that Dr Fox may have encouraged use. Although there is a much smaller quantity of use available for this period, this is to be expected as we are considering a time in excess of 60 years ago, which will have a natural consequence on the members of the public available to give evidence. It is thought that in all the circumstances of the matter, there is sufficient evidence of public use prior to ownership by the National Trust to reasonably allege that a right of way had been acquired at common law.
- 13.16 Width: As described in section 5.23 above, it is difficult to get a consensus from the evidence provided as to the width that has historically been available. Currently the paths are between 1.5m and 2m in width, and it is thought appropriate to record the routes as 1.5m throughout.
- 13.17 Ability of National Trust to show 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 National Trust has argued that they have done this through maintaining a boundary fence, and through the existence of signs at point A. Despite their assertion that they have carried out these acts, there is still a considerable amount of user evidence to show that use continued unabated over a long time period.

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- 13.18 One action a landowner could take to tell the public that the route they are walking is not public is to stop and challenge any user identified. The evidence of use, particularly of the eastern path is quite considerable. There is no evidence that National Trust stopped people when walking the claimed route to challenge them as to their right to use the route. The National Trust might argue that it would be unreasonable to do so, as access to paths in Winkworth Arboretum is open to any member of the public (on payment of entrance fee since 1984 (or donation since 1964) or by virtue of personal membership of National Trust), and therefore use of the paths is to be expected. In addition, as almost all of the users that replied regarding personal membership of the National Trust disclosed that they did have personal membership, it might be argued therefore that they had permission to be there, by virtue of that membership.
- 13.19 However, it is open to the National Trust to take steps to identify the visitors to the Arboretum in some way – a visible sticker for example, by which they might identify those that are not legitimately using the path. That they have not done this is evidence that they have not taken sufficient steps to challenge users regarding their right to use the claimed path. Similarly the National Trust had the option to make a s.31 (6) deposit to protect their land from the acquisition of public rights through use, and they did not do this.
- 13.20 Use 'As of Right' or 'By 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'.
- 13.21 The fact that there is a boundary fence which has been cut or broken down at various times indicates that for at least some users there has been an element of force used in order to use the claimed path. However, it is difficult to identify who it is that has undertaken the force element to the entry onto the land, and certainly once cut or broken down all other users would then not be using the route with force.
- 13.22 There does not appear to have been any secrecy involved in the use of the path. Users indicated that they were doing so openly.
- 13.23 Users were not individually granted specific permission to use the claimed path. Neither did they ask for it. However, the Arboretum is open to the public on payment of the entrance fee (since 1986), or by donation prior to 1986. Once in the Arboretum members of the public have the permission to walk anywhere they choose (on the paths provided).
- 13.24 According to the Planning Inspectorate Consistency Guidelines;

*The [National] Trust has power to dedicate highways by virtue of s12 of the National Trust Act 1939. However, Trust bylaws may be in place and operate as a conditional permission to use the land. Such bylaws **may** prevent a presumed dedication under s31, whether users were aware of them or not. Useful reference can be made to National Trust v SSE [1999] JPL 697, holding that the permissive nature of the use of NT land precluded user as of right.*

- 13.25 Winkworth Arboretum currently display a set of their byelaws at the kiosk at the entrance to the site. A copy is attached at **Annex G**. It is not clear how long the byelaws have been in place on site, or if they have always been in the same position. It would appear that the current kiosk was built following planning permission granted in 1994. It replaced an earlier one but it is unknown whether the byelaws were similarly displayed on that kiosk or when it was built. In any event, there are no byelaws displayed at the junction with Bramley FP165, and it is entirely possible that a user entering the property from this end and walking along the claimed route and then along FP166 could be unaware that the byelaws existed.
- 13.26 In addition to the points at paragraph 13.25 above, the byelaws posted on site and copied in **Annex G** make no reference to any permission to use the land for walking, or other recreational pastimes. There is therefore no permission granted in the byelaws which would render use of the path 'by right', and therefore users of the claimed path would be using it 'as of right'. The byelaws that are in place, therefore, are considered irrelevant to this claim.
- 13.27 Consideration has recently been given to the impact of potential permissive access on a claim for a public right of way in Aldenham Country Park Trust Ltd v Hertfordshire County Council (Appeal Ref: FPS/M1900/14A/7 - 11th May 2017) (**Annex I**). In this case the inspector considered whether the permissive access the tenant of the land had granted to the public for recreation rendered use of a linear route "by right" rather than "as of right". She concluded that permissive use needed to have been overtly communicated to the public and that, as it had not been, it was reasonable to allege that a right of way had come into existence. It is thought that a similar situation applies here, in that any permission granted by virtue of the land being owned by the National Trust was not overtly communicated to the public.

14. CONCLUSION

- 14.1 In light of the above, it is the Officer's view that, by virtue of the use by the public on foot, public footpath rights have been acquired over the route A-B under section 31 of the Highways Act 190 and at common law.

15. RECOMMENDATION

- 15.1 This being the case the Officer would submit that:
- 15.2 The route between A-B as shown on drawing number 3/1/3/16, should be recorded on the Definitive Map and Statement for Surrey as Public Footpath No.559 (Busbridge) with a width of 1.5m

16. WHAT HAPPENS NEXT?

- 16.1 Committee can agree with the officer recommendation, in which case an order would be made to add Public Footpath No.559 (Busbridge) to the Definitive Map and Statement for Surrey. If objections to the order were received the

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County Council would submit the case to the Secretary of State for determination.

- 16.2 Alternatively, Committee may be of the opinion that there is insufficient evidence to reasonably allege that public rights exist over the route and it may disagree with the officer recommendation and direct that no order be made.
- 16.3 Where the County Council decides not to make an order, the decision may be appealed to the Secretary of State. If such an appeal resulted in a Public Inquiry the County Council would take a neutral stance.
- 16.4 The decision can only be made on the basis of the evidence submitted as interpreted under the current legislation. Matters such as security, privacy, safety or convenience are not relevant.
- 16.5 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.
- 16.6 All interested parties will be informed about the decision.

Contact Officer
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Consulted:
See Section 7.

Annexes:

- A** - Claimed Route
- B** - Photographs
- C** - MMO guidelines
- D** - Graph of User evidence
- E** - User interviews
- F** - Statutory Declarations and notes on telephone conversations
- G** - National Trust Byelaws
- H** - Order Plan 3/1/13/H16
- I** - Aldenham Country Park Trust Ltd v Hertfordshire County Council
(Appeal Ref:FPS/M1900/14A/7 - 11th May 2017)

Sources/background papers:

File 'CP547' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.

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