



**GUILDFORD BOROUGH COUNCIL AND
SURREY COUNTY COUNCIL**

GUILDFORD JOINT COMMITTEE

DATE: 19 SEPTEMBER 2018

**LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS
OFFICER**

**SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN PUBLIC
FOOTPATH 180 AND PUBLIC BRIDLEWAY 181 SHERE**

AREA AFFECTED: SHERE

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 between Public Footpath No.180 (Shere) and Public Bridleway No.181 (Shere)
- 1.2 It is considered that the evidence is not sufficient to reasonably allege that the public have a right of way over the claimed route.

2. RECOMMENDATIONS:

- 2.1 The Local Committee (Guildford) is asked to agree that:
- 2.2 The application to record a public footpath as described above be turned down.

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 on balance supports a modification.
- 3.2 In this instance the evidence submitted by the landowner shows a lack of intention to dedicate a right of way between points A and B that is sufficient to negate the claim of long user by members of the public. In addition the nature of the land between B and C is such that a public right of way could not be acquired, regardless of the frequency or length of that use.

4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 14 May 2015 from Mr Wayne Kitcat 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 180 (Shere) and Public Bridleway 181 (Shere). The application was supported by 38 User Evidence Forms (UEF) and 3 signed statements giving evidence of usage. One of these UEFs was a duplicate, which gives 37 UEFs submitted in support in total.
- 4.2 The path claimed in the application is shown on the plan at **Annex A**.
- 4.3 The claimed path leaves Public Footpath 180 (Shere) at point A on the plan in Annex A. At this point there is a fence chicane through which the path passes. It then proceeds in a south westerly and south easterly direction for 589m to point B, where it passes through a gap adjacent to a gate and continues for a further 57m to join Public Bridleway 181 (Shere) at point C. The path is a trodden earth path along its whole length varying in width between 1 and 2 metres. In March 2018 there was a sign on a tree to the north of the gate/gap at point B, visible when walking from the south back up to point A, which reads "Private No Right of Way". There was a similar sign positioned in a tree part way along the path at a point where a track joins the claimed path from the west. It also reads Private No Right of Way and is visible when walking south from point A. The location of these signs is marked by an X on the plan in **Annex A**. In 2015 there was also a similar sign at point A, visible when joining the claimed path from Public Footpath 180 (Shere), this sign was not present in 2018. Photographs of the claimed path as seen in March 2018 (and of the sign at point A in 2015) are located at **Annex B**.
- 4.4 There is no record of the route 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 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. 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 37 people were submitted during the course of the application. Three of these also provided signed statements with 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 challenged.

- 5.3 The application was prompted by actions taken by a new landowner of land over which the majority of the claimed path runs. Between A and B the land is now in the ownership of Mr & Mrs Steinberg. Between B and C the land is owned by the Shere Manor Estate. The Steinbergs bought the land in question in September 2014 and moved onto the site in July 2015. Shortly after purchasing the property Mr & Mrs Steinberg became aware of people using the path and, wanting to secure their property they fenced either end to prevent use. These actions prompted the applicant to make a claim under the Wildlife and Countryside Act and it is therefore appropriate to take 2015 as the date of challenge. There was one user (number 36), whose use was wholly prior to the relevant 20 year period, so when considering statutory deemed dedication his use will not count.
- 5.4 Routes Used: There is one linear claimed route running between points A-B-C which is referred to in all of the user evidence forms. Fifteen of the 37 users also referred to the use of an additional spur at point A and when users were interviewed use of this spur was questioned. The evidence for this spur was vague, and users that were interviewed admitted that this spur was not as well used or as frequently used as the main path. It is thought that it is appropriate to consider just the main path A-B-C as being the claimed route.
- 5.5 Method of use: All of the users claimed use on foot in their user evidence forms. In addition one user has made reference to use by bicycle (number 17) and one user has made reference to use on horseback (number 34). Both use on horseback and on bicycle could give rise to bridleway rights however 2 users is not considered sufficient to make that allegation. It is therefore appropriate that only footpath rights are considered in this investigation.
- 5.6 Reason for use: All users walked the path for recreational purposes.
- 5.7 Number of users & Years of Use: **Annex D** contains a graph showing years and frequency of use. Of the 36 users whose use spanned some or all of the relevant 20 year period (1995 – 2015), 33 have used the route for the whole of the relevant period. Only users 6, 14, 23 have used the path for less than the full 20 years. Their use however has been for more than 50% of the period, with number 23 being just 1 year short of the full 20 years.
- 5.8 Frequency of use: 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 number of users stating that range it is possible to estimate the minimum number of uses per year, and by extrapolation per week, that the path was experiencing:

E.g. in 1995 :

Not specified = 4 (discounted for purpose of this equation only),

Number of times per year	Number of users	Using minimum number of times per year; number of uses per year
Up to monthly (i.e. up to 12 times a year)	3	36
Fortnightly to weekly (i.e. 24 – 52 times a year)	4	96
Several times a week (i.e. 104 – 299 a year)	10	1040
Daily/almost daily (i.e. 300-365 a year)	13	3900
Estimate minimum number of uses per year		5072 per year
Estimate average number of uses per week		98 per week

Using this method it can be estimated that in 1995 the minimum number of uses the path was receiving was in the vicinity of 98 per week. This is an underestimation as minimum numbers have been used and there were 4 users that did not give a frequency. One can assume that use was higher. Use remained relatively consistent over the 20 year period.

5.9 Limitations: There is now a chicane at the northern end of the path and a gap adjacent to a locked gate at the southern end, however it is important to establish what whether there were any limitations to use during the relevant 20 year period. Almost all users referred to there having been a gate at the southern end of the path. Interviews with some of the users enabled more details about this gate to emerge. It seems that it was never locked, and was rarely closed over the path, so that it did not limit use of the path in any way.

5.10 Width: The majority of users described the path as being either 1m or between 1 and 2 metres wide.

5.11 Signs: 26 of the users referred to there having been signs at one or more locations along the claimed path. Memories are varied as to what the signs said, however most people indicated that they said something along the lines of "Private: No Right of Way". There is currently a sign at the southern end and half way along, however there was also a sign at the northern end until quite recently (at least 2015 when there is a photograph of the sign – see **Annex B**).

5.12 User interviews

As part of the investigation users were contacted and 12 were interviewed (UEF: 4, 5, 7, 10, 11, 13, 14, 20, 25, 26, 33 and 35). The interviews confirmed the long use that had been indicated in the user evidence forms and in particular further clarification was sought over the presence and effect of the

signs and of contact that the users had had with previous landowners.

- 5.13 Signs: When interviewed, most users recalled seeing the signs but did not take them to mean that they couldn't be there.

User 35 stated: *"I understood it to mean that although it is not a Public Right of Way, because the route isn't actually physically blocked then it is ok to walk there"*.

User 7 stated: *"I ignored the no right of way sign at the northern end. If you have walked all your life through there and no one has ever stopped you, including the owner, then you just continue"*.

User 14 stated: *"I didn't really give it much thought as to what the signs meant. I saw a lot of people walking there so walked there too. Maybe I thought it was just a general warning to people that didn't know the area, but anyway no one has ever challenged me or told me not to use it"*.

User 25 stated: *"I took this as discouragement of non-locals. Since I had met the landowner there I felt I was OK to use it, and that he had no problem with locals walking there"*.

User 22 stated: *"I always took the signs to mean that the general public wasn't allowed into the woods, but I didn't think this applied to me as I felt that the owner was happy for residents of Sutton Place to walk through on the main path. I felt confident about this because where another path leads off the claimed path, up to the house, there is another sign saying No Entry. Why have that there if you didn't expect people to be walking down the path?"*

- 5.14 Contact with previous landowners: Some of the users reported that they had met previous landowners (Mr & Mrs Burt) and had comments to make about these interactions:

Users 11&12 stated: *"We would quite often see the previous owner and stopped to talk to them. They knew that we were walking there and never stopped us"*.

User 10 stated: *"He was happy for people to walk on the path but was concerned that people didn't stray or stop to picnic"*.

User 7 stated: *"I do remember me saying to Mr Burt once "I hope you don't mind me in your wood", he said "no, everyone else goes through here""*.

User 13 stated: *"We met the previous landowner several times; he said hello, he was lovely and didn't seem to have a problem with people using the path"*.

User 22 stated: *"We never asked him if we could use the path, it was just generally accepted that it could be used"*.

5.15 USE AT 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.

5.16 LANDOWNERS' EVIDENCE

The majority of the land over which the claimed path runs forms part of the property now known as Great Hoe Farm but historically known as Stilton. This land is currently in the ownership of Mr & Mrs Steinberg (since 2014). The previous owners were a Mr & Mrs Burt who owned the land from 1966 to 2014. The remainder of the land over which the claimed path runs (from B-C) is in the ownership of the Shere Manor Estate. Statements were received from the following landowners, previous landowners and other family members:

5.17 Mr Steinberg: In his statement Mr Steinberg confirms the purchase of the land from Mr & Mrs Burt in 2014. He recalls having asked Mrs Burt whether anyone used the footpath through the woods, and that Mrs Burt had stated that they had permitted some people who lived nearby at Sutton Place to use the footpath but that it was not a right of way. Mr Steinberg recalls having concern over the path through the woods and the fact that it was ungated at either end, with people at liberty to walk in or out of their land freely. He refers to the signs as being proof that the path was not public but states that he did not feel like the open ends to the path were secure. He was concerned about the security of the land, especially with his own dogs & other animals able to escape. Mr Steinberg recounts instances of challenging walkers that he had found on his land and conversations that he has had with members of the public indicating that he was not happy with the path being open to the public. He also explains the erection of fences either end of the path for security which were subsequently cut and sections bent back (by person or persons unknown) so that the path could continue to be used without permission.

5.18 Dr Steinberg: In her statement Dr Steinberg confirms that she and her husband purchased the land from Mr & Mrs Burt in 2014. She relates a conversation she had with Mrs Burt in which Mrs Burt had indicated that her and her husband allowed a few people from Sutton Place to walk their dogs through the wood. Dr Steinberg recounts the steps that she and her husband have taken, since becoming owner of the land, to let people know that the woods are private and that there is no public right of way. She recounts conversations with a couple of people regarding the possible continuation of public use of the path and a letter that had been sent to her from a local resident wishing to discuss use of the path. Dr Steinberg also explains the need for re-fencing of her land to ensure the safety of her ponies and the fact that within days of fencing the gaps they had been cut by person or persons unknown.

5.19 Mrs Prunella Burt: In her statement Mrs Burt confirms that she lived at the property known as 'Stilton Hoe' between 1966 and 2014 with her family. She states: "...it is absurd for the residents of Sutton Place to be asserting that there is any kind of right of way over the footpath...when we first moved to Stilton Hoe in 1966 I recall that there were even at that time signs saying

'private – no right of way'...my husband had new signs erected saying the same thing and he placed these at either end of the footpath...someone sought to tear down one or more of those signs after we had them erected, so my husband arranged for replacement signs to be re-erected higher up on the trees...". Mrs Burt goes on to acknowledge that she was aware that local people from Sutton Place would walk through to get into the Hurtwood. She explains that "our attitude was that we were happy to allow them to use the footpath for walking their dogs etc. so long as they did not cause damage or stray off the path. However our reason for erecting (and re-erecting) the 'private – no right of way' signs was precisely so as to remind people of the basis on which we were allowing them to use the path – i.e. it was private property and they could only use the path as a privilege, not a right". Mrs Burt concludes her statement by saying "We were a tolerant and easy-going family and we had no confrontations with people who used the footpath over the years...however that certainly does not mean that we were conceding a legal right of way over the footpath to anyone – we would never have agreed to that. The 'private – no right of way' signs remained there throughout and were clear to anyone who chose to use the footpath.

- 5.20 Mrs Nicola Pedretti (nee Burt): Mrs Pedretti is the daughter of Mr & Mrs Burt and spent her childhood at Stilton Hoe, leaving in 1980 although returning regularly to visit family. Mrs Pedretti concurs with the statement made by her mother, and adds that she recalls a discussion with her parents when a new gate was hung at the southern end of the path and about whether it should be locked. She recalls them deciding not to lock it as the man in the electric wheelchair would no longer be able to use the path, she explains that her father was courteous to all he met and enjoyed thinking that others were getting pleasure from his bluebell wood. She recalls that "a favourite way of him greeting a walker would be 'afternoon, are you enjoying my woods?' he liked to remind people that it wasn't a right of way and they were only able to use the footpath with his permission". She adds that she felt that it was always clear that it was her father's decision to allow access and it surprises her that anyone would contest that.
- 5.21 Mr Lyndon Burt: Mr Lyndon Burt is Mr & Mrs Burt's son and he has written with his view on the claim in which he states "I am very firmly of the opinion that no rights of way of any kind run through the property which we knew as Stilton". He recalls the signs at both ends of the path and remembers his father upgrading and repositioning the signs when they were removed. He concludes his letter by adding "I remember little in the way of trespassing issues and arguments with neighbours.....in recent years I would imagine that my parents would, due to their age have been likely to have had a laissez-faire attitude to people using the path".
- 5.22 Shere Manor Estate: The legal representatives of the Shere Manor Estate (Alexander Wilks from Batcheller Monkhouse) responded to draw attention to the fact that The Shere Manor Estate land subject to the application is subject to a deed of dedication made under s.193 Law of Property Act 1925 which allows public access, and which has never been rescinded (a copy of this document and a transcript is at **Annex E**). It is also currently registered common land under the Commons Registration Act 1965, and is recorded as

access land under the Countryside and Rights of Way Act 2000. The land over which the claimed path runs from B-C is owned by Shere Manor Estate and is subject to these designations. They wrote that it is their understanding therefore that an application under the Wildlife and Countryside Act would therefore be invalid, as no new footpath could be created where public rights of access already exist.

5.23 DOCUMENTARY EVIDENCE

5.24 *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.

5.25 *Ordnance Survey County Series Map 1:2500 sheet 32-12 dated 1870, 1874, 1896, 1912, 1915, Ordnance Survey 6 inch Maps XXXII SE dated 1897 & 1920, Ordnance Survey 1:10,000 TQ04 SE & NW 1977 & 2009, Ordnance Survey 1:25,000 TQ04 1953*: These maps show Tenningshook Wood as being the same approximate size and shape since at least 1870. The public footpath 180 and bridleway 181 are shown as double or single pecked lines (depending on scale). There is also a single or double pecked line (depending on scale) in the location of the claimed route, linking the two public rights of way. On the 1:2500 editions the land either side is braced across the double pecked line indicating that it was a feature that ran through the land parcels (numbered 517 and 515). Although this is an indication that there was a physical path on the ground in the location of the claimed path since at least 1870 this does not assist in determining the status of that route.

5.26 *Shere Tithe Map (sheet 11)*: The Shere Tithe Map covers the area over which the claimed path runs between A and B. The section between B and C would have been untithed as part of the Shere Manor Estate. The plots of land over which the claimed path runs are numbered 756, 757 and 758. There is no indication from this map that there was any right of way over these plots of land. All three plots are in the ownership of an E. Lomax, and are described as either arable, furze or wood. No deductions were made for rights of way or user.

5.27 *Map of Hurtwood, 6 inch to 1 mile, 1964*: This map covers a wide area and shows the extent of the land owned by the Shere Manor Estate and uses an Ordnance Survey 6 inch map as the base map. It was published by the Hurtwood Control Committee which was a charity set up to manage the land for public access. It shows Bridle Paths, Footpath, Unmetalled Roads and County Roads (metalled). It covers the section of claimed path between B and C, and shows the bridleway to which the claimed path joins. There is no route shown on the claimed route, other than that shown on the base Ordnance Survey map.

5.28 *Aerial Photography dated 1948, 1971, 1988, 1998, 2006, 2012*: On the majority of these photographs it is not possible to see a path at all due to the forestation of the area. However the later photographs (1998/2006/2012) show that the area was slightly less forested and there is an indication of a path in the

location of the claimed route in places.

- 5.29 *Other historic evidence:* The investigation incorporated a search of the Surrey History Centre and Surrey County Council internal records. No other historical evidence for the claimed path was discovered.
- 5.30 In the absence of any conclusive documentary evidence showing public rights the claim must rely on user evidence either by statute or common law.

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 Shere Parish Council, Mr Keith Taylor County Councillor, Mr Richard Billington & Mr David Wright Borough Councillors, The British Horse Society, The Ramblers, The Open Spaces Society and all relevant landowners have been consulted.
- 7.2 Guildford East Ramblers responded to say that the group often cross the southern end of the path but do not recall using the path itself and are therefore unable to add any useful information.
- 7.3 Shere Parish Council responded to say that they strongly object to the assertion that has been made by the residents of Sutton Place, and believe the claimed path to be a private track on private land. They forwarded photographs of the gate (point B) and drew attention to the signs which state that the path is private. They described some of the history of the site, as they understand it: *"In excess of 20 years ago this track was maintained for the use of Surrey Union Hunt, with jumps installed. Certain residents of nearby Sutton Place started to use the track which was challenged by the owners of Silton. Eventually, in the interests of good neighbourly relations and under a certain amount of duress, a number of people living in Sutton Place were allowed to use the track which leads onto Holmbury Hill"*.
- 7.4 No other responses to consultation were received.

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 exists. 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: There is a clear indication that 2015 is an appropriate date from which to calculate the relevant 20 year period. Although the path is now open and available to use it was the actions of the current landowner shortly after purchasing the property that drew the local population to the lack of public status. The relevant 20 year period is therefore 1995 – 2015.
- 13.6 Public Use: The users that have given evidence to this investigation come from a very limited area, predominantly around the northern end of the path in the estate known as Sutton Place or the roads immediately outside the estate. However they are not owners of the land over which the path runs and are not licensees or invitees of the landowners; they are members of the public albeit ones that live close to the path. The use therefore can be considered to be by the public.
- 13.7 Route walked: With the exception of a possible spur at the northern end, which was discounted due to poor evidence, the claimed route is a single linear path between two public highways that would be capable of recording as a public highway (all other requirements having been met)
- 13.8 Sufficiency of use – statutory deemed dedication: The length and frequency

of use of the claimed route has been discussed above in section 5.7-5.8. There are a large number of users with very high usage over the full 20 year period and beyond. This use would be considered sufficient to raise a presumption of statutory deemed dedication.

13.9 Lack of intention to dedicate: Almost all users have referred to the signs that are present on the land. These state quite clearly that there is no public right of way over the land. They are an overt act which was seen by the public using the route (the need for an overt act is clarified in *Fairey v. Southampton County Council* [1956] by Denning LJ). That they took no notice of the signs does not stop the signs having been present and clear in their intention. The evidence from the previous landowner confirms that the signs were put up with the intention of letting the public know that no public right existed. The fact that they then permitted use by local residents does not negate the fact that they had carried out an overt act, one which had been recognised by the public, to tell the public that the route was not being dedicated as a public right of way.

13.10 Section 31 of the Highways Act 1980 states:

- (3)Where the owner of the land over which any such way as aforesaid passes
- (a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and
 - (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

The notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway

13.11 Sufficiency of use – 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.

13.12 The signs erected and maintained by Mr Burt on his land are a clear indication that he did not intend to dedicate the route as a public highway and therefore although a considerable quantity of local people have used the route it cannot have become a public footpath at common law.

13.13 Impact of Deed of Dedication under s.193 Law of Property Act 1925/Common Land/Countryside and Rights of Way Act 2000 Access Land
The land in question between B and C is in the ownership of The Shere Manor Estate and is subject to a deed of dedication made under the s.193 Law of Property Act 1925 and dated 21st November 1926 (see **Annex E**). It is also registered Common Land under the 1965 Commons Registration Act and is now classified as Access Land under the Countryside and Rights of Way Act 2000.

13.14 In *Queen v. Secretary of State for Environment Ex Parte Robert D Billson*

[1998] EWHC Admin 189 (16th February, 1998) Justice Sullivan concluded that a deed of dedication under the Law of Property Act would negate a claim for a public right of way by long use as the public were doing what they were permitted to do by virtue of the Deed and no more., The enjoyment of the ways was by license and not as of right, even though they genuinely believed that it was as of right.

- 13.15 This would apply in this instance to the land from B-C and would mean that the nature of that land is such that a public right of way could not be acquired, regardless of the frequency or length of that use.

14. CONCLUSION

- 14.1 In light of the above, it is the Officer's view that despite evidence of considerable use of the claimed route by the public there is sufficient evidence of the landowner's lack of intention to dedicate a route between A and B on the plan in **Annex A** for the claim to fail both under the Highways Act 1980 and at Common Law. In addition the nature of the land between B and C is such that a public right of way could not be acquired, regardless of the frequency or length of that use and that a claim for a public right of way over that land must fail.

15. RECOMMENDATION

- 15.1 This being the case the Officer would submit that:
- 15.2 The application should be refused and no public right of way should be recorded on the route A-B-C as shown on drawing 3/1/68/H36.

16. WHAT HAPPENS NEXT?

- 16.1 Committee can agree with the officer recommendation, in which case no order would be made.
- 16.2 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 normally take a neutral stance.
- 16.3 Alternatively, Committee may be of the opinion that there is sufficient evidence of use, that the evidence of a lack of intention to dedicate is insufficient to rebut this, and that the status of the land between B and C is irrelevant, and they could direct that an Order be made, in which case an order would be made to add Public Footpath No.602 (Shere) to the Definitive Map and Statement for Surrey. If objections to the order were received the County Council would submit the case to the Secretary of State for determination.
- 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.

Lead Officer & Contact:

Catherine Valiant, Countryside Access Officer, Tel. 020 8541 9342

Consulted:

See Section 7

Annexes:

- A** - Claimed Route
- B** - Photographs
- C** - MMO Guidelines
- D** - User Evidence Graph
- E** - Deed of dedication, transcript and plan

Sources/background papers:

File 'CP569' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.

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