

**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 174 (SHERE) AND PUBLIC BYWAY 512 (SHERE)

**DIVISION:** SHERE

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| <p><b>1. SUMMARY OF ISSUE:</b></p> <p>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 174 (Shere) and Public Byway 512 (Shere).</p> <p>1.2 It is considered that the designation of the land is such that no rights of way could be recorded over it through long use.</p> <p><b>2. RECOMMENDATIONS:</b></p> <p>2.1 The Local Committee (Guildford) is asked to agree that:</p> <p>2.2 The application to record a public footpath as described above be turned down.</p> <p><b>3. REASONS FOR RECOMMENDATIONS:</b></p> <p>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.</p> <p>3.2 In this instance the nature of the land is such that a public right of way could not be acquired through use, regardless of the frequency or length of that use.</p> |
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## 4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 25 September 2015 from Mr Brian Golightly 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 174 (Shere) and Public Byway 512 (Shere). The application was supported by 12 User Evidence Forms (UEF) giving evidence of usage.
- 4.2 The path claimed in the application is shown on the plan at **Annex A**.
- 4.3 The claimed path leaves public footpath 174 Shere at point A on the plan 3/1/68/H37 at Annex A and proceeds in a generally southerly direction for 80m to meet Public Byway 512 Shere (Radnor Road) at point B on the same plan. At point B there is a short flight of steps. Photographs of the claimed path as seen in August 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 12 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 challenged.

- 5.3 The application was made by Mr Golightly, prompted by the then forthcoming sale of the land from The Shere Manor Estate to what is now the current landowners, Mr Hallett & Ms Janse. There had been no overt act to stop public access to the path but Mr Golightly felt that the public status of the path should be recorded to protect it if future landowners should decide to take steps to stop access. There being no specific actions taken it is appropriate to take the date of application as the challenge date and the relevant 20 year period would therefore be 1995-2015.

- 5.4 Route Used: There is one linear claimed route running between points A and B which is referred to in all of the user evidence forms.
- 5.5 Method of use: All of the users claimed use on foot in their user evidence forms.
- 5.6 Reason for use: All users walked the path to access village amenities or for dog walking/recreational purposes.
- 5.7 Number of users & Years of Use: **Annex D** contains a graph showing years and frequency of use. Of the 12 users whose use spanned some or all of the relevant 20 year period (1995 – 2015), 11 have used the route for the whole of the relevant period. The twelfth (Mrs Golightly) had use spanning the majority of the 20 year period.
- 5.8 Frequency of use: The graph shows the frequency of the use (as stated in the user UEF), 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* = 1 (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 |
|---|-----------------|---|
| Less than once a month<br>(i.e. up to 12 a year, but 6 used for equation) | 2               | 12  |
| Between once and twice a month<br>(i.e. 12-24 times a year)               | 4               | 48  |
| More than once a week<br>(i.e. more than 52 times a year)                 | 2               | 104   |
| Daily/almost daily (i.e. 300-365 a year)                                  | 2               | 600   |
|   |                 |   |
| <b>Estimate minimum number of uses per year</b>                           |                 | <b>764 per year</b>   |
| <b>Estimate average number of uses per week</b>                           |                 | <b>15 per week</b>  |

Using this method it can be estimated that in 1995 the minimum number of uses the path was receiving was in the vicinity of 15 per week. This is an underestimation as minimum numbers have been used and there was 1 user that did not give a frequency. In addition some of the users, when interviewed, indicated that their use was much more frequent than that stated in their UEF (see section 5.12). Use remained relatively consistent over the 20 year period.

- 5.9 Limitations: There are no gates or stiles across the path and none have been

referred to in the user evidence. The steps at the southern end would be included in the description of the path but would not constitute a limitation.

- 5.10 Width: Users described the path as being between 1 and 3ft wide.
- 5.11 Signs: None of the users referred to there being any signs, and none are present now.
- 5.12 User interviews  
As part of the investigation all 12 users were contacted and 9 were interviewed (UEF: 1, 2, 3, 4, 5, 6, 7, 8, and 10). The interviews in the main confirmed the evidence given in the UEFs, although a couple of the users did alter the frequency of their use (UEF 2, 3 & 10 indicated much more frequent use in interview than that recorded on the form).
- 5.13 Contact with landowners/ maintenance of the route: In discussion whilst being interviewed some of the users talked of the steps at the bottom of the path. Users recalled a Mrs Best installing them to aid her access onto the path. She had not been the landowner, but had lived near the path. Over the years other people had maintained the steps with Mr Salter having repaired them most recently. People also talked about how locals have done work to keep the path open when the grass got long and that sometimes people from either the Hurtwood Control (the charity tasked with looking after the maintenance of the Hurtwood for open access) or from Shere Manor Estate also did this. None of the users referred to any problems with the fact that they were doing work on somebody else's land.

Mr Warrell (User 10) stated: *"Repairs are done by the locals, they were repaired quite recently in fact by someone locally...."*

Mr Salter (User 6) stated: *"The steps at the bottom were there when I moved in, I don't know who first put them in. I repaired them in 2001 so that they were easier and safer to use."*

Mr Dench (User 1) stated: *"It feels like a community path; a number of residents have done work to keep it open"*.

Mr & Mrs Thompson (user 7 & 8) stated: *"When we first came someone would go out occasionally and trim it; someone from the Hurtwood"*.

Users 2 & 3 stated: *"We have seen people managing the land over the years from the Bray estate, and have seen people from the Hurtwood Control – the charity that manages the Hurtwood – trim the area. Once or twice a year they would trim the whole piece of land and then occasionally the path as well. Very occasionally a tree has come down and has blocked the path, but then someone would make a call to the Hurtwood Control and they would come out and clear it very quickly so this has never really stopped us from using the path."*

#### 5.14 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.

#### 5.15 LANDOWNERS' EVIDENCE

The land over which the claimed path runs is now in the ownership of Mr Hallet and Ms Janse who live adjacent to the land at Brackenside and who bought the land in 2016. An interview was undertaken with Ms Janse. The previous owners was the Shere Manor Estate and their views were sought in relation to this application.

5.16 Ms Janse: In his statement Ms Janse confirmed that they had purchased the land in 2016 from the Shere Manor Estate. She stated that they are aware that there is a deed of dedication associated with the land which means that the public have a right of access all over the land. She acknowledged that she was aware of the claimed path and that people used it and added that she had no intention of stopping people from using the path. Ms Janse indicated that she had known Mrs Best and believed that it was her that had put in the steps at the bottom as she used the path and was adamant that people were allowed to continue to use it. Ms Janse indicated that they had never done anything to stop people using the path and have no intention ever so to do.

5.17 Shere Manor Estate: The legal representatives of the Shere Manor Estate (Alexander Wilks from Batcheller Monkhouse) responded to draw attention to the fact that Shere Manor Estate land 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**). They also pointed out that the Hurtwood is 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, whilst no longer owned by Shere Manor Estate, is still subject to these designations. They wrote that it is their understanding therefore that an application under the Wildlife and Countryside Act would be invalid, as no new footpath could be created where public rights of access already exist.

#### 5.18 DOCUMENTARY EVIDENCE

5.19 *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.

5.20 *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 the area of land over which

the claimed path runs and shows the development of the area over the years. There is no route shown on the line of the claimed route on any of the Ordnance Survey maps.

- 5.21 *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 6inch 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, Footpaths, Unmetalled Roads and County Roads (metalled). There is no route shown on the claimed path.
- 5.22 *Aerial Photography dated 1948, 1971, 1988, 2006, 2012/13:* The path is identifiable on the 2006 and 2012/13 aerial photographs, at least over the unwooded section of the land. The path is either not visible or the photograph is not of sufficient clarity on earlier aerial photographs.
- 5.23 *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.
- 5.24 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 Andrew Bowden of the Ramblers Association responded to say that he is aware of the patch of land where the route is claimed, which is rough grassland and scrub and which he assumed is common land. He added that The Ramblers frequently use Public Footpath 174 as a route through Peaslake village and occasionally Bridleway 512 and Footpath 175 to reach the same point, as footpath 174 is very steep and can be difficult in wet weather. He

added that they do not use the claimed route regularly, if at all, as it is not a "through route".

7.3 Colin Sandford of the Open Spaces Society responded to comment that "It is apparent from the fact that this footpath has created its own "shelf" in this relatively steep hillside that it has been in existence that for far longer than the 20 year period required under HW1980 s31. It is also obvious that has been in frequent use in the recent past. We therefore believe that this application is well founded".

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 being no overt act that calls into question the right to use the path, it is appropriate to take the date of application as the date from which to calculate the relevant 20 year period. 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 local area predominantly in Plaws Lane, 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: 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 is a reasonable number of users, given the size of the local population, with consistent usage over the full 20 year period and beyond. Some of this use is of very high frequency – with several people stating nearly daily use. This use would be considered sufficient to raise a presumption of statutory deemed dedication.
- 13.9 Lack of intention to dedicate: None of the users have ever encountered any action by a landowner that would indicate to them that the route is not a public footpath. There are no notices and there have never been any fences, locked gates or other overt act.
- 13.10 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.
- 13.11 The steps installed at the bottom of the path is a clear indication that it was expected that people would be using the path. They have been installed so as to make passage over the path up and down the hill easier. There is nothing to suggest that they were installed for the use of a particular person or persons and so, there being no information to the contrary, it is reasonable to assume that they have been installed to aid passage by the general public. Although they were not installed by the landowner, the fact that they were not removed is an indication of acquiescence by the landowner. In addition there is a suggestion that the charity tasked with maintaining the land has at times strimmed the path and removed fallen trees.
- 13.12 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 was in the ownership of The Shere Manor Estate until 2016 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.
- 13.13 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.

- 13.14 This would apply in this instance to the land over which the claimed path runs 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 the nature of the land 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 as shown on drawing 3/1/68/H37.

#### **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 and that the status of the land is irrelevant, and they could direct that an Order be made, in which case an order would be made to add Public Footpath No.604 (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 'CP571' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.

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