

**TO:** PLANNING & REGULATORY COMMITTEE

**DATE:** 21 November  
2018

**BY:** DANIEL WILLIAMS, COUNTRYSIDE ACCESS  
OFFICER

**DISTRICT(S)** GUILDFORD AND WAVERLEY  
BOROUGHES

**ELECTORAL DIVISION(S):**  
Shalford and Farnham North

**PURPOSE:** FOR DECISION

**GRID REF:** SU 866 487

**TITLE:**  
**ALLEGED PUBLIC BRIDLEWAYS BETWEEN LOW LANE  
(FARNHAM) AND THE MOORS (TONGHAM)**

## SUMMARY

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which can be reasonably alleged to support a modification.

An application was received for a Map Modification Order (MMO) to add public bridleways between Low Lane (C121), Farnham and Public Bridleway 348 (Tongham) known as The Moors, to the Surrey County Council Definitive Map and Statement (DMS).

It is considered that the evidence shows that no public bridleways can reasonably be alleged to subsist over the routes. As such a legal order to modify the definitive map and statement should not be made.

This case crosses the Borough Council border of Guildford and Waverley. It would be usual to take Rights of Way cases to the Local Area Committee. Given that this would involve two Committees we have been advised to bring such reports just once to Planning and Regulatory Committee. This is in accordance with section 9.2 of the Surrey Code of Best Practice in Rights of Way Procedures.

## OFFICER RECOMMENDATIONS

The Planning and Regulatory Committee is asked to agree that:

- i. No public rights are recognised over any of the routes shown on Drawings Nos. 3/1/18/H93 or H93A and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a public bridleway is not approved.
- ii. In the event that the Council is directed to make an order by the Secretary of State, a neutral position will be adopted by the Council at any subsequent public inquiry.

## 1. INTRODUCTION AND BACKGROUND

- 1.1 Mrs Caroline Amond Lewis submitted an application in October 2013 for a Map Modification Order (MMO) to add several public bridleways between Low Lane (Farnham) and The Moors (Tongham) to the Surrey County Council DMS. The routes claimed are shown I-VI on Drg. No. 3/1/18/H93 (Annex A). A total of 20 user evidence forms were submitted in support of the application
- 1.2 Following examination of the plans attached to the user evidence forms and other evidence it is clear that the lines annotated by the applicant on the plan attached to the Schedule 14 application are not an accurate representation of the routes which were or could have been used. There are in addition a number of other routes across the site which were indicated on the user forms and which were indicated to have been used to some extent. These are shown labelled between A and X on Drg. No. 3/1/18/93a (Annex A).
- 1.3 The physical conditions on the ground indicate that some of these routes cannot now and most likely could never have been used. Interviews and careful examination of map and aerial photos were used to clarify some of these anomalies.
- 1.4 It is considered that the evidence shows that no public bridleway, nor a public right of way of any other kind can reasonably be alleged to subsist over the route(s). No legal order should be made.
- 1.5 A legal background to Map Modification Orders is attached at Annex B and considered in section 9.

## 2. ANALYSIS

### PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 20 people completed public user evidence forms, spanning a period of 42 years from 1973 to 2017. Seven of the users were interviewed in person. The time spans and types of use are summarised in table 1 below.

*Table 1*

	<b>Foot</b>	<b>Horseback</b>	<b>Bicycle</b>	<b>Horse and Carriage</b>
<b>Years</b>	1973-2017	1979-2014	1975-2013	1997-2000
<b>Users</b>	1, 3, 6, 9, 10, 16, 20	1-20	3,4 ,9	1
<b>Times per year</b>	5-300+	6-150	5-50	50
<b>Total usages per year on average</b>	385	979	85	50

- 2.2 On average the evidence suggests about 1499 uses per year which is around 4 uses per day by all means, almost two thirds of which are on horseback.

- 2.3 The plans accompanying the user evidence forms show a variety of routes across this land, which indicates some confusion in the minds of users. This is understandable given that some have not been onto the land for some years, may have been following a guide and the land itself has been subject to much physical change. The table at annex C indicates which users used which routes as shown on drawing Drg. No. 3/1/18/93a.
- 2.4 Riders discovered the route by riding out with friends and family; by generally exploring; through word of mouth or by being taken from Badshot Lea equestrian centre. This was for leisure, pleasure, hacking or horse exercising. Dog walking was also mentioned. All said they had used the route openly. Their descriptions generally describe the routes as running from Low Lane along the south bank of the Blackwater and by the lake. None of the riders suggested that they went into areas where mineral working was taking place.
- 2.5 The width of the way was recalled as varied but generally between 2-4 metres or wide enough for 2 horses.
- 2.6 12 users recall seeing gates or stiles of some description along the route. Mrs Amond suggested that stiles and gates were erected from approximately 2000-2013. Others state that fences or gates were put in around 2012 and this commonly seems to be the date around which many of the riders stopped entering the land, although 6 claim to have continued riding until 2013 or 2014. Five riders noted that there were gates but they were always passable or open.
- 2.7 None of the users claim to have ever requested permission from, worked for or met a landowner.
- 2.8 The consensus is that the entrance at point X was closed in around 2009 after travellers has camped in the field. Subsequently riders entered at point H then I as each was successively blocked during 2012. Most riders had never entered at A or did so only for a very short time.
- 2.9 A gate was described at point C as a locked swing gate, although there was no consensus about whether and when this was locked. Three riders mentioned that it had been locked and that a key and permission was given to the local riding school by the landowner Hanson. This may have been sometime between the late 1980s to the late 1990s. A gate was also described at point E which was probably unlocked during the relevant period.

#### LANDOWNER EVIDENCE

- 2.10 There are several different routes in consideration here and the contents of the evidence forms are not wholly consistent with the routes indicated on the Schedule 14 application plan. In order to accommodate this variety, every possible landowner which might be affected was contacted. The six affected landowners are listed in table 2 below and shown as plots 1-6 on Drg. No. 3/1/18/H93.

Table 2

Plot	Routes / Points	Title
1	X-B, U-B	Stephanie Elizabeth Fetiveau, Oliver Harold Fetiveau, Marc Alexander Edward Fetiveau, Charlotte Hillary Fetiveau
2	A-B	Brenda Wood
3	B, C, D, J, H, I, K, G, N, P, R, O, Q, E	Hanson Aggregates
4	E-F	LEDA
5	Close to F	The Council of the Borough of Rushmoor
6	F-F2-F1	The County Council of Surrey
7	Part of E-F	The County Council of Surrey

2.11 The Fetiveaus have no objection to the proposed route except where it affects their land. They state that their land has been securely fenced and gated for several years and refute any allegation that horse riders have trespassed across it. A detailed statement of their position is summarised below.

- i. The land was actively farmed between 1992 and 1997. Photographs (from 1992 or 1993) are supplied showing no evidence of trespass.
- ii. A google earth photograph shows evidence of trespass in 2006.
- iii. During May 2009 the land was occupied by travellers as shown by a google earth photograph from 2009. As a result of this, work was commissioned to secure the land, then to flail and plough it.
- iv. At the same time clearance of the track directly to the north of the land was commissioned.
- v. Photographs of the fencing and relevant paperwork 2009 show when the land was secured.
- vi. An analysis of the user evidence forms shows that most use should be discredited as they claim either access during the years when the land was cultivated or show use of other routes not on the land.
- vii. Much of the user covers an insufficient period of time.

2.12 Mrs Brenda Wood has not responded regarding her position as the holder of the caution for part of the affected land.

2.13 Hanson Quarry Products Europe Ltd objected to the bridleway proposals. They had the following comments:

- i. They did not believe that the claimants had enjoyed uninterrupted use of the route(s) as claimed.
- ii. There has been permissive access on foot, but this has never amounted to permission for horses.
- iii. All quarry managers responsible for the site over its operational lifetime since the late 1990s would have discouraged and prevented horse access.
- iv. A physical kissing gate and barriers were erected just west of what were known as the warming ponds (at point E). There was never authorised access east of here from that gateway as this gate was always locked whilst the site was operational.
- v. All other perimeter fences were maintained in a secure condition and regularly repaired when damaged as required by Quarry Regulations procedures.

- vi. They had a close relationship with local residents, walkers and birdwatchers who would have reported any concerns of inappropriate horse riding as they did for cycling and motorbike scrambling.

2.14 No response has been received from LEDA despite several separate attempts to prompt a response both by post and email.

2.15 No response was received from Rushmoor Borough Council.

2.16 Surrey County Council had no objections or comments to make regarding the alleged bridleway.

#### DEFINITIVE MAP

2.17 The claimed routes are not shown as prospective routes on the 1952 draft definitive map nor are they shown on subsequent definitive maps of 1952, 1959, 1966 and the current consolidated definitive map with the relevant date of 20 April 2016. They were not shown as rights of way on the map produced under the 1932 Rights of Way Act.

#### HISTORIC EVIDENCE

##### *Historic Maps:*

2.18 None of the claimed routes appear on maps produced by Roques 1770, Lindley Crosley 1794 and Mudge 1812. On Greenwoods map of 1823 section only A-B is visible. The land is recorded throughout these times as a combination of open land, fields and woodland.

##### *Ordnance Survey Maps:*

2.19 The first edition Ordnance Survey map of 1883 shows section A-B as an enclosed track bounded by solid lines running to a field and recorded as 'road'. There is no sign of any continuing route through to The Moors. The same is also true for the 1897, 1915/16, 1934 and 1961 editions where they are available. At no time are any of the other tracks indicated and the land is crossed by numerous solid field boundaries and drains.

##### *Finance Act 1910:*

2.20 On the mapping produced for the 1910 Valuation Act the claimed way appears uncoloured over a short length between A and B indicating that it was not subject to tax and therefore presumed to be a public highway (of some kind) by the Inspector of Taxes. This is good but not conclusive evidence of the existence of public rights over this short stretch, although it gives no indication of what kind of right.

##### *Aerial photographs:*

2.21 Section A-B is slightly visible on the 1949 aerial photograph but there is no sign of the rest of the claimed route. The land appears as enclosed fields of various sizes. The same appears to be true of aerial photos from 1964 and 1971. There is no sign of any beaten path or desire lines between B and F2 although issues of scale and lighting make interpretation problematic.

2.22 There is a slight indication of a beaten path from X-B across the field including a point of entry from Low Lane on the 1988 map and also some slight evidence of use along a line running I-G-K. It does not appear that quarrying north of the A31

had yet commenced nor the construction of the Blackwater Valley Relief Road (BVR) and related works.

- 2.23 An aerial photograph of plot 6 dating from between 1988 and 1994 shows works during the excavation of Tongham Pond: a large water body and much disturbed and waterlogged land. Reclamation and landscaping of the site does not appear to have begun in earnest. It seems unlikely that either pedestrians or equestrians would be allowed access whilst these works are ongoing for both health and safety and operational reasons.
- 2.24 Aerial photos from 1998 and 1999 show a clear entry point at or near X and a defined route across the field to B. These photos also reveal a number of beaten paths across the fields in plot 3 which indicate use of some kind. The line I-G-K is quite clear and there is some evidence of use along a route similar to D-J-H and K-N. The land between Low Lane and point F remains mostly fields with some evidence of mineral extraction along its southern edge. This does not yet appear to impinge upon the majority of the claimed routes which are to the north of it. There may be slight evidence of beaten paths between E and F. North-east of F there are clear and presumably 'constructed' routes to the west of Tongham Pond through to The Moors and also around the eastern side of it. The land here appears immature and newly landscaped.
- 2.25 Aerial photos from 2004 and 2006 show that the previously enclosed fields have been partially landscaped and planted with trees in the northern half of plot 3. The western section of the Blackwater River (in plot 3 north) has been 're-routed' and numerous tracks appear to have been laid out. There continues to be a clear entry point and beaten track from X-B. All of the primary routes plotted on drawing 3/1/18/H93A are now visible to some degree.
- 2.26 The 2012/13 photos show a similar situation except that the entry point at X and route across the field is now very faint and presumably no longer in use. Route A-B now seems significantly wider and clearer. The many routes through the landscaped area around north of the quarry and south of the Blackwater are very clear and some additional routes are visible.
- 2.27 There is no way of knowing whether use of any of the routes shown on aerial photographs was by members of the public, either 'as of right' or with permission, but they do clearly show 'use'.

#### *Site photographs*

- 2.28 Site photos provide additional evidence regarding the entry points onto the land and various key points on the land from 2009 up to 2015.
- 2.29 Point A:
- **July 2009:** Obstructed by chestnut paling fence. There does not appear to be pedestrian or equestrian use around or over it.
  - **November 2011 and July 2012:** The fencing now contains a small pedestrian metal kissing gate. This could not be passed by horses, and bicycles would have to be lifted over. There is a sign on the gate stating :  
*"Permissive Footpath. Please keep to the permissive routes at all times. Hanson Aggregates"*.

- **July 2015.** The paling fence has been replaced with a large field gate, a slightly larger kissing gate and some picket fencing. It is not known if the large field gate is locked.

#### 2.30 Point X:

- **May 2009:** There is a clear entry onto the land with no sign of any gates, fences, notices or other forms of challenge. This entrance appears to have been consciously cut through an earth and vegetation bund. A well-worn track can be seen across the field towards B.
- **July 2009:** There continues to be no gate, fences or notices here but a bund of earth and other materials has been dumped in the entrance to the field. It is not known what the purpose of this was or whether it was undertaken by the landowner. A section of flattened earth over the bund suggests that use has continued to some degree although the narrowness suggests this may have been on foot or bicycle only.
- **July 2012 and July 2015:** Access onto the field is now obstructed by a metal gate and fence. A notice is attached to the gate which says "Private Keep out".

#### 2.31 Point H:

- **July 2009:** A gap in the hedge about 4-5 metres in width contains a kissing gate across half of its width. There is no obstruction across the remainder of the route.
- **July 2012:** The gap now contains four fixed metal bollards. This would prevent equestrian use but not pedestrian use. A copy of the aforementioned 'permissive footpath' sign is attached to the gate.
- **September 2013:** A locked field gate was in place with adjacent bollards preventing equestrian use.
- **July 2015:** A smaller kissing gate has been installed to the right of a new field gate. Two metal bollards also remain. It appears that equestrian access is not possible although it is not known if the gate was locked.

#### 2.32 Point I:

- **July 2009:** There is a wide access point to the south of the bridge. This consists of two forks each side of a deposited log. These appear to be sufficient for both equestrian and pedestrian use.
- **July 2012:** The log has been removed but replaced by nine metal bollards across the gap. This would prevent equestrian but not pedestrian use.
- **September 2013 and July 2015:** The situation appears the same but a chain or wire appears to link all but one of the gaps between bollards limiting the access to one small gap probably less than 1m wide.

#### 2.33 Point F1

**September 2007, January 2012 and September 2013:** There is a field gate at F1 which appears unlocked with a gap next to it which is most likely only sufficient for pedestrian use. It is not known if it is easy or possible for horses to pass through the gate.

#### 2.34 Point B:

**November 2011 and September 2013:** A gate is visible with a bollard next to it which narrows a clearly previously much wider gap.

### OTHER EVIDENCE

- 2.35 Minutes of the Farnham Quarry Liaison Meeting held on 11 October 2002 referred to access for the public. They noted that there were 'claimed routes' around the north-west of the site and continuing problems with motorcycles accessing the site and related damage. Representatives of Hanson at the time said that gates could be put at the garage (H) and Pea Bridge (I) to restrict motorcycles, but there would have to be some access for horse riders, with the possibility of keys available. This seems to suggest some permissive access was considered for equestrians but that Hanson had no intention to dedicate public rights.
- 2.36 Site visit reports for the Runfold Farm part of the site have been retained by Surrey County Council from 1993 through to 2006. Amongst other issues they consistently mention public use of that site on foot, bicycle and scrambler (but not horses). In November 1996 some users on site were challenged who noted that there were no signs saying keep out. The Planning Agent for the site commented that everything gets "ripped down or out". This suggest that efforts were being made to prevent or challenge use.
- 2.37 The land over which the claimed routes run has a complex history A brief time line of planning and land changes affecting the site is listed below:
- 1968: Surrey purchased land (plot 6) from Tongham Nurseries*
- 1973: The Tice Family sold the land (plot 3) south of the river to Pioneer Aggregates*
- 1989: Planning permission was given for mineral extraction and concrete batching plant to Hanson for the land on plot 3.*
- 1990: The plot 6 land was taken over for construction of the BVR.*
- 1993: Plot 6 was leased to Costain for mineral extraction.*
- 1998 Mineral extraction commenced on works known as Runfold then Farnham Quarry Site acknowledged by Guilford Borough Council as Tongham Ponds and Tice's Meadow Site of Nature Conservation Interest following a recommendation from Surrey Bird Club*
- 1999: Lease to Costain for mineral extraction at plot 6 came to an end and site restored.*  
*Planning permission given for working of site plot 3 to be complete and restored by 2012*
- 2006 First western phase of re-routing of Blackwater River, including landscaping and setting out of permissive paths.*
- 2009: Tongham Pond and Tice's Meadow designated as Site of Nature Conservation Importance. First suggestion that the land could be used as a SANG.*
- 2010: Mineral extraction came to an end on plot 3. Blackwater Valley Countryside Partnership produced a draft management plan for Tongham Pool (plot 6).*
- 2011: Much of restoration of Farnham Quarry site (plot 3) site was completed.*
- 2012: Revised restoration scheme (plot 3) proposed.*
- 2013: Second eastern phase of re-routing of Blackwater River.*
- 2015: Final phases of restoration of Farnham Quarry (plot 3) site.*
- 2015: Consideration of sites as SANGS<sup>1</sup> (plots 3 and 6).*
- 2016 Restoration completion date*
- 2.38 The consultations which would have occurred as part of some the above planning developments would have included local interested parties and local residents covering a wide immediate area. For example, in a 2006 report brought to this committee regarding the restoration of Farnham Quarry, it was made clear that

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<sup>1</sup> Suitable Alternative Natural Greenspace

only 'permissive paths' would be laid out. Surrey rights of way officers at the time expressed disappointment that no permanent paths would be dedicated.

### 3. CONSULTATIONS:

The following parties were consulted as part of this investigation in both 2014 and 2018 (except where specified) and their responses summarised.

Denise Le Gal, County Councillor (2014)	No reply
George Johnson, County Councillor (2014)	No reply
Matt Furniss, County Councillor (2018)	No reply
Stephen Spence, County Councillor (2018)	No reply
Waverley Borough Council	Damian Roberts (Director of Operations) noted that the route does not traverse any land belonging to Waverley Borough Council and therefore they had no information or comment.
Guildford Borough Council	No reply
Rushmoor Borough Council	No reply
Mr R. Potter, Farnham Town Council	No reply
David Attfield (Farnham Town Council)	Mr Attfield passed on comments collected from a local birdwatcher (Mr Sargeant), who said he had not seen (c. December 2017) horseriders on the site in the last 10 years. He was aware that Ms Amond had attempted to ride her horse at Tice's Meadow once extraction had ceased but this stopped when BWVCT <sup>2</sup> closed one of the access points. She has not been riding around for the last 20 years. She would not have been able to due to mineral extraction. Other comments passed on from a Mr Horton suggested that Ms Amond had been trying to get equestrian access for the last 7 years and not 20 years. He said Hanson and Pioneer had never allowed equestrian access to Tice's Meadow that is why barriers were put up to stop it. If horses were allowed disabled and general public would not be able to access the area because the paths would be impassable.
Margaret Murray, Tongham Parish Council	Remembered horses occasionally using the way. The Parish Council thought that the path past the pond remained open throughout the workings. There was probably very little use onto The Moors as access was not possible through there to Tongham
Tim Devis, Ramblers (Farnham Town)	No reply

<sup>2</sup> Blackwater Valley Countryside Trust

Alan Keeley, Ramblers (Tongham)	No reply
Colin Sandford, British Horse Society (Guildford)	No reply
Sandra Smith, British Horse Society (Waverley)	No reply
Bob Milton, Open Spaces Society (Guildford and Waverley)	No reply
CTC / Cycling UK Simon Scobie, Terry Manton, Timothy Barr	No reply
Mr S. Sharp, Auto Cycle Union	No reply
Gail Brownrigg, British Driving Society	No reply
Mr M Wheaton, Trail Riders Fellowship (2018)	No reply
Steve Bailey, Blackwater Valley Countryside Partnership (BVCP)	<p>BVCP works to improve access to the countryside throughout the Blackwater Valley and during 2013 promoted the issue of creating a bridleway as part of the restoration with Hanson. He raised the issue at Quarry Liaison meeting so Surrey should hold minutes of these. The idea was not accepted and is not included in the restoration plans.</p> <p>In December 2011 the track off Low Lane (A) was cleared to improve access. At this time there was chestnut pale fencing and a kissing gate. This was replaced on 26 March 2014 with a (locked) gate and the gate at B removed. Wire and wooden posts were added at I on 21 March 2017 to metal posts erected by Hanson. This still allowed bikes to get through.</p>
David Brittain (DB Landscape Consultancy Ltd)	No reply
Badshot Lea Community Association (2018)	No reply
Scottish and Southern Electric (2018)	No reply
Thames Water (2018)	No reply
Highways Information Team	Provided maps showing highway extent at both ends of the claim.
Environment Agency	Their biodiversity team had no comments.
Tices Meadow Bird Group (2018)	<p>Several responses were received from individuals.</p> <p><i>Cliff Watts:</i> There was a gate at 'C' which prevented all but pedestrian access since I first visited the site in 2008, although both the gate and posts were continually cut</p>

	<p>down over the years, probably by locals wanting to rider their motorbikes on the site.</p> <p><i>Richard Seargent:</i> Had been birdwatching regularly on the site since before 2006 and there had never been horse riders until briefly about 2 years ago which was stopped by the Blackwater Valley Conservation Trust Ranger. Many of the routes being claimed were within the bounds of the working quarry. If horse-riding were to occur it would severely damage the surface of existing paths.</p> <p><i>Oliver Sackwood:</i> He had lived in Badshot Lea since 1989. The site was used for agriculture then partly as a working quarry. At no point has there been a bridleway or regular use by riders. Fences had been knocked down but were soon replaced and signs put up to say no entry/private. Many of the routes claimed were impossible. There has been a locked gate at point E for a long time with no way through except for pedestrians.</p> <p><i>Mark Elsoffer:</i> Provided a number of photographs of the site from November 2011. They show that a sign was posted on the kissing gate at A which said: <i>“Permissive Footpath. Please keep to the permissive routes as all times”</i>. They also show the new fencing erected at B which prevented access from the field and point X.</p>
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#### 4. OPTIONS

- 4.1 The Committee may agree or disagree with the officer’s recommendation, both in terms of the status of the way and whether rights exist at all.
- 4.2 Decisions can only be made on the basis of the evidence available. The recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see Annexe B).
- 4.3 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 the Council being directed to make a map modification order we would remain neutral at any ensuing Public Inquiry or similar.

#### 5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 5.1 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.
- 5.2 The cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council’s Countryside Access budget. If objections are received and a Public Inquiry held, additional costs of around £4000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

**6. EQUALITIES AND DIVERSITY IMPLICATIONS:**

There are no equalities and diversity implications. These are irrelevant factors under the current legislation.

**7. LOCALISM:**

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

**8. 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	

**HUMAN RIGHTS ACT 1998**

Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1998. Primary Legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular way. While the Council must interpret primary legislation in a way that is compatible with Convention rights that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended to Members touches on a Convention right. The making of this order may affect the rights of the landowner/occupier (paragraph 2.12) under Article 8 of the Convention, the right to a private and family life and Article 1 of Protocol 1, the right to peaceful enjoyment of one's possessions. The Act makes it clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law as detailed in paragraph 9.2-9.6 and Annex A of this report. As such the recommendation to the Members is not considered to be in breach of the 1998 Act.

**9. CONCLUSION AND RECOMMENDATIONS:**

- 9.1 Any decision must be made on the legal basis set out in Annexe B to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way is reasonably alleged to exist. Other issues such as security, privacy, safety or convenience are irrelevant.
- 9.2 Under Section 53 of the Wildlife and Countryside Act 1981, "the authority shall make such modifications to the Definitive Map and Statement as appear to them to be requisite in consequence of the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates".
- 9.3 This involves two tests:

- i. TEST A: Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.
- ii. Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

For the purpose of making an Order it is only necessary to meet the second (lesser) test.

- 9.4 Both user and documentary evidence must be considered in this case to come to a conclusion under either statute or common law.

#### USER EVIDENCE

- 9.5 **Statute Law:** Section 31 (1) of the Highways Act states that: *“Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually 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”*.
- 9.6 The period of 20 years referred to in sub-section 2.1 above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether that is by a notice, by the making of a schedule 14 application, by blocking the route or otherwise. It is necessary to distinguish between different types of use for the purposes of identifying the relevant date.
- 9.7 **Common Law:** For rights to be established at common law it is necessary to provide evidence to show that the facts, taken as a whole, infer that at some point in the past the landowner had been willing to dedicate the way as public. It is also necessary to show that the public have accepted the route. Evidence of public use can be used to demonstrate both of these requirements. Unlike section 31 there is no minimum period of use that must be shown at common law, however the onus of proof lies with the party claiming that rights have been acquired. A landowner can rebut a claim if they can provide evidence that they did not intend to dedicate the route to the public or that the public use had been insufficient.
- 9.8 The evidence shows use on foot back to 1973, cycle use to 1975 and equestrian use to 1979. Prior to 1992 there were only four users, although from this point onwards until 2012 there were 12 users throughout or at various points during this period. Interpreting the user evidence on this site is very complicated due to its size, varied landownership and the number of routes and points of entry into the land. It appears that access via point X was first challenged when earth and rubbish were dumped here between May and July 2009. Most horse riders said they did not stop using this entrance until the fence, gates and notices were erected, which according to landowner was autumn 2009. These structures would have prevented all types of use. Photos suggest there was no use here in the early 1990s. If there was ever use on horse from points U or A then this must have been prior to 2009 as it is clear from the photos at this time that access would not be possible. It is clear that access was not possible even on foot from A at this time.

- 9.9 A locked gate was installed at or near point C and a key and permission given to the local riding school. The exact date when this happened is unclear. Mrs Macleod (5) thought this was late 1980s or early 1990s sometime before she left the area in 2005. Miss Williams (19) said the gate at 'C' was there for a while but was unclear about the date. Mrs Amond (1) says this gate was probably put in during the late 1990s, although she did not mention that it was locked. Supporters of Tices Meadow suggest that the locked gate was in place as late as 2008. All users entering from A or X would need to pass this gate to continue onto the site.
- 9.10 Users indicate that access onto the site from points H and I took place but was minimal until the obstruction of access from X. Site photographs suggest that bollards prevented equestrian (but not pedestrian) use around 2012.
- 9.11 Only around 13 of those who submitted forms continued on to and beyond point F1- some making a circuit of the lake instead. Mrs Amond (1) suggested the gate at F1 went in around 2012 but photographic evidence shows the gate was already in place by 2007. It is not known whether the gate was locked. The gap to the side of the gate appears to be only passable by pedestrians. None of the users originated at this end of the land.
- 9.12 Large swathes of the land in question have been subject to workings (both mineral and highway related) and reclamation/landscaping. Construction of the BVR commenced in 1991 which included the excavation of a large 'borrow pit in plot 6 excavated between 1993 and 1999. Given the size of the lake, the width of the site and the complex construction operations nearby whilst the BVR was being built, it seems extremely unlikely that public access would have been allowed or even possible by any means through the site. Following excavation of the pit and the building of the BVR the whole site was landscaped. There must have been a substantial break in use during these works. In an earlier case of alleged public bridleway rights along The Moors in Tongham, it was reported that 'a side roads order made in 1991 stopped up Public Footpath No. 348 under the bypass and created a new footpath once the works were complete'. The intention of the Order would have been to stop up any existing rights at the time. That The Moors was inaccessible during part of the construction of the BVR is most likely irrefutable and most horse riders who did continue on to F1 then turned right along The Moors and onwards. It seems unlikely then that riders would continue to this point during the construction of the BVR from 1991-1994, irrelevant of whether it was possible to get to F1 past Tongham Pond. It seems likely that there would have been an intention to stop use whilst the works were happening.
- 9.13 The land outlined as plot 3 has been subject to several phases of works. That land which falls within "plot 3 south" has been worked since 1998, during which time mineral works, fencing or standing water would have made use of this land impossible. That land which falls within "plot 3 north" however does not appear to have been subject to these works although it was landscaped around 2006 and then again in 2013. In 2006 the western section of the Blackwater River was realigned. This must have prevented or deterred much of the use of this section of land, particularly by horse riders. Comparison of aerial photos from 1998 and 2006 confirm the situation. Similarly the eastern section of the river was realigned in 2013, now cutting across some of the claimed routes.

**Date of challenge:**

- 9.14 Given the number of entry points, routes and landscape changes it is not possible to identify one date of challenge which would necessarily have made the landowners' intention clear to all or most users, nor one primary route along which riders have typically ridden throughout the period.
- 9.15 The earliest obvious challenge to use appears to have been the workings which lead to the construction of the BVR and Tongham Pond. This must have been around 1993 when works commenced. It seems likely that this area could not have been useable by the public for several years. Shortly afterwards access to the site from point A or X was challenged by the insertion of the locked gate at C and the granting of an explicit permission and key, not just to an individual but to the owner of the largest local riding school to whom many of the riders had close links. This implies an explicit permission to the individual and an implicit permission which can reasonably be extended to members of the school. This was probably in the late 1990s but may have been earlier. It is not clear after this time when the gate at C either became unlocked or was removed. In 2013 an unlocked metal gate was in place but apparently replaced a previous wooden gate. The entry point at 'H' and 'I' do not seem to have been challenged until around 2012 when bollards were put in but most users did not appear to use these routes until the other access points were closed around 2009. The only date of challenge which applies equally to all of the land is the making of the Schedule 14 application in October 2013.

### Conclusions

- 9.16 Evidence suggests that there has been use by the public of various routes across the land between Low Lane and The Moors, on foot, horseback and by bicycle between 1973 and 2014. This would normally be sufficient to give rise to a public right in the 20 years prior to the making of the application (1993-2013) so long as the criteria otherwise set out in the Highways Act 1980 were satisfied, which in this case they are not.
- 9.17 Use across the land has been very diverse. Riders have entered from many different points, successively moving on to the next as routes were blocked off and have used many different routes as the conditions on the ground changed. Notices, Gates and bollards have been widely installed by Hanson around their land since at least 2011 affecting entry points A, H and I. Prior to this, the installation of the gate at B/C would have prevented and challenged the primary access point as early as the late 1980s or 1990s. Mrs Amond thought this coincided with the start of the extraction works, so perhaps this might have been 1998.
- 9.18 Photographic evidence suggests that access on horseback has not been possible since at least 2009 at point A and as indicated above, a continuation of use would have been challenged by the gate at B/C. Mr Hill (4) stated that there has never been bridleway access from this point since he started riding in 1998.
- 9.19 At least 13 of the users entered at point X. Use was challenged by the erection of gates and fences in autumn 2009. Prior to this the installation of earth bunds may have challenged use earlier in 2009 or at least made clear the intention of the landowner and the continuation beyond B would anyway have been challenged by the aforementioned gate.
- 9.20 Little can be said about whether landowners challenged use at F1, but it seems likely that the excavation of the Tongham Pond would have prevented use

between F1 and F for a substantial period after 1993. Whilst not all users passed points A, X and B/C or continued through to The Moors along F-F1 it is clear that those who did were prevented from doing so at various points in time and at different locations.

- 9.21 There is insufficient clarity within the evidence to add any of the claimed routes as bridleways using any 20 year period or over any other period under common law. The number of routes and inconsistency and contradictions within the evidence make finding a presumption of dedication impossible. In addition it seems clear that the landowner Hanson had at times given clear express or implied permission to sufficient numbers of horseriders to indicate that use was not 'as of right'. This indicated their lack of intention to dedicate.
- 9.22 Seven of the users also indicated use on foot, which has been allowed to continue across large parts of the land, six of which showed use before 2012. This is an insufficient volume of use to give rise to public footpath rights at both statute and common law, although it does seem that pedestrian entry to the land at H and I has never been prevented in recent memory. The same cannot be said about entry via X, A, via the gate at C or between F1 and F where use has been more recently challenged.
- 9.23 It is concluded that on the basis of the available evidence no public rights of any kind can be reasonably alleged to subsist over any of the routes shown on drawings 3/1/18/H93 or H93A.

## **10. RECOMMENDATION**

The Planning and Regulatory Committee is asked to agree that:

- i. No public rights are recognised over any of the routes shown on Drawings Nos. 3/1/18/H93 or H93A and that the application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the DMS by the addition of a public bridleway is not approved.
- ii. If the Authority is directed by the Secretary of State to make a MMO after it has decided not to do so and objections are made which result in a Public Inquiry being held, the authority will adopt a neutral stance. (See comment in 4.3).

## **11. WHAT HAPPENS NEXT:**

- 11.1 If Committee agrees that no order be made the applicant will have opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 11.2 If Committee decides that an order should in-fact be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 11.3 If the Committee resolution is against Officer's recommendations then they should record the reasons, the precise routes and cite evidence for the decision. This will make it easier to explain the decision should the matter proceed to public inquiry or appeal.
- 11.4 All interested parties will be informed about the decision.

## Informatives

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**Contact Officer:**

Daniel Williams, Countryside Access Officer Tel. 020 8541 9245

**Consulted:**

See section 3

**Annexes:**

- A Drawings No. 3/1/18/H93 and H93A
- B Legal background
- C User evidence summary and Section use charts
- D Schedule 14 application

**Sources/background papers:**

File 'CP562' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, user evidence, legal cases, assorted mapping documents can be viewed by appointment.

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