

SURREY COUNTY COUNCIL**LOCAL COMMITTEE (REIGATE AND BANSTEAD)**

DATE: 2 DECEMBER 2019

LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN WOODHATCH ROAD AND ATHERFIELD ROAD, REIGATE

DIVISION: EARLSWOOD AND REIGATE SOUTH

SUMMARY OF ISSUE:

An application was received for a Map Modification Order (MMO) to add a public footpath between Woodhatch Road and Atherfield Road in Reigate.

It is considered that the evidence shows that a public footpath can reasonably be alleged to subsist over the route. As such a legal order to modify the definitive map and statement should be made.

RECOMMENDATIONS:

The Local Committee (Reigate & Banstead) are asked to agree that:

- i. Public footpath rights are recognised over A-B-C on Drg. No. 3/1/37/H83 (annex A) and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is approved. The route will be added as Public Footpath No. 637 (Reigate).
- ii. A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

REASONS FOR RECOMMENDATIONS:

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 on balance supports a modification. In this instance the evidence of long and unhindered use supports the making of an MMO.

1. INTRODUCTION AND BACKGROUND:

- 1.1 An application was submitted on 7 July 2017 for a Map Modification Order (MMO) to add a footpath between Woodhatch Road and Atherfield Road to the Surrey County Council DMS. This is shown on the claimant's Schedule 14 application and equates to B-C-D on the Drg. No. 3/1/37/H83.
- 1.2 The claimed route is located in the southern suburb of Reigate known as Woodhatch on the edge of an estate called Rushett's Farm. It commences at point B on Atherfield Road opposite nos. 11 and 17 and precedes in a north-

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westerly direction for 13 metres to point C where it passes the corner of an old, disused barn. It then continues in a generally north-westerly direction across part of Earlswood Common for 32 metres to point D just south of the pedestrian crossing over Woodhatch Road (A2044). Prior to the application in 2017 the route was tarmacked along its entire length although it is currently only tarmacked between C-D; B-C is now a firm earth/grass surface.

- 1.3 It is noted that the claimed route B-C-D does not connect with a public highway or other public place at B. Whilst there is nothing in law stating that a public right of way cannot be a cul-de-sac, it shall become obvious that the public are continuing on beyond this point and not turning around and going back the way they came. It is the intention then to consider whether public rights exist between not just B-C-D but also A-B. Point A is at the edge of the closest publicly maintainable highway at Atherfield Road as recorded by Surrey's Highway Information Team (See yellow shading on the highway extent map at annex D). Section A-B is mostly indistinguishable from the maintainable highway and has a concrete surface.
- 1.4 The route is currently available along its entire length although it was obstructed between B-C, for a short period in early 2019, when an alternative route was put in to the west of the barn.

2. ANALYSIS:

PUBLIC USER EVIDENCE FOR THE ROUTE:

- 2.1 Section 31 of the Highways Act 1980 provides that the claimant's evidence must show that the route has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged. The use must have been without force, secrecy or permission. Public use can also lead to the acquisition of public rights at common law. In such cases the use must have been sufficient to raise a presumption that the landowner had intended to dedicate the route. A legal background to Map Modification Orders is attached at Annex B.
- 2.2 18 people completed public user evidence forms (UEFs), spanning a period of 64 years from 1953 to 2017. Four of the 18 users also made themselves available for interview and written statements were produced. Jane Bourne (who did not complete a form) was also interviewed with her husband Kevin Bourne (UEF 3).
- 2.3 Individual use on foot varied from daily to yearly. Twelve¹ said they used it daily on average.
- 2.4 The use is summarised in a bar chart at Annex C.
- 2.5 Three people (UEFs 5, 14, 16) had also used it on a bicycle covering the period from 1969-2017. Their use varied from daily to every few months.
- 2.6 The width of the way is remembered by users as between 1-2.5m. Some described it more generally as wide enough for two people to pass or for a tandem buggy. Its surface was described by most users as 'tarmac' and having not changed.

¹ UEFs 2, 4, 5, 7, 9, 10, 11, 13, 14, 16, 17, 18

- 2.7 Of the 18 users, 11 gave evidence of use in excess of 20 years at some point between 1953 and 2017.
- 2.8 The majority had used the route to access the shops, the library, to go to school, for dog walking and exercise and to visit Earlswood Lakes. It was noted by many users that this was convenient for accessing the pedestrian crossing which continues directly on from the end of the path and also to get to the bus-stop. User 12 noted that: *"It is very busy around 8.30 and 3pm with the school children from the school at Woodhatch"*.
- 2.9 UEF 15 does not appear to be referring to the claimed path but actually to the alternative route which has since been provided to the western side of the barn. This evidence should therefore be discounted. It does however indicate why local people wish to use the original route rather than the route which has subsequently been provided.
- 2.10 All users stated that there were no gates or other obstructions over the claimed route. Similarly none knew, worked for, or obtained permission from the landowner. None had ever been challenged in their use in any way.
- 2.11 The only signs or notices remembered by any user were those relating to use by children and adults by foot or bicycle. These were interpreted as encouraging use. Excerpts from user interviews support this.

User 3 for example stated: *"There have been bike and pedestrian signs at both ends of the path. This is why most people assumed it was public"*.

User 18 suggested that: *"The only signs I remember are the blue posts showing footpath and cycle use. There is still one near the crossing and was also one at the estate end, but this one has disappeared.... These have been there about 10 years, perhaps, and were put in during the ownership by Raven. There were no signs before these"*.

- 2.12 Several of the users expressed a long term knowledge of the route.

User no. 3 noted that *"the footpath was already there when the estate was built.....the claimed path has always been the same claimed path"*.

- 2.13 User 18 clarifies this point noting that: *"The estate was built in the 1950s on the Rushett's Farm site and I grew up at 11 Vevers Road....we moved here in 1952-3.....the footpath has existed all my life.....it was probably surfaced at least by 1958 by Reigate and Banstead to give access to the estate and through to the school and bus stop"*.
- 2.14 Several users noted that the route was also well used by mobility scooters and that any changes to the route (or its obstruction) would mean that their journey to a suitable dropped curb would leave them in the roadway for longer and that this was dangerous.

LANDOWNERS EVIDENCE

- 2.15 As of 2019, the land over which the claimed path runs is covered by three titles. Section A-B is owned by Raven Housing Trust Limited. The section from point B north-westwards for 23 metres to C1 is owned by Broadhaven Estates

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Limited. The remainder is owned by Reigate and Banstead Borough Council. Prior to 2013 the land now owned by Broadhaven was also owned by Raven Housing Trust.

2.16 Raven Housing Trust claimed that none of the land belonged to them. As far as the applicant's plan was concerned this was strictly true. It was thereafter outlined to them that any user would continue over Atherfield Road which was in their title. Raven then stated that they had no concerns provided it didn't impact parking in the vicinity.

2.17 Broadhaven Estate objected to the application for the following reasons.

- i. They would prefer to dedicate the new purpose built footpath as a public right of way. This is a significant improvement to the existing path and the sustainable, permeable materials have been specifically designed to be more environmentally friendly and user friendly for the public.
- ii. They question the requirement for two public rights of way alongside each other going to and from the same location.
- iii. They stated that they had contacted Surrey County Council prior to the submission of their planning application and received written confirmation that the footpath running across the site was not a public right of way.
- iv. They were advised that diverting the way was a matter for the landowner. They therefore submitted a planning application to divert the path and construct a more direct route across the site on 23 March 2017.
- v. The new footpath has been constructed in accordance with planning permission and is being used.
- vi. When the new path was installed, barriers were erected at both entrances of the old path to prevent its continued use. These have been removed without authorisation.

DEFINITIVE MAP

2.18 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 previously for inclusion on any of these maps. It does not appear on the map prepared for the purposes of the 1932 Rights of Way Act prepared by the Borough of Reigate in 1947.

HISTORIC EVIDENCE

Historic Maps:

2.19 The route cannot be seen on any historic maps.

Ordnance Survey Maps:

2.20 On the 1872, 1896, 1914 and 1934 Ordnance Survey maps the Rushett's Estate has not yet been developed. There is no evidence of Atherfield Road but Woodhatch and Pendleton Road clearly exist on their current lines. Similarly the wide verges of Earlsfield Common are also easily visible. Despite

this, all of the maps show a double pecked line crossing the common on the same line as shown C-D today. It appears that this was the access route to Rushett's Farm between the barn and larger buildings to its east. The 1962 National Grid map shows that most of Rushett's Estate had been completed although Rushett's farm and its satellite buildings are still in place. The claimed route is now clearly demarcated by double-pecked lines from B-C-D and is clearly linked to Atherfield Road which is shown for the first time.

Finance Act 1910:

2.21 The base mapping for the 1910 Finance Act is drawn from Ordnance Survey mapping of uncertain date- perhaps 1914. The route is shown as a double pecked line between C-D. This is across the existing Earlsfield Common which is shown uncoloured in its entirety as such land was not subject to tax. The hereditament to the south is shown outlined with blue and recorded in the relevant book of reference as Rushett's House (Land and buildings). There are tax deductions in the book of reference for this land but it is not possible to distinguish to what rights these deductions apply- certainly the mapping suggests that various footpaths cross this area of land, none of which are shown along A-C.

Aerial photographs:

2.22 The route is clearly visible on aerial photographs of 1971, 1998, 2006 and 2012. Those of 1948 and 1988 are too dark to distinguish. It appears that the route was slightly widened sometime between 1998 and 2006. This may be when it received its current surface and perhaps the blue signage. The route appears well defined although it is not possible to distinguish what it was surfaced with. The fact that the path runs through an open area and connects a large estate with a main road and school would suggest that it would be well used. The photo of 1971 also shows several other 'beaten' paths from Atherfield Road across the common. It is clear that by 1971 the original Rushett's Farm has now been replaced with housing and garages.

Tithe map and award:

2.23 None of the route A-B-C-D is shown on the Tithe Map of 1843.

Site photographs including signs. (Annex E):

2.24 Site photographs were taken by the officer on 6 September 2017 and 14 February 2019. Photographs are also available from Google Streetview from June 2016, August 2015, June 2014, May 2012, June 2009 and March 2009. From 2009-2017 no change is visible on the ground. The alleged path is clearly visible, tarmacked and signed with a blue pedestrian and cyclist bollard at each end. There are people clearly using the path on foot and on bicycle in 2009 and 2012. The 2019 photographs show the alternative route provided by Broadhaven to the west of the barn. They also show that the sealed surface on part of the original route has been removed and the temporary barriers are visible, albeit pushed over. The blue bollard remains at Woodhatch Road but has been removed at the Atherfield Road end. The concrete roadway and occasional parked cars between A-B can also be clearly seen.

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Common land:

2.25 The land between Woodhatch Road and the Rushett's Estate has the appearance of a wide verge which alternates between grass and trees. This land appears on the Commons Register held by Surrey County Council in its role as Commons Registration Authority. Its reference number is CL039 and it is owned largely by Reigate and Banstead Borough Council. According to the Land Registry a small section of the land to the north of the barn is now owned by Broadhaven and also appears to be commonland. This accounts for about 10 metres of the claimed path north of point C. There are no references to the claimed path in the Register entries for the common. Nor is there yet any reference to change of ownership. The public already have a right of access over this land under the 1965 Commons Registration Act, so there would be no need to add section C-D to the Definitive Map.

Planning and the alternative route:

2.26 Section B-C, and C-C1 of the path runs over land which was recently the subject of a planning application to Reigate and Banstead Borough Council. The application was specifically to "divert a footpath and erect a 1.8m fence around the perimeter of the site". This application was made in 2017 with amendments in late 2017 and early 2018. The permission was ultimately granted with some modifications. The proposals and consents took place after the application was made. Therefore these are not relevant considerations. It should be noted that any proposal in a planning application to divert a footpath has no legal effect upon a public right of way. Such changes can only be made by 'legal order'. The applicant (Broadhaven Estates) was notified in the decision that the present alignment of path might be subject to a claim and that the permission did not override the principle of a claim. In 2019 an alternative route was constructed by Broadhaven to the west of the barn. This is tarmacked and has a similar width to the claimed route. The presence of this route cannot legally influence whether public rights can be found along the alleged route A-D. Users also note that, given the choice, they would prefer to continue to use A-D and have expressed this preference by doing so, despite attempts to obstruct the alleged route between B-C.

Connection to public highway:

2.27 It was noted at paragraph 1.3 that the alleged path proposed on the Schedule 14 application did not connect to a public highway at its southern end and that an additional section A-B would be considered so that it did so. The evidence presented shows that users crossed from the public highway (and pavement) at Atherfield Road to connect with the path at A. They may have been approaching from west, south or east as indicated by the 'origin' addresses of those who completed forms. A dropped curb section from the pavement just south of A, with a tarmac surface across the grass verge suggests that use through to the footpath was considered important by the highway authority. It is deemed that A-B (as a reasonable generalisation of use beyond B in various directions) can validly be considered part of the claim and will be considered as such in conclusions and recommendations. The user evidence in 2.1-2.14 also supports that use continued over this section (A-B) at similar levels and over a similar time period to that for the rest of the route (B-D).

3. OPTIONS:

- 3.1 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 Annex B).
- 3.2 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.

4. CONSULTATIONS:

- 4.1 No response was received from local representatives for the Ramblers, the Open Spaces Society, the British Horse Society or Cycling UK.
- 4.2 Borough Councillor James King said he would like to informally add his support to the views of Pauline Young. He had himself used the footpath for over 20 years. County Councillor Barbara Thomson said she would like to add her support for this application.

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.

7. LOCALISM:

There are no localism issues.

8. OTHER IMPLICATIONS:

| Area assessed: | Direct Implications: |
|--|------------------------|
| Crime and Disorder | No direct implications |
| Sustainability (including Climate Change and Carbon Emissions) | No direct implications |
| Corporate Parenting/Looked After Children | No direct implications |
| Safeguarding responsibilities for vulnerable children and adults | No direct implications |
| Public Health | No direct implications |

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 in this report impacts 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 respect for family and private life and Article 1 of Protocol 1, the right to protection of property. 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 recommendations in this report are 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 Annex B to this report. The only relevant consideration is whether the evidence is sufficient to raise a presumption that a public right of way exists. Other issues such as security, privacy, safety or convenience are irrelevant.
- 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:
- 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.
- 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

STATUTORY TEST

- 9.4 Section 31 (1) 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".

- 9.5 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 that is by a notice, by the making of a section 53 application, by blocking the route or otherwise.

CALLING INTO QUESTION AND LANDOWNERS INTENTION

- 9.6 In this case the Section 53 application made in July 2017 is the calling into question. No evidence of any challenge has been uncovered before that date. The relevant 20 year period is therefore 1997-2017.

PUBLIC USE

- 9.7 Section 31 provides no minimum level of user for the establishment of a public right of way. Instead a route must have been used by a sufficient “number of people who together may sensibly be taken to represent the community²”. It is not necessary for all, or indeed any, of the claimants to have used the route for the whole 20 year period but the cumulative effect must be considered. In this instance 11 claimants used the route for the whole of the 20 year period 1997-2017 and an additional six users for some part of it. This level of use during this 20 year period and as detailed in s. 2.1-2.14 meets the statutory test that the route can be reasonably alleged to have been dedicated as a public footpath. There is no evidence to suggest that the landowner challenged use during that period or expressed any lack of intention to dedicate a right. Use was not by force, secrecy or permission. The way was always open during the relevant period and for a long time prior to it. The signage shows that the public were explicitly invited to use it.

COMMON LAW

- 9.8 An inference that a way has been dedicated for public use may also be drawn at common law where the actions (or lack of) by the landowner indicate they intended a way to be dedicated as a highway and where the public have accepted it. Dedication may be express or implied from evidence of use by the public and of acquiescence to that use by the landowner. The period of use required to give rise to dedication at common law has never been defined and will depend upon its own facts.
- 9.9 The location of the route and the level of use by pedestrians from a housing estate towards other busy locations such as a school and bus-stop suggests that the landowner must have been aware of the use and could have taken action. This is supported by the fact that the route has a sealed tarmac surface and signage inviting use. Notwithstanding the view that rights have been acquired under section 31 of the Highways Act 1980, due to the period and frequency of use officers would also submit that the facts imply that the landowner has dedicated the route as a public footpath under common law.

CONCLUSION

- 9.10 In light of the above, it is the Officer’s view that public footpath rights have been acquired over the route A-B-C under section 31 of the Highways Act

² Definition from the Planning Inspectorate Definitive Map Orders: Consistency Guidelines April 2003.

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1980 and at common law and should be recorded on the Definitive Map and Statement for Surrey as a public footpath.. No rights need be recorded over C-D

9.11 The Committee is asked to agree that:

- i. Public footpath rights are recognised over A-B-C on Drg. No. 3/1/37/H83 (annex A) and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath is approved. The route will be added as Public Footpath No. 637 (Reigate).
- ii. A MMO should be made and advertised to implement these changes. If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

10. WHAT HAPPENS NEXT:

- 10.1 If an order is made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 10.2 If Committee decides that no order be made, the applicant will have the opportunity to appeal to the Secretary of State for Environment, Food and Rural Affairs against this decision.
- 10.3 If the Committee resolution is different to the officer's recommendation the reasons and evidence for the decision should be recorded. This will explain the Council's actions should the matter proceed to Public Inquiry or appeal.
- 10.4 All interested parties will be informed about the decision.

Contact Officer:

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Consulted:

See section 4

Annexes:

- A Drawing No. 3/1/37/H83
- B Legal background
- C User evidence bar chart
- D Extent of publicly maintainable highway
- E A variety of site photos

Sources/background papers:

File 'CP579' 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.