

ELMBRIDGE LOCAL COMMITTEE

DATE: 5 DECEMBER 2019

LEAD OFFICER: CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER

SUBJECT: ALLEGED PUBLIC FOOTPATH BETWEEN LITTLEHEATH LANE AND WATER LANE, COBHAM, ESHER

AREA AFFECTED: COBHAM, ESHER

1.	SUMMARY OF ISSUE:
1.1	The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which can be reasonably alleged to support a modification. An application has been received for a Map Modification Order (MMO) to add a public footpath between Littleheath Lane and Water Lane, Cobham, Esher
1.2	It is considered that the evidence is sufficient to reasonably allege that a public footpath subsists over part of the claimed route. As such a legal order to modify the DMS should be made.
2.	RECOMMENDATIONS:
2.1	The Local Committee (Elmbridge) is asked to agree that:
2.2	It is reasonable to allege that by virtue of the use by the public on foot, public footpath rights have been acquired over part of the claimed route under section 31 of the Highways Act 1990 and at Common Law.
2.3	A Definitive Map Modification Order should be made to record the route between B and K as shown on the plan in Annex A , on the Definitive Map and Statement for Surrey as Public Footpath No.96 Esher.
3.	REASONS FOR RECOMMENDATIONS:
3.1	The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA1981) to modify the Definitive Map and Statement (DMS) if it discovers evidence which can be reasonably alleged to support a modification.
3.2	Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable (R v Secretary of State for Wales ex parte Emery 1997).
3.3	In this instance the evidence submitted in support of the application is considered sufficient to reasonably allege that public footpath rights subsist over the claimed route, having been acquired by virtue of use by the public on foot under statutory deemed dedication (under s.31(6) of the Highways Act 1980), and at common law.

4. INTRODUCTION AND BACKGROUND

- 4.1 The County Council received an application, dated 9th June 2015 under the provisions of the WCA 1981 for a Map Modification Order (MMO) to modify the DMS by the addition of public footpath between Littleheath Lane and Water Lane, Cobham. The application was supported by 16 User Evidence Forms (UEF). A further 8 UEFs were submitted during the course of the investigation which gives 24 UEFs submitted in support in total.
- 4.2 The path claimed in the application is shown on the plan at **Annex A**. Photographs of the claimed path as seen in 2018 are located at **Annex B**. The following description of the claimed route is how it appears now and does not reflect how it might have appeared in history.
- 4.3 The claimed path commences from Littleheath Lane at point A (as shown on the plan in **Annex A**), opposite house number 52. It proceeds as an unfenced tarmac drive, approximately 3m wide, in a south west direction through a wooded area of common curving around to continue in a southerly direction where it is crossed after about 100m by a wooden field gate (point B). This gate is electronically controlled and there are signs indicating the track to be a private drive with no access and that CCTV is in operation. After passing through the gate the claimed path, which is now fenced on the western side, continues in a general southerly direction at about the same width for approximately a further 100m through the wooded area, to point C being the point at which the houses to which it provides access are reached.
- 4.4 At point C the driveway splits with access for the properties continuing straight and the claimed path turning sharply to the south west. After about 10m the claimed path reaches a metal field gate (point D) 3.8m wide, with a 'private' sign attached. This gate can be opened, but tracks on the ground indicates that users are also walking around the southern side of the gate making the path here approximately 4.3m wide. From this gate the claimed path continues as a surfaced track (older tarmac than in the previous section) now fenced on both sides, and again approximately 3m wide, in a generally south westerly direction for about 100m to point E. At this point the track splits again with one branch curving off to the south and entering a plot of land with a large black barn and other buildings. The claimed path however continues at 3m wide, through a metal field gate, which is pulled across the track but (at the time of walking) not locked shut, in a generally south westerly direction. From point E the claimed route becomes an unsurfaced track. The gate at point E has a sign reading 'Private Property Keep Out' fastened to the south-western side of the gate (i.e. visible to walkers approaching the gate from point F).
- 4.5 From point E the path continues as an unsurfaced track, approximately 3m wide but with the northern side now becoming slightly overgrown with Laurel and other vegetation so as to slightly narrow the path in places. After about 75m, at point F, the path is blocked by overgrowth and fallen trees and is impassable. The path continues to be impassable for approximately 70m as it runs over land in the ownership of Mr. and Mrs. Ross to point G. On leaving the property the path becomes useable again and continues, at approximately 3m wide over a small enclosed area of land, bounded on the north side by a fence to point H

where it is crossed by a dilapidated metal gate. On some occasions when site visits have been undertaken this has been open, and on others pulled across the path. From point H the path continues in a westerly direction to point I where a track branches off in a south easterly direction. The claimed path continues to point J as a wide path, 3m wide, bounded on both sides by fences. At point J there are wooden gate posts that indicate where a gate once hung. The path continues at the same width to point K where it meets the metalled Private Road called The Stables, which has a width of 4.7m. The claimed route then turns to run in a northerly direction over The Stables, widening at L where it meets Water Lane in a visibility splay that is 11.5m wide.

- 4.6 In investigating the claim and analysing the UEFs it became clear that there were other routes that had been used by some of the users and these will be considered in the analysis below.
- 4.7 The claimed path is currently blocked between point F and G meaning that it is currently impossible to use as a through route.

5. ANALYSIS

LEGAL TEST

- 5.1 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.
- 5.2 A challenge could be in the form of a locked gate, a notice, an obstruction or some other event that brought the intention of the landowner home to the user of the route.
- 5.3 Public use can also lead to the acquisition of public rights at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public. There is no minimum time period over which use must have occurred for rights to be established at common law.
- 5.4 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**.

PUBLIC USER EVIDENCE FOR THE ROUTE

- 5.5 As indicated above in section 4.1, user evidence forms covering the use of the routes by a total of 24 people were submitted during the course of the application. In addition a further user (Mrs Taylor) was interviewed at the same time as her husband, Mr Taylor (UEF 19). There are therefore 25 users who have given evidence to the investigation. User evidence will be discussed

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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 was first challenged.

- 5.6 The applicant indicated that they were prompted to make the application following actions taken in 2015 by owners of land (Mr. and Mrs. Ross) over which part of the claimed path runs. User evidence forms suggested that from about 2015 Mr. and Mrs. Ross blocked the route first with branches and brash at point F and then by allowing the vegetation to grow up such that the route was impassible between F and G.
- 5.7 Evidence from another landowner, Mr. and Mrs. Black, indicates that in 2014, when they moved into their property they installed a gate (not locked) across the path at point J, with a sign saying No Public Right of Way. Although this gate did not last long (see section 5.42 below), it and in particular the notice could also be considered a point of challenge.
- 5.8 An earlier point of challenge has also been identified as being 2013 when Mr. Perry acquired his land, installed the gate at point B and erected signs saying "private drive, no access". This could also be considered a point of challenge.
- 5.9 In addition to these clear acts which could be considered points of challenge (obstruction in 2015, gate and notice in 2014 and gate and notice in 2013), Mrs. Ross suggests that steps had been taken by her and her family before 2015 to stop users of the claimed route (and other routes). She stated that she first became aware that people were walking across her meadow to join the claimed path in 1995 (see plan in **Annex A** for indication of this route, shown by a narrower black line and labeled N-O) and surmised that this use had begun in 1989 when her property was being rented out prior to them purchasing it. After 3 burglaries in the first 3 years of their ownership they improved the fence around the edge of their property. Then, in 1999 they had works done to the land immediately in front of the tennis court, and the tennis court subsequently overhauled which she argues would give the impression that the area was private and not a public right of way. Mrs. Ross says that by 2001-2, still unhappy with the walkers crossing her land over the meadow she worked with Cargills (the then owner of land to the south – now a private gated residential area called Knowle Hill Park) to replace and reinforce the boundary fence. She notes that this reduced users of the route but did not get rid of them completely.
- 5.10 Additional acts that Mrs. Ross considers should have been sufficient to indicate to users of the path that the route was not public include steps taken around 2012-13 to make the area appear more domestic, instructing her gardener to challenge users, challenging users herself, planting a line of fir trees along the eastern boundary, closing a gate at the boundary of the land (in the corner of the meadow at point O, not along the claimed path) and adding the words "Private No admittance" to it, and ultimately locking the same gate. By 2015 she was actively encouraging the claimed path to become overgrown between F and G by not removing fallen trees. She argues that the steps that she and her family have taken consistently over 22 years of their ownership should have been sufficient to indicate that the land is private, domestic and not a public right of way.
- 5.11 Reference has also been made by landowners to two signs which are currently situated on the gates at point D and point E. The gate at point D has a sign stating 'private', while the gate at point E has a sign saying "private property no access". It is not clear, however, when these signs were placed on the gates. Mrs. Turk (a previous landowner 1975 – 2004) considers them to

have been in place since she purchased land in 1975, however very few of the users refer to having seen them and their use was not curtailed as a result.

- 5.12 Despite the evidence from current and previous landowners that the route was not usable for much of the past 20-30 years, there is evidence from users that the route was indeed used until 2015. It is clear that several events have occurred all of which could be considered a point of challenge, however it is incumbent upon the investigation to determine the earliest point of challenge from which to calculate the relevant 20 year period. While Mrs. Ross has described some actions taken by herself and those she employed prior to 2015 to challenge users, these were either not on the claimed path or do not seem to have been sufficient for users to have been aware of them. In this instance the installation of the gate and signs at point B by Mr. Perry have been considered as the first clear point of challenge to users and this then makes the relevant 20 year period with regard to statutory deemed dedication from 1993 – 2013.
- 5.13 Number of users and Years of Use: **Annex D** contains a graph showing years and frequency of use. Of the 25 users there are 15 that have claimed use over the full 20 year period with a further 3 whose use is over 50% of the relevant period. At the start of the 20 years there were 17 users, in 2013 there were 20 users.
- 5.14 Frequency of use: The graph at **Annex D** shows the frequency of the use with the actual times per year stated in a column. By using the actual number it is possible to quantify the number of times the path was used per year at the start and end of the 20 year period in total. Users that have been interviewed clarified their use and some of the frequencies have been amended to reflect the information supplied as clarifications in the interviews. A cautious approach has been taken, and where there is uncertainty as to the frequency of the use, no figure has been included in the calculation (these figures are highlighted yellow on the graph). This means that the numbers stated below are likely to be an under-representation of the actual times the path has claimed to have been used.
- 5.15 In 1993 there were 1358 uses per year of the path, which is approximately 26 per week. In 2013 this use was 2100 per year or 40 per week (rounded down).
- 5.16 Method of use: All of the users claimed use on foot in their user evidence forms and there is no indication that the routes have been used significantly in any other way.
- 5.17 Reason for use: All users walked the path for recreational purposes; walking dogs or for pleasure. Some users indicated that they also used the route to get to the shops/post office.
- 5.18 User interviews: Several of the users were interviewed as part of the investigation and they were able to elaborate on their user evidence forms and explain a little more about their use. The statements are at **Annex E**.
- 5.19 Mrs. Beeby: Spoke of her long knowledge of the path, having grown up in Water Lane and with her mother (Mrs. Pearson) owning a property that backs onto the path. She walked a number of different routes from the rear of the property including the whole of the claimed path and some additional routes

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over land abutting the path. On her User Evidence Form she describes a route that passes the substation and crosses the meadow, and then back to her house, which is a variation from the claimed route (I-O-N). Her use in the 60s and 70s was daily, however she has since moved away, so her use is not as frequent now.

- 5.20 Mr. and Mrs. Butler: Mr. Butler kept a horse at the stables along the path, and this was the reason he found out about the route. He used the path to access the stables as well as to continue along the path. They have met the previous owner of the stables (Mrs. Turk) and she never said anything to them about not using the path. Mrs. Butler's use has been more along an alternative route that runs from point I in a southeasterly and then southerly direction to join Public Footpath 52 Esher. Mr. Butler stated on his UEF that his use was in order to get to his horse and then, from 2007, for dog walking.
- 5.21 Mrs. P Hutchings: Referred to knowing Mrs. Turk and there not being any issue about walking along the path. Mrs. Hutchings did not often walk the section I-L, instead she walked from I, past the electricity substation and south to Public Footpath 52 Esher. She also referred to her most common walk as going up, past the tennis court, across the meadow to join a different path there (N-O).
- 5.22 Mr. and Mrs. Gaskell: Stated that their most frequent route was across the meadow adjacent to the tennis court, having walked down the path from Esher Public Footpath 52 (M-O-N). They would then continue back to Littleheath Common along the claimed route (N-F-E-D-C-B-A). They also knew Mrs. Turk as their daughter had a pony at the stables and was in the Pony Club with her; Mrs. Turk never told them not to walk that route.
- 5.23 Mr. Lumley: Stated that he walked a circular route taking in the path that leads past the substation to Public Footpath 52 Esher (K-J-I-O-M- then along Esher 53 and across the common to B or C and back along the claimed route to his home in The Stables). Mr. Lumley also indicated that he asked permission of one of the landowners (Mr. Perry) to walk on part of the claimed path. Mr. Lumley lives in The Stables and so has an ownership interest in the land over which the claimed path runs from K-L
- 5.24 Mrs. Rutherford: Talked about how her use had increased over the years, and that from 2002 use was weekly. There were a number of routes she used that the claimed route was one of. She added that she thought the majority of people cut across the field (the meadow adjacent to the tennis court), rather than use the full length of the claimed path.
- 5.25 Mrs. Lowthian: Talked of how in the past the area was a lot more open, and that it was a well-used path that was sufficiently surfaced to take children on bikes down there. Mrs. Lowthian referred to walking the path as a safe, pleasant alternative to the road.
- 5.26 Mr. Fossett: Mr. Fossett lives in The Stables and so has an ownership interest in the land over which the claimed path runs from K-L. He has walked most of the claimed path very frequently; 3 times a day for the last 18 years. He has

also walked the path that runs south past the substation to Public Footpath 52 Esher (I-O-M).

- 5.27 Mr. and Mrs. Taylor: Talked about their lifelong connection to the area and about how they had used the claimed route in different ways over the years. Their use increased from 2002 as they started walking with a dog. Their recollection is that it looked and felt like a lane, rather than part of someone's garden.
- 5.28 Mr. Page: Mr. Page has been the Countryside Officer for Elmbridge Borough Council, with responsibility for Littleheath Common, since 1991. He has used part of the route about 8-10 times in total (he would access it having walked down the path running north from Public Footpath 52 Esher M-O). He described the route as having the appearance of an old cart track. He does recall having to climb over a gate at one point and remembers signs of some description, but he stated he did not realise it wasn't a public footpath.
- 5.29 Alternative routes: Some of the users referred to additional or alternative routes that they also used. In particular there is a path that links Public Footpath 52 Esher north to the claimed path, joining it at point I (I-O-M). There is also a route that some users have said they used some of the time running across the meadow adjacent to the tennis court to come out on the other additional route that runs up to 52 Esher (N-O). These routes are shown on the plan in **Annex A**.
- 5.30 The fact that users have walked more than a single linear route means that their evidence needs to be treated with a certain amount of care. If, for example a user has completed the UEF to say that they have used 'a route' three times a month over a period of time, but in reality have actually only used part of the route or a different route as well, it may be that they have only actually walked the full claimed route once a month. A relatively frequent level of claimed use may apply to the whole of the path, part of the path, and/or an additional path that has not been shown on the map. This means each individual path may have been less used.
- 5.31 Out of the 25 users, 9 gave some indication that they used the additional route as well (I-O-M), either by showing this route on the map, referencing the route in their description or making reference to furniture that is to be found on other paths. 4 indicated that they walked across the meadow between the claimed route and the path leading to Esher FP52 (N-O). The impact of this is considered when the user evidence is analysed below.
- 5.32 Permission granted/connections to the land:
A few of the users indicated that they had specifically asked or been given permission to walk at least part of the claimed path. Mr. Lumley had asked permission of Mr. Perry for permission to walk over his section of the claimed path. Mrs. Thorne had asked for permission in 2005 (from an unknown landowner) although her use had started back in the 1970s and so use up until that point was without permission. Mrs. Ross and Mrs. Turk (a previous landowner) both indicated that permission was given to Mrs. Pearson to walk the path. Mr. Butler, Mrs. Patrina Hutchings, Mr. and Mrs. Gaskell and Mrs.

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Rutherford have all indicated that they either kept a horse at Mrs. Turk's stables or (in the case of Mrs. Hutchings) visited the stables to muck out a friend's horse. None of these users indicated that they had ever specifically asked permission of Mrs. Turk to use the path and they all stated that they walked on from the stables without considering that they had to ask permission. Mrs. Turk stated that she had not given anyone permission to use the path, with the exception of the children of a Mr. and Mrs. Bailey, a Mrs. Cowlard and Mrs. Pearson.

- 5.33 Limitations: Currently there are gates at points B, D, E and H. There was also for a short period of time in 2014 a gate installed at point J. The gate at B is electronically controlled and has been in situ since 2013. Gates at D, E and H are historic, and most users refer to at least one of them. All users that refer to gates state that they have never been locked until recently when the one at H started to be locked from about 2015/2016. Four users stated that there were no gates on the route at all.
- 5.34 Width: The width given by users for the route used varies considerably, from 1m to 5m wide. Between A and K the path is a relatively wide, mainly surfaced track approximately 3m wide. The gate at point D is 3.8m wide and has a gap to one side which has been used as an alternative (although it can be opened) and in total the path is 4.3m wide here. On the section K-L where it runs on the Private Road, The Stables, the available width is 4.7m and at L the path widens to a visibility splay of 11.5m.
- 5.35 Signs: Currently there is a sign on the gate at point D saying "Private" and at the gate at point E saying "Private Property Keep Out". There was also a sign at point J where a gate was temporarily located, saying "Private Land No Public Right of Way", although the gates were only in place for a short while in 2014, and the sign has also recently been removed. 6 users refer to having seen signs along the route when they walked it, however all state that these are recent additions to the route. Only one of the users, Mr. Fossett, refers to a sign having been there for any length of time, and then only the Private sign at point D which he states has not been there continuously.

LANDOWNERS'/ADJACENT LANDOWNERS' EVIDENCE

- 5.36 There are a number of different landowners that own the land parcels over which the routes run. All landowners and adjacent landowners have been approached and statements were taken from some. **Annex F** contains a map showing landownership, while **Annex G** contains copies of the statements. In addition some people with connections to the land either currently or historically came forward wanting to give information and evidence in support of the landowners and this information is included here.

Mr. and Mrs. Ross

- 5.37 Mr. and Mrs. Ross have owned land over which the claimed path runs since 1995. Mrs. Ross was interviewed and indicated that she does not believe that the route has been passable for much of the time that they have owned it, and that in summer it was always impassable. She accepts that some people did

walk diagonally across their meadow (N-O), and states that she took steps to stop them doing this. Mrs. Ross indicated that she had given permission for one person, Mrs. Pearson, to walk across the meadow but that she has never given permission to anyone else.

- 5.38 Mrs. Ross outlines in her statement the steps that she has taken over the years of her family's ownership of the land to show to the public that there is no public right of way over her property. This includes instructing her gardener to challenge users, challenging users herself, erecting better and more secure fencing around the boundary of their land, planting a line of fir trees along the eastern boundary, digging up the surface of the path for grounds maintenance, closing a gate at the boundary of the land (in the corner of the meadow, at point O, not along the claimed path) and adding the words "Private No admittance" to it, and ultimately locking the same gate. Finally in 2015 Mrs. Ross did not clear a laurel tree that had fallen across the path and took steps to reinforce that barrier and this had the ultimate effect of prompting the schedule 14 application.
- 5.39 Mrs. Ross highlighted various actions that had been taken by members of the public in their attempts to access her land to walk the claimed path and/or a route across the meadow and she recounts altercations she has had with walkers and their dogs.
- 5.40 Documentary evidence was also submitted by Mr. and Mrs. Ross, including a statutory declaration made by a previous owner of their land referring to vehicular rights conferred to them initially on payment of an annual fee and then given freely, by an earlier owner of part of the track (that part which runs between H and K). This statutory declaration indicates that, from a date sometime between 1919 and 1934 a locked gate was erected and maintained at a point referred to as point A and which, with reference to modern maps appears to be the location of the current dilapidated gate at point H. This part of the claimed route is that which is now owned by Mr. and Mrs. Black (see **Annex F**).
- 5.41 Mr. and Mrs. Ross also submitted information from the planning report dated 2011 relating to the development of Littleheath Farm which refers to the site being accessed via a private track. Further submissions included a letter (copied in **Annex G**) dated 2017 setting out their views and a timeline of steps they had taken since purchasing the property, copies of receipts for works done on the land, a police report regarding an incident of criminal damage on the land, photographs and a number of letters and statements from friends and family who write regarding their knowledge of the land having visited it and played tennis on the court. In addition they submitted a statement from Mrs. Turk, a previous landowner of land adjacent to Mr. and Mrs. Ross' land, and who owned part of the claimed route (this is described in more detail below)

Mr. and Mrs. Black

- 5.42 Mr. and Mrs. Black have owned land over which the path runs between K and H since 2014. Shortly after moving in they installed a wooden field gate, with signs stating that the route was not public, across the path at point J, leaving it unlocked so that permitted people could continue to use the route. The

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intention was to indicate to the public that the route was not public. Within a very short period of time the gate was stolen, although the signs remained in situ for longer (they have now been removed).

- 5.43 Mrs. Black commented that she had rarely seen people walking on from their land onto Mr. and Mrs. Ross' land, but rather people tend to turn and walk up, past the electricity substation (I-O).

Mr. and Mrs. Perry

- 5.44 Mr. Perry gave a statement to say that they bought Littleheath Farm as a development project in 2012 and moved in in 2013 when the property was completed. They own part of the track over which the claimed route runs between B and E. The electronic gate that crosses the path at point B was installed by them shortly after moving in. It includes a sign saying Private Drive No Access. Mr. Perry indicated that the gate at point D has been in place for over 35 years and that the 'private' sign which is present on it was been there in 2013 when they moved in. He also referred to the gate at point E with the sign reading 'Private Property Keep Out' which was also there when he moved in in 2013.

- 5.45 Mr. Perry confirmed that he has given permission for Mrs. C Cowlard to use the route to access her horse which is stabled on his land. He also confirmed that he has a private right of access along the length of the claimed path to get to buildings that are located past the Ross' land (H). He stated that at the moment he cannot use this right because the route is overgrown, but that he is not greatly concerned by that. He also confirmed that he has challenged people using the track if he has come across them, since 2013, as he does not believe that the route is a public right of way.

- 5.46 In a later email he clarified the details regarding the electronic gate, confirming that the gate at point B is able to be opened with a push button, rather than by remote from inside the house – which is how a further gate closer to his property is opened and not on the claimed route. His statement has been amended to reflect the clarification.

Mrs. Cowlard

- 5.47 Mrs. Cowlard wrote in to state that she has kept horses on the land (owned by Mr. Perry) for well over 35 years and that she understood the claimed route to be access for people who owned the garages at the far end of the path and the houses that backed on to it only, and not a public right of way. She stated that she always expected to challenge anyone else using the path and that this resulted in a safe place to keep horses.

Mrs. Bailey

- 5.48 Mrs. Bailey has lived at 51 Littleheath Lane for 30 years. It is accessed along the track from Littleheath lane to point C, continuing in a southerly direction, past Littleheath Farm. Part of the track forms part of the claimed route. She stated that she has walked the claimed path once, out of curiosity, but that when she came to an area that appeared to be someone's back garden she stopped.

5.49 She confirmed that the electronic gate at point B has been in place since the Perry's moved in to Littleheath Farm, although she could not precisely recall if there was one in the same place prior to this one being installed. She felt that it was likely that there was one as there are posts and the previous occupants had been very private.

5.50 Mrs. Bailey talked about the time when the stables along the claimed route were operational. She recalled that there was about a dozen horses there and that it was quite busy. She indicated that Mrs Turk, the owner, was keen on privacy and that she would tell people to leave if they didn't have reason to be there.

Mr. Page, Elmbridge Borough Council

5.51 Mr. Page has been the Countryside Officer for Elmbridge Borough Council since 1991 and has been responsible for Littleheath Common in his role. He referred to the electronic gate at point B, but does not recall a gate being there before Mr. Perry installed it. Mr. Page has walked most of the route 8-10 times in total (although not the section between I-L, turning instead to walk from I-O-M). He clearly remembers it as an open, wide cart track. He was put off using the route by the current obstructions. He recalls a gate at the sharp bend (point D) and another by the large barn (point E) and that this had a sign on it in the same location as present day (i.e. visible when walking from west to east).

Elmbridge Borough Council

5.52 EBC owns the section of the claimed path that is registered common land between points A and B. They responded to consultation by stating that as registered Common Land the area is open for public access at all times. The claimed route follows a vehicular access track to private properties which have existing prescriptive rights to cross the Common by vehicle. They added that EBC has no objection to this claim for a Right of Way, and that it would be a welcome addition to the Rights of Way network in this area.

Mrs. Turk

5.53 Mrs. Turk owned land over which part of the claimed path runs (between approximately D and E) from approximately 1975 – 2004, running a stables on the land to the north of point E. When purchasing the land to run the stables from she also had to purchase the strip of land over which the claimed path runs, and the two buildings that were located at H (now demolished). During the period of time of her ownership of the land she lived at 32 Water Lane and would access the stables from the rear of her garden. She accessed her stables several times a day in order to look after the horses. Visitors to the stables would access them by using the track from Littleheath Lane (A).

5.54 Mrs. Turk explained that she did have a problem with people thinking they could continue along the access track for purposes other than to access the stables. She indicated that things kept on happening like gates near the dilapidated garages being removed (point H). She indicated that together with the previous owners of Hazel Glen (the Doggetts) they agreed that they would allow the track to become overgrown to deter users. She accepted that she didn't think it ever became totally impassable, but that passage would have been more difficult.

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5.55 Mrs. Turk described the track as it entered and left her land as being gated at both ends, although accepted that they might not have always been closed as people used the track frequently, but that both gates had the word 'Private' on them to show that the route was not public. Mrs. Turk also stated that if she ever saw people using the route she would stop them.

5.56 In a later email to clarify regarding people using the route after accessing the stables where their horse was stabled, Mrs. Turk added: "The people that did keep horses at my stables walked across my fields (not using the footpath) from the cottage in the woods. They were the children of Christine and Michael Bailey. Another person that walked across my land was the Cowlard children (mother Carole). None of these used the footpath because it was private to us. The only other was my neighbour Mrs. Pearson who was allowed to walk across our footpath to get to my land to walk her dog. This was with my permission. Apart from the people mentioned above, no one else walked across our land or footpath".

Mrs. Koep

5.57 Mrs. Koep owns land adjacent to the claimed path, and has been there for 4 years. She stated that she had only seen people walking on the path about 3 times and does not believe that the route is public.

Mr. Lawrence

5.58 Mr. Lawrence has owned a property in The Stables since 2007, and has an interest in the land over which the claimed path runs from K to L. He and his wife have walked the section from K to I, but have always turned at point I and walked up past the electricity substation. They stated that they have never continued on through the gate at point H as this has always been closed and appeared barricaded to them. They indicated that they have seen other people using the route that they use, but that they would not want the route to become a public footpath.

Knowle Hill Park

5.59 The land over which a route between I and M runs is part of a gated residential community known as Knowle Hill Park. Historically this land was part of the Schiff Home of Recovery, a convalescent home for post-operative patients from London. It closed as a home in 1980 and became offices before being redeveloped into the existing residential community. The senior property manager for the company acting for the residents responded to enquiries about the alternative path by stating that he is "not of the knowledge of any restrictions to this pathway...nor of any residents that live on or near the development that have tried to restrict access to it. I therefore do not see any existing objections in place regarding this pathway".

5.60 His comments refer solely the section of path from I-O-M.

UK Power Networks

5.61 UK Power Networks own the electricity substation, and wrote to state that they have no objection.

DOCUMENTARY EVIDENCE

- 5.62 **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.
- 5.63 **Ordnance Survey County Series Map 1:2500 dated 1884, 1895, 1913 & 1934 (sheet XVIII:6).** There is a route that approximates to the route of the claimed path shown on all editions of the County Series Map. The maps indicate that the route between A and D only became available in the current location at some point between the 1884 and the 1895 editions. The 1884 edition indicates a different alignment to the path between A and D. All editions indicate that there was a through route between point D and the buildings that are where The Stables Private Road is now (point K). The route is shown variously with solid lines or pecked lines either side to illustrate locations where there were solid boundaries and areas where it was open to the adjacent land. The earliest edition indicates this route stopped at the property at point K, while the 3 later editions suggest that there was a route through to the road at point L. The maps indicate that there were other paths running up the field edge from the approximate location of the tennis court and between point I-O-M at Knowle Hill. There is no annotation on the plan to indicate what the Ordnance Survey considered this route to be and it is braced across the path to indicate that it was considered a part of the plot of land either side, rather than a separate title.
- 5.64 **Tithe Map:** The majority of the claimed route runs over land that is not included in the Cobham tithe. The exception being plot number 30 over which the claimed path runs in part. The route itself is not shown on the plan. The tithe book records this plot as being owned by Lady Moore, and being Meadow. There are no remarks made in the book that refer to a public right of way over the land.
- 5.65 **Aerial Photography:** Aerial photography does not add to our understanding of the route as the area is too wooded to show any paths.
- 5.66 **Finance Act Map and Record 1910 (IR58/87828):** The claimed route runs across plots of land numbered 220 and 223 for the purpose of the Finance Act taxation. The taxation books indicate that plot 220 was Knowle Hill Park and that a deduction of £25 was made for rights of way or user. Plot 223 was also described as Knowle Hill Park and there was a deduction of £20 for rights of way or user. The claimed route itself is not identified on the plan, other than on the base Ordnance Survey Map and it is unclear whether the deduction relates to the claimed path or other paths. As there are Definitive Rights of Way that run over both of these plots, it is unclear to what the deduction refers.
- 5.67 **Knowle Hill Estate Sale Plan 1904:** This document refers to the sale of Knowle Hill in 1904 and shows the whole of the estate shaded pink. This includes the whole of the claimed route, with the exception of the section A-B. It is shown as part of plots numbered 305, 297, 287, 301 and 274, and as being excluded from plots 286 and 300 but without a number. The book that

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accompanies the sale plan describes these plots as follows:

305	Stables, Farm Yard, Kitchen Garden
297	Orchard
287	Wood
301	Wood
274	Grass
286	Grass
300	Arable

- 5.68 There is no reference in the plan to the claimed route, or to whether it was considered public or private over the estate. There is also no mention in the document of the route that is now recorded as Public Footpath 52 Esher, although it is shown on the base plan as a double pecked line running through the southernmost plots of land.
- 5.69 **Knowle Hill Estate Sale Plan:** This is the sale document relating to the sale of Knowle Hill at a date unknown. It details the plots of land included in the sale, but there is no mention of a public right of way across any of the land.
- 5.70 *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.
- 5.71 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 Elmbridge Borough Council, Borough and County Councillors, The Ramblers, The Open Spaces Society, The British Horse Society, the CTC and all relevant landowners including adjacent landowners have been consulted.
- 7.2 Elmbridge Borough Council responded to state that they have no objection the claim for a right of way and indicated that they felt it would be a welcome

addition to the Rights of Way network in the area.

- 7.3 Mrs Janet Miller, retired Bridleways Officer for the BHS, replied to state that she has walked the route once with difficulty due to plentiful obstructions and excess weed growth. She stated that she could see the route had been maintained when the Estate owned it, but access had not been maintained. She added that she could not assist with providing evidence of use over 20 years.
- 7.4 Mrs. Mary Lewis, Surrey County Councillor for Cobham, responded to say that she wholeheartedly supports the application and herself used the route for many years. She added that she moved to her current house in Stoke D'Abernon Cobham in 1988 and used the path intermittently since then, and that between 2002 and 2005 she walked with dogs along that route at least once a week. She stated that she used it intermittently since then until it was blocked off- firstly with a metal gate at the Littleheath end (which they would open and close) and then with more difficult obstacles at the Water Lane end. Mrs. Lewis added that the path was well known locally for having a lot of primroses alongside it in the Spring and that many local people walked along there in springtime to see them.

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.

10. LOCALISM

- 10.1 There are no localism issues.

11. OTHER IMPLICATIONS

Area assessed:	Direct Implications:
Crime and Disorder	No direct implications
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 1998

- 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 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 described in **Annex C** of this report. As such the recommendations in this report are not considered to be in breach of the 1998 Act.

13. DISCUSSION AND CONCLUSION

- 13.1 Impact of Common Land
The land in question between A and B is in the ownership of Elmbridge Borough Council and is registered Common Land under the 1965 Commons Registration Act.
- 13.2 The public have a right of access over land registered as Common Land under the 1965 Commons Registration Act.
- 13.3 This would apply in this instance to the land from A-B 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.
- 13.4 The remainder of the claimed route B-L
Any decision regarding the remainder of the claimed route 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.
- 13.5 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”.

- 13.6 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.
- 13.7 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”.
- 13.8 Calling into question:
There are 3 key acts which could be identified as the point at which the public’s right to use the claimed path, and these are described in sections 5.6 – 5.12. These are the installation of a gate and notice at point B in 2013, a second gate and notice at point J in 2014 and the obstruction of the way between F and G in 2015 that prompted this application. Although Mrs. Ross has outlined other actions that she took to try to alert the public that the route is not public the three actions highlighted above are the most significant, as they are the ones that are corroborated by the public. 2013 being the earliest date, this is therefore the date of calling into question and the relevant 20 year period is therefore 1993-2013.
- 13.9 Public Use:
The users that have completed UEFs live in the local area with most living in Cobham and the surrounding villages. There is one user who has now moved away. This would be considered as use by the public.
- 13.10 Sufficiency of use – statutory deemed dedication:
Volume and frequency of use of the claimed route has been discussed in section 5.13 & 5.14. It is acknowledged that the strength of the evidence is reduced by the introduction of the use of additional and alternative routes, over the meadow and along the path to Esher FP52. However, there is still a reasonable body of evidence describing a long and frequent use of a path, throughout the relevant 20 year period and earlier, which would have provided members of the public with a safe, off road rural alternative to walking along Water Lane.
- 13.11 Lack of intention to dedicate:
There is some evidence of a recent lack of intention to dedicate, and certainly current landowners have indicated that in their minds they were clear about their intention and they consider that they made it clear to users that the route was not public. Mrs. Turk, a previous landowner gave evidence to suggest that she felt she had given members of the public a clear indication that the route over her land was not to be considered public. However this is in conflict with the user evidence which indicated that use continued throughout her ownership, and that while there were some users

that were aware that Mrs. Turk owned some of the land, they recall no intervention to their use of the route. The clearest and most consistent actions have occurred since about 2013 with the actions of Mr. Perry, Mr. and Mrs. Black and Mr. and Mrs. Ross. It is clear that from that date the lack of intention to dedicate has been brought home to the users, with the desired effect that use had been reduced to almost nothing with the blocking of the path between F and G finally by 2015.

- 13.12 Some of the actions that Mr. and Mrs. Ross have referred to prior to 2013 (reinforcing boundaries, locking gates not on the claimed route, maintaining the tennis court) were not directed at users of the claimed route. Others, such as maintaining the land to give a more garden like appearance would not necessarily be inconsistent with the route being a public footpath. Prior to 2013 it would seem that the lack of intention to dedicate was not made sufficiently clear to the users of the path. Use continued and users indicated that it was only the actions of Mr. and Mrs. Ross from 2015 that really made them aware that the route was not public and that the landowners did not want the public to access the land.
- 13.13 Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable (*R v Secretary of State for Wales ex parte Emery* 1997). It is therefore felt that it is reasonable to allege that a public footpath exists over the claimed route between B and L (see 13.1 – 13.3 for explanation of why rights cannot be reasonably alleged to exist over the section of claimed route A-B).
- 13.14 Sufficiency of use – Common Law:
Public use can also lead to the acquisition of public rights at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public. There is no minimum time period over which use must have occurred for rights to be established at common law.
- 13.15 There is no suggestion that the owners of the land over which the claimed path runs did not have the capacity to dedicate. The evidence as already outlined of use over many years and with relative frequency could be viewed as evidence of implied dedication by those landowners. The evidence of use would also indicate acceptance of the dedication by the public. It is therefore felt that it is reasonable to allege that there has been a common law dedication of a public right of way over the claimed route B-L (see 13.1 – 13.3 for explanation of why rights cannot be reasonably alleged to exist over the section of claimed route A-B).

13.16 Width

The width given by users for the route used varies considerably, from 1m to 5m wide. Between A and K the path is a relatively wide, mainly surfaced track approximately 3m wide. The gate at point D is 3.8m wide and has a gap to one side which has been used as an alternative (although it can be opened) and in total the path is 4.3m wide here. On the section K-L where it runs on the Private Road, The Stables, the available width is 4.7m and at L the path widens to a visibility splay of 11.5m. In this instance, from the widths available on the ground and from the widths indicated by the users it is considered appropriate to record the following widths: B-D 3.0m, gate and gap at point D 4.3m, D-K 3.0m, K-L 4.7m widening to 11.5m at L.

13.17 Additional and Alternative Routes

There is some indication that members of the public have also been walking routes between I-O-M and N-O and these routes were also therefore considered as possible rights of way. The number of people alleging use of these routes, however, is much smaller than the main claimed route. There is currently insufficient evidence to reasonably allege that they should be recorded as public rights of way.

14. CONCLUSION

- 14.1 In light of the above, it is the Officer's view that it is reasonable to allege that by virtue of the use by the public on foot, public footpath rights have been acquired over the route B-K as shown in **Annex A** under section 31 of the Highways Act 1990 and at Common Law.
- 14.2 No public footpath can be said to exist over the claimed route between A and B by virtue of the fact that the land is registered Common Land.
- 14.3 There being a reasonable allegation of public rights, it is incumbent upon the County Council to make a Definitive Map Modification Order to record the route so that the evidence may be tested at public inquiry should objection be received,

15. WHAT HAPPENS NEXT?

- 15.1 Committee can agree with the officer recommendation, in which case an order would be made to add Public Footpath No.96 (Esher) 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
- 15.2 Alternatively, Committee may be of the opinion that there is insufficient evidence to reasonably allege that public rights exist over the route and it may disagree with the officer recommendation and direct that no order be made.
- 15.3 Additionally, if Committee is of the opinion that there is sufficient evidence to reasonably allege an alternative route it may direct that an order be made to record that route instead of, or as well as, the claimed route.

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- 15.3 Where the County Council decides not to make an order, the decision may be appealed to the Secretary of State. If such an appeal resulted in a Public Inquiry the County Council would take a neutral stance.
- 15.4 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.
- 15.5 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.
- 15.6 All interested parties will be informed about the decision.

Lead Officer and 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** - User Statement
- F** - Land ownership
- G** - Landowners statements

Sources/background papers:

File 'CP568' including all relevant correspondence and documents can be viewed by appointment at our Merrow Offices.

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