

SURREY COUNTY COUNCIL

LOCAL COMMITTEE (WAVERLEY)

DATE: 19 JUNE 2020



LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER

SUBJECT: MAP MODIFICATION ORDER: APPLICATION TO ADD THE WIDTH OF 30' TO THE DEFINITIVE STATEMENTS FOR BRIDLEWAYS 99 (PART OF) AND 101 (PART OF) IN THE PARISH OF THURSLEY

DIVISION: WAVERLEY WESTERN VILLAGES

SUMMARY OF ISSUE:

An application was received for a Map Modification Order (MMO) to add the width of 30' to the Surrey County Council (SCC) Definitive Statement (DMS) for Public Bridleways 99 (part of), 99a and 101 (part of) in the Parish of Thursley.

It is considered that the evidence shows that the width of 30' can be shown over the routes on the balance of probabilities. As such a legal order to modify the DMS should be made.

RECOMMENDATIONS:**The Local Committee (Waverley) is asked to agree that:**

- (i) The width of 30' is added to the Definitive Statements for Public Bridleways 99 (part of), 99a and 101 (part of) over the extents shown A-F on drawings 3/1/14/H54 and 55 in the Parish of Thursley and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Statements as outlined is approved.
- (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 determination.

REASONS FOR RECOMMENDATIONS:

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to keep the Definitive Map and Statement (DMS) under continuous review and by order make any modifications to it that are required in consequence of the occurrence of certain events.

The Elstead Inclosure Award of 1857 laid out a public driftway and heath road along both BW 99 and BW 101 with a width of 30' (9.1m). These legal widths, to the standard of public bridleway continue to persist and should be recorded on the definitive statement on the basis that they subsist on the balance of probabilities. A MMO to record these widths should be made.

Although some of the evidence considered may also support the existence of higher rights, this is not deemed sufficient on the 'balance of probabilities. No order to record higher public rights over BW 99 and 101 should be made.

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1. INTRODUCTION AND BACKGROUND:
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1.1 On 14 May 2013 and 13 August 2013 Mrs Sandra Smith submitted two applications for Map Modification Orders (MMOs) to add the width of 30' to the Definitive Statements for

- i. Public Bridleways 99 (part of) and 99a in the Parish of Thursley from the junction of Houndowns Lane with Woolfords Lane (O.S. Grid Reference: 489334 140887), to the junction with Thursley Road (Houndown Road), (O.S. Grid Reference 489280 139727). (Hereafter referred to as 'BW 99') Shown A-C on drawing H54.

- ii. Public Bridleway 101 (part of) in the Parish of Thursley from Thursley Road, Truxford Cottage at O.S. Grid Reference 488610 141386, to the Lions Mouth on Hankley Common at O.S. Grid Reference 488761 141400 respectively (hereafter referred to as 'BW 101'). Shown D-F on drawing H55.

(Annex A).

1.2 These applications were prompted by work undertaken by the Ministry of Defence's (MoD) land agent 'Landmarc' to remove trenches and banks alongside parts of BW 99 and 101; by the proposed closure of the car park near Lions Mouth and also by the attempt at first registration of the BWs by the MoD in 2012.

1.3 It is considered that the evidence shows that the width of 30' can be shown over the routes on the balance of probabilities. As such a legal order to modify the DMS should be made.

2. ANALYSIS:

2.1 No first-hand evidence of 'use' has been submitted with regard to this route so we cannot rely upon section 31 of the Highways Act 1980 where use has been enjoyed by the public for a 20-year period, calculated retrospectively from the point at which that use was first challenged.

2.2 Implied dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and the public has accepted the dedication. In this case the documentary evidence provided must enable an inference of dedication and acceptance of a right of way. Section 32 of the Highways Act 1980 requires a court or tribunal to take into account any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate before determining whether or not a way (and its extent) has been dedicated as a highway. If the evidence is sufficient to show that the particulars of the DMS should be modified then the general principle "once a highway always a highway" will apply if no lawful extinguishment can be shown. Any evidence must be considered with regard to its entire effect not just that applied for by the applicant. If there is cogent evidence, which is sufficient to displace the presumption that the DMS is correct and shows that on a balance of probabilities additional or higher rights exist, then any order made must reflect this.

HISTORIC EVIDENCE

Inclosure Award and Map:

- 2.3 The main body of evidence upon which the applicant bases their claim is the Elstead Inclosure Award of 1857. This award describes the allotment of land for:

*“One Public Driftway or Heath Road of the width of thirty feet numbered 25 on the said map commencing in the Houndown Road at a point marked **M** on the said map and extending thence in a Westwardly, Northwesterwardly and Eastwardly direction to and terminating in the Elstead and Truxford road at a point marked **N** on the said map”*

This equates to the current bridleways 99 (part of) and 99a known as Houndown Lane.

- 2.4 and

*“One other Public Driftway or Heath Road of the width of Thirty feet numbered 32 on the said Map commencing at Truxford at a point marked **O** on the said map and extending thence in Westerly direction to and terminating at the Lions Mouth at a point marked **P** on the said map”. The boundaries of this route were legally defined in the Inclosure Award with a width of 30”.*

This equates to the current bridleway 101 (part of) known as Woolfords Lane. This route ends at the point known as Lions Mouth as it reaches the edge of the Inclosure Award in question. There is no allocated award to the north-west of this point.

- 2.5 There are no references in relevant contemporary Highways Acts prior to 1857¹ to identify ‘public driftway’ or ‘heath road’ as classes of public highway. Generally the former was used to identify horseways or routes for driving cattle. No definition whatsoever of the latter has been found in Acts or other literature.
- 2.6 The award also once refers (incidentally) to “*the public carriage road leading from Farnham to Thursley at a point marked B on the said maps...*” when describing the route taken by the boundary between adjacent Manors. This seems to equate to point F at Lions Mouth which is BW 101. There is no suggestion however that the Award creates or confirms public carriage road rights, nor does it refer at any point to carriageway rights when laying out public driftway 32, or with reference to any others ways which cross or have junctions with it.

Tithe Map and Award:

- 2.7 Both of the routes in question are shown clearly and identically on the Elstead Tithe Maps of 1841 with a sepia tint. These maps were not compiled however for the purposes of recording public rights of way or highways. The routes in question are not numbered which might suggest they were exempt from Tithe and perhaps considered public highway. There was however no standard by which this notation was used. A comparison with other routes and their current day status does not infer any useful conclusion- some are full highways and others carry no rights at all- so this cannot be relied upon. It is nevertheless good evidence of the existence of the way on its current line. On these maps the route

¹ In the 1862 Highways Act a driftway is described (in footnote of s. 36) as a way which the public have a right to use either on foot or horseback and is called a pack or prime or drift or bridleway.

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continues in the same fashion across Hankley Common all the way to Abbot's Pond and presumably Tilford Road; it does not stop at Lion's Mouth (F).

Historic Maps:

2.8 Discussions of map keys are provided where available.

Map name / Date	BW 99	BW 101
Senex 1729	Not visible on the map	A route shown by double pecked lines runs south-east to north-west approximately to Lion's Mouth. It then continues over the common but on a more southerly route than it does today.
Bowen 1753	Not visible on the map	A route shown by double pecked lines runs south-east to north-west approximately to Lion's Mouth. It then continues over the common but on a more southerly route than it does today.
Roques 1770	Not visible on the map	The first (easterly) section from Thursley Road to where Woolfords Lane now turns to the north is clearly visible but there is no visible route north-west of this
	This notation is recorded in the key as 'road' across 'heath'	
Lindley Crosley 1793	Not visible on the map	This shows as a double pecked line running south-east to north-west from Thursley Road to Lions Mouth. It also continues to the north-west along the same route as exists today
	Routes indicated with double pecked lines are not explained in the key of this map but are mysteriously shown next to the label for heaths and commons.	
Mudge 1816, Ordnance Survey Drawing 1816	This is the first map to show this route, running north –south along the western side of the valley to the west of the land now known as Houndown	This shows as a double pecked line running south-east to north-west from Thursley Road to Lions Mouth. It also continues to the north-west along a similar route as exists today. There are numerous other tracks across the land
Greenwood 1823	Not visible on the map	This shows as a double pecked line running south-east to north-west from Thursley Road to Lions Mouth. It also continues to the north-west along the same route as exist today, running north of Abbots Pond
	The pecked line is recorded on the map's key as ' CrossRoads'	
Trigonometrical Survey 1874	Not visible on the map	This shows as a double pecked line running south-east to north-west from Thursley Road to Lions Mouth. It also continues to the north-west along the same route as exist today
Bartholomew 1902-06, 1924, 1942	This route is shown the same on all three maps, running from Woolfords Road south to Pitch Place and shown by two solid parallel lines.	This route is shown the same on all three maps, running from Thursley Road to Tilford Common via Lions Mouth and shown by two solid parallel lines.

	The key to the Bartholomew Maps suggest that these uncoloured routes are considered 'inferior and not to be recommended to cyclists. The key also notes that 'the representation of a road or footpath is no evidence of the existence of a right of way'. The purpose of this commercial mapping was however to demonstrate routes available for use.
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- 2.9 Most of the above maps were produced for sale to the travelling public and so were more likely to show roads for public use than those they could not use, insofar as their information was correct. It is more debateable whether these were full roads or merely bridleways. Where the route is shown it is not shown as any different to roads which are today public highways for all purposes. Conversely there are also indicated many roads which today are clearly private ways, lesser highways or indeed no longer visible and useable on the ground, so it is difficult to put significant evidential weight on these maps.

1910 Finance Act:

- 2.10 Finance Act records were compiled to establish the extent and value of landholdings so that upon the sale of land tax could be levied on any increase in land value. The full extent of both of the routes appear uncoloured on the maps prepared for the purposes of this Act. Such uncoloured parcels tend to represent features which 'may' be carriage roads, but may also include bridleways and other such features like common land and railways embankments. This is land which was excluded from adjoining land for taxes purposes. In this case the uncoloured sections are well defined by the solid lines provided by the Ordnance Survey Base map (last surveyed in 1895) and clearly delineate the extent of 'roads'. The base maps were accurately surveyed and reproduced here at a scale of 1:2500. Along both claimed ways the unshaded area indicates a width throughout of around 10m (or 30'). Whilst there is some variation to a greater width in places, it rarely goes below this. Where a route is shown as uncoloured this is regarded as strong evidence of the existence of public rights. In this case they can be inferred across the full 10m (30') width). The uncoloured section stretches from Truxford Lane to Lions Mouth along BW 101 and from Woolfords Lane along Houndown Lane (BW 99) to Pitch Place. At the southern end of Houndown Lane the uncoloured section bifurcates in the same way that the current bridleways 99 and 99a do, although the 10m uncoloured width continues along 99A whilst a much narrower uncoloured route runs along 99. The uncoloured section does not continue across Hankley Common north-west of Lions Mouth inferring that this section was not considered to be exempt from tax and therefore less likely to be a public carriageway. This also seems to imply that the 1910 Act is only (and could only) reiterating those rights laid out by the Inclosure Award to the standard of driftway- considered a lesser highway. It is not known whether the valuation books which accompanied the maps included a reduction for public rights of way beyond Lions Mouth. These records provide evidence, not only of unrecorded width but also of unrecorded rights. S. 35 of the Finance Act 1909-10 provided that no duty under this part of the act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority (e.g. highway authority). The implication being that uncoloured roads have no duty chargeable and must therefore vest in the highway authority. This was often, but not always, as full highways.

Ordnance Survey Maps:

- 2.11 Both routes are shown clearly on Ordnance Survey mapping from 1872 onwards. BW 101 is shown enclosed by solid lines throughout and having a

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clearly delineated extent. The same is largely true of BW 99, although much of its western boundary is shown delineated only by dotted lines at various times which indicate only a change of surface rather than a solid boundary of some kind. An extent of around 10m (or 30') is shown throughout with some slight variation, mainly at junctions with other rights of way.

- 2.12 Many of these solid boundaries are still visible on contemporary Ordnance Survey maps although they are not all necessarily easily visible on the ground as the current surfaced routes have been subject to encroachment by vegetation and the digging of more recent ditching. This is particularly so between the car park just off BW 101 and the point known as Lion's Mouth about 700 metres to the north-west. The Ordnance Survey was able to survey and plot solid boundaries throughout this section as recently as 1915 but by the 1970s this distinction had mostly disappeared. Both bridleways are shown within the parish of Elstead on the first edition Ordnance Survey map. The Elstead Book of Reference is available at the British Library if required.

Aerial photographs:

- 2.13 The majority of the routes are visible on aerial photographs from 1948 onwards. Little can be interpreted about their width due to issues of scale and varying tree cover. It does appear from the 1948 photograph that many of the hard boundaries along the northern end of BW 101, between the car park and Lion's Mouth, may have been lost, perhaps due to military manoeuvres during the 2nd World War- certainly the land looks subject to intense erosive use. This may account for the inability of the Ordnance Survey to record those boundaries in their later maps. No conclusions regarding the use of the way or their extent can be obtained from the photographs.

Definitive map and statement:

- 2.14 Both routes were shown as 'rights of way' on maps prepared for the purposes of the 1932 Rights of Way Act. No information is recorded about their widths nor about the nature of the rights (i.e. footpath or bridleway for example).
- 2.15 The entirety of the claimed route(s) were recorded as public bridleway 99 (part of), 99a and 101 (Thursley) on the first definitive map of 1952. This remained unchanged on the subsequent revision of 1959 and 1966 and through to the present day. The current definitive statement does not record any widths for bridleway 99. Similarly no width is recorded for the relevant section of bridleway 101. (See Annex D). Bridleway 99a is currently recorded with a fence to fence width of 10'0".
- 2.16 There were objections to the inclusion of right of way 99/99A on the 1952 Definitive Map as bridleway. This objection (No. 266) recorded was made by a J. Gorringe on 3 September 1952. The objection was that they believed the route to have been kept up and surfaced by the Council and it therefore should be classified as a public highway as summarised in the extracts below.

Thursley Parish	266	J.Gorringe	99(pt) & 99A Bridle-ways Map 37	That the rights of way are publicly repairable highways.	I believe these rights of way to be partly kept up and surfaced by the
Council. I have always used them with tractors and they are used by postmen and workmen on bicycles. Older residents of Thursley state that they have always been public carriageways and years ago were maintained as such by the Council and a part of them still is.					

These rights of way were shown as bridleways on the District Council's Maps of 1936 and 1949. In recent years they have been used by equestrians.	No evidence.	These rights of way were not included in the schedule of repairable highways submitted by the Rural District Council under the Local Government Act 1929, and have always been considered to be bridleways. Repairs previously carried out have been at the expense of the frontagers, the War Department and certain tree felling operators. The Elstead Enclosure Award refers to these rights of way as a driftway.	<u>Recommendation:</u> That no modification be made to the draft map and statement.
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- 2.17 Surrey County Council examined the available evidence and resolved that no modification be made to the draft map and statement. There was no objection to the inclusion of BW 101 as a bridleway.
- 2.18 The draft statements of 16 September 1950 do contain information about extents which did not make it onto the definitive statement. A copy of the relevant sections (side-marked red) of the ways are shown below.

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Parish Thursley District Thursley Status _____

R/W. No. 99, 99A Status _____

Width claimed _____

Commences at Holly Copse to Thursford Firs in a northerly direction

Surveyed by P.H. Hughes Date 23/9/50

Address Chante House, Town End Street

Sodalming Survey

Description	Width Fence to Fence	Condition of surface	Remarks
<u>Footpath</u>	<u>2'-3'</u>	<u>earth</u>	<u>BW</u>
<u>Path</u>	<u>6'</u>	<u>"</u>	<u>hemlock tree waterlogged</u>
<u>Junction with Path 99A</u>	<u>10'-12'</u>	<u>"</u>	<u>Forest woods on either side than heathland</u>
<u>Sandy track</u>	<u>6'-8'</u>	<u>"</u>	<u>Open heathland</u>
<u>Junction with Path 101</u>	<u>no obstructions well defined throughout used as a Girdle path</u>		
<u>R/W. 99A</u>	<u>Bluest Road, Holly Copse to Junction with Path 99. westerly direction</u>		
<u>Sandy track</u>	<u>9'-10'</u>	<u>earth</u>	<u>Through woods</u>
<u>Junction with Path 99</u>	<u>no obstructions well defined used as a Girdle path</u>		
<u>R/W. no 108</u>	<u>Boundary N.W. Wolmer Cottages to Kettlebury Hill Hambley Common</u>		
<u>Sandy track</u>	<u>9'-10'</u>	<u>earth</u>	<u>Open commonland on either side</u>
<u>"</u>	<u>12'</u>	<u>"</u>	<u>" " " " " " " "</u>
<u>Kettlebury Hill</u>	<u>8'-10'</u>	<u>"</u>	<u>Track runs length of hill then on to Hambley</u>
<u>no obstructions</u>	<u>well defined throughout used as a Girdle path</u>		
<u>R/W. 108A</u>	<u>Boundary & Junction with Path 105 to Path 108 at Kettlebury Hill</u>		
<u>Sandy track</u>	<u>8'-10'</u>	<u>earth</u>	<u>Open commonland</u>
<u>Junction with 108</u>	<u>well defined throughout used as a Girdle path</u>		

BW 99, 99A

Parish Thursley District Thursley Status BW

R/W. No. 101 (Continued) Status BW

Width claimed _____

Commences at Polstead Road Hamer Hill in a N/E. direction

Reg. No. Map 37

Surveyed by P.H. Hughes Date 16/9/50

Address Chante House, Town End Street

Sodalming

Description	Width Fence to Fence	Condition of surface	Remarks
<u>Sandy track</u>	<u>10'</u>	<u>Land</u>	<u>bordered by common</u>
<u>Junction with Path 102</u>			<u>Thursford.</u>
<u>Thursley Road</u>			<u>main Road</u>
<u>Thursford Firs</u>			
<u>Sandy track</u>	<u>15'</u>	<u>Land</u>	<u>bordered by common land.</u>
<u>Junction with Path 99</u>			
<u>Sandy track</u>	<u>12'-16'</u>		<u>Lions Mouth</u>
<u>Junction 101A</u>			
<u>Sandy track</u>	<u>8'</u>	<u>Land</u>	<u>bordered by golf course.</u>
<u>Junction with Path 73</u>			
<u>Sandy track</u>	<u>8'</u>	<u>Land</u>	
<u>Blue House and Dikes of Sandridge</u>			<u>no obstructions throughout</u>

BW 101

2.19 The relevant sections of RoW 99, 99a are variably described as:

R/W 99A

<i>Churt Road, Holly Copse to Junction with Path 99, westerly direction:</i>	
<i>Sandy Track</i>	<i>9-10' Earth Through woods</i>

RW 99

<i>Junction with R/W 99A</i>	<i>10-12' First woods on either side then heathland</i>
<i>Sandy track</i>	<i>6-8' Earth Open heathland</i>
<i>Junction with Path 101</i>	<i>No obstructions well defined throughout used as a bridle path</i>

R/W 101

<i>Thursley Road</i>	<i>Main Road</i>
<i>Truxford Firs</i>	
<i>Sandy Track</i>	<i>15' Land Bordered by common land</i>
<i>Junction with path 99</i>	

<i>Sandy Track 12-15'</i>
<i>Lions Mouth</i>

Highways Records /Minutes - 1929 Handover Map:

2.20 Responsibility for maintaining highways was transferred from Rural District Councils ('RDCs') to County Councils by the Local Government Act 1929 and maps were prepared showing all roads that were maintained at public expense at that time. A map found in Council archives which might constitute this record was produced by Hambledon Rural District Council as a set of four well printed maps in a box. This is undated but shows all of its classified, scheduled and district roads. Neither BW 101 nor BW 99 appear on this map. This map seems to adhere to the purposes of the 1929 strongly in terms of the information it records.

2.21 Another map produced by Hambledon Rural District Council titled 'Rights of Way Map' and dated December 1936 shows bridleway 99 coloured red and labelled as 'BR' or bridle road. Bridleway 101 however is shaded blue. The key for the map indicates that this was considered 'highway for all purposes other than (1)²'. This blue colouration extends all the way from Thursley Road along BW 101 to Tilford Road and along Thursley 101a from Lions Mouth due west to Tilford Road. The map contains no information about lateral extent. This 'may' constitute part of the records handed over from the District to the County, but it cannot be confirmed. Even if it can be shown that this map does constitute the 1929 record it must be considered fairly neutral evidence. It is not considered stronger evidence for the following reasons: (1) There was no legal requirement to produce these maps nor was their public scrutiny of any kind. (2) The 1929 Act was strictly concerned with routes maintainable at public expense. Any other

² Where (1) means "Roads repairable by the inhabitants at large."
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routes would not then strictly need to have been included³. (3) This map is subsequently at odds with other contemporary or near contemporary documents. (4) The 'exact' provenance of this map is not entirely clear. (5) the handover agreements for highway functions dated from 1930 and were with regard to all 'Classified' roads vested in the former District.

- 2.22 BW 101 appears on a list of 'highways repairable by the public at large which are of doubtful status' which was compiled by Surrey County Council Hambledon Division and is dated 9th October 1936. The list also remarks that the way is shown on the Roques Map of 1762 and has a local name of 'Lions Mouth'⁴. This is actually not quite consistent with the 1770 Roques Map which only shows a short section of BW 101 equivalent to D-E on plan 3/1/14/H55. The 'doubtful' status is not inconsistent with its current designation of bridleway.
- 2.23 Later sets of maps compiled by SCC to constitute their responsibilities for maintenance of Highways and Bridges (date unknown, but most likely 1930/40s) showed both BW 99 and 101 as bridleways only. The same is true for all subsequent road registers prepared by SCC.
- 2.24 In 1965 the County Engineer wrote to the County Divisional Surveyor in Hambledon with regard to Right of way 99 and 99A. He referred to the allocation of the public driftway no. 25 and argued that it was apparent that this was awarded purely for the purpose for which a driftway is used and carriage rights are not necessarily implied. He continues to note that the 1862 Highways Act provided a procedure for declaring driftways to be public highways in their broadest sense but that he could not determine that this had ever been made here. His opinion was that the highest rights extended only to the driving of cattle but that public vehicular use might have increased this to non-repairable public highway. No evidence has been uncovered since this time to suggest such a declaration was ever made.

Military Byelaws and Plans:

- 2.25 The general area of land in question is subject to the Surrey Commons Military Byelaws 1978, which were made on 13 January 1978 and came into operation on 24 April 1978. The BWs in question appear to be entirely excluded from the land bounded in 'black' on the accompanying plan and identified as military land, although part of the continuation of BW 101 north-west of Lions Mouth does appear to be contained within the byelaws. It would seem therefore that the byelaws are of no significance when considering the routes claimed.

Conveyance 1927

- 2.26 A conveyance dated 3 October 1927 and relating to the '*Aldershot Training Ground's*' access from BW 101 refers to it as "...the road leading from Farnham to Thursley.... which in the award of the Valuer in the matter of the Elstead Enclosures and the Map thereto annexed is numbered 27....". This seems to imply that this was considered a through road, although it cannot determine what public rights exist. The fact that no private rights of access to the land are mentioned, implies perhaps that access was dependent on pre-existing public rights. This is not stated nor can we assume that the lack of private rights must therefore mean that public rights existed. The road referred to as 'public'.

³ An agreement between SCC and Hambledon RDC on 14 June 1930 under the 1929 Act clearly outlined the new duty of the County in terms of maintenance, repair and improvement of County Roads, which become and remain vested in the Council.

⁴ Recorded as "Tilford Common to Truxford Corner, Thursley, Local name: Lions Mouth.
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LANDOWNERS AND ADJACENT LANDOWNERS

2.27 The land over which the two ways run is currently unregistered. Whether the mid-point rule (*ad medium filum*) of adjacent landowners could be shown to apply to the centre of each way is a matter of argument and dependent upon how public rights here first came into being. An attempt by the Ministry of Defence in December 2012 to obtain title to this land as part of the first registration of their land in the area was unsuccessful following a challenge and tribunal supported by evidence indicating that this had never fallen within their title. The land adjacent to the ways is registered to a number of different parties in addition to the MoD. This is listed in the table below.

Title number	Freeholder
SY466195	Evelyn Ann Deary
SY805053, 380195	Church Commissioners for England
SY556882	Brenda Anne Jordan
SY806752	Ministry of Defence
SY806767	Ministry of Defence
SY805443	Ministry of Defence
SY533207	Ministry of Defence
SY805053, 806827	Ministry of Defence
SY805054, 806827	Ministry of Defence
SY495436	Steve Roger Mitchell
SY702019	Steve Roger Mitchell
SY778335	Ian Cameron Graham-Stewart and Alastair Graham-Stewart
SY805054, 654199	Darryl David Illtyd Williams and Honor Ross Williams
SY430436	Darryl David Illtyd Williams and Honor Ross Williams
SY806819	Ministry of Defence
SY245963	Ministry of Defence

2.28 S. 31(6) of the Highways Act 1980 allows landowners to deposit a legal document with the Highway Authority which acknowledges existing public highways and no others. By these means landowners can protect their land from the acquisition of further public rights. This does not extinguish any rights which may already have been acquired but have not yet been recorded. In 2012 the MoD deposited a statutory declaration under this section which covered several sections of their estate including that known as “Elstead, Peper Harow, Frensham and Thursley”. In it they acknowledged that BWs 99, 99a and 101 were public bridleways. This deposit cannot make any difference to the recording of a greater width on the definitive statement as the relevant evidence pre-dates it. It is significant however that on this deposit as elsewhere the MoD do not claim title to the land over which the BWs run, although the extent of the land registered by the MoD at this time arguably includes some of that land which would otherwise historically have been considered excluded and part of the highway. The MoD considered only very small sections of BWs 99 and 101 to fall within their title.

2.29 All of the adjacent landowners were also consulted. None raised any objection to the application to add the additional width to the definitive statement.

ENVIRONMENTAL DESIGNATIONS

2.30 The section of BW 101 running westwards from its junction with BW 99 has been recorded as Site of Special Scientific Interest (SSSI) by Natural England since

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1991. It is also recorded as a Special Protection Area (SPA), a Special Area of Conservation (SAC) and falls within the Surrey Hill Area of Outstanding Natural Beauty (AONB) and is a designated Area of Great Landscape Value (AGLV). Most of bridleway 99 is also recorded as common in the Surrey Commons Register. The unit number of this is CL234. The dimensions of the driftway laid out by the Inclosure Award would have pre-dated this and so would have been unaffected by its registration. It seems that the majority of the land to the south of BW 101 was once registered common land but was removed from the register at some point leaving a thin strip.

3. OPTIONS:

- 3.1 The Committee may agree or disagree with the officer's opinion and recommendation. Alternatively, they may decide that the evidence shows a different conclusion. Decisions can only be made on the basis of the evidence available. The recommendation is based upon the officer's opinion, on balance, of the evidence available and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see Annexe 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 take a neutral stance

4. CONSULTATIONS AND OPINIONS:

- 4.1 Consultations were sent out on 18 February 2014 and again on 6 September 2018. No responses were received from the Local County Councillor (Mr David Harmer) nor Thursley or Elstead Parish Councils. The British Horse Society confirmed that they supported the application. The British Driving Society confirmed they would like to see them defined as restricted byways if possible. The Ramblers had no objection.
- 4.2 The Open Spaces Society representative (Mr Bob Milton) argued that BW 101 was designated as the road to Farnham in the Inclosure Award and its carriageway rights had not been removed by the Natural Environment and Rural Communities Act 2006 (NERCA) because it is subject to the exemption that all properties abutting it rely solely on the public carriage way rights to gain access to their properties. Their representative argued that at the Land Registry Tribunal (noted in 2.25) proved that access was as a result of a public vehicular highway and not by private right. Such a tribunal could not have determined the status of a highway, it would have been beyond their power- the most they could have done is comment upon it. The result was only to remove land from the MoD first registration attempt. This was done by agreement rather than by the ruling of any court of tribunal.
- 4.3 A Mr Michael Organe submitted various interpretations of the Inclosure Award documents and other maps. He confirmed that he supported the application to add the 30' width. He did not support any conclusion that higher rights might exist but also did not rule this possibility out.
- 4.4 No responses were received from the Cycling UK, the Auto Cycle Union, nor Waverley Borough Council. Natural England could find no evidence to support or contradict the evidence provided by the applicant.
- 4.5 The applicant in this case has also expressed an opinion that higher rights than bridleway subsist along BW 101 at least, on the basis of the Inclosure Award and the Finance Act evidence primarily.

4.6 SCC Legal Services and Legal Counsel have been consulted and have approved this report.

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:

These factors cannot be considered 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 the 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 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 below and in paras. 2.1-2.2 of this report⁵. Issues such as security, privacy, safety or convenience are irrelevant.
- 9.2 The WCA 1981 section 53(2)(b) applies. As regards every definitive map and statement the Surveying Authority shall-
- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
 - (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of these events, by order make such modifications to the map
- 9.3 Section 53(3)(c) then requires that an order be made under section 2 where the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
- i. 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”.
 - ii. that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
 - iii. that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
- 9.4 In this case the application made was for the insertion of 30’ into the definitive statement, which would qualify as a modification of “... any other particulars...” outlined in section iii above. The available evidence must be evaluated and weighed and a conclusion reached as to whether on the balance of probabilities⁶ the DMS must be modified. It is insufficient for changes made under (iii) that the lesser test of ‘reasonably alleged’ be applied.
- 9.5 It is clear that a width of 30’ was laid out by the Inclosure Award in 1857. Despite the fact that this width did not make it onto any of the definitive statements compiled in 1952 or thereafter, there is no evidence to suggest that any of this width was ever legally extinguished. Early Ordnance Survey mapping indicates that this width was actually laid out with reference to solid boundaries and most likely only become unclear on the ground at a later date. Despite solid boundaries demarcating the extents it is impossible to say whether it was ever fully used across its entire width. The 1910 Finance Act also corroborates this position, showing a clear uncoloured 30’ width equating exactly to those routes laid out as

⁵ Please also see annex B for further information.

⁶ Sometimes known as the two tests- test A: Balance of probabilities- where there is clear evidence in support of the proposition and no credible evidence to the contrary. Test B: Reasonably alleged- where a proposition may be reasonably alleged even where there is conflict of evidence.

driftway by the Inclosure Award and no more. This is very clear evidence in the absence of any legal mechanism removing those rights. Accordingly it is deemed on the balance of probabilities that the width of 30' should be added to the definitive map and statement for Surrey for BWs 99 and 101 (See annex D).

9.6 The Council also has a duty under s. 53(3)(c)(ii) of the 1981 Act (see para 9.3) to consider any evidence that suggests 'higher' rights might exist over a way currently recorded on the DMS. The evidence must be cogent and sufficient to displace the presumption that the DMS is correct as to the rights recorded on it and again this section must pass the test of the 'balance of probabilities'. The main evidence discovered which might support such a change is listed below:

- i. The appearance of the parts of routes on early commercially produced maps. (mainly BW 101).
- ii. The incidental reference to a Public Carriage Road from Thursley to Farnham in the 1857 Inclosure Award. (BW 101)
- iii. The uncoloured sections on the Finance Act 1910. (BW 99/101)
- iv. The reference to 'highway for all purposes' on the Hambledon Rural District Council map of 1936. (BW 101)
- v. The reference to BW 101 being a "highway repairable by the public at large which is of doubtful status" in a list prepared by the County Divisional Surveyor in 1936.
- vi. The reference to road from Farnham to Thursley on early conveyances.
- vii. The lack of recorded private rights vehicular rights for frontagers.

9.7 BW 99 was considered for inclusion at a higher status in 1952. Some of the same evidence was considered with the following conclusions.

- i. BW 99 was 'NOT included in the schedule of repairable highways submitted by the Rural District under the Local Government Act 1929'
- ii. Repairs had previously been carried out at the expense of frontagers, the War Department and tree felling operators- not the Highway Authority.
- iii. It was laid out in the Inclosure Award as Drift Way only. No evidence has been supplied to suggest that these ways contain vehicular rights. It seems unlikely that the Inclosure Commissioners would have found it necessary to have laid out these driftways⁷ if the routes were already considered to carry full public carriageway rights.

This is somewhat at odds with the aforementioned map of 1936.

9.8 There a little evidence to suggest that BW 101 has been considered a public carriage road and certainly much of the route has long been freely used in vehicles of various kinds. It seems much less likely that BW 99 has been considered a public carriage road. The mapping and highway authority records considered at paras. 2.20-2.24 contain conflicting information. No user evidence is currently

⁷ 1835 Highways Act: new driftways and horsepaths in Inclosure Awards not maintainable at public expense unless statutory procedures followed.

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available for either way of daily use other than officer observation, anecdote and inference. Whether this use would turn out to be public or in exercise of private rights is not known. Such use in a vehicle by the public of a bridleway without legal authority or long standing legal right would constitute a criminal offence under section 34 of the Road Traffic Act 1988, notwithstanding any higher public rights.

9.9 The evidence to suggest that higher rights might exist over both of these ways, is not currently deemed sufficient 'on the balance of probabilities' to suggest that an order should be made to record higher rights. This conclusion is without prejudice to such higher rights being proven to exist at some future point on the discovery of additional new evidence. Had higher rights been shown to exist they would presumably have either pre-dated the Inclosure Award and so could have been of a greater or lesser width than 30' or come about as a result of long use after the Inclosure Award but prior to 1930⁸ and so would be dependent upon relevant evidence of use, none of which has been submitted. Should committee disagree with this view it is incumbent upon them to consider the effect upon on any such rights of the Natural Environment and Rural Communities Act 2006 (NERCA). Sections 67-70 of this Act have a significant impact upon the acquisition of vehicular rights, their extinguishment and the exact challenge date should it subsequently be considered that the public could have acquired MPV⁹ rights as a result of long use. This is considered below:

9.10 S.66(1) provides that no public right of way for MPVs is created after its commencement (2 May 2006) except on express terms or by construction of a road for such vehicles under statutory powers. After 2006 no further MPV rights could have been acquired.

9.11 S.67(1) extinguished those vehicular rights which were not shown on the definitive map and statement at the commencement of the act or were shown only as a footpath, bridleway or restricted byway. This general rule is subject to a number of exceptions and conditions outlined in s. 67(2) and (3). The burden of proving that MPV rights have not been extinguished falls upon the person trying to prove rights exist.

9.12 Subsection 67(2)(a) – excepts ways “whose main lawful use by the public during the period of 5 years ending with commencement was use for MPVs”.¹⁰

9.13 Any rights resulting from this exception would most likely not be recordable on the Definitive Map. The Wildlife and Countryside Act 1981 s. 66(1) states that 'BOAT': "...means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpath and bridleways are so used". If the way was 'mainly (lawfully) used by the public in motorised vehicles' then vehicular rights might be reserved, but such a route could not be recorded on the DMS and therefore an MMO removing the existing bridleway(s) would need to be made.

⁸ The year it first became an offence to drive a mechanically propelled vehicle on a footpath or bridleway.

⁹ MPV: Mechanically Propelled Vehicle

¹⁰ E.g. That 'the public' have used lawfully more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the 'ordinary roads network'.

- 9.14 Advice notes issued by DEFRA¹¹ explicitly state that for the exception to apply, the main lawful use must have been *“by the public... it is irrelevant for the purposes of this test that the way might have been used during the relevant period by landowners or their visitors under any form of licence or easement by any means whatever, whether on foot, horseback or MPV”*. If this was not the intention of the Act, and such longstanding rights were not captured, then there would have been little reason to include the protections at 67(3)(c) and (5) detailed below¹². This makes most sense when the reasons for the inclusion of s. 66 and 67 in NERCA are considered- to minimise the establishment of rights for recreational vehicles based on historic use in non-mechanically propelled vehicles. Given that most use of the road in vehicles is to access land and property or at the invite of those holding the land this exception seems unlikely to apply. Proving otherwise would be evidence dependent.
- 9.15 Subsection 67(2)(b) – excepts ways if *“immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under s. 36(6) of the Highways Act 1980 (c.66) – known as “list of highways maintainable at public expense”*. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’. This route is not and never has been recorded on the Surrey List of Streets.
- 9.16 Subsection 67(2)(c) – excepts ways ... *“created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles”*. There is no evidence to suggest that the route was expressly on such terms for motor vehicles (under statutory powers).
- 9.17 Subsection 67(2)(d) – excepts ways *“created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles”* (MPVs). There is no evidence to show that this is the case.
- 9.18 Subsection 67(2)(e) –excepts from extinguishment, ways *“..created by virtue of use by such vehicles during a period ending before 1st December 1930”*. I.e. That they were in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road’. To show this, such a right must have been created by inference of dedication at common law through actual use by MPVs before 1 December 1930. No first-hand evidence of such use has been submitted and whilst a pragmatic approach must be taken it would not be safe to make a judgement on the basis of this section only on anecdotal evidence alone as mentioned in para. 9.8.
- 9.19 Section 67(3)- provides that existing rights are preserved if:
- a. Before 20 January 2005 the way had been the subject of an application under the Wildlife and Countryside Act 1981 to add it to the DMS as a BOAT;
 - b. Before 2 May 2006 the County Council had made a determination in relation to such an application;
 - c. Before 2 May 2006, an application to add it had been made by a person with an interest in the land where the way was reasonably necessary to access their land.

None of the above apply.

¹¹ Paragraph 28, A guide for local authorities, enforcement agencies, rights of way users and practitioners. Version 5, May 2008.

¹² Which means that frontagers would not be prejudiced by not being counted amongst the public for the purposes of s. 67(2)(a).

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9.20 Section 67(5) provides a private right for mechanically propelled vehicles for those persons who have reasonable need for access by MPVs to land in which they have an interest, in all cases where a public right of way for MPVs is extinguished under s. 67(1) of the Act.

Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies-

- a. was reasonably necessary to enable a person with an interest in land to obtain access to the land, or
- b. would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

9.21 This private right extends to landowners, occupiers and tenants. It also includes lawful visitors to the person who has an interest in the land. The test of 'reasonably necessary' has not yet been clarified by the Courts, but a pragmatic viewpoint must be that this would extend to any landowner or frontager who had reasonable need. DEFRA guidance suggests that the words would have their normal, everyday meaning and the outcome would depend upon the facts. The Act is silent regarding the Council's responsibility to record or defend such rights and similarly it is not the responsibility of the Secretary of State to determine them.

9.22 Section 67(7) For the purposes of subsections (3)(c) and (5), it is irrelevant whether the person was, immediately before commencement, in fact- exercising a public right of way, or able to exercise it.

9.23 Section 68 of the Act inserted new subsections into s. 31 of the Highways Act 1980 providing (after commencement) for the dedication of a way as restricted byway after public use for 20 years in non- mechanically propelled vehicles.

9.24 Section 70(1) allows for the recording on the DMS of a 'restricted byway'. This type of highway was first provided for under the Countryside and Rights of Way Act 2000. Section 70(1) means that restricted byways can be established and recorded on the Definitive Map on the basis of either historic evidence or evidence of use. The implication of this is that if a route carries historic vehicular rights, but the MPV rights are extinguished by s. 67, it will be possible to record that route as a restricted byway, rather than a BOAT.

9.25 If committee considers that there is sufficient cogent evidence to displace the presumption that the DMS is correct and finds that on the balance of probabilities that historic vehicular rights exist over BW101, then the MPV element of this cannot be preserved as none of the above exceptions are deemed to apply. Accordingly, on the available evidence, an order would need be made for a restricted byway. S. 67(5) may then be deemed to apply to those frontagers who have need of it for their private vehicular access, but the committee need not decide this.

9.26 To reiterate then, on the balance of probabilities it does not appear, as outlined in para. 9.8 and 9.9, that higher rights than bridleway can be shown, only that the definitive statement should be amended as explained at para. 9.5.

9.27 Copies of the proposed amended definitive statements can be found at annex D with 30' widths converted to metric (9.1m). Minor changes to more accurately

locate the routes as of 2020 are also included. All additions are shown in bold italics and deletions are struck through.

9.28 The Waverley Local Committee is asked to agree that:

- i. The width of 30' is added to the Definitive Statements for Public Bridleways 99 (part of), 99a and 101 (part of) over the extents shown A-F on drawings 3/1/14/H54 and 55 in the Parish of Thursley and that this application for a MMO under sections 53 and 57 of the Wildlife and Countryside Act 1981 to modify the Definitive Statements as outlined is approved.
- 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 determination.

10. WHAT HAPPENS NEXT:

- 10.1 If the Committee decides that an order be 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 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 officer recommendations they should record the reasons and cite evidence for the decision. This will make it easier to explain the decision should the matter proceed to public inquiry or appeal.
- 10.4 All interested parties will be informed about the decision.

Contact Officer:

Daniel Williams, Countryside Access Officer Tel. 020 8541 9245

Consulted:

See section 4

Annexes:

- A Drawings Nos. 3/1/14/H54 and H55
- B Legal background
- C Extracts from Inclosure Map and Award
- D. Amended definitive statements

Sources/background papers:

File 'CP558 and 561' and all contents, including the application, all correspondence and representations, responses to consultations, landownership details, legal cases, assorted maps and documents can be viewed by appointment.

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