

DEFINITIVE MAP MODIFICATION ORDER APPLICATION: DELEGATED DECISION REPORT

DATE: 25 OCTOBER 2023

LEAD OFFICER: RIK CATLING, COUNTRYSIDE ACCESS OFFICER

SUBJECT: APPLICATION TO REMOVE WINDLESHAM FOOTPATH NO. 185 FROM THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY

AREA AFFECTED: WINDLESHAM PARISH

1. SUMMARY OF ISSUE:

1.1 Surrey County Council (the Council) has received an application under Section 53 of the Wildlife and Countryside Act 1981 (WACA 1981) to make a Definitive Map Modification Order (MMO) to remove public footpath no. 185 (Windlesham) from the definitive map and statement of public rights of way (DMS).

1.2 The Council has a statutory duty under paragraph 3(1) of Schedule 14 and Section 53 of the WACA 1981 to investigate the application and to make an order to remove the public right of way from the definitive map and statement if it discovers evidence that there is no public right of way over land shown in the map and statement as a highway of any description.

1.3 Following investigations, and having considered all of the available evidence, the Council is not satisfied that there has been a discovery of evidence which (when considered with all other relevant evidence) shows that there is no public right of way over land shown in the map and statement as a public footpath.

2. RECOMMENDATIONS:

The Officer with delegated authority is asked to agree that:

2.1 **The application to delete public footpath no. 185 Windlesham from the definitive map and statement is refused.**

3. REASONS FOR RECOMMENDATIONS:

3.1 There is no compelling new evidence that an error was made when the path was recorded on the definitive map and statement as a public footpath.

4. INTRODUCTION AND BACKGROUND

Application

- 4.1 The application was submitted by Mr Lionel Trice and is dated 14 June 2017. It was made under the provisions of the WACA 1981 and requests that the Council makes an order to modify the DMS by deleting public footpath no. 185 Windlesham.
- 4.2 A large number of documents were submitted as supporting evidence between 2017 and 2020.
- 4.3 On 15 February 2021 Mr Trice wrote to the Council and stated the following:
- I shall be leaving SHBC [believed to mean Surrey Heath Borough Council] and moving to Woking so I have passed my files to -NAME REMOVED- All correspondence should be sent to him.
- 4.4 A Land Registry search has confirmed that Mr Trice no longer resides at his last known address.
- 4.5 It is not possible to transfer an application to another applicant. In 2023 the Council wrote to -NAME REMOVED- to confirm this point, to give him the opportunity to make comments on the application, and to give him the opportunity to inform Mr Trice that the application was being investigated in case he wished to continue his involvement. No response was received.

Route description

- 4.6 The route applied to be deleted is Windlesham footpath no. 185 and is shown on the plan at **Annex A**.
- 4.7 Footpath 185 commences on High View Road, Lightwater, opposite 15 High View Road. It proceeds generally west then northwest on a curved alignment to the boundary of Lightwater CP. The public footpath stops at the park boundary and does not connect to any other public rights of way at this point.

Land ownership

- 4.8 The footpath passes through 4 land ownership parcels. The registered owners are as follows:
- a. NAMES REMOVED
- 4.9 All affected landowners have been consulted, as have adjacent landowners. No responses have been received. Land Registry details are in **Annex B**.

Previous applications

- 4.10 The status of the path has been considered on 2 previous occasions. The footpath was originally recorded on the DMS in 1991 following an application from the Ramblers Association, which was ultimately heard at public inquiry.
- 4.11 In 2007 Mr Trice applied for the public footpath to be deleted on the basis that the 1991 decision was incorrect and that public footpath rights had not in fact been acquired. Surrey County Council turned down the application due to a lack of evidence. Mr Trice appealed this decision to the Planning Inspectorate, who considered written submissions from all parties before dismissing the appeal in 2011.

5. ANALYSIS

Legal tests

- 5.1 Section 53(3)(c)(iii) of the WACA 1981 states that a DMMO should be made by an authority following the discovery of evidence which (when considered with all other relevant evidence available to them) shows that there is no public right of way over land shown in the map and statement as a highway of any description.
- 5.2 Guidance¹ states that “The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement... will need to fulfil certain stringent requirements. These are that:
- a. The evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
 - b. The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.
 - c. The evidence must be cogent.
- 5.3 The Council should also have regard to the judgement in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001]. Though this refers to the Secretary of State, the considerations apply equally to the Council. The judgement includes the following statement:
- Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does... At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than a balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way

¹ Rights of Way Circular 1/09

exists.

5.4 The Council must therefore determine whether the evidence shows that, on a balance of probabilities, an error was made when the application route was recorded in the definitive map and statement. In view of the guidance and the Trevelyan case, there should be an initial presumption that the recorded rights do exist. The burden of proof rests with the applicant to provide evidence that no public right of way existed over the application route when it was added to the definitive map and statement.

5.5 No account can be taken of whether a route is desirable or not. Factors such as amenity, crime or the impact on landowners are not relevant to the decision. The purpose of the application process is to ensure that the DMS accurately records public rights of way which have been shown to exist based on evidence.

5.6 Legal guidance for Map Modification Orders is attached at **Annex C**.

EVIDENCE ASSESSMENT

5.7 In order to determine whether footpath 185 was incorrectly recorded as a public footpath, it is therefore necessary to establish when and on what basis it was added to the DMS.

Definitive Map Modification Order (confirmed 1991)

5.8 The footpath was added to the DMS in 1991. The Ramblers Association applied to have the path formally recorded on the basis that public footpath rights had been acquired through long, unchallenged public access. Several people submitted evidence forms or letters describing their use of the path to Surrey Heath Borough Council (SHBC), acting highway authority at that time.

5.9 SHBC accepted the evidence and made an order to add the application route to the DMS in 1990. The order received objections and was considered at public inquiry on 26 February 1991, following which the inspector confirmed the order.

5.10 The inspector determined that user evidence submitted by 8 people was sufficient to show that the footpath had been used by pedestrians for an uninterrupted 20-year period prior to 1980 / 81 and that public footpath rights had been acquired as a result. The inspector's report is at **Annex D**.

5.11 It is noted that Mr Trice, the applicant for the application under consideration in this report, was one of the objectors and attended the inquiry to present his case against the order.

5.12 The following issues are considered in the inspector's decision report:

5.13 The erection of boundary fencing on Lightwater CP in 1979/80. SHBC installed boundary fencing which briefly prevented public access at point

B. Shortly afterwards they provided a stile in the fence. The inspector determined that the fencing was not intended to deny access to walkers, that the obstruction to public access was for a short duration only, and therefore that the 20-year period of use was not affected for the purposes of the application.

- 5.14 Ordnance Surveys maps dated 1915 and 1934. These maps showed a footpath on a different line to footpath 185 Windlesham. The inspector considered that this difference did not provide evidence against public use of the route during the period 1960/61 to 1980/81. He also referred to “a more recent edition of the Ordnance Map showing the route on its present line”.
- 5.15 Fencing. Shepperton Builders Ltd claimed that the land had been fenced for grazing purposes 28 years previously (which would be 1963), with evidence of the fencing remaining. This is not considered further in the inspector’s report.
- 5.16 The desirability and suitability of the footpath were also raised by objectors but were not and are not matters which can be considered as part of this process.

Application to delete the public footpath (refused 2011)

- 5.17 In 2007 Lionel Trice applied to have the footpath deleted from the DMS on the grounds that it had been wrongly recorded and that no public footpath rights had been acquired on the route. The Council determined that the supporting evidence was insufficient and turned down the application. Mr Trice then appealed this decision to the Planning Inspectorate. Following consideration of written submissions, an inspector dismissed the appeal. The following evidence was considered in the inspector’s report (full report at **Annex E**):
- 5.18 Boundary fencing on High View Road. Mr Trice provided evidence that the land parcel through which the footpath runs was fenced. The inspector accepted that the plot was fenced, but considered there to be no evidence that fencing obstructed public access onto the footpath at point A.
- 5.19 Northern boundary fencing and stile. Fencing on the Lightwater CP boundary was replaced by SHBC in the late 1970s (discrepancies in the dates). The new fencing was installed in the wrong location, which is not relevant to this application. Mr Trice claimed that the fencing blocked access until a stile was installed in 1985. However, user evidence submitted in 1981 identified the stile as already being in place at that time. The inspector noted that the fencing and stile had already been discussed at the 1991 public inquiry and considered that there was no evidence that public access had been challenged at this point.
- 5.20 Padlocked gate at point A. Mr Trice claimed that a padlocked 5 bar gate was installed at point A in 1953 and prevented public access for around 30 years until it was forcibly removed around 1974 (NB: this period is around

20 years). The inspector found no compelling evidence that any gate at this location had been locked during the relevant 20-year period.

- 5.21 Use was restricted to family and friends by permission. Mr Trice and a Mr Arliss, resident at 18 High View Road, both argued that the land was crossed by paths or tracks which were allegedly used for private purposes only. Paragraph 14 of the report states: “The Appellant further argues use made of the way was by friends and family and with permission”. The inspector considered that this claim was unlikely and incompatible with the user evidence. It also appears to contradict Mr Trice’s other claims about the 1971 OS plan and aerial photograph.
- 5.22 1971 OS plan and aerial photograph. The 1971 OS plan shows the footpath with a double pecked line marked ‘path’. A 1971 aerial photograph also shows the path. Mr Trice argues that these evidence sources do not show a footpath but instead depict a drainage gully built by contractors to help alleviate waterlogging to the north, which was incorrectly depicted on OS plans. The inspector rejected this claim, noting that the path shown on the photographs “links with a network of other similar features” and that both OS plan and photographs are consistent with the application route and the user evidence.

The current application

- 5.23 The footpath was added to the DMS on the basis of presumed dedication following 20 years’ uninterrupted, unchallenged public use from 1960/61 to 1980/81. For this application, the burden of proof therefore rests with the applicant to provide new, substantial, cogent evidence that that the presumed dedication did not in fact occur during that period.

Whether there has been a discovery of new evidence

- 5.24 The first matter for the Council to consider is whether there has been a discovery of new evidence to trigger the Council’s duty to investigate the application. As outlined above, this footpath has been subject to 2 previous applications, both of which were considered by independent inspectors. The vast majority of the supporting evidence for this application duplicates evidence which has already been considered during the earlier applications.
- 5.25 A table listing all of the evidence submitted in support of the application is at **Annex F**.
- 5.26 Some of the evidence is not documented in previous inspectors’ reports but does not relate to the relevant period, such as an alleged Windlesham Inclosure Award Map (dated 1813), which does not show the application route. As these documents cannot provide evidence that public footpath rights were not acquired during the period 1960/61 to 1980/81, they are not relevant to this application and cannot be considered new evidence.
- 5.27 The potentially relevant new evidence can be categorised into 2 groups.

First, letters and statements from 5 residents of High View Road, claiming that there was a padlocked gate at point A during the relevant period. A comment in the 2011 inspector's report confirms that these are, in the main, new evidence, stating: "Five witnesses for the Appellant are said to be able to confirm the existence of the gate, although no statements from them have been provided in this respect."

- 5.28 Second, evidence has been provided about landfill works to the north of the footpath and subsequent waterlogging on properties on the north side of High View Road. The applicant gave no reasons about why they considered this evidence to be relevant, but the issue does not appear to have been considered previously, and it is noted that Mr Trice previously claimed that the path shown on the 1971 OS plan was in fact a drainage gully.
- 5.29 The Council considers that the new evidence is not significant, covers topics that have already been considered in previous applications, some at public inquiry, and which in the case of the landfill / drainage work, is of dubious relevance. Nevertheless, it is acknowledged that the statements submitted in 2017 are new and that the presence of a locked gate on the path during the relevant period would call into question whether the footpath was correctly recorded. The Council has therefore investigated the application on the basis that there has been a discovery of new evidence.

New evidence

- 5.30 5 residents who lived at High View Road during the relevant period have provided statements in support of the application, including Mr Trice. Mr Trice also submitted an evidence form, while Gavin Davis also submitted a letter. These submissions all claim that there was a gate on the footpath during the relevant period which was never unlocked or opened. A sketch of the gate is included, with the location believed to be point A.
- 5.31 The statements are dated 2017 and are listed below in alphabetical order, along with Mr Davis's letter. 14 High View Road is also known by the name 'Woodpeckers' and is the land lying to the east of the affected land. Full statements are at **Annex G**.
- 5.32 As the statements are clearly at odds with the user evidence provided in 1981, in 2023 the Council wrote to the statement providers in order to obtain more information, using their last known addresses. 1 response was received, from Lise Reeve. This is also considered below.
- 5.33 Gavin Davis. States that his family "has owned the land west of Woodpeckers since 1953 and to the best of my knowledge the gate was never unlocked or opened and there was never any access through it". According to correspondence, Mr Davis is / was a director of Shepperton Builders Limited, who were identified as the affected landowner and gave evidence against the footpath at the original public inquiry in 1991. The company is no longer the registered landowner.

5.34 Mr Davis also wrote a letter to SHBC in May 2016 where he stated:

“I am writing to support the removal of the status of Public Footpath on private land as this is an Act of Trespass. The gate in Highview Road is shown on the original Deeds and also on an ordnance survey map. The gate, shown in the attached Artist’s sketch, was privately owned by this Company and was used for private access to Silverlands. At no time did the public have free access over the private land. The gate, posts and padlock were subversively removed, probably around the early 1980s, if I remember correctly.”

5.35 Vera and K Johnson. Lived at Woodpeckers from 1975 to 1987. They state that “during the time we lived at 14 High View Road there was a gate opposite number 17 High View Road, which was never opened”.

5.36 Lise Reeve. “I lived at Woodpeckers through the 1960s into the 1970s and to the best of my knowledge this gate was never unlocked or opened and there was never any access through it”.

5.37 Further information submitted 2023:

“I lived in the property just to the right of the marked footpath on the map you enclosed with your letter. I lived there from 1965 to 1974 from the age of 3 to 13.”

“From my memory the gate from High View Road was never opened and was in fact rather overgrown. I and many other children in High View Road considered this area our playground. If we wished to enter ‘the orchard’ as we called it by that route we climbed over the gate.

We were allowed to play freely in this area and I don’t recall our play being interrupted by strangers walking through.

The entry to the Country Park you ask about [at point B] was not gated at that time, the only real border was a fire ditch.”

5.38 Lionel and Mrs P. Trice. This statement takes a question-and-answer format. It states that Mr and Mrs Trice first became aware of the gate in 1965, that it was removed in the late 1970s and that they never noticed the gate being opened during this period. It also states: “I lived in Macdonald Road before moving to no. 10 High View Road in 1967”. Mr Trice’s evidence about the gate is not new, instead repeating evidence which was considered in the 2011 inspector’s report (paragraphs 15 and 16).

5.39 Mr Trice also submitted a user evidence form dated May 2017. The form is intended to document usage of a claimed route, but Mr Trice completed it to support his deletion application. In it he states that he never used the footpath and that there was a padlocked gate from 1953 to late 1970. He also ticked boxes stating that there were notices, fencing and ‘any other

structures or obstructions' on the route, but provided no further details.

- 5.40 Tony Wilmot. This form has the same wording as Lise Reeve's form i.e.: "I lived at Woodpeckers through the 1960s into the 1970s and to the best of my knowledge this gate was never unlocked or opened and there was never any access through it".
- 5.41 The statements suggest that public access onto the footpath was prevented by a locked gate during the relevant period. However, of the 5 forms, neither Mr Trice nor Mr Davis's evidence is considered to be newly discovered. Both Mr Trice and Shepperton Builders Ltd (individual representative unknown) gave evidence at the 1991 public inquiry. In 2011, Mr Trice was the applicant / appellant and is specifically mentioned as having provided evidence about the gate in the inspector's report, while Mr Davis provided evidence during research into that application.
- 5.42 This leaves 3 completely new statements from people who lived at 14 High View Road, covering 2 time periods: the 1960s to the 1970s (Reeve & Wilmot) and 1975 to 1987 (Johnsons).
- 5.43 The statements provide very little detail other than stating that there was a gate which the author does not remember being opened or unlocked. There are also discrepancies in some of the dates given. In 2011 Mr Trice claimed that the gate was removed in 1974, before the Johnsons moved to their property. His 2017 statement claims that the gate was removed in the late 1970s, and Davis states it was around the early 80s, but the Johnsons claim that there was a gate through to 1987. This is well after a stile is known to have been installed at point B in order to facilitate public access (pre-1981), which would have been unnecessary if the path was blocked at point A, and calls into question the reliability of their evidence.
- 5.44 Once the Council's duty to investigate the application has been triggered, it is required to consider the available evidence as a whole, including previously considered evidence. With regards to a gap at point A, the 2011 inspector's report records that a letter from the Ordnance Survey (OS) dated 17 January 2001 was raised. This letter confirmed that the OS had recorded the presence of a gate at point A during a 1969 site survey. However, having considered this letter and Mr Trice's verbal evidence, the inspector found that there was insufficient evidence that any gate was ever locked.
- 5.45 Landfill and flooding. Mr Trice submitted several documents which indicate that following construction of the M3 motorway to the north, significant landfill works were carried out on what is now Lightwater Country Park. This appears to have affected water flow onto the properties on the north side of High View Road, causing waterlogging in places, and eventually resulted in drainage works being carried out.
- 5.46 It is believed that Mr Trice submitted this evidence to demonstrate that the path shown on the 1971 OS plan and aerial photos was in fact a drainage gully, a claim which is noted in the 2011 inspector's report. His letter

dated 13 February 2018 states: “The gully marked was excavated by G Farr and Sons... What you claim as a footpath 185 is in fact a water way excavated by Farr + Son”.

- 5.47 To support this, Mr Trice refers to a letter dated 24 March 1971. However, this letter does no more than identify that drainage works will be carried out. It does not state what those works would be, nor identify any specific locations.
- 5.48 The majority of the documents refer to Mr Trice’s land rather than the land crossed by the footpath. Though some letters discuss alleviation works, none state that the footpath itself was flooded during the relevant period, nor specify any works in the vicinity of the footpath. When considering the 2011 appeal, the inspector found that there was no evidence that the path shown on the 1971 OS map and aerial photos was anything other than a footpath.
- 5.49 Pictures of waterlogging dating from the early 2000s, a flooding report dated 2004 and a letter regarding court proceedings in relation to alleged trespass and flooding damage dated 2005 are all outside the relevant period and therefore have not been considered. The documents submitted in relation to landfill and flooding are at **Annex H**.

Other evidence

- 5.50 The remaining supporting evidence has all been either considered previously as part of previous applications, refers to previously considered evidence, or else is not relevant as it either does not relate to the relevant period or does not touch on matters which may be considered. The main issues are summarised below.
- 5.51 Boundary fencing on High View Road. Mr Trice resubmitted evidence of fencing on the affected land along its boundary with High View Road. It is not disputed that this boundary has been fenced. However, this evidence does not demonstrate that access was not possible at point A during the relevant period, as it does not show that location.
- 5.52 Northern boundary fencing and stile. Mr Trice has submitted some new correspondence with SHBC regarding the location of the northern boundary fence on the affected land and the stile at point B. These letters do not establish any new information.
- 5.53 He also resubmitted several documents and letters that have been considered previously. These demonstrate that SHBC installed a boundary fence along the northern boundary of the affected land (the Lightwater CP boundary) around the late 1970s. Much of the correspondence relates to how this fencing encroached on Mr Trice’s land, which is not relevant to this application. The correspondence also confirms that SHBC subsequently installed a stile in the fence to allow continued public access from the footpath into the country park. The original user evidence confirms that this stile was in place when the user forms were

completed in 1981. All of this evidence was considered by the inspector in 1991, who determined that any interruption to public access was short term and unintentional on the part of SHBC.

- 5.54 Maps and historical documents. Mr Trice submitted a number of maps which pre-date the relevant 20 year period and do not show the footpath. These maps do not provide evidence that the path was not used by the public during the relevant period and have therefore not been considered.
- 5.55 The 2011 inspector's report refers to an OS plan and aerial photos dated 1971. The OS plan has not been identified, but a letter from the OS to Mr Trice dated 17 January 2001 confirms that a 1969 survey identified a gap in the fencing at point B, which was recorded on the 1971 OS map.
- 5.56 The aerial photograph clearly shows a worn line connecting to other similar worn lines on the line of the footpath, and appears to confirm that the footpath was in place on the ground at that time. A plan hand-labelled "OS 1983" shows the footpath with a single pecked line labelled 'path'.

6. OPTIONS

- 6.1 Decisions can only be made on the basis of the available evidence. The recommendation is based upon the evidence submitted as interpreted under the current legislation. Matters such as convenience, amenity, security or safety are not relevant under that legislation (see **Annex C**).
- 6.2 Having considered the evidence set out in this report, the Officer with delegated authority, in consultation with the relevant divisional member, may select one of the following options: 95
- a. Accept the officer's recommendation and refuse the application.
 - b. Reject the officer recommendation and defer a decision on the application subject to further investigations (reasons to be given).
 - c. Reject the officer recommendation and resolve that an order should be made to remove the public footpath from the definitive map and statement of public rights of way (reasons to be given).
 - d. Reject the officer recommendation and resolve that an order of a different type should be made (details and reasons to be given).
- 6.3 Where the Council decides not to make an order, the applicant may appeal the decision to the SoS. The SoS may then direct the Council to make an order. Where this is the case, the Council would normally take a neutral stance in any further proceedings, including any subsequent public inquiry if necessary.

7. CONSULTATIONS

- 7.1 Windlesham Parish Council, Borough and County Councillors, user groups

and all relevant landowners including adjacent landowners have been consulted.

- 7.2 Windlesham Parish Council replied: “Members considered the application below to remove public footpath no.185, in Lightwater. It was resolved to object to the removal of the footpath on the basis that it has been in use for more than 60 years, therefore the public had acquired a right to use it.”
- 7.3 Shaun Macdonald, District Councillor for Lightwater Ward, replied as follows: “I am supportive of retention of the status quo. This path has been in active use throughout the period of my residency in the village from 2001 onwards and provides material benefit to the residents in access open land efficiently.”
- 7.4 The Open Spaces Society replied: “On behalf of the Open spaces Society I believe there is no new evidence to support the modification and the evidence is insufficient to outweigh the presumption that the DMS is correct. The authority’s decision should be to refuse to make the order applied for. As a result of my prior involvement with the High View Road [restricted byway RB188] case I do not consider it to be new evidence. There is no substantive or independently substantiated evidence that any locked gates were ever in place nor if there was whether there was sufficient opening on the side so that any gate was purely to act as an obstruction to vehicles turning off High View Road.”
- 7.5 The Ramblers Association replied: The Ramblers believe that this new request should not be admissible on two points
1. A previous extensive review already considered similar evidence in detail and confirmed the RoW
 2. The new evidence is minor compared to the evidence given at the earlier hearing and is insufficient to consider a further review.
- 7.6 All of the consultation responses are supportive of the path continuing to be recorded as a public footpath. None provide any evidence which would alter the Council’s judgement on the application in any way.

8. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

- 8.1 The County Council is under a duty to make an MMO to amend the DMS where evidence is discovered which, taken as a whole, shows that there is no public right of way over land shown on the map and statement as a highway of any description.
- 8.2 The cost of making an order is therefore not a relevant factor in this decision. For information, 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 the Council’s duties under

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 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 the action recommended in this report is not considered to breach Convention right.
- 12.2 The recommendations in this report are considered to be compatible with the 1998 Act.

13. DISCUSSION

- 13.1 The burden of proof rests with the applicant to demonstrate that public footpath no. 185 Windlesham was incorrectly recorded on the DMS. The footpath was added to the DMS based on presumed dedication following a 20 year period of unchallenged public access from 1960/61 to 1980/81. In

order to be successful the applicant must therefore provide significant new evidence that such a presumed dedication did not in fact occur.

- 13.2 The principal new evidence sources are the statements from residents of High View Road, who claim that a padlocked gate prevented access to the public at point A during the relevant period 1960/61 to 1980/81.
- 13.3 Both Mr Trice and Shepperton Builders Ltd provided evidence at the 1991 public inquiry. The 2011 inspector's report records that Mr Trice discussed the alleged gate in his evidence that year. Their evidence about the gate is not considered to be new.
- 13.4 There are therefore 3 statements from residents which appear to provide new evidence. All of these people lived at 14 High View Road. Only 1 replied to a request for further information.
- 13.5 2 people lived at this address at the same time, from the 1960s until the mid-1970s, and both stated that there was a gate at point A which they do not remember ever being unlocked or opened. Lise Reeve responded to a request for further information and confirmed that she lived there from 1965 to 1974, between the ages of 3 and 13. Her recollection is that the gate was overgrown and never opened, but also that children used to climb over the gate and play freely on the land.
- 5.57 The Council has no reason to believe that that this is anything other than an honest recollection of the path and gate as Ms Reeve remembers them. However, it is noted that she was a child at the time, and although she cannot remember the gate being open, she does recall playing on the affected land, which suggests that the landowner tolerated access to some extent.
- 13.6 Vera and K Johnson then lived in the property from 1975 to 1987. They claim that the gate was never opened during this period. However, the user evidence demonstrates that a stile was installed at point B before 1981, and it is considered very unlikely that access would not have been possible at point A when the stile was installed, as the stile would have served no purpose. The Johnsons did not respond to a request for further information.
- 13.7 Due to the low numbers of statements provided, the lack of detail given, the failure to address the paths shown on 1971 OS plans and aerial photos and the discrepancies in the dates, as well as the fact that a gate at this location was previously considered in 2011, it is considered that the statements fall some way short of the compelling new evidence required to call into any serious doubt the presumption of dedication established at the 1991 public inquiry.
- 13.8 The new documents submitted regarding landfill to the north of the footpath and subsequent flooding of properties on High View Road are not considered to provide any new relevant information. None of these documents identify any obstructions or impact on the footpath which may have prevented public access rights from being acquired. Nor do the

documents provide any proof that the path shown on the 1971 aerial photos and OS plans was anything other than a footpath walked by the public.

- 13.9 It is also considered that, with regards to the previously considered evidence, the judgements made by the Secretary of State in 1991 and 2011 continue to be a correct analysis of the evidence.
- 13.10 It is therefore considered that the evidence is insufficient to demonstrate that the public footpath was incorrectly recorded on the DMS.

14. CONCLUSIONS

- 14.1 Having considered all of the available evidence, the Council is not satisfied that there has been a discovery of evidence which (when considered with all other relevant evidence) shows that there is no public right of way over land shown in the map and statement as a public footpath.
- 14.2 It is therefore recommended that the application is turned down.

15. WHAT HAPPENS NEXT?

- 15.1 Details of the determination should be recorded in a decision notice, along with information about which parties reached the determination. The reasons and evidence for any decision which deviates from the recommendation should also be outlined in the decision notice.
- 15.2 Where no order is made, the applicant may appeal to the Secretary of State. If such an appeal results in a public inquiry the County Council would normally take a neutral stance.
- 15.3 Where an order is made and objections are received and maintained, the order will be submitted to the Secretary of State for confirmation, most likely by public inquiry, where the evidence can be heard in detail by an Independent Inspector.
- 15.4 If no agreement can be reached, the matter may be deferred for further investigations before being considered for a second time. A timescale should be laid out.
- 15.5 Alternatively, where no agreement can be reached, it may instead be referred to the Planning and Regulatory Committee for determination.
- 15.6 All interested parties will be informed about the decision. Where subsequently an order is made, they shall be supplied with a copy and notice of its making.

Lead Officer and Contact:

Rik Catling, Countryside Access Officer, Tel. 07890 944 220

Consulted:

See Section 7

Annexes:

- A** - Plan showing public footpath no. 185, Windlesham
- B** - Land Registry title deeds
- C** - Map Modification Orders Legal Guidance
- D** - 1991 public inquiry decision report
- E** - 2011 appeal decision report
- F** - List of evidence submitted
- G** - Statements regarding the alleged padlocked gate
- H** - Documents regarding landfill and flooding

Sources/background papers:

File CP580, which includes all documents relating to the application, can be viewed by appointment at Merrow Depot.