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## Order Decision

Inquiry opened on 3 May 2017

Site visit made on 27 July 2017

**by Susan Doran BA Hons MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 14 August 2017**

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### **Order Ref: FPS/B3600/7/111**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Surrey County Council Footpath No.578 (Hambledon) Definitive Map Modification Order 2016.
- The Order is dated 13 January 2016 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Surrey County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is not confirmed**

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#### **Procedural Matters**

1. This case concerns the addition of a public footpath through Coleman's Copse, Hambledon along a route commencing on Bridleway No.213, point A on the plan attached to the Order, and proceeding through the woodland via points B, C, D, E and F to Bridleway No.183a, point G.
2. I carried out an unaccompanied site visit to the Order route on the afternoon of Tuesday 2 May. I made an accompanied visit on 27 July with the Applicant, representatives of Surrey County Council ('the Council'), and of the landowner of part of the Order route (points A –F), Stamford Property Holdings ('the Objector')<sup>1</sup>, and an interested party opposing the Order. The remainder of the Order route crosses registered common land, points F-G, in the ownership of Stephen Dean.
3. I adjourned the Inquiry at the end of the first day, and resumed on 26 July.

#### **The Main Issues**

4. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 which requires me to consider whether, on a balance of probabilities, the evidence shows that a footpath subsists along the Order route.
5. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in

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<sup>1</sup> Stamford Property Holdings Limited adopted the original objection submitted by the then landowner, Millgate Developments Limited ('Millgate')

the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication under common law.

6. Section 31 of the 1980 Act requires me to establish the date when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowners to dedicate public footpath rights.
7. The evidence may also be considered under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner(s), who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowners were aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

## **Reasons**

### ***Presumed dedication under Section 31 of the 1980 Act***

#### *When the claimed route was brought into question*

8. The application to add the Order route to the Definitive Map and Statement was made in September 2012. In the absence of an alternative date of bringing into question this would provide a 20 year period of 1992 to 2012.
9. The only other date is 2001 when notices were put up by Graeme Simpson on behalf of Millgate at 5 locations at access points into Coleman's Copse along and facing Bridleway 213 and at the junction of Bridleways 183a and 213, stating 'Private Property No Public Right of Way', though none on the Order route itself. However, only one witness, Stephen Dean, had a vague recollection of notices. None of the other witnesses or user evidence forms (UEFs) described notices<sup>2</sup>, although some witnesses referred to those erected more recently in 2013.
10. A 'bringing into question' arises when at least some of the users are made aware that their right to use the way as a highway has been challenged, so that they have a reasonable opportunity to meet that challenge. I do not consider that the notices put up in 2001 meet this test, for the reasons given above. I conclude that the application in 2012 is the date of bringing into question for the purposes of Section 31 of the 1980 Act<sup>3</sup>.

#### *Whether the claimed route was used by the public as of right and without interruption*

11. A total of 26 UEFs were provided in support of the application, with claimed use extending beyond the 20 year period in question, 1992 to 2012. Of these, 25 people claimed use on foot for recreation or to go shopping. Nine of these

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<sup>2</sup> Other than a metal sign attached to a tree near point D with the word 'Bridleway' and an arrow

<sup>3</sup> Highways Act 1980, Section 31, subsections (7A) and (7B)

individuals had used the Order route on average over 10 times a year, and 10 over 5 times a year.

12. I note that the original route claimed was subsequently amended to more accurately reflect the route surveyed on the ground by the Council. Those completing UEFs confirmed the amended route as correct, and this is the route shown on the Order plan.
13. I heard from 6 witnesses. Whilst I take into account the evidence of the remaining users, the weight that I am able to attach to it is reduced as it has not had the benefit of being tested.
14. None spoke of use by force, or that their use had been interrupted. Claimed use was open. Michael Coleman walked for recreation or with his dog and used parts of the Order route with other paths or as part of a circular walk. He walked sections of the Order route at different times, but could not say that he had used the whole of the route shown on the Order plan, or how many times a year, but he walked there on many occasions. Stephen Dean had used the Order route as part of a circular walk from Hambledon Hurst for recreation. Sally Edwards used the woods generally. In the 1990s she walked the Order route 2-3 times a week, fortnightly then monthly as part of a circular walk or to go shopping in Chiddingfold. Jane Moore had used a number of routes to reach Dunsford, and her use had varied over the years. She sometimes walked with family and friends.
15. Michael Parry used the woodland for dog walking, twice a day to Chiddingfold from 1987, using tracks shown on the Ordnance Survey ('OS') map, often to the pond (west of B) and sometimes to see the bluebells. His frequency of use varied, averaging 3 times a year, and he did not always follow the Order route. David Williams had only used the section A to C for recreational walking in the region of once a year, or every other year, and believed it to be well used. Audrey Monk walked the Order route regularly to Dunsfold and back, at least 10 times a year, often with friends.
16. The only witness I heard from whose use may have been by permission was Sally Edwards of Nutbourne Cottages, although she did not believe this to be the case as regards her past use. In 2013, Graeme Simpson wrote to the residents of Nutbourne Cottages referring to having allowed residents permissive use of Coleman's Copse for recreational purposes since 2000. The letter appeared to grant both future and retrospective permission for them to access the woodland. Arthur Frearson spoke of a permissive right for the residents to collect fallen wood and so forth from the woodland, and indicated this extended to recreational use such as dog walking. There is no substantiated evidence before me that prior to 2013 any permission granted to the residents was other than verbal.
17. The Objector claimed that use was by force as claimants ignored the notices that had been put up in 2001 and subsequently replaced around 2001/2 and 2003/4. However, since users did not recall seeing these notices, or indeed any on the Order route itself, I do not conclude that use was by force. A Council officer who had worked in the area had not seen the notices either, although the periods when he was on site appear not to have coincided with the dates the notices were said to have been in place. Witnesses when asked about them did not consider that they referred to the Order route and were not relevant to them. Section 31(3) of the 1980 Act requires that notices of a

contrary intention put up by the owner of land over which a way<sup>4</sup> passes, must be erected so as to be visible by those using the way. No notices were erected at the ends of the Order route, or along it. In any event, no notices were seen by users in the woodland during the 20 year period under consideration. They appear to have been removed soon after they were put up and again after they had been replaced.

18. I am satisfied that claimed use is by the public. I acknowledge as the Objector argues that it represents only a small proportion of the local population of Hambledon and Chiddingfold. However, I prefer the Council's view that there is no minimum level of user required to give rise to a public right of way. The evidence must, however, satisfy the tests, and be by a sufficient number of people who together may be taken to represent the community as a whole.
19. Witnesses were broadly consistent in that they rarely encountered others when on the Order route, on the public bridleways or in the woodland. It was not untypical it was said, to walk there without seeing a soul. Michael Coleman though had seen others, both strangers and people he knew; and Sally Edwards had seen people including groups in the woodland. The Council considered the lack of observed use was commensurate with such a rural location. The Objector's evidence further to surveys carried out over 6 weeks and described by Adam Kennedy showed a lack of observed use. Whilst these surveys are argued to reflect the situation in earlier years, they post-date the 20 year period under consideration and I attach little weight to them.
20. The Order route was mostly described as well-defined in part and less so in other parts: in recent times fallen trees had blocked the claimed route. I found this to be the case at the accompanied site visit. However, witnesses indicated there were numerous footpaths criss-crossing the wood, such that it was easy to get lost. People could walk wherever they wanted, although some paths were easier to follow than others. The woodland was considered a place the public could access and was regarded by some as 'open' or 'common land'. It was a popular place to visit in the spring with the bluebells in flower; as well as a place where children would play.
21. Those providing UEFs had marked several routes on the plans attached to their forms, indicating that there was a network of paths which they used. The maps show combinations of parts of the Order route with other paths shown on the Order map, but which do not form part of the Order route itself.
22. The Council had interviewed 6 witnesses in its examination of the application, and 3 spoke at the Inquiry. Of the others, one had walked the Order route 6 times a year, another walked through the woods, not always walking the whole of the route; and one had worked for the former brickworks and used the woodland during lunch breaks. She indicated that the routes were not mentioned by the then landowner.
23. I find that use by the public has been as of right, without force, secrecy or permission during the 20 year period, save for those residents of Nutbourne Cottages whom I consider it more likely than not had permissive rights to use the woodland, including for recreation. I agree with the Council that most of the Order route is visible as a physical feature on the ground. This is not surprising in my view given that much of it, together with several other paths

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<sup>4</sup> Section 31(1) of the 1980 Act

in the woodland, are physical features that have been recorded in OS mapping since at least 1916, forming tracks or rides through the woodland. I heard that some of these tracks, including the Order route between B and C were used by local residents with vehicles to extract materials from the woodland.

24. In considering the user evidence I do not doubt that the public have accessed the woodland, and walked the Order route. Nevertheless, the witness evidence described above shows that actual use of the Order route itself is relatively low and infrequent and by some only in part. It is clear that witnesses have used multiple routes within the woodland, and the evidence appears to me to reflect use of the land as a whole rather than the consistent use of a defined route as claimed. This is reflected too in the UEFs which indicate use of multiple routes within the woodland connecting with the Order route<sup>5</sup>, such that it is not evident how much of their claimed use relates to the Order route itself.
25. On balance, and having given careful consideration to the user evidence as it is available to me, I am not satisfied that it is sufficient, even when considered as a whole, to establish use of the Order route, but rather it points to use of various routes within the woodland, and of the woodland as a whole for general access and recreation.

#### *The evidence of the landowners*

26. There is no evidence that any landowner took any actions before 2001 to indicate they had no intention to dedicate the Order route. The notices put up by Graeme Simpson in 2001, it was argued, were intended to apply to the woodland as a whole, but none were placed at, or on, the Order route.
27. Permission to access the woodland appears to have been verbal until 2013 when it was formalised in writing. Arthur Frearson indicated he had written permission from a former owner of the brickworks with regard to the woodland, but it is unclear if this extended to other residents of Nutbourne Cottages. In any event, only one of the 26 claimants could have had permissive access rights as a resident of the Cottages.
28. In 2010, in connection with planning proposals for the former Brickworks site, Graeme Simpson indicated to Audrey Monk that the woodland was private with no public access. To be effective as a lack of intention to dedicate I consider that this view would need to have been expressed more widely to the public.

#### *Conclusions on presumed dedication*

29. Having regard to my findings above, I conclude that there has been use of Coleman's Copse by the public during the 20 year period 1992 to 2012. However, I find on the evidence available to me that use is not consistent with use of a way as required by Section 31(1) of the 1980 Act. Use of the Order route itself is slight, even allowing for its rural location, and/or is of parts of it in connection with other routes not claimed. Accordingly, I am not satisfied that use of the Order route as a way has been demonstrated, as I find that use by the public is more akin to a general access to the woodland for recreational purposes.
30. Had I taken 2001 as the date of bringing into question, my conclusions would be the same based on the available evidence of use.

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<sup>5</sup> Notwithstanding the claimants' confirmation of the alignment of the Order route

## **Common law**

### *Documentary evidence*

31. Extracts from OS maps show the presence of tracks or rides through Coleman's Copse from at least 1916, some of which coincide with the Order route. Exceptions are the first part of the Order route south-west from A and the south-west section from E to F, which are not shown on the historic mapping. Thus large parts of the Order route have existed as physical features available on the ground, potentially available for use. However, whilst OS maps provide evidence of the existence of such tracks, they do not provide evidence of their status. The same is true of an extract from the Sale Particulars of the Hambledon and Witley Estate 1932 which shows a network of tracks through the wood, including much of the Order route.
32. Accordingly, I do not find the maps provided are evidence of the existence of a public right of way over the Order route.

### *Evidence of use*

33. Claimed use extends back to the 1950s, although one UEF claims use from 1919. Eight people claim use for 40 years or more. Frequency of use remains low, taking into account the rural location. There is no evidence that users were challenged or that use was permissive, with the likely exception of residents of Nutbourne Cottages. The Council considered that over many decades the landowners appeared to have acquiesced or been indifferent to use.
34. Nevertheless, having regard to the evidence of use as a whole, it remains my view that use has been of the woods generally, with some limited use of the Order route or parts of it, rather than use of the defined route as claimed. Accordingly, I do not find that a claim at common law is made out.

## **Other**

35. Audrey Monk argued that the Order route provided access to an area of common land to the west of F which would otherwise be inaccessible. However, I note that adjacent land north of F is also registered as common land.

## **Conclusions**

36. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should not be confirmed.

## **Formal Decision**

37. I do not confirm the Order.

*S Doran*

**Inspector**

## **APPEARANCES**

### **For the Council:**

Nancy El-Shatoury

Principal Planning & Highways Solicitor,  
Surrey County Council

who called

Debbie Prismall

Senior Countryside Access Officer, Surrey  
County Council

Michael Coleman

Stephen Dean

Sally Edwards

Audrey Monk

Applicant

Jane Moore

Michael Parry

David Williams

### **For the Objector:**

Douglas Edwards of Counsel

instructed by Chris Holmes, Solicitor  
Pitmans LLP on behalf of Stamford Property  
Holdings

who called

Adam Kennedy

Graeme Simpson

### **Interested party opposing the Order**

Arthur Frearson

## **DOCUMENTS**

### *Submitted on 3 May*

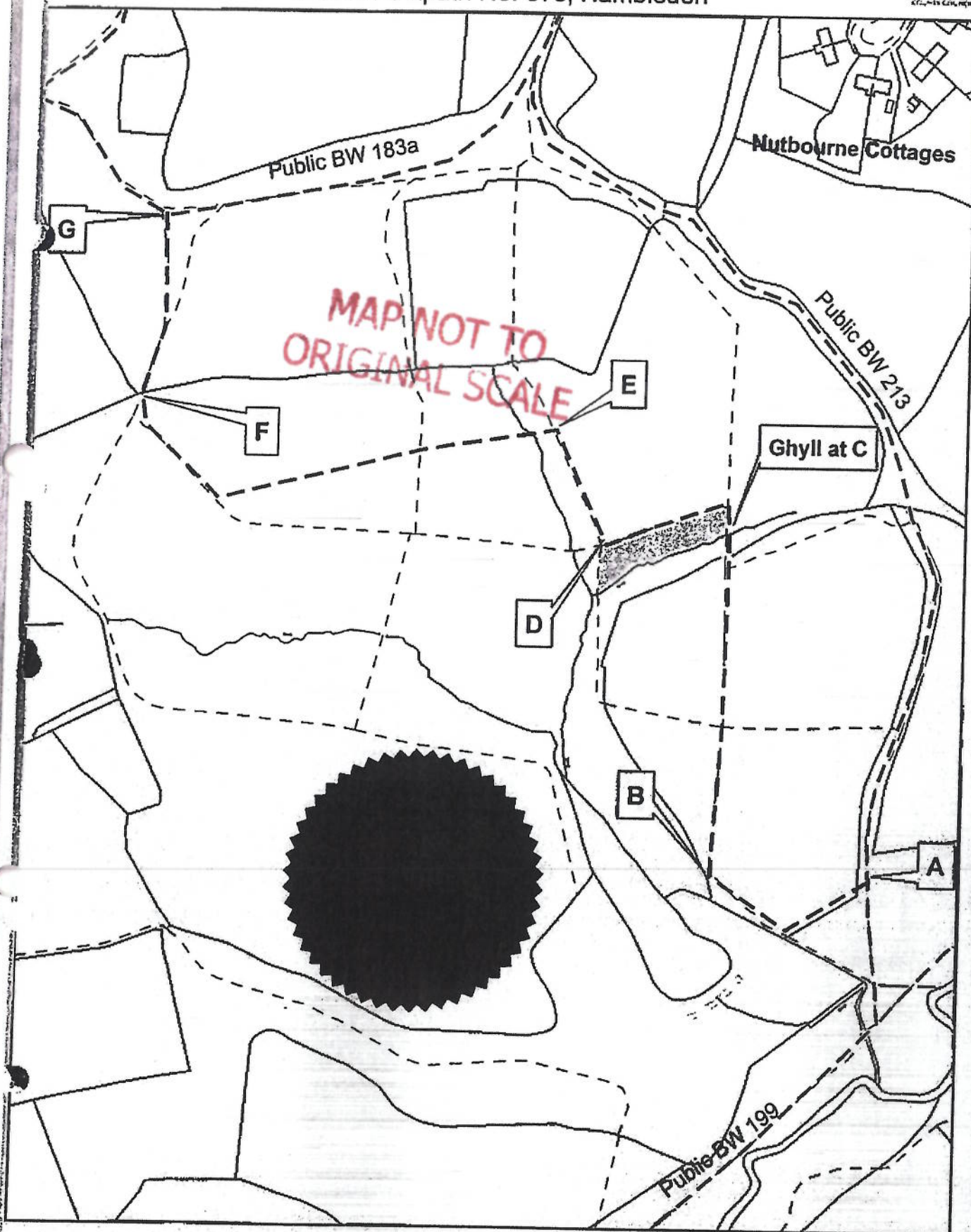
1. Certificate confirming compliance with statutory procedures, submitted by Surrey County Council
2. Signed Statutory Declarations of Robin Baum, George Cowell, Peter Howell-Davies, Gosia Mikowski, Vanessa Rhode, Nick Watson, John Whittall, and Laura White, submitted by Stamford Property Holdings
3. Table of user evidence, submitted by Stamford Property Holdings
4. Opening submission, submitted by Surrey County Council

### *Submitted on 26 July*

5. Statutory Declaration of Langton Chipangula together with attachments, submitted by Stamford Property Holdings
6. Statutory Declaration of James Taylor, submitted by Surrey County Council
7. Additional Statement of Audrey Monk
8. Extracts from 1932 Sale Plan of the Hambledon and Witley Estate, and 1916 and 1976 Ordnance Survey Maps, provided by Audrey Monk
9. Copies of documents from the Council's bundle ( letter dated 8 November 2010 and Hambledon Parish Council Minutes of 2 December 2010) provided for ease of reference by Stamford Property Holdings
10. Errata sheet concerning the Witness Statement of Graeme Simpson, submitted by Stamford Property Holdings
11. Closing submissions on behalf of Stamford Property Holdings
12. Closing submissions on behalf of Surrey County Council



Borough of Waverley  
Public Footpath No. 578, Hambledon



1:2,500

Grid ref at point 'A' SU 972 369

Proposed route shown - - - - -

Distance A - B - C - D - E - F - G 728m

Scale 1:2500 Drg. 3/1/11/H10 Drawn by DP 10/15

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**RIGHTS OF WAY**

STATUS	
Footpath	— — — — —
Bridleway	— + — — —
Rest. Byway	— v — — —
BOAT	— ^ — — —