



## Order Decision

Inquiry opened on 22 May 2018

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 22 July 2019**

---

### **Order Ref: ROW/3182825**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Surrey County Council Footpath No. 129 Byfleet, 3 Wisley (Part) and 566 (Wisley) Definitive Map Modification Order 2016.
- The Order was made by Surrey County Council ("the Council") on 20 July 2016 and proposes to upgrade sections of footpaths to bridleway status ("the claimed route"), as detailed in the Order Map and Schedule.
- There were eleven objections and six representations outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed.**

---

### **PROCEDURAL MATTERS**

1. I opened a public inquiry into the Order on 22 May 2018 at the Council Chamber within the Civic Offices of Woking Borough Council. The inquiry was adjourned after the first day to allow the Council time to consider the late submission made by the objectors (Mr Garland and Mr Salaman)<sup>1</sup> and it resumed on 6-7 February 2019 and 19-20 March 2019 at the same venue. I made an unaccompanied visit to the site on 21 May 2018 and I revisited the site accompanied by the interested parties on 20 March 2019.
2. An application for an award of costs was made at the inquiry and this will be the subject of a separate decision.
3. The objectors have referred to Article 2 of the Human Rights Act 1998. However, the confirmation of the Order would be lawful as it is not possible to interpret the 1981 Act in such a way that it is compatible with the Convention rights.
4. All of the points referred to below correspond to those delineated on the version of the Order Map attached to this decision.

### **MAIN ISSUES**

5. The Order is made under Section 53(2)(b) of the 1981 Act, relying on an event specified in Section 53(3)(c)(ii) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that highways shown in the map and statement as highways of a particular description ought to be there shown as highways of a different description. The evidential test to be applied is the balance of probabilities.
6. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This

---

<sup>1</sup> They presented the case in opposition to the Order as joint owners of land crossed by the claimed route to the south west of the M25 motorway.

---

- requires consideration of whether there has been use of a way by the public, as of right<sup>2</sup> and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way. Section 31 does not apply to land belonging to the Crown<sup>3</sup>, except under a special agreement pursuant to Section 327(2) of the 1980 Act.
7. If statutory dedication is not applicable, I shall consider whether an implication of dedication can be shown at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.
  8. Section 66 of the Natural Environment and Rural Communities Act 2006 prevents the creation of a public right of way for mechanically propelled vehicles after 2 May 2006 and there is nothing to suggest that any of the exemptions in the Act apply to the claimed route. Further, as outlined in guidance issued by the Department for Environment, Food and Rural Affairs<sup>4</sup>, use by mechanically propelled vehicles will not give rise to a lower public right of way.

## **REASONS**

### **Background**

9. The Order proposes to upgrade sections of public footpaths<sup>5</sup> to bridleway status. Reliance is placed on user evidence in support of the dedication of 'higher' public rights over the claimed route. A side roads Order of 1978 diverted a section of the route in the locality of points C-F to facilitate the construction of the M25 motorway. The M25 was opened in this locality in December 1983 and the claimed route has subsequently passed underneath the motorway by means of a subway. It is likely that works in this area would have served to physically obstruct the route for a period of time prior to 1983. In terms of the two levels that exist underneath the motorway, the Council submits that the alleged bridleway proceeds over the lower level. It is the width of the lower level that is included in the Order.
10. Land crossed by the claimed route in the locality of the M25 appears to have been acquired by the Ministry of Transport ("MOT") for the motorway scheme. It is apparent that the land remained in the ownership of the MOT until the formation of Highways England in 2015. Therefore, statutory dedication could not have applied to this section of the route for a period covered by the user evidence as it was crown land. It follows that my consideration of the evidence in the context of statutory dedication below does not apply to the land previously owned by the MOT. The references to the 'claimed route' should be taken to encompass the sections laying either side of the MOT land as well as the whole route.

---

<sup>2</sup> Without force, secrecy or permission

<sup>33</sup> Including government departments

<sup>4</sup> Paragraph 14 of guidance titled "Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways. A guide for local authorities, enforcement agencies, rights of way users and practitioners Version 5 – May 2008".

<sup>5</sup> Byfleet Footpath No.129 and Wisley Footpath Nos. 3 and 566

## **Statutory Dedication**

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

11. There will ordinarily be symmetry between acts that bring the status of a way into question and acts that constitute a lack of intention by the landowner to dedicate a public right of way. Where there is no such event, an application to modify the definitive map and statement will be taken to have brought the status of the way into question. In this case an application was made on 1 June 2013. No such application was made in connection with the submission of evidence forms in 2000.
12. In terms of what might constitute a lack of intention to dedicate, Lord Hoffman outlines at paragraph 32 of the judgment in the case of *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs 2007* ("Godmanchester") that it "means what the relevant audience, namely the users of the way, would have reasonably understood the landowners intention to be."
13. The Council submits that the status of the claimed route was first brought into question in 2006 following the sale of the land to the south west of the M25. Reference is made to verbal challenges and other action being indicative of a lack of intention to dedicate higher rights over the route. The objectors point to earlier events they believe served to challenge use by cyclists or horse riders.

### *Verbal challenges*

14. Given the extent of the use, the verbal challenges relate almost wholly to cyclists. It cannot be determined that cyclists were challenged as early as 2006. Mr Salaman's evidence at the inquiry was that he believed he started to challenge people after 2008. On this issue, I note the difference between Mr Salaman's oral testimony and the objectors closing submissions where it is stated that he challenged cyclists from 2006. I also note from the user evidence forms ("UEFs"), submitted in support of the application, that the earliest specified year given for a verbal challenge is 2008.
15. The evidence is more indicative of the verbal challenges to cyclists not commencing in 2006 but around a couple of years later. However, I appreciate the difficulty of witnesses recalling exactly when particular events occurred. I accept that it is quite possible that the initial challenges occurred shortly after the land was purchased in 2006. I address below the other events that could have served to bring the status of the claimed route into question.

### *Barriers*

16. A letter of 30 January 1965 from a residents' association to the Council refers to a note in connection with a meeting of Wisley Parish Council in March 1964. This states that the claimed route had been closed to wheeled traffic one day a year, but pedestrians could pass on this day by means of a kissing gate. Evidence was provided which led to the route being recorded in the definitive map and statement. In terms of a letter of 7 April 1988 from Mr Cook to the Council, I do not find this to be supportive of the existence of a locked gate at the time. It provides hearsay evidence that a landowner had stated to another person that there was a right to close the route one day a year.

17. The objectors have referred to a conversation between Mr Salaman and Mrs McIntyre regarding the locking of a gate by previous landowners. Notwithstanding my concerns about the late introduction of this matter, there is nothing to substantiate the comments attributed to Mrs McIntyre. In her statement to the inquiry she says that there was a gate at around point F, but it was not an obstruction to people using the route and its purpose was to control the movement of livestock. My note of the evidence of Mr Davis at the inquiry is that he recalled a wooden gate in this location which was rarely closed.
18. A file note by a Council officer (Mr Powles) of 6 June 1995 records what had been found during a site visit to discuss the surface condition of the claimed route in the locality of the M25. It is recorded that "*the metalled access track has been gated off pedestrians have to use the raised F.P. ... This is proving difficult for a number of wheelchair and bicycle users*". It is noted that the route was mainly used by cyclists and it was proposed to investigate making it a cycle route. There is no other information regarding this structure to indicate whether it was sufficient to bring the status of the claimed route into question. The file note only indicates that the structure made it difficult to use the route.
19. Works commenced in 1999 as part of the 'Safer Guildford Initiative' ("the SGI"). This was a multi-agency scheme, which included Guildford Borough Council and the Council. A letter of 15 October 1999 sent to local residents refers to the aim of this scheme being to eliminate traffic using the route as a short cut, the burning of vehicles and fly tipping. The long-term aim was to make the route more environmentally friendly for pedestrians and cyclists. Reference is made to the erection of a new security gate. It is stated that the installation of no entry signs at each end and the locking of the gates would be undertaken shortly.
20. A statement has been made by Mrs Boardman who was the clerk of Wisley Parish Council when the SGI works were undertaken. She says that gates were installed near to the M25 bridge and towards Wisley Lane to stop cars going through, which had padlocks to enable the emergency services to have access. The gates were soon vandalised and had to be replaced. Mrs Boardman states that prior to the gates being installed there was no obstruction. She also outlines that the gate near to Wisley Lane had a gap to one side that was wide enough for walkers and cyclists and she believes horse riders as well.
21. Nine UEFs were submitted in 2000 by people claiming to have used the route in a motor vehicle. It is likely that the SGI works prompted the submission of these forms. This is supported by the letter of 29 March 2000 from one of the users (Mr Chapman). He mentions barriers being erected on either side of the M25, at Samways Road and near to Wisley Lane. Mr Chapman says that he complained when barriers were erected in around 1997 and bollards were subsequently installed and the gates opened. It is apparent that Mr Chapman was concerned about the closure of the route for motor vehicles. Further support for the existence of barriers is found in a letter of 28 August 1997 from Thames Water.
22. Another person who completed a UEF in 2000 (Mr P. Casemore) states that someone had dug a trench in an attempt to obstruct the route. He also mentions that an attempt had been made to erect a gate years ago. Although the reference to a gate could correspond to the one recorded by Mr Powles in

- 1995, there is no additional information regarding a trench. It cannot be said that it was completed or prevented use of the route by cyclists or horse riders.
23. Mr Salaman says that barriers near to the M25 were locked before he moved to his property in 2006. In support, he has provided a photograph believed to have been taken in that year. This shows a barrier across the claimed route on the south western side of the subway. He states that the gate was locked at the time of the meeting with a Council officer in 2006. It is apparent from looking at the photograph that there was a means of access via gaps between the bollards to the side. There is a reference to a locked gate in a Letter of 30 May 2006 from the Council to the former landowner<sup>6</sup>, which could have related to the barrier located at point G. Email correspondence from 2006 states that the intention of the barriers was to prevent access by motor vehicles and fly tippers.
24. The Council says that a locked barrier was erected at point B in 2007 and another such barrier has existed near to the cottages at point G. It cannot be determined when the latter structure was installed. However, a gate in this locality is mentioned by Mrs Boardman in relation to the SGI works. It is apparent from the evidence that the structures were erected with the purpose of stopping use by motor vehicles and to deter activities such as fly tipping. Kissing gates have been inserted where there were previously gaps to the side of these gates in around 2012.
25. There is written evidence of a gate being locked in the mid-1960s on one day a year and this may have hindered or prevented use by horse riders and cyclists. However, the information provided makes it difficult to reach a firm conclusion on this matter. Moreover, the user evidence relied upon by the Council generally covers a more recent period of use. The personal evidence of Mrs McIntyre and Mr Davis does not suggest that another gate was locked.
26. The information regarding structures during the mid-1990s is limited and it cannot be determined that access was not possible for horse riders or cyclists. This would equally apply to the reference to a trench. Whilst there is evidence that barriers and gates were locked on occasions, this does not seem to have prevented access for equestrian or cycle users. The evidence of the users is that gaps at the side provided a means of access until the installation of kissing gates at points B and G by the Council in 2012.
27. The objectors have drawn attention to the case of *R v The Secretary of State for the Environment ex parte Blake 1983*. In this case it was held that gates had served to demonstrate a lack of intention to dedicate a bridleway even though the public had been able to deviate around the structures. The Council point out some differences between *Blake* and the present case. However, as outlined above in *Godmanchester*, consideration needs to be given to what the users of the way would have understood the intention behind the structures to be.
28. It is clear that the intention of the various structures was to prevent use by motor vehicles and other activities that had occurred on the route. Access was available at the side of the structures and the evidence is that the public continued to use the claimed route. None of the users interpreted their use on a cycle or horseback to have been challenged prior to action taken by the objectors after 2006. This contrasts with the UEFs submitted in 2000 from

---

<sup>6</sup> Arlington Business Parks Ltd

people claiming to have used the route in a motor vehicle. The structures clearly served to challenged use by motor vehicles.

29. In light of the particular circumstances in this case I take the view on balance that the structures with adjacent gaps did not serve to bring the status of the route into question for horse riders and cyclists.

### *Signs*

30. In a letter of 23 June 1999, Mrs Boardman refers to 'No horse riding' signs at either end of the footpath between the River Wey and the Thames Water Sewage Works. She says they are small and it is doubtful that horse riders will see them. However, the description of a footpath between the river and the sewage works corresponds to the branch of Wisley Footpath No. 3 to the east of point F, which is not part of the claimed route. The same applies to particular signs mentioned by Mr Salaman, most notably the sign in the tree visible on one of the photographs supplied.
31. There are letters from other objectors that refer to signage, but it is difficult to reach any meaningful conclusion from the limited information provided. None of these parties gave evidence at the inquiry to clarify matters such as the wording and location of particular signs and when they were in place. It appears that some of the references relate to finger post signs and the 'no entry' signage.
32. Finger post signs are generally found at the end of public rights of way. They are informative signs showing the location of the way and its recorded status. These signs do not serve to challenge use by particular types of user. Small Council waymarks have been put on posts confirming that the route is a public footpath and other types of use is not allowed. The Council's witness (Mr Williams) does not know when the waymarks were first put in place. Site notes of 2006 compiled by Mr Booker of the Highways Agency refer to a small Council sign stating that the underpass is a "*footpath no horses*". It is acknowledged that a 'no cycling' sign was erected at point B in conjunction with a barrier in 2007.
33. The evidence of the users is supportive of 'no cycling' signs first being seen in around 2005 or 2006. I do not agree with the objectors that the evidence of Mr Creswell at the inquiry was indicative of earlier signs being on the route. In terms of an original sign on the barrier at point G, which Mr Salaman says he replaced with a similar worded sign, no sign is visible on one of photographs of 2000. It cannot be said when any such sign was first placed on the barrier at point G.
34. There were no entry signs at each end of the claimed route with an accompanying plate with the wording "*Except for access*". It is apparent that this signage was erected at the end of 1999, or the beginning of 2000, as part of the SGI. Investigations undertaken by the Council reveal that no Traffic Regulation Order ("TRO") was ever made, and it is stated that the signs were erected without lawful authority. The objectors say that you cannot tell by looking at the signs that this was the case. They also draw an analogy with the use of no entry signs in private car parks.
35. The absence of a TRO means that no offence was committed by cyclists using the route. However, it is apparent from the evidence of some of the witnesses at the inquiry that they were aware that 'no entry' signs apply to cyclists. The

signage did not indicate that there was an exemption for cyclists. Whilst these signs are not applicable to horse riders, the vast majority of the use relied upon in support of the application for a bridleway is from cyclists.

36. In considering the use by cyclists, I have to consider what they would have understood the signage to mean. I take the view that the signs were mostly to have indicated to cyclists that they should not use the claimed route. This would have been apparent when travelling from either end of the route. Therefore, I conclude on balance that the status of the claimed route was brought into question by the no entry signs, which were erected in the latter part of 1999 at the earliest. I distinguish these signs from the no through route signage at point H, which would not have challenged users. I do not find there is evidence to show that any earlier action was sufficient to challenge use by cyclists or horse riders.
37. In light of my conclusion above it cannot be shown that there was use for a continuous period of twenty years following the interruption caused by the works in relation to the M25 and the realignment of the claimed route. Further, statutory dedication cannot apply to the part of this section that was in the ownership of the MOT. The combination of these factors means that I consider it appropriate to assess the user evidence relied upon in the context of common law dedication.

### **Common Law Dedication**

38. Fifty-seven people have completed a UEF in support of use of the claimed route on a cycle or horse. Ten of the users were interviewed and eleven people gave evidence at the inquiry in relation to their use of the route. Around thirty-five of these people have provided evidence of use between 1983 and 1999. Additional people have provided some brief written information in support of use of the route. I do not find it relevant that no earlier application was made to record the route as a bridleway. In terms of a later UEF from Mr Chapman that mentions additional use on a cycle, there was no question relating to cycling use on the earlier form he submitted in 2000.
39. In assessing the number of people who have used the claimed route I have discounted the evidence of Mr and Mrs Kaile as they enjoy a permissive right of way between their property near point G and Wisley Lane. However, any use by them towards Byfleet would not appear to be by way of permission. Whilst the Woodruff family own land crossed by a short section of the claimed route, they have no apparent private rights over the remainder of the route.
40. The frequency of the specified use is stated to range from once a year to around once a week and was mainly for recreational purposes. Mr Salaman disputes the level of use, particularly for the period following his purchase of a property that abuts the claimed route in 2006. Although the period of use to be considered for the purpose of common law dedication predates 2006, the evidence of the users and other documentary evidence points to the route previously being well used by cyclists.
41. I found the user evidence given at the inquiry to stand up well to cross-examination. There is also an acknowledgment in the written submissions of additional parties that the claimed route was used by cyclists. For instance, Mrs Boardman says that when she moved to the area in 1988 the route was used by walkers, cyclists and motor vehicles. It is clear from the UEFs that the use by cyclists far outweighs the evidence of equestrian use. However, the

- cycle use would be taken along with the use by horse riders to be indicative of a bridleway.
42. In terms of whether the user was as of right, I have addressed the permissive use above. There is no evidence to indicate that the use was undertaken in secret. It is apparent that the SGI works were implemented to address various problems but that these did not involve use by cyclists. In light of the circumstances in this case I do not view people riding to the side of any barriers to constitute use by force. It cannot be said that barriers were vandalised by cyclists or horse riders. The written evidence of Mr Greasley outlines that one of the more recent signs was removed by a cyclist in 2013. However, this occurred well after the period to be considered for common law dedication. The same would apply to the removal of any signs erected by the objectors.
  43. It cannot be determined from the evidence whether the landowners actively supported or opposed the SGI works that were undertaken. The fact that the proposal for the route to become a cycle track failed to materialise does not mean that any landowner opposed it. Signs of the resurfacing works undertaken in 1999/2000 are still visible on site. There is no evidence of action being taken by a landowner prior to the measures adopted by the objectors after 2006 to challenge use of the claimed route. The evidence regarding the installation of signage and barriers is attributed to other parties.
  44. The user evidence outlined above would also be supportive of the dedication of a bridleway at common law for the section of the claimed route where it crossed the MOT land. I consider from the evidence of use provided that it would have been sufficient for a reasonable landowner to be aware that the route was being used by bridleway traffic. There is no evidence of action being taken by the MOT to challenge the use of the route by horse riders or cyclists.
  45. Signage at the entrance to the subway states that it has a headroom of 7 feet 6 inches (2.3 metres). However, measurements taken by the Council indicate that a greater clearance is available at each end of the subway. Reference has been made to various design standards for subways. The objectors assert that the MOT did not have the capacity to grant bridleway rights over the footpath as it breached their own design standards.
  46. Extracts have been provided from the Inspector's report that followed the public inquiries held at Byfleet in September 1977 involving the proposed M25 motorway. Paragraph 9.41 of the report outlines that the headroom under the bridge should be 2.3 metres and the realigned footpath would co-exist with the new private means of access subject to vehicular rights.
  47. A number of the documents provided postdate the construction of the subway. They are forward looking documents setting out the design standards for future schemes. The same applies to the British Horse Society guidance. There is uncertainty regarding what standards were applicable when the subway was approved. However, there is some merit in the Council's view that the relevant standards would have been those found in the 'Roads in Urban Areas' publication of 1966. The Council points out that the subway conforms to the relevant standards in this guidance.
  48. It is apparent from the above that there is the potential for the subway to have conformed to the relevant design standard for a route used by pedestrians and cyclists when it was approved. Nonetheless, I do not find on balance that this



issue has any bearing on whether an inference of dedication can arise from the user that occurred once the subway had been built. The evidence is clearly supportive of both cyclists and horse riders subsequently using the claimed route.

49. For these reasons I conclude on the balance of probabilities that the dedication of a public bridleway at common law can be implied from the evidence of use and the conduct of the landowners prior to the erection of the no entry signs. It should also be borne in mind that the no entry signs were erected in connection with the SGI and not by the landowner. Before reaching my final conclusion, I briefly address below the submissions made by the objectors regarding public nuisance.

### **Public Nuisance**

50. The granting of higher public rights over an existing footpath might constitute a public nuisance to pedestrians using the path. Such a grant would not be lawful if it gave rise to a public nuisance. This is distinct from the allegation that the recording of the route as a bridleway would mean that it is unsafe for cyclists or horse riders, which is not relevant to my decision.
51. There is a lack of evidence to substantiate the objectors claim that the designation of the route as a bridleway will constitute a nuisance for pedestrians. The concerns expressed in the written submissions of people opposed to the Order generally relate to the potential use by motor cycles. There is scope for the Council to maintain the route in a manner that would accommodate the different types of lawful user. It follows in my view that there is no merit in the objectors' submissions on this matter.

### **OTHER MATTERS**

52. The objectors have also referred to the issue of safety when making submissions on the physical character of the route and statutory incompatibility. In terms of the statutory incompatibility issue, there is nothing to show that the use of the subway by cyclists and horse riders will be incompatible with the statutory functions of Highways England.
53. The issue of the widths presently recorded in the definitive statement for sections of the claimed route was not the subject of the inquiry. It would need to be demonstrated by way of cogent evidence that an error occurred when the widths were first recorded in the definitive statement. It is open to the objectors to provide such evidence and make an application to modify the definitive statement. In respect of the subway, there is nothing to suggest that the user did not extend over the full available width of the lower level. It is also apparent from the evidence that a greater width was previously available for the remainder of the route.
54. I appreciate the concerns expressed regarding the risk that there will be an increase in anti-social behaviour and criminal activity if particular structures are removed. However, these matters are not relevant to my consideration of the Order. It will be for the Council to decide what action should be taken to mitigate any unlawful use of the route. It cannot be determined that there were any structures in place when the higher public rights were dedicated.

**CONCLUSION**

55. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed.

**FORMAL DECISION**

56. I confirm the Order.

*Mark Yates*

**Inspector**

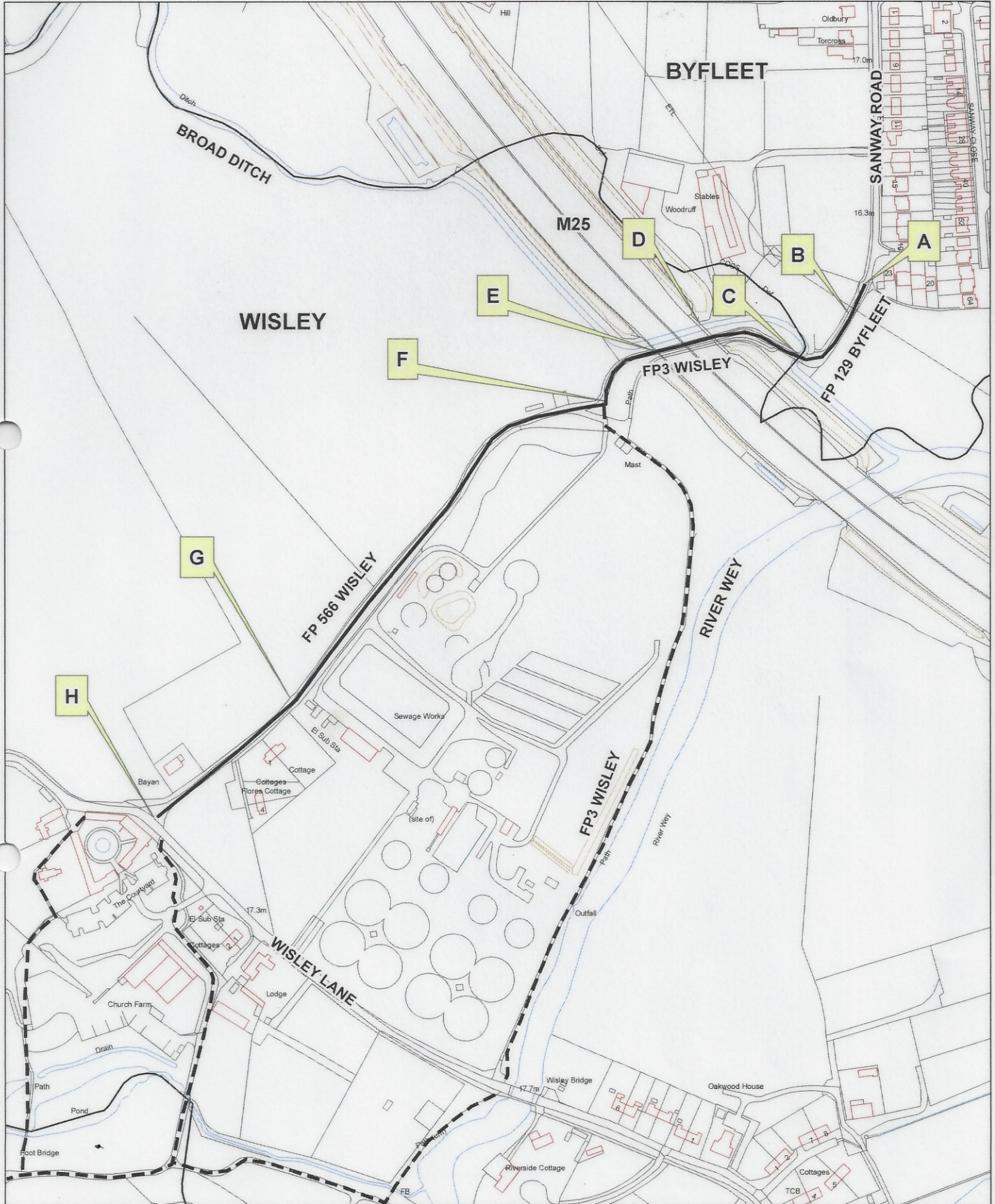




H25

# Claimed Route

## Claimed upgrade of Public Footpath 129 (Byfleet), Part of Public Footpath 3 (Wisley) and Public Footpath 566 (Wisley)



**1:2,500**

Public Footpaths

Claimed Route A-B-C-D-E-F-G-H

Parish Boundary

© Crown Copyright and database rights 2014 Ordnance Survey 1000019613.  
 Except A-Z Street Atlas © Copyright of the Publishers Geographers' A-Z Map Company Ltd.

Drawing No: 3/1/75/H25  
 Date: 09.02.16  
 Drawn By: CV  
 Grid Ref at point A: 506261 160018



## Costs Decision

Inquiry opened on 22 May 2018

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 24 July 2019**

---

### **Costs application in relation to case Ref: ROW/3182825**

- This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5).
- The application is made by Mr Ward on behalf of Surrey County Council ("the Council"), for a partial award of costs against the objectors (Mr Garland and Mr Salaman).
- The inquiry was held in connection with the Surrey County Council Footpath No. 129 Byfleet, 3 Wisley (Part) and 566 (Wisley) Definitive Map Modification Order 2016.

**Summary of Decision: The application fails and no award of costs is made.**

---

### **The Submissions by Mr Ward for the Council**

1. The application is for a partial award of costs against the objectors for the additional time at the inquiry arising out of their unreasonable behaviour in the conduct of the inquiry. That behaviour relates both to the lack of detail and evidence, giving proper disclosure of the case they would be advancing in their statement of case and proof of evidence, as well as their conduct at the inquiry itself.
2. It is submitted that there have been numerous examples of unreasonable behaviour and without which the inquiry would have been completed sooner and the costs of attending further days of the inquiry would be avoided.
3. That unreasonable behaviour includes the following:
  - a) The failure on the third day of the inquiry to indicate that there was an intention to ask further questions of Mr Salaman – completing his evidence in chief, despite there being sufficient time to do so. Around an hour of inquiry time was unreasonably and unnecessarily lost. That time was lost yesterday and as a direct consequence of this there has been the need to continue the inquiry today when at the very least it should have been concluded yesterday. The costs are therefore for the fifth day of the inquiry.
  - b) Additional time has been wasted as a result of further unreasonable behaviour as follows:
    - i. The persistent and unjustified interruptions of witnesses when they were answering questions;
    - ii. The failure to identify documents before putting the documents to witnesses or otherwise referring to them;
    - iii. The constant interruptions of others whilst making submissions to the inquiry;

- iv. Unreasonably protracted cross-examination of witnesses, lacking focus and direction and often concerning irrelevant issues or unnecessary repetition of questions which the witness had given a direct answer to;
  - v. The failure to answer questions when giving evidence requiring the question to be put again several times;
  - vi. The lack of detail or particularity in the case advanced thereby increasing the time required to deal with issues, for instance regarding when the status of the route was brought into question;
  - vii. Introducing late evidence and submissions on the first day of the inquiry concerning, amongst other matters, construction guidelines allegedly applicable to the subway. An adjournment to investigate these issues was necessary which could otherwise have been dealt with on the day.
4. These further matters have delayed the inquiry by at least a further day. But for the unreasonable behaviour, an inquiry of this type could and should have been completed within three days.
5. The application is for the wasted expense associated with sitting days four and/or five of the inquiry.

#### **The Response by Mr Garland**

6. The application for costs is opposed.
7. They are not qualified practising lawyers and the statement Mr Ward delivered is what would be expected from qualified legal representatives.
8. The objectors are litigants in person attempting to protect their property rights. What is unreasonable behaviour for a litigant in person is different to that set out by Mr Ward. Unreasonable should be given its ordinary meaning and they do not believe that they have acted unreasonably in this matter.
9. In response to the particular points set out in the costs application:
- (a) This appears to relate to questions put to Mr Salaman as part of his evidence in chief. He called Mr Salaman to read his statement and give evidence followed by questions. This evidence would then be subject to cross-examination and re-examination. He understood that this was the procedure. After Mr Salaman finished what he wished to say there was a discussion about what to do. He was not aware that he had to ask permission to put questions to Mr Salaman. He may have been mistaken but he does not consider this to be unreasonable. The loss of time is disputed. In any event Mr Ward had extensive cross-examination and a lot of time was wasted.
  - (b) (i) It is not known how much time was attributed to this matter. It is potentially minutes. The Inspector made a comment. If it was significant he would have said something more. They are not lawyers.  
  
(ii) How are they supposed to do this? Mr Ward did not seem to know where documents were located. Mr Garland went through a number of documents with the Council's witness and these were identified.

(iii) Minimal time was taken up on this matter.

(iv) It is not believed that anything was wrong. Nor was there any indication from the Inspector that this was the case. Again, no time is placed on it.

(v) He recalls one incident where the question was put three times. It potentially wasted 30 seconds.

(vi) They put in an objection and a file of emails with the Council. Arguments were put in the statement of grounds. The Council knew of the objectors' position.

(vii) The legal submissions were submitted to the Planning Inspectorate prior to the inquiry. Mr Ward objected to them being put to the inquiry, but the inspector took the view that they should be considered. No time was wasted as people were heard on the opening day who wanted to give evidence.

10. What costs have been incurred by not setting a date for the bringing into question. Mr Ward has put in various dates. As the inquiry has progressed various events have come to light. To ask the Inspector to decide the point is not unreasonable.
11. There is no evidence that one or two days have been lost. Mr Ward's cross-examination has not helped. The site visit also took time.
12. It is a question of available resources. They have acted as reasonable as they could and do not think they should be penalised with costs. It is a malicious application.

### **Reasons**

13. I have considered this application for costs in light of the published Planning Practice Guidance relating to costs. The guidance advises that costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense.
14. The objectors put questions on specific topics to the Council's witness (Mr Williams) and the individual supporters. Mr Salaman then gave evidence on behalf of the objectors and delivered the closing submission prepared by Mr Garland.
15. It was my understanding that Mr Salaman had completed his evidence in chief on the third afternoon of the inquiry. However, it was apparent from hearing Mr Garland's submission on the fourth day that this issue had been misunderstood as he wanted to put questions to Mr Salaman to clarify some points regarding his evidence. It is not unreasonable for the evidence to be presented in this manner. Further, as the third day of the inquiry finished at 16:45, it is unlikely that Mr Garland would have concluded putting his questions by the end of the scheduled finish time at 17:00.
16. I do not accept that the objectors unreasonably held up matters in terms of documents put to witnesses or when referring to documents. There were a number of documents presented to the inquiry. This caused problems on occasions in locating where something was located. I noted that Mr Garland assisted other parties at times on this matter.



17. In my experience the cross-examination of witnesses is the aspect that lay people find most difficult at inquiries. As occurred at this inquiry, there is often the need to remind people to ask questions rather than making statements that should rightly be given as part of their own evidence. I did not detect any particular focus on irrelevant matters in this case. When I asked the objectors to move onto another question or topic they did so.
18. Mr Salaman did not directly answer questions on some occasions. This does happen at inquiries and I made the point that I had noted the question and the lack of response from the witness. Whilst this happened on more than one occasion, I did not find it to be a significant issue.
19. The objectors' statement of case was very brief, and no specific proof of evidence was provided by Mr Salaman. However, the objectors had submitted most of the information they relied upon well in advance of the inquiry. It was apparent that a number of the issues pursued by them had been included in the material already supplied to the Council. Mr Salaman relied on a statement previously submitted which he read at the inquiry. The lack of experience by the objectors meant the way their case was presented at times was disjointed but I do not view this as being unreasonable behaviour. The issue of when the status of the route was brought into question will depend upon the evidence presented at the inquiry and views may change on this matter as the inquiry progresses.
20. As I made clear at the inquiry, the interruptions by the objectors were on occasions unnecessary and not appropriate. To a certain extent this can be put down to their lack of experience of public inquiries. However, it should have become apparent as the inquiry progressed that some of the interruptions were unwarranted. Whilst such conduct may be viewed as unreasonable behaviour, it is difficult to attribute a specific amount of time to this matter. On balance, I do not consider that the interruptions amounted to such a significant loss of inquiry time to warrant a finding that unnecessary expense had been incurred by the Council.
21. It was unreasonable to submit additional material to the Planning Inspectorate only a day or so before the opening of the inquiry on 22 May 2018. This was well after the deadline for the submission of documents and no justification has been provided for their late submission. In my view this was clearly unreasonable behaviour on the part of the objectors.
22. The need to take an adjournment following the submission of late material can lead to a finding in favour of a costs application due to the inquiry being prolonged and unnecessary expense incurred. However, in this case, inquiry time was not lost to the adjournment as the evidence of individual witnesses was heard on the opening day of the inquiry. The second day of the inquiry resumed after the Council had had the opportunity to consider the late submissions. It cannot be said that the duration of the inquiry was prolonged by the late submission. Clearly additional time was taken to cover matters included in the late submission, but this is different from the issue raised in the costs application. Therefore, I am not satisfied on balance that unnecessary expense can be said to have arisen from the late submission.

**Conclusion**

23. For these reasons I do not conclude that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated.

**Formal Decision**

24. I refuse the application for an award of costs.

*Mark Yates*

**Inspector**