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| **Order Decision** |
| Inquiry Held on 10 & 11 May 2023 |
| **by K R Saward Solicitor MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 July 2023** |
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| **Order Ref: ROW/3228628M (Order D)** |
| * 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. 644 (Banstead) Definitive Map Modification Order 2018.
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| * The Order is dated 28 August 2018 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
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| * 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.
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| **Summary of Decision: The Order is confirmed subject to modifications previously proposed and as set out below in the Formal Decision.** |
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Preliminary Matters

1. This Decision relates to one of four Orders considered in my Interim Order Decision (‘IOD’) which was issued on 15 July 2022.
2. All four Orders were made by Surrey County Council (‘SCC’) following an application by Mrs Christine O’Brien in August 2015 to add public footpaths to the Definitive Map and Statement (‘DMS’) on land to the east of Rectory Lane, Woodmansterne. Orders A and B (Appeal refs: ROW/3228625 and ROW/3228626, respectively) were made on 21 March 2018. Due to drafting errors those Orders were re-made by SCC on 28 August 2018 and those Orders are referred to as Orders C and D (Appeal refs: ROW/3228627 and ROW/3228628, respectively).
3. I have already decided not to confirm Orders A and B, as requested by SCC. I also decided to confirm Order C as made, the objection to which was withdrawn during the previous Inquiry. Those decisions have taken effect.
4. In my IOD, I proposed modifications to Order D to the effect that part of the way shown in the Order as submitted should not be confirmed and added to the DMS.
5. When advertised, there were 11 duly made responses (including one from SCC, as order making authority) opposed to the proposed modifications and advocating confirmation of Order D in unamended form.
6. Given the number of objections and their nature (concerning submissions of use by the public), a second Inquiry was held to hear evidence in relation to the proposed modifications to Order D for points B to F only.
7. Counsel for SCC joined the Inquiry remotely and was able to participate fully throughout.
8. At the request of Mr Morgan who submitted an objection to the proposed modification, I undertook a further unaccompanied site visit on the morning of 12 May 2023. The purpose was to see the entry/exit points onto Rectory Lane between points B to F, as mentioned in his proof of evidence. I was unable to walk the entirety of this stretch due to the presence of fencing across the route at point B and the creation of a vehicular access with steep banks on each side a short distance north of this point. Despite these features, I nevertheless saw the access points as marked on Mr Morgan’s map.
9. In arriving at this final Decision, I have considered the totality of evidence (both written and oral) over the course of both Inquiries. This Decision should be read in conjunction with my previous IOD.

**Background**

1. Before analysing the evidence, I firstly summarise the background as context.
2. One objection was outstanding to Order D by the time of the Inquiry from the Drake family who are affected landowners. They do not object to the part of the Order route beside the field boundary between points C and F on the Order map. Their objection challenges the existence of a public footpath around the perimeter of the same field between points B and F. The land affected by the Orders is known locally as ‘Drakes field’.
3. In my IOD, I concluded that the route between C and F should be confirmed. The legal tests and standard of evidence remain the same for the entire route. Whilst I accepted the testimony of some users as good evidence of their use for the route in its entirety, I found the evidence to be stronger for points C to F. The evidence heard for B to F was more limited and although there were a lot of user evidence forms (‘UEF’s’), much of the details lacked clarity as described in more detail below.
4. The advertisement of the proposed modification gave opportunity for further witness evidence to come forward, and clarification to be obtained on the UEFs to address the gaps in evidence identified in my IOD. Any such further evidence could then be tested.
5. There is a typographical error in Order D. Claimed public footpath No 644 (‘FP 644’) is incorrectly described as Footpath No. 643 (‘FP 643’) in paragraph 3. SCC agrees that this requires modification should the Order be confirmed. The statutory objectors agree that it is a minor clerical error capable of correction.

**Reasons**

1. As set out in my IOD, the application relies upon evidence of public use of the claimed path. In my IOD, I concluded that the date the status of the claimed route was brought into question was the date of the application for a definitive map modification order in August 2015. This gave a 20-year period of August 1995 to August 2015 for the purposes of establishing whether dedication of the way as a public footpath has occurred through public use under section 31 of the Highways Act 1980 (‘the 1980 Act’). Evidence in the second Inquiry focussed on this period.
2. After the first Inquiry, I was not satisfied there was sufficient evidence to show that on the balance of probabilities a public footpath subsists over the section of route from B to F in relation to the tests under section 31. The quantity and quality of evidence also led me to conclude that the evidence did not suffice to show dedication at common law either. I reached that view having taken into account that a period of under 20 years public use might suffice at common law.
3. I reached this conclusion given the limited tested evidence for this stretch and ambiguities in the submitted UEF’s. This was not a criticism of those who completed the forms. Invariably, the detail given in standard template forms is far more generalised than full written statements or indeed oral testimony.
4. Whilst the UEFs are part of the overall picture of use, the lack of clarity and precision in those for B to F led me to treat the contents with caution. Only five users attended the first Inquiry to clarify their use.
5. The parties agreed a form of wording to modify Order D should I only find in favour of that part of the route along the uncontested stretch between C to F.

*Witness evidence heard at the second Inquiry*

1. SCC supports confirmation of the Order in its entirety and took the lead at both Inquiries in promoting the Order. Aside from a proof of evidence from the Council Officer, SCC also presented proofs from five witnesses for the second Inquiry, three of whom had submitted proofs and given oral evidence at the previous Inquiry. The two new witnesses called by SCC were Mr O’Brien (the applicant’s husband) and Mr Kidman.
2. Mr Poore was not re-called by SCC although his oral evidence at the first Inquiry had included B to F. Mr Lehman also attended the first Inquiry and gave evidence in support of both FP 643 and FP 644. My considerations include their evidence.
3. At the first Inquiry, the witness evidence concerned both Orders C and D. At the second Inquiry, evidence focussed on B to F in Order D.
4. Mrs Auston said she had been able to check dates since the first Inquiry. Her use of Drakes field began upon getting a dog in 1976. They always had at least 1 dog until about 3 years ago and she “walked them around the field”. This depended on time and weather. Mrs Auston’s proof of evidence refers to walking all the way around the field probably 3 days per week. She corrected this to mostly twice per week as her husband was the main dog walker. The edge was uneven when it was a grassed field. Crops appeared mid to late 2000s but not every year. At the first Inquiry Mrs Auston described walking the whole perimeter in a clockwise direction, as a nicer walk, sometimes entering midway between B and F.
5. Mrs Thorpe clarified and corrected details in her second proof of evidence. This refers to regularly walking around the field throughout the relevant period of 1995 to 2015. The proof specifies that either Mrs Thorpe or a member of her family walked their dog in the field from 1996. They entered the field at point A. During the week the main walk was “across bottom and up the far side”. By this Mrs Thorpe confirmed she meant A-B-C-F and “maybe not all the way up” to point F. With more time available at the weekends, they would walk a complete lap i.e., including F to B. They tended to go anti-clockwise. This pattern continued until 2010 (not 2015) when their dog died. Thereafter, Mrs Thorpe continued to walk her sons’ dogs 2/3 times per week and “often a full circle of the field” until 2015.
6. There are some inconsistencies in the evidence of Mrs Thorpe’s use in 1995. Her UEF indicated no use from 1992-1995 (inclusive) with use resuming with “another dog” in 1996 rather than 1995 as stated in her second proof and at the second Inquiry. At the first Inquiry she had confirmed use from 1996, which I find more plausible particularly as the UEF was completed closer in time to the event.
7. The evidence of Mrs O’Brien, the applicant, was at times unclear and contradictory. Of course, witnesses were being asked to recall activity from many years before and I appreciate it is not an easy task. Her proof of evidence for the second Inquiry refers to use of the field generally without explicit mention of B- F.
8. Mrs O’Brien confirmed that “when we got our first dog” in 1990 she would occasionally walk the dog around the whole perimeter (including A to F) maybe once or twice a month. Her proof of evidence makes no mention of any change in this pattern before 2005. However, at the second Inquiry Mrs O’Brien indicated her use of B to F between 2000 to 2005 was at least once a week. At the previous Inquiry her evidence of B to F was weekly use from 2003-2011 and occasionally thereafter. When I sought clarification, Mrs O’Brien could not recall and said she had walked “all routes” and no two days were the same. Due to difficulties in recollection, I find it more likely that her use of B to F was as stated in writing and once or twice a month from 1990-2005.
9. From 2005 to 2011 Mrs O’Brien said that her use increased when she would take her active grandson “into the field” every weekday after school, weather permitting, to use up his energy. Her proof refers to this use as “around the field”. In answer to my questions, Mrs O’Brien said that if her grandson was “hyper” they would go from B up towards F to look at the wildlife “but not to the top”. She then corrected this to say they “might on occasion” go to point F.
10. In her written proof, Mrs O’Brien says that since 2011 her use was only ‘occasional’ taking the dog for a walk. However, her oral evidence was that from 2011 her use of the field paths was “once a week and usually the whole field”. The inconsistencies give cause to question the reliability of her evidence outside of the period 2005 to 2011 on which she was most clear. She also acknowledged occasionally walking through the middle of the field where there was a clear path.
11. Mr O’Brien claims use from 1976-2015. His oral evidence was somewhat hesitant on the details. He would often enter Drakes field by going up the bank off Rectory Lane at the first entry point up from point B as this was nearest his house. He “generally walked the whole perimeter”. He clarified that his reference (in UEF 52) to use 300+ times per annum included cross-field paths. When pressed on how often he used B to F, Mr O’ Brien thought it probably 5 days per week and the other “middle paths” 2 days per week. At point F he would walk up to the plantation. He also walked beside and to the back of the lagoon. When going to the station, Mr O’Brien said that he would enter via the stile at point B to the corner of the field at point C. His evidence indicated that he walked multiple routes all over the field.
12. During cross-examination, Mr Kidman explained that the Council Officer had written his proof of evidence. Some of the details were wrong and he did not agree all the content. For instance, he would not walk a full “loop of the field” as specified. When I queried with Mr Kidman how I could tell which parts of his proof were accurate, he told me to disregard his proof of evidence altogether. Instead, Mr Kidman was “sticking by” his previous joint statement made with Ms Gately dated 2 September 2016, which he confirmed to be correct. Consequently, I have disregarded Mr Kidman’s proof of evidence and taken into account the content of his earlier statement and corrected oral testimony.
13. The statement of 2 September 2016 is written as a record of interview which both Mr Kidman and Ms Gately signed. It records that aside from using A-B-C for the railway station they “also walked a full lap of the field daily since they got dogs in 2010, before then they probably didn’t do a full loop of the field.” When asked if he walked the full perimeter prior to 2010, Mr Kidman replied “probably once or twice but I can’t really remember”.
14. Mr Kidman told the Inquiry how he had once been midway between points A and F when the farmer stopped his tractor to tell Mr Kidman that he should not really be there. Mr Kidman’s dog had been off-lead and his interpretation was that the farmer only meant he should not be there during ploughing for safety reasons. According to the interview record, this incident occurred around 2014.
15. In addition to those provided by SCC, a proof of evidence was submitted in support of Order D by Mr Morgan who also attended the second Inquiry. Mr Morgan had completed a UEF at the outset but did not give evidence at the first Inquiry. In his UEF Mr Morgan claimed use between 2004 and 2015 of three paths annotated on his map. His path 3 is B to F which he claimed use of 5 times per year. He changed the frequency slightly in oral evidence to between 3 to 5 times per year commenting that he had not documented his use, but it would have been “occasional”.
16. In his UEF, Mr Morgan said that when he came to view land he intended to buy “the footpaths were obvious and had clearly existed a long time.” Mr Morgan confirmed orally that he first became aware of the paths in November 2004. He “didn’t walk the whole field to start” but could see there was a path from B to F.
17. Mr Morgan described doing a lot of work on his boundary fence (next to The Midday Sun pub, and adjacent to part of B to C) in 2007. He referred to “a lot of people” walking past. However, these were users of B to C and not B to F. Mr Morgan confirmed during cross-examination that B to F is not visible from his boundary as the field is convex with the middle part rising significantly higher than the rest. He admitted having “no idea at all” who was walking B to F whilst working on his fence.
18. Most of Mr Morgan’s points are submissions, including on aerial photographs, to which I return.
19. During the Inquiry two further witnesses, Ms Bassett and Mrs Coward, came forward to give evidence in support of the route B to F. Their oral evidence was subject to cross-examination by the landowner’s advocate.
20. Mrs Coward lives in Rectory Lane and began use of Drakes field from 2000, always walking in an anti-clockwise direction. She walked A-C-F about 4 or 5 times per annum and “not the full circuit as much”. Her use of the disputed stretch between F to B was 2 to 3 times per annum.
21. Ms Bassett had completed a UEF (UEF 13). She has lived in Rectory Lane for 33 years. Her UEF indicated use since 1989 around the whole perimeter plus a cross field path around 350 times per year. In oral evidence Ms Bassett clarified that she did not walk B to F in 1989 but “the bottom path”. It was from the early 1990’s, maybe 1992/3, that she started to walk her two dogs twice a day around the perimeter (including B to F) and did so for 18 years. After that, she walked B to F possibly once or twice per month, always entering at point A. Ms Bassett explained that in the early 1990’s the field was fallow, and people (herself included) walked across the field as well as the perimeter. When the field started to be ploughed in the early 2000s, she and other users started to walk the perimeter. At this time, Ms Bassett stopped using the cross-field path. In her UEF completed in 2015, Ms Bassett indicated that it was around 2005 that the field was planted, and her use of a cross field path stopped.
22. This account is helpful in clarifying that the use of B to F by herself and others was less during the 1990’s into the 2000’s until the field became under cultivation. It also demonstrates how distorted the information in the UEF’s can be when multiple routes are claimed, until it is clarified. This was the same with Mr O’Brien, Mr Kidman, and others.
23. Reference was also made by Ms Bassett to a client farmer that rented Drakes field who had told her that he knew people walked the path, but it was not a public right of way. The details are imprecise of what was said, when and in what capacity. As evidence this carries little weight. It cannot be taken as an acknowledgement by or authorised on behalf of the landowner of acquiescence in public use.

*UEF’s*

1. SCC’s advocate warned against taking an overly forensic approach to the UEF’s and said it would be wrong in law to do so. By the same token, it would in my view, be a grave error not to pay sufficient attention to the UEF’s. Taking a broad-brush approach leading to assumptions could equally be wrong. Ultimately it is a question of weight that can be applied to the UEF’s. Some are clearer than others. It is undisputed by SCC that the written evidence is not as good as tested oral evidence. No-one disputes that it is a case of looking at the totality of evidence.
2. SCC produced a table to summarise which of the 85 UEF’s identified use of the route between B to F. In preparing the table SCC disregarded those who referred solely to FP 643, points F to C or other paths. According to SCC, this leaves 48 users claiming use for the route all around the field. Its table lists 46 UEFs from 47 users.
3. SCC invites me to conclude that 8 of those UEFs contain an error in the user’s map drawing skills attributable to unfamiliarity with mapping and the user had meant to include the Order route.
4. The Council Officer confirmed that SCC had not actually checked with the users to clarify if they had indeed made a mapping error as it suspected. In re-examination the Officer said that it had not been assumed there was a mapping error. Rather, a conclusion was reached by exercising professional interpretation based on experience when reading the drawn line in conjunction with the written description used by each individual.
5. Where 3 of those 8 users from the same address (UEF’s 64, 70,71) show a route extending from F to B and continuing behind the allotments and public house to reconnect at point D, this must be in error. Their evidence is of daily dog walking “all around the field” which logically includes B to F as already shown on their map. Each of those 3 witnesses can only show 1 year of use from 2014-2015, but it remains as evidence for consideration.
6. In the remaining 5 UEFs, a cross field path has been drawn along the line of a mapping feature shown on the printed map as a solid line across the field. SCC says the feature gives the illusion that the line is around the whole field.
7. It transpires that 2 of those users (UEF’s 2 and 3) said the owner was happy for them to walk their dog around the field. This indicates landowner consent which would not support a claim for the acquisition of public rights. The Council Officer agreed that those two forms should be discounted.
8. Another of the remaining users (UEF 22) has not specified their frequency of use. This alone means that little reliance can be placed on the UEF even if I could be satisfied that there was an error when plotting their route.
9. Of the two left, UEF 15 describes the way as a “footpath around the perimeter of the field” and UEF 30 says a “footpath all around the edge of the field.” Ordinarily the use of the word ‘perimeter’ denotes a continuous line around a shape or boundary. From the description it might be reasonable to conclude that the user had meant B-C-F-B, but that is not consistent with what has been drawn. Caution is needed in seeking to rely on a written interpretation in circumstances such as this where multiple paths were evidently in use.
10. By way of example, both users in UEFs 83 and 84 describe a footpath “around the field” but their marked-up plan includes the adjacent plantation and omits part of the route around the field between F-C. This illustrates how without clarification it cannot be presumed that use of the words ‘perimeter’ or ‘around’ actually means the whole claimed route. That is particularly so where there is inconsistency with the drawn line. It was also possible, in common with the UEF’s of many others showing cross-field paths, that those users in UEFs 15 and 30 had walked across the field.
11. The fact remains that the line drawn by 5 users only includes part of B to F. It is speculative whether the line is just drawn incorrectly. I cannot apply an interpretation which may or may not be right. The onus was on SCC to check.
12. SCC maintains that partial use supports use of the whole. That is not necessarily so and very much depends on the circumstances. Where, as in this case, users have marked a route indicating use up to a midway point between B and F, it does not demonstrate any travel beyond that point especially as a cross field option was available. This is not a case where users would have to continue along the whole stretch to reach their destination point.
13. As it is, I shall take into account UEFs 15 and 30 insofar as they concern use of part of B to F. This leaves 43 other UEF’s where the whole of B to F is claimed. From these, UEF 63 does not specify any dates for use. As it is unclear whether their use even fell within the relevant period, I cannot attribute it weight. In UEFs 37 and 38, the users claim use exceeding 20 years but do not specify any frequency, which limits the weight that can be given to these forms. There remains around 40 UEFs.
14. SCC accepts that a route drawn all around the field includes FP 643 (i.e., A-B-C) and this might introduce uncertainty over the use attributable to B to F. However, SCC maintains that there is important supporting evidence in how users describe the route used. SCC cites how 21 of 48 users specifically refer to a perimeter path, or words to that effect, without distinguishing between FP 643 or 644.
15. This does not necessarily help clarify matters when points B to F are one of three routes which could be described as a perimeter path. Users could be referring to all three or only one or two. B to F extends beside the curved field boundary and B to C and C to F similarly extend beside other boundaries of the same field. As emerged in oral evidence, users stated a specified period and frequency of use in their UEF’s but invariably gave different periods and frequencies when asked to explain the period, frequency and purpose of use between different points.
16. Account can be taken of the identified destination to assist with interpretation. The difficulty arises where different purposes are recorded. For instance, where the destination is the railway station or school then the shortest and most direct route would probably utilise C to F. It would be illogical to use B to F, as Mr O’Brien made plain in his evidence when asked to describe the route he took to the station.
17. During the Inquiry I invited the Council Officer to help me identify from a series of UEFs how I could establish from the forms what level of use was claimed for B to F when different routes and purposes were identified. Mrs Valiant acknowledged that the frequency cannot be ascertained in those cases, and her answer would be the same however many of such forms were picked out.
18. Herein lies a major flaw in the Council’s case. In most of the UEFs the user identifies at least one purpose for their use which is unlikely to involve B to F. That is because it would not be the most direct route available. For example, in UEF 30 the user lists various purposes besides dog walking (e.g., short cut to shops, bus stop) where a direct route would not be around the whole field. The frequency of use cannot be distinguished between the different routes claimed.
19. Mr Morgan asserted that where users have identified different purposes for their walk involving the use of different paths around the field, then it must be taken that users had used each path equally. He suggested that there was no basis to conclude that the user had used one route more than the other and users had, say, taken more trips to the station along A-B-C than a walk involving use of B-F.
20. In my view there is no evidential basis to reach such a conclusion and that interpretation would be no more than a guess. Dividing a cumulative figure equally also does not reflect other evidence heard by the Inquiry. For instance, the Council Officer acknowledged that there was undeniably more use of points B to D than B to F. Mr Dixon (UEF 23) who claimed use from 1965 annotated points B-F-C on his map as the ‘lesser used footpaths’. This also came out in the oral evidence. For example, Mrs O’Brien referred to daily use of B to C between 2005 to 2011 and less use all the way to point F over the same period.
21. Quite simply, if a cumulative figure is given in the UEF for frequency of use without distinguishing between different points on the accompanying map, then no no-one knows with any level of clarity how that number was meant to translate to use of B to F unless the question was asked. In some cases, the position was clarified because witness evidence was given at the Inquiry. This was comparatively few people, and their answers highlighted the inadequacy of the UEFs in providing accurate information on the amount of use of B to F.
22. Bearing in mind that SCC made two different Orders for routes around the same field, there was all the more reason to clarify the answers given in the UEF’s.
23. Aside from the users who gave oral witness evidence, the most helpful UEF’s in terms of B to F are predominantly dog walkers who had reason to do a circular walk for exercise, and the very few people who differentiated between their use of the paths. They amount to some 12 users (11 UEF’s) where there can be a reasonable level of confidence that their claimed use included the whole length of B to F because it was either part of a longer walk or the user has specified their use of that stretch. Of those, 4 users claim use throughout the 20-year period on a daily or twice weekly basis, 3 claim 19 years’ use and the remainder claim between 1 and 13 years. Of course, this evidence has not been tested and carries less weight than the oral evidence.
24. The importance of clarifying the UEF’s and proofs of evidence was highlighted during the Inquiries. It was quite apparent from those who did give oral evidence, the extent to which their answers changed from their UEF’s.
25. A case in point is UEF 39 for Mr Kidman. The conclusion would be reached on the face of his UEF that he used the whole perimeter path on most days between 1993 and 2015. I found Mr Kidman to be an honest and reliable witness who clarified that his evidence of the whole perimeter was not 22 years but 5 years from 2010 (i.e., 5 years before the date of bringing into question). I do not for one moment question that his UEF was completed in good faith. It simply illustrates how answers are skewed by the questions if multiple routes are claimed.
26. During the Inquiries even some proofs of evidence were corrected and in one case, abandoned altogether.
27. Mr Morgan submitted that the Inquiry had only heard from those who gave evidence and there will be others who had not been heard with relevant evidence. In reaching my decision I have considered both the written and oral evidence presented to the Inquiry. I cannot attribute weight to the unknown possibility of there being other users who did not come forward, especially as I have no idea of what might have been said.
28. I was able to see during my second site visit a number of entry/exit points through the treed boundary and bank connecting Drakes field with Rectory Lane. These indicate recent use of at least part of the path as a shortcut, but also tallies with some users who claimed access via such points. It does not mean that users walked the entirety of B to F or must have done so throughout the relevant 20-year period. It still comes down to the evidence in support. Indeed, users who indicated access from one of these midway points generally also claimed use of cross-field paths. It is evident from the UEF’s that users did also walk across the field taking the most direct route to their destination.
29. Mr Morgan raised the ‘presumption of regularity’ and asserted that it must be presumed the users did use the path (i.e. B to F) unless there is evidence to the contrary. The presumption of regularity is a common law maxim that all things are presumed to be done correctly until the contrary is proved. An example of the operation of the doctrine can be found in the judgment of *Trevelyan v SSETR* [2002] EWCA Civ 266*. ‘Trevelyan’* was a public rights of way case where it was held that in the absence of evidence to the contrary, the Secretary of State or an Inspector acting on his behalf, should assume that a right of way marked on a definitive map did in fact exist. That was in the context of a route already recorded in the DMS.
30. It is unclear quite how the maxim assists supporters of B to F. The burden of proof is upon those asserting that public rights of way exist. It is not presumed that claimed public rights exist unless and until the objectors show otherwise.
31. As a matter of logic, where people said they walked anti-clockwise they must, upon reaching point F, have walked downhill towards point B, unless they back tracked or went into the plantation. Evidentially, this does not take matters further forward. Those who gave oral evidence mainly walked anti-clockwise but not everyone completed a full circuit or on every occasion. It cannot be assumed that others who did not give oral evidence also walked anti-clockwise.

*Aerial photographs*

1. My attention is drawn by Mr Morgan to aerial photographs from several years between 1988 to 2016. SCC similarly produced aerial images with its statement of case, the earliest being 1948. There is no image from 1995. The closest in time is dated 1998/99 when the field is grassed. The only distinguishable feature is a lighter diagonal line (part circled) from point F towards the rear of the pub. Mr Kidman thought this is where a gas pipeline was laid in the late 1970’s or early 1980’s.
2. The next photograph is dated 1 January 2003. In the one after dated 15 September 2006 the field remained grassed. In both 2003 and 2006 images, there are pale lines crossing the field and a lighter line around the whole perimeter. There is a light diagonal line from B to F in 2009 and lines across the field may signify the start of cultivation. By 2011 the field appears to have been cultivated with lines possibly created by a tractor and a margin left at the outer edges. That is the same in April 2015.
3. However, the aerial photograph dated 1 January 2003 cannot have been taken on that date as the trees are in full leaf. As Mr Morgan acknowledged in cross-examination, he cannot say when the photograph was taken and nor can anyone else. With such a glaring dating error, it calls into question the accuracy of the dates on all the aerial images.
4. It is submitted by SCC and repeated by Mr Morgan that, to the extent that the aerial photographs are sufficiently clear, they show a clear perimeter path including B to F in no different way than the ‘accepted paths’. As the evidence of use of those other sections was found sufficient, it is argued that there is no reason or explanation as to what would have created paths with similar appearance other than a similar level of sufficient use. SCC acknowledges that the aerial images are not sufficiently clear prior to 2006 (or more probably 2003) but says there is nothing within them to undermine the user evidence and demonstrate non/low use prior to this.
5. The aerial photographs may not undermine the user evidence, but the question is whether they add anything. Setting aside for now my concerns over the accuracy of the dates, the images dated 2003 and 2006 show a perimeter line from B to F much in the same way as B to C and C to F where I found public paths to exist. Even if this line is a trodden path, it does not establish use throughout by members of the public. Mr Morgan referred to there being no evidence of use apart from that by the public with the farmer attending only around 6 times per year. That is not wholly correct as a small amount of user evidence was disregarded where users indicated they had consent.
6. Nevertheless, aerial images do not identify use taking place by members of the public without consent or that such use must have been at the same level around the field. Indeed, that is not what is claimed. If the soil is shallow with a chalk substrate, as both Mr Kidman and Mr White suggested, it is unclear what impact this might have in terms of how easily lines might appear and if indeed it is chalk widely appearing in the images as the objectors suggest.
7. SCC also argues that during the relevant 20-year period there was a clear, unobstructed and available route on the ground. This is supported by witnesses such as Mrs O’Brien, the applicant, whose use began in 1990. She said even if there was a crop there was “always a margin to walk” and this was repeated by others who gave live evidence except for Mr Kidman. He stated that the route was ploughed but reinstated by people walking on the land.
8. The presence of a field edge margin in aerial images supports witness testimony that space was available to walk all around the field at those times. Aerial images do not tell me how often members of the public walked any route, whether they had consent or if the route was always available. Moreover, the dates of the aerial images have not been verified. At best, they show a path at that moment in time going back to 2003, at the earliest (not 1995).

*Other points arising*

1. Criticism is levied at my IOD for finding that the Order should be confirmed to add a public footpath to the DMS between points C to F, but not B to F when the evidence for each is similar. That is not so. The evidence was clear that B to F was used less than C to F. There can be times when the evidence more clearly supports one route than another. This is one such occasion. Of course, the landowners conceded that public rights had been acquired over C to F as a well-used route linking Lyndhurst Road to the public path network north of point F. Thus, the objection to C to F was withdrawn but that was not the case for B to F.
2. SCC cites 21 users referring to a perimeter path or similar. It says that this signifies that in the minds of users there was a single path. That may be so for some, with a number of users walking around the field anti-clockwise taking the route from B-C-F and then downhill from F to B but not all users used it as such. This is also reflected in SCC itself making two different Orders recognising that the highest use was A-B-C which connects two residential areas and provides a shortcut between amenities. Mr Morgan identified three paths; path 1 (A-B-C), path 2 (C-F) and path 3 (B-F) which corresponds with the three paths identified at the outset in SCC’s officer report.
3. Where users say they entered Drakes field from Rectory Lane for instance midway between B to F to head south to point B, it does not support use of a route all the way to point F unless used as a circular walk. Mr Morgan refers to well used connection points along A to F, the existence of which remains evident. Some users did say they sometimes used such an access point e.g., Mr O’Brien, Mrs Thorpe and Ms Bassett. However, it is unclear how this supports the totality of use between points B to F (or vice versa) unless witnesses came forward to confirm their use.
4. In closing submissions, SCC’s advocate suggested there was new evidence in the form of the analysis of the user evidence conducted by the Council Officer. This is not new evidence to clarify the use. Rather, it is an assessment of the UEF’s that already existed. Except for the two new witnesses called by SCC and three other witnesses (Mr Morgan included) appearing of their own volition the new user evidence was quite limited. Had the UEFs been clarified, then it is quite possible that more weight could have attached to it.
5. Mr White, a landscape architect, spoke against confirmation of the Order for B to F. Between 1983-2003, Mr White had a view of part of the field from his home but the topography prevented his view of B to F. From his own personal knowledge, Mr White confirmed that he was unable to say whether or not the claimed footpath was used between 1995 to 2015. I read little into Mr White’s acknowledgement that as a matter of farming practice a field edge path would have been left along B to F, even when crops were being grown. Mr White was not holding himself out as an expert in such matters. Moreover, a margin may (or may not) be left for any number of reasons e.g., to allow space for hedge trimming.
6. The crux of the matter is the level and duration of public use. When it was put to him, Mr White accepted that as a path existed without impediment to its use, it was likely to be in public use. This is no more than an opinion. It is not evidence.

*Cul-de-sac*

1. Without confirmation of B to F, there would be a cul-de-sac path from C to F terminating at the top of the hill. It is submitted by supporters that the field path has not been used in this way. However, whilst some users clearly did carry on past F to B, not everyone did. There can be times when evidence supports the acquisition of public rights over part of a claimed route. This is not a case where a path would end abruptly at a midway point.
2. Several witnesses referred to the far-reaching views from point F. Indeed, Mr Kidman described point F as a destination point for unrivalled views and a place for quiet reflection. Mr Morgan pointed out that Mr Kidman had reached such viewpoint by walking clockwise from B to F rather than anti-clockwise via C to F. I do not find that particularly significant and note that Mr Kidman’s evidence of B to F is over the later years within the requisite period. Mrs Coward similarly described the view from point F as “beautiful” in her oral evidence. Mrs Coward was interested in the work of the water board and also mentioned how the construction of the lagoon at Drakes field could only be seen from point F.
3. Plainly, not all users stopped at point F to take in the view. There is also evidence of users walking beyond point F where a stile was once located to reach Prospect Plantation and beyond. The stile is marked on the map by both Mr and Mrs O’Brien, Ms Bassett and others. The status of any such extension of the route is not a matter before me. Equally, the fact that others did walk from F to B does not mean there is sufficiency of evidence throughout the 20-year period.
4. I see no impediment to confirming C to F without B to F if that is where the evidence leads.

*Conclusions on statutory dedication*

1. There is no statutory minimum level of use required to raise a presumption of dedication under section 31 of the 1980 Act. However, there must not only be sufficient numbers of people making use of the route over the requisite period, but the quality of evidence must also suffice. When looking at ‘quality’ of evidence this ordinarily involves consideration of factors such as its accuracy, cogency, credibility, honesty and consistency with other evidence. I have no reason to question the honesty of any witness. My main concern arises from how the evidence has been collected.
2. There are a lot of UEFs but far fewer have the level of clarity on use of B to F required on which to place reliance than the Council maintain. UEF’s are a recognised tool for gathering information but they can lack sophistication. That is particularly so in cases such as this when more than one route is claimed or used for different purposes. The onus was on the Council to obtain further clarification. As it is, only two new witnesses were called by SCC, one of whom disagreed with their own proof evidence.
3. I agree that the use of other cross-field paths did not prevent the use of B to F. The key question still arising is how much use there was of B to F and over what period. Plainly no single user needs to have used B to F for the full 20-years (or a lesser period at common law).
4. Across both Inquiries,10 users attended and gave evidence of their use including B to F. Overall, there was tested evidence from 4 witnesses claiming over 20 years use up to the relevant date in 2015 with 6 others claiming between 7 and 19 years, but not all evidence was clear, consistent or of frequent use.
5. After the second Inquiry, there is more tested evidence than before. Most notably, an account was given from Ms Bassett of daily use from 1995 to 2010 and twice weekly use from 2011 to 2015. However, Ms Bassett confirmed that she and others also walked cross-field until it was cultivated. Whilst she thought cultivation occurred in the early 2000s, it appears more likely to have been later that decade. It adds uncertainty over the level of actual use of B to F during the years when the field remained open and available to use cross-field.
6. Mr O’Brien’s use spanned 44 years of almost daily use although his evidence was not always clear, involving multiple routes and different entry points not always using B to F. Mrs Coward gave new evidence of weekly use of B to F over 15 years from 2000 and Mr Kidman claimed daily use limited to the last 5 years of the relevant period.
7. Mrs Auston and Mrs Thorpe repeated their evidence of use twice weekly over 44 and 19 years respectively, up to 2015. Mrs O’Brien’s use spanned 25 years but was only occasional during some periods and contained some inconsistencies. From the previous Inquiry Mr Lehman’s use was 3-4 times per week over 8 years. Mr Morgan was another new witness, but his use was very infrequent over an 11-year period.
8. Although Mr Poore did not claim use of B to F in his UEF, he did attend the first Inquiry and gave evidence of his twice weekly use of this stretch between 1984 to 1998 and 2011 to 2015. Thus, it covered part of the relevant period of 1995 to 2015 with a long gap in between.
9. By my calculations, the UEF’s where use of B to F was quantified consist of 4 users claiming 20 years use, 3 claiming 19 years, and 5 users claiming between 1 and 13 years. As set out above, these UEF’s carry less weight than the tested evidence. Even less weight can be given to those other UEF’s where frequency and periods of use cannot be distinguished between paths.
10. Whilst there is more information after the second Inquiry, the evidence of use is still quite limited, and I have concerns over some significant changes in evidence. There remains a lack of clarification on the UEF’s. The evidence points to only a small number of people using B to F during the early years, rising as time went on and the field was cultivated making it more likely that people would stick to the perimeter. Even then, the evidence still indicates less use of B to F than the other paths that are not in issue. Taking all the evidence as a whole, it is insufficient in my view to give rise to the statutory presumption of dedication for B to F throughout the 20-year period of 1995 to 2015.

*Common law*

1. The considerations for an inference to be drawn that a way has been dedicated for public use at common law were set out in my IOD and I do not repeat them here. There is no fixed period of use at common law. Depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated. As there is no evidence of express dedication, the issue turns on whether dedication may be implied.
2. There is no suggestion that use was anything other than open. Whilst unreliable on dates, the aerial photographs tally with users saying that a path physically existed from at least the mid 2000s. Combined with the creation of entry/exit points off Rectory Lane, it may suggest that the landowner would have reason to be aware of the use of a path between B and F. However, the land was tenanted for long periods and the objectors refute any suggestion of their acquiescence. Although some users referred to seeing a tractor in the field on occasion, it does not mean that the landowner knew that the route was being used by the public.
3. SCC asserts that the level of use clearly establishes a public path at common law. I recognise that the evidence points to increasing use over the later years with more dog walkers, in particular, but the tested evidence does not reveal very high levels of use. The same difficulty arises as before with interpretation of the UEFs where clarification has not been obtained from the numerous users who claimed more than one route or purpose. The lack of clarification means that it is not possible to glean with any confidence whether the level of intensity of use was such to tip the balance in favour of a case being made out at common law.
4. As a matter of judgement and taking the evidence as a whole, I remain of the view that the evidence does not suffice to make a finding of dedication at common law for a footpath between B and F.

*Other matters*

1. I appreciate that there are people who would like to walk a full circuit of Drakes field, but my decision must be based upon the evidence before me and the issue of whether a public footpath already exists rather than the desirability of a route.

Conclusion

1. I conclude that the Order should be confirmed subject to the modifications identified in paragraph 85 of my IOD and as set out below.

**Formal Decision**

1. In exercise of the powers transferred to me, I confirm the Order subject to the modifications previously proposed, as follows:

 In paragraph 3 of the Order:

* Delete “No. 643” and substitute “No. 644”.

 In the Order Schedule: Part I

* Delete the description of the path to be added and substitute the following:

Footpath No. 644 (Banstead) in the Borough of Reigate and Banstead, shown by a bold broken line on Drawing No. 3/1/36/H48, commencing at the northern corner of the field at point F (Grid Ref: 527954 159044) and running in a south-south-easterly direction for 321 metres to point C (Grid Ref: 528224 159294). The width is 1.5m

In the Order Schedule: Part II

* Delete the Table and substitute the following:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| R/WNo | Status & Width Claimed | Description (Limitations shown in bold) | Width Fence to Fence | Condition or Surface | Remarks | Map No. |
| 644 | FP1.5m | FROM the northern corner of a field in south-south-easterly directionPathTO the south eastern corner of a field at the County boundary | 1.5m | Earth | MMO 2018 | TQ25 |

On the Order map:

* Amend the line of the footpath to be added by removing the section from B to F as shown.

*KR Saward*

INSPECTOR

**APPEARANCES**

|  |
| --- |
| **For Surrey County Council:**Mr Trevor WardCounsel, instructed by Surrey County Council |
|  who called: Christine O’Brien  Mr O’Brien Mrs J Auston Mrs P Thorpe Mr Kidman Catherine Valiant

|  |
| --- |
| **Other supporters:** |
|   Mr Morgan   Ms Debra Bassett Mrs Coward  |

 **Objectors:** Mr Michael Wood   | Applicant Local resident Local resident Local resident Local resident Countryside Access Officer    Local residentLocal residentLocal residentET Landnet Ltd instructed by the Drake family    |
| **Others who spoke:**Mr L White Local resident |
|  |   |

**DOCUMENTS submitted at the Inquiry**

1. Closing submissions on behalf of the Drake family

2. Closing submissions on behalf of SCC

ROW/3228628 (D)

