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| **Order Decision** |
| Inquiry opened on 29 April 2025 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 09 July 2025** |

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| **Order Ref: ROW/3333509** |
| * 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. 96 (Esher) Definitive Map Modification Order 2021. |
| * The Order is dated 31 March 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a footpath as shown on the Order map and described in the Order Schedule. |
| * There were four objections outstanding at the date of the commencement of the inquiry. |
| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. I held an inquiry at The Cobham Curve, Fairmile Lane, Cobham, Surrey commencing on 29 April 2025.
2. I made an unaccompanied site visit on the afternoon of 28 April 2025. At the conclusion of the inquiry it was agreed that no further site visit was necessary.
3. This Order seeks to add to the DMS a public footpath commencing at point A on the Order map which is on a track where it leaves Littleheath Common. The Order route proceeds initially in a southerly direction to point B, then in a generally south-westerly direction to point J before turning slightly west of north along a private road known as The Stables to point K located on Water Lane.
4. Four objections to confirmation of the Order were received which have not been withdrawn.
5. In this decision I have found it convenient to refer to the Order map and for ease of reference a copy is attached. The Order map is annotated with points A to K which I shall refer to in this decision.

**The Main Issues**

1. The Order has been made under section 53(3)(b) of the 1981 Act which requires the expiration of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.
2. The standard of proof to be applied is the balance of probabilities.
3. Surrey County Council (‘the Council’), in making the Order, rely upon a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
4. Accordingly, I must establish the date when the public’s right to use the Order route was brought into question. The evidence must then be examined to determine whether there has been sufficient use to demonstrate use by the public and that such use has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence of actions by the landowners during the relevant 20-year period which demonstrate that there was no intention on their part to dedicate public rights.
5. In the event that the requirements for a presumption of dedication under the 1980 Act are not met, I will need to consider whether there is sufficient evidence for an inference of dedication at common law.

Reasons

***Site visit***

1. I began my visit on Littleheath Lane. I walked along the track which crosses the common to point A which is on the boundary of the common. At point A there is a wooden five bar gate across the track. The gate is controlled by an electrically operated mechanism. The gate is opened by pressing the button on the left-hand gate post. Once the button is pressed the gate opens (and then closes) automatically.
2. From point A the track continues in a southerly direction to point B and beyond to a residential property. At point B the Order route turns approximately 90 degrees to the west. At the time of my visit there was what appeared to be a relatively new wooden gate across the Oder route at point B which was secured shut with cable ties such that I had to climb the gate to proceed.
3. From point B there is a defined track with a fence to the northern side beyond which is woodland. To the south side is a hedge with some mature trees. In places encroaching vegetation narrows the available width, but in other parts the track is of sufficient width for a vehicle to pass. At point D the track turns to the south while the Order route continues along the woodland boundary. Here there is a large dilapidated, corrugated iron clad barn. Where the Order route deviates from the track there was at the time of my visit a metal five-bar gate which opened sufficiently to allow me to pass.
4. The Order route continues behind the barn to point E where it opens up to the south. Here there is a tennis court and open ground rising to the south with some distinct tracks through the rough grass. There is a track leading north but there was no obvious sign of the Order route continuing as the way was obstructed by shrubs, principally laurel with no apparent way through. At this point I retraced my steps and walked along Water Lane to point K.
5. The Order route between points K and J is a hard surfaced private road known as The Stables, serving a number of residential properties. At point J the Order route turns almost due east, along a clear tree lined track of vehicular width. At point I there is a pair of wooden gate posts. On the northern post is a sign stating, ‘PRIVATE LAND No public right of way’. At point H the main track veers to the south to a brick-built electricity sub-station. The Order route continues along the northern boundary fence for a short distance before the route becomes overgrown with fallen trees and other debris, rendering further progress difficult if not impossible. At point G are gate posts with no gate.

***Documentary evidence***

1. The Order was made under section 53(3)(b) of the 1981 Act and does not rely on documentary evidence. Other than photographs and material collected for the purpose of the application to record the claimed footpath, the only documents in evidence were Ordnance Survey (OS) sheets dated 1884, 1895. 1913 and 1934. These each show a feature consistent with the Order route. The representation of a route on an OS map is not evidence of status and these maps were not relied upon by either party at the inquiry. The only value of this evidence is to demonstrate the historic existence of the track as a physical feature.

***User Evidence***

1. The application for a modification order was initially supported by 28 user evidence forms (UEFs). Further forms were submitted prior to the inquiry. Proofs of evidence relating to use of the Order route were submitted on behalf of six individuals who had also each completed a UEF. At the inquiry I heard evidence from seven individuals, each of whom had either completed a UEF or a proof of evidence.

Twenty-year period

1. For the purposes of a statutory presumption of dedication under section 31 of the 1980 Act it is necessary to establish when the right of the public to use the route was first brought into question. The Council contend that this occurred in 2014 when a notice was installed at point I which stated, “No public right of way”. At that time the Order route was blocked by an accumulation of garden waste and a trench, and users had been frequently challenged on the route. The Objectors contend for the earlier date of 2013, being the date when they assert a gate with a “Private” sign was installed at point G.
2. For reasons which will become apparent later in this decision, I find that nothing turns on whether the date of 2013 or 2014 is taken as the date of challenge. However, I find the evidence of the Objector as to the erection of the gate and sign (supported as it is by a receipt dated 6 August 2013) convincing and it is this date which I shall adopt for the retrospective calculation of the relevant 20-year period, which is therefore 1993 – 2013. I deal later with the appropriate interpretation to be put on the wording of the sign “Private”.
3. Neither party invited me to consider any earlier date of challenge; in fact, both parties took the position that the evidence did not justify any such conclusion. There is evidence of gates and signs on the Order route before 2013, which the Objectors seek to rely upon in arguing that an intention not to dedicate has been demonstrated sufficiently. However, the Objectors’ case is that the date when these gates and signs were installed cannot be identified with sufficient precision to establish a date of challenge. The Council do not accept that the evidence in relation to gates and signs is sufficient to call into question the right of the public to use the order route. Whilst I consider that a credible argument could be made for an earlier date of challenge, I have concluded that it is not necessary for me to decide the point.

Use as of right

1. Use is only as of right if it is undertaken without force, secrecy or permission. In this case there is no suggestion that any use was undertaken in secret.
2. Use can be permissive if undertaken in consequence of specific permission having been granted by the landowner. Use will also be permissive if it is undertaken in the exercise of an implied right.
3. Five users acknowledge that some, or all, of their use was permissive. Such use is to be disregarded when assessing whether the overall level of use is sufficient to demonstrate use by the public.
4. Use by force does not necessarily require the use of physical force in the sense of breaking down gates or moving obstructions or the like. Use in the face of a clear prohibition by the landowner will amount to contentious use and thus use which is not as of right. In this case there is evidence that some signs were displayed on the route and these are relied upon by the landowner to both establish that use was contentious, and to demonstrate a lack of intention to dedicate so as to engage the proviso to section 31(1) of the 1980 Act (‘the proviso’). As the evidence in relation to the presence and effect of the signs is the same when considering contentious use and the proviso I shall deal with the issue now.

Presence of gates and signs

1. The Objectors’ case is that there were various gates across the Order route at various times, but reliance is placed specifically upon gates at points C and G. The former owner of Kingfisher Lodge, 32 Water Lane, Mrs Diane Turk, provided a written statement explaining that she had lived at that address from 1979 until 2006. Her property initially included the section of the Order route C to D but in 1983 she, together with the owners of 24 Water Lane and the owners of Littleheath Farm, jointly purchased additional land which included the Order route between points D and G. Her statement records that she and the neighbours from 24 Water Lane ‘promptly’ erected gates at each end of her land with signs which ‘clearly stated private’. In her statement Mrs Turk expressed willingness to give oral evidence on the subject but sadly had died in the intervening period before the inquiry.
2. The son of Mrs Turk provided a written proof and gave evidence to the inquiry. He stated that he had lived at Kingfisher Lodge between 1979 and 2003. He said that throughout the time he knew the property there were gates at points C and G and on each gate was displayed an outward facing sign stating ‘Private’ in red lettering. The signs were hung such that they could be read even when the gate was open. The gate at C was usually open during the day but closed and locked at night. The gate at G was always closed. He stated that the Order route between points D and G was often overgrown and impassable. He recalled that his mother was keen to preserve her privacy, especially as she had horses on the land. She would challenge walkers, as he had done, but did not encounter then very often.
3. A local resident who kept a horse on Mrs Turk’s land from the mid-1990s to the early 2000s provided written evidence confirming her recollection of the gate at point C ‘with a private sign’. She also recalled ‘another gate that Die [sic] Turk used as her access to Water Lane. Also Private’. This could be a reference to point G.
4. The current owner of the land which includes the Order route D to G purchased it in 1995. She stated that when she bought the land there was a steel gate at point C with a sign stating ‘Private’. She confirmed that this gate was ‘sometimes (but not always) left open during the day’. She also recalled a gate at point G which she first became aware of in the late 1990s. She described it as ‘a heavy, very old metal gate and fence post’ which was closed and she believed locked shut, although at the inquiry she accepted that the chain shown in a photograph was at the hinge end of the gate. She stated that a sign which read ‘Private’ in red lettering on a white background was ‘hung over’ the gate. She accepted that the sign disappeared ‘at some stage’ but the gate remained until 2011 when a neighbour, without authority, cleared the area and took down the gate to create a means of rear access to his property. The gate was replaced in July 2013 with a new wooden five bar gate with a ‘Private’ sign affixed centrally on the top rail. Later in 2013 or 2014, after the gate was left open on occasions, she installed a lock, but this was cut off and ultimately the gate itself was taken.
5. Four other witnesses recall the gate at point C with the private sign, including one who provided evidence of their own use and supports confirmation of the Order.
6. Many of the users who have provided evidence recall a gate or gates on the Order route but do not recall signs before 2013. In the course of giving evidence some witnesses conceded that the ‘Private’ sign at C could have been in place before 2013, although others assert that a sign has only been present in recent years.
7. I am required to conclude, on a balance of probabilities, whether the gates coupled with ‘Private’ signs referred to in the preceding paragraphs were present as claimed by the Objectors within the period 1993 to 2013. On this point I accept the submissions made on behalf of the Objectors. There is clear, cogent and consistent positive evidence that the signs were present on the gates at points C and G throughout much of the relevant 20-year period, and probably from about 1983 when Mrs Turk acquired the additional land. Against this there is no direct evidence of the absence of the signs and, put at its highest, the Council’s case is that a number of the user witnesses cannot recall such signs being present, although one user witness did recall the private sign. On a balance of probabilities, I conclude that the gates and signs were present as contended by the Objectors and would have been seen by a reasonably observant user of the route.

Effect of gates and signs

1. Having concluded that the gates and signs were present at the relevant time it is necessary for me to consider their legal effect having regard to the wording and context. For the Objectors’ argument to succeed I would have to conclude that the signs on the gates were sufficient to inform a reasonable person reading them that to continue along the Order route would be in contravention of the landowner’s overtly expressed intentions. In most, if not all cases, action by the landowner which would render use contentious will also sufficiently demonstrate a lack of intention to dedicate.
2. The judgment of Lord Hoffman in *R (Godmanchester TC) v Environment Secretary (HL(E))[2008]* sets out the test to be applied when considering the evidence in relation to the proviso. He states “*I think that upon the true construction of section 31(1), “intention” means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be. The test is, as Hobhouse LJ said, objective: not what particular users of the way subjectively assumed, but whether a reasonable user would have understood the landowner’s intention to be”*. In my view, the same approach is to be taken when considering whether the sign would render use contentious.
3. In the case of Taylor v Betterment Properties Limited and Dorset County Council [2012] EWCA Civ 250, which concerned an application to register land as a village green, the question of use ‘as of right’ was considered by the Court of Appeal and Patten LJ said in his judgment “*If the landowner displays his opposition to the use of the land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable”*
4. Taking together these statements of the law, the test I should apply to the evidence is whether the landowner has made known their opposition to use of the Order route in such a way that a reasonable user would have seen the sign and understood the owner’s intention. The subjective opinion of any individual user is not a material consideration, and it is not relevant that some members of the public used the route ‘without concern’.
5. I have concluded that the gates and signs were, during the relevant period, present and would have been seen by a reasonable user. The presence of gates on a route can itself be an indication of an intention to control access but less weight can be attached to this if the gates are left open or unlocked. In this case the evidence before me is that the gate at G was usually closed but it is less clear whether or when it was locked. The gate at C was often open but the evidence indicated that it was sometimes locked, especially at night. The issue before me now is what that reasonable user would have understood from the presence of the gates and the wording of the signs displayed on them.
6. The Council contend that the use of the single word ‘Private’ is potentially equivocal. It is suggested that it was not sufficiently precise to make clear that it applied to the track rather than to the parcel of land as a whole and that it did not make clear that it was aimed at preventing use of the track rather than wider trespass. The point was made that most public rights of way pass over privately owned land.
7. On behalf of the Objector, it was argued that not only must the test applied be an objective one, but also that any sign should be interpreted in context rather than in isolation. In the present case the context was that the two signs relied upon were displayed centrally on gates across the Order route. The Objector says, in effect, ‘if they do not indicate that the track is private and not for public use, what possible other interpretation could be found’?
8. I recognise that a regular user who becomes familiar with a route may, after a while, pay no attention to a sign no matter how prominently it is displayed. This sense may be reinforced if the user experiences nothing else to suggest their use is contentious. In that situation a user may well feel ‘comfortable’ using the route, but that is not how such use should be judged. The test is how a reasonable person, reading the sign in its full context, would understand the position.
9. I am persuaded by the arguments of the Objector. Whilst recognising that a sign stating ‘Private’ and nothing more is capable of being equivocal, in the particular context of this matter I would find it difficult to accept that any reasonable person could see the sign on the gate and conclude that it was not directed at use of the track as well as the other land within the same parcel. It is an unqualified assertion of privacy sufficient to render use in the face of the sign as contentious.
10. My conclusion in relation to the effect of the signs is reinforced by the provisions of section 31(3)(a) of the 1980 Act which give statutory recognition to the effect of the display of a ‘notice inconsistent with the dedication off the way as highway’ as ‘sufficient evidence to negative the intention to dedicate the way as a highway’.
11. Having concluded that the gates and signs were present during and probably throughout the relevant 20-year period, and were effective to render use contentious, I must find that any use which did take place within that period was not use as of right. On that basis it is not necessary for me to consider further the sufficiency of the use as it is only use as of right that is relevant to the issue.

Conclusions on user evidence

1. For the reasons given the use of the Order route within the relevant 20-year period was not such as to give rise to a presumption of dedication under section 31 of the 1980 Act.

Lack of intention to dedicate (‘the proviso’)

1. Evidence of a lack of intention on the part of the landowner to dedicate the Order route as a footpath would preclude any statutory presumption of dedication from arising. To constitute an effective demonstration of a lack of intention to dedicate the landowner, during the relevant twenty-year period, must have acted in a way which would have brought home to users of the route that he did not wish it to become a public right of way. The requirement is only that the lack of intention is demonstrated ‘during’ rather than throughout the 20-year period.
2. I have explained earlier that acts undertaken by a landowner can be sufficient to both render public use contentious and to demonstrate a lack of intention to dedicate such as to allow reliance upon the proviso. For the reasons I have set out, I have found that ‘Private’ signs on the gates were sufficient to render use contentious. Using the same facts and applying the same analysis, I conclude that the landowner has, during, and possibly throughout the relevant period, sufficiently demonstrated a lack of intention to dedicate the Order route as a public footpath such as to rebut any presumption of dedication that would otherwise arise.

Conclusions on presumed dedication under section 31 of the 1980 Act

1. Having regard to the foregoing I am satisfied, on a balance of probability, that the Order route has not been sufficiently used as of right to give rise to a presumption of dedication and further, that any presumption which did arise would be rebutted by reason of the proviso.

Common Law

1. Although I have found that no statutory presumption of dedication arises it is necessary for me to also consider the position at common law.
2. For dedication to occur at common law by reason of public use, it would be necessary for the evidence to give rise to an inference that the landowner had in fact dedicated the Order route as a public right of way. As I have found that the actions of the landowner were sufficient to demonstrate a lack of intention to dedicate it would be perverse to suggest that same evidence could be relied upon in support of dedication at common law, and the parties do not urge me to do so.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Nigel Farthing

**Inspector**

**APPEARANCES**

For the Council Trevor Ward of Counsel who called: -

Rik Catling

Patrick Fossett

Mary Lewis

Joanna Rutherford

Patrina Hutchings

Mary Lowthian

Jeremy Taylor

Supporter Ian Williamson

For the Objector Greg Jones KC and Michael Feeney of Counsel who called: -

Richard Turk

Christopher Perry

Kathryn Ross

**DOCUMENTS PRODUCED AT THE INQUIRY**

* Inquiry Bundle, including various documents at Tab D that had not been previously circulated to the parties
* Photograph Point G March 2015
* Photograph Point G close up of sign on gate

ORDER MAP – COPY NOT TO SCALE

1. 