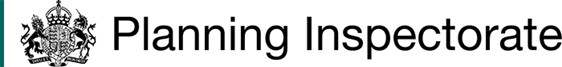
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| **Order Decision** |
| Site visit 1 May 2025 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 15 August 2025** |

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| **Order Ref: ROW/3342307** |
| * This Order is made under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Surrey County Council Bridleways 99 [Part], 99A and 101 [Part] (Thursley) Definitive Map Modification Order 2021. |
| * The Order is dated 3 February 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by amending the particulars for each of the Order routes to amend or add a width, and to amend or add a description of the Order routes as set out in the Order Schedule. |
| * There was one objection outstanding at the date of the commencement of the inquiry. |
| **Summary of Decision: The Order is confirmed subject to the modification set out in the Formal Decision which does not require advertising.** |
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Preliminary Matters

1. I made an unaccompanied site visit on 1 May 2025.
2. This Order seeks to add to or amend the particulars of the Order routes contained in the DMS. In the case of the relevant sections of BR 99 and BR 101 no width is currently recorded, and the Order proposes the addition of a width of 9.1 metres (30 feet). In the case of BR 99A a width of 10 feet is currently recorded and the Order seeks to amend this to 9.1 metres. The Order also seeks to amend the description of the routes, including by the addition of the names of the Order routes.
3. One objection to confirmation of the Order was received which has not been withdrawn. One representation was made.
4. In this decision I have found it convenient to refer to the Order maps and for ease of reference a copy is attached. The Order maps are annotated with points A to F which I shall refer to in this decision.
5. In this decision I shall refer to BR 99A, BR99 between points B and C and BR101 between points D and F as ‘the Order routes’.

**The Main Issues**

1. The Order has been made under section 53(3)(c)(iii) of the 1981 Act which requires the discovery of evidence which (when considered with all other relevant evidence available) shows that the particulars contained in the map and statement require modification.
2. It is a pre-requisite to an Order being made under section 53(3)(c)(iii) that there has been a discovery of evidence.
3. The question of what constitutes the discovery of evidence has been the subject of judicial consideration in various cases including *R v Secretary of State for Environment ex parte Riley [1989] 59 P&CR 1* and *Burrows v Secretary of State for Environment Food and Rural Affairs [2004] EWHC 132 (Admin).* The following principles can be drawn from these authorities: -

* that there must be some new evidence, being material which is different from the evidence considered when the Order route was recorded on the DMS,
* it is immaterial whether the new evidence was in existence at the time of the previous consideration or has arisen since,
* the discovered evidence must be more than de minimis but is not required to be determinative of the issue,
* there must be some new evidence which in combination with the previous evidence justifies a modification,
* it is not sufficient for the previous evidence to be simply re-interpreted.

1. Subject to being satisfied that there has been a discovery of evidence, the simple and single issue is whether the discovered evidence, together with the original evidence, is sufficient to establish, on a balance of probability, that the Order routes should be recorded with a width of 9.1 metres (there being no apparent objection to the other amendments to the particulars which attribute the name Houndown Lane to BR 99 and BR 99A and the name Woolfords Lane to BR 101 and which delete reference to a building known as the Colonial Training Institute).
2. The Objector argues that no evidence has been discovered which is sufficient to engage the provisions of Section 53(3)(c)(iii) and that this is determinative of the matter such that the Order should not be confirmed (I shall refer to this as the primary objection).
3. Subject to the primary objection, the Objector seeks to question the status of the Order routes as public bridleways. It is argued that the Order routes were recorded solely on the evidence of the Elstead Inclosure Award 1857 (the “Award”) whereby they were awarded as ‘Public Driftways or Heath Roads’. The Objector argues that the award of a ‘Driftway’ did not confer any other public right of way and therefor does not justify the recording of such a way as a bridleway.

Reasons

Site visit

1. I began my visit at point D on the Order map and walked along BR 101 to point F via point E which is the intersection with BR 99. Point D is at the junction of the Order route and Thursley Road. From point D, BR 101 heads broadly north-west and uphill to point E. This section of the route has a metalled surface which seemed recently applied. The track has banks on both sides and runs through an area of woodland. Beyond point E the surface is stoned but not metalled. The woodland continues for a short distance before reaching an area where the trees have been felled to create, or perhaps restore, open heathland. The track is in good condition, it appearing that the stone had been also added recently. The track continues uphill before reaching a crest where there was a metal gate across the route which was shut. Beyond the gate the track continues downhill between banks on both sides to point F. The width of both the metalled and stoned sections of the track appeared uniform, and the entire route has the appearance of a wide, well-maintained track or road across the heath.
2. I walked back from Point F to point E (which is point C on the Order map relating to BRs 99 and 99A) from where I walked the length of BR 99 to point B and BR 99A to point A. This track runs on a north / south alignment. From point C the track runs slightly uphill before levelling out. It runs between trees on both sides but has the character of a route over heathland. As with BR101 the track has a good, stoned surface and was open and unobstructed. The character of the route was very similar to BR101.
3. At point B the track intersects with BR 99A which runs downhill in a north-easterly direction to Thursley road. This section is somewhat narrower than BR 99 and BR101. It runs between banks and through woodland.

Discovery of evidence

1. In deciding to make the Order SCC has considered a variety of documentary evidence. It is not in dispute that some of this evidence was considered at the time the First DMS was compiled, and that this included the Elstead Inclosure Award 1845 (the Elstead Award). It is also common ground that the Elstead Award awarded the Order routes BR99, BR99A and BR101 in identical terms as a ‘Public Driftway or Heath Road’ in each case with an awarded width of 30 feet.
2. SCC assert that four pieces of new evidence have been discovered within the meaning of section 53(3)(c)(iii) of the 1981 Act. This ‘new evidence’ includes maps prepared for the purposes of the Finance Act 1910. It is this new evidence that SCC relies upon to give jurisdiction for the making of a modification order under this section.
3. The Objector, whilst recognising the inherent difficulties of proving a negative, seeks to put the Council to proof that the new evidence was not in fact considered at the time of compilation of the first DMS. I do not accept that this is requirement, nor is it a reasonable expectation but on this point there is a simple answer. There is no quantitative threshold for new evidence. A single piece of evidence can be sufficient to meet the requirement. The Finance Act maps were not publicly available until 1968 and therefore could not have been considered at the time the first DMS was compiled. On this basis alone I am satisfied that there is new evidence which has been discovered.
4. The Objector’s second basis for objection is that the new evidence relied upon to make the Order is not relevant to the issue of the width of the Order routes and should therefore not be regarded as ‘evidence’ for the purposes of this exercise. He argues that the width of the Order routes is derived solely from the Award, which set out the awarded public rights of way with a width of 30’. He asserts that none of the documents introduced as new evidence purport to identify the width of these routes.
5. SCC argue that the depiction of the Order routes on the Finance Act maps as uncoloured, and thus excluded from dutiable hereditaments, is indicative of the routes being subject to a public right of way (possibly at a higher status than bridleway) and the representation of the routes is consistent with tracks of 30’ width. SCC state that this evidence is supportive of the Award and demonstrates that the Order routes as awarded were set out on the ground and used by the public.
6. In *R. v Secretary of State for the Environment Ex p. Riley, (1990) 59 P. & C.R. 1 (1989)* the court was faced with the same issue that I am required to address here in relation to what constitutes ‘new evidence’. In that case it was recognised that *“the additional evidence supplied did not really add to the weight of the evidence previously considered*” but Macpherson J. agreed with the submissions made to him for the Claimant, which he summarised as follows: -

*“The discovery by the authority of evidence” means exactly what it says. And if there has been since the original 1968 Act classification, and thus the 1981-1984 inquiry, evidence “discovered” or “produced and laid before the Council at the appropriate time” which is different from the original evidence, it matters not that the original evidence carried the day by itself in connection with paragraph 10(a) in 1981-1984.*

*The words “…evidence (when considered with all other relevant evidence available to them)” wholly cover the present case, where it is accepted that the “discovered” evidence was not minimal, even if it does not “really add to the weight of evidence previously considered”.*

1. In his objection the Objector relies upon the following passage from the judgment of Andrew Nicol QC sitting as a deputy High Court judge in *Burrows v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 132 (Admin)*: -

“*An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification. ....*

*Section 53(3) must require the discovery of evidence which was not produced to the decision maker who made or approved the existing version of the definitive map.”*

1. In this case the evidence of the Finance Act maps is fresh evidence, material that was not considered when the first DMS was compiled, and it is not de minimis. When the evidence of the Finance Act maps is considered in combination with the evidence of the Award, it demonstrates that not only were public rights awarded over routes with a width of 30’, but those routes were set out on the ground consistently with the awarded width. Accordingly, I am satisfied that the criteria of section 53(3)(c)(iii) of the 1981 Act are met and that there is jurisdiction for the Order to be made.
2. As for the substantive merits of the Order, the Objector accepts that the Award had the effect of setting out public rights of way with a width of 30 feet on the line of the Order routes but argues that the rights are wrongly recorded as bridleways.
3. This Order seeks only to amend the particulars of the rights of way recorded on the DMS. It does not purport to modify the status of the recorded rights of way (SCC has considered whether the evidence supports the existence of public vehicular rights over the Order routes but has concluded it does not).
4. The DMS does not record a width for BR 99 or BR 101. The fact that a width is not recorded does not limit the extent of such rights as exist; it is the function of the DMS only to record rights, not to create or limit them. Accordingly, the Order routes have retained their full legal width regardless of whether or not that width was recorded in the Definitive Statement.
5. In the case of BR99A a width of 10’ is currently recorded. It is not apparent why this width was recorded, nor is it apparent why a width was recorded for BR99A but not for BR99 or BR101. Each of the routes was awarded in the same terms in the Award and the same principles apply to each of the routes when considering this Order.
6. Section 56 of the 1981 Act provides that “A definitive map and statement shall be conclusive evidence as to the particulars contained therein.” The current DMS thus conclusively establishes the existence of public bridleway rights over the Order routes. The Order before me for confirmation does not seek to modify the DMS in that respect. It seeks only to add to the Definitive Statement a width, or to modify the recorded width, for the rights which are already recorded.
7. The Objector accepts that public rights with a width of 30 feet were set out in the Award, and I have accepted the Finance Act maps support such routes having been established on the ground and used by the public. The status of the Order routes, unless and until the subject of a modification order, is conclusively established by their recording on the DMS. For this reason, I do not consider it is necessary for me to deal at length with the Objector’s submissions as to the proper interpretation of the award of a ‘Driftway or Heath Road’. On the face of it this exercise was carried out in 1952 when it was concluded that the routes had the status of bridleways. The Order before me does not seek to challenge that conclusion.
8. The Objector countenances the possibility that the decision in 1952 to record the Order routes with the status of bridleways was made on the basis of some evidence other than the Award and suggests that may explain why no width was recorded. There is no reasonable doubt that the rights were recorded over the tracks which have plainly been in existence from at least the mid-nineteenth century and whose existence and physical characteristics are recorded on the Finance Act map and a sequence of OS maps from that date. I consider, on a balance of probabilities, that any rights so recorded would have been over the entirety of the track (including its verges) as evident on the ground and depicted on the maps. For the reasons given, I accept that the routes were set out at a width of 30’ and have been continuously represented consistent with that.
9. My attention is drawn to the existence of a culvert within BR99 approximately 25 metres north of point B. The culvert has the effect of limiting the available width at this point to 4.5 metres and SCC suggest this should be recognised within the DMS. I agree and propose to modify the Order to include a limitation to this effect.

Conclusions on width

1. The recording of the Order routes on the DMS as bridleways is conclusive as to their status. I am satisfied that the Order routes equate to the routes set out in the Award as public rights of way with a width of 30 feet. Following the principle ‘once a highway, always a highway’ the public rights remain extant over the full 30’ width and it is appropriate for this to be recorded in the Definitive Statement subject to the limitation of the culvert.

**Other matters**

1. The Objector expresses concern about the loss of trees that would be necessary if the full width of the Order routes were to be made available for use by the public. Whilst understanding the motivation behind the concern, this is not a matter which I can take into account; my role is to ascertain the historical extent of the public rights and for these to be recorded in the DMS.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should be confirmed subject to the modification detailed in the formal decision.

**Formal Decision**

1. I confirm the Order subject to the following modification which does not require advertising:

Add to the Statement for BR99 in the Description column: -

***Culvert approximately 25 metres north of junction with BR99A***

Nigel Farthing

**Inspector**

A map with a red stamp

AI-generated content may be incorrect.

A map with a red circle

AI-generated content may be incorrect.