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For London Borough of Bromley

Wildlife & Countryside Act 1981 – Section 53 Determination of an Application for Definitive Map Modification Order Alleged Bridleway – Clarence Road, Footpath 279, Avenue Road/The Avenue to The Grove

Introduction

1. This report seeks to assist the London Borough of Bromley, as Surveying Authority (“the Authority”) to determine an application for a Definitive Map Modification Order. The application seeks to record a public bridleway over Clarence Road, footpath No 279, The Avenue/Avenue Road to the Grove. The route is shown on Plan 1a (Annex 1).
2. During the investigation of the evidence it became apparent that a small part of the The Avenue/Avenue Road section of the claimed route (between B and C on Plan 1b, Annex 1) was in Surrey. At officer level it has been agreed between the two Authorities that the matter will be considered by London Borough of Bromley and should an Order need to be made a formal agreement will be entered into to delegate to the London Borough of Bromley the legal authority to make an Order that would modify the Definitive Map for the County Council of Surrey.
3. Copies of the application, supporting evidence forms and statements made by users on interview are held by the Council on file. The evidence in support of the application is largely that of alleged public use of the route on horse-back. If having considered all the relevant available evidence and on a balance of probabilities public bridleway rights are shown to exist over the route, the Authority will be obliged to make a Definitive Map Modification Order to “upgrade” the footpath to bridleway and to add a bridleway along The Avenue/Avenue Road.

Legislative Background

Legislative Framework

4. The application has been made under the Wildlife and Countryside Act 1981. Section 53 of the Act places a duty on the Authority to keep the Definitive Map under continuous review and to make any modifications to the Definitive Map as may be “requisite”. In determining the application the Authority is acting in a quasi-judicial manner and must weigh the evidence and apply the law accordingly.

Test to be Applied

5. When considering an application for a Definitive Map Modification Order to alter the status of a public right of way shown on the Definitive Map, or to include a public right of way on the Definitive Map over a route where no public rights are presently recorded, the burden of proof initially rests with the applicant to prove their case. If under Section 31 of the Highways Act 1980 a prima facie case in favour of the application is established, the burden then falls upon anyone opposing the application to provide evidence in rebuttal. The standard of proof to be applied to the evidence is the civil test of ‘on the balance of probability’.
6. In the case of the route presently recorded as Footpath 279, if the Authority is satisfied that, having taken into account all of the available relevant evidence, the alleged bridleway rights exist it has a duty to make a Definitive Map Modification

Order to “upgrade” the footpath to bridleway. In the case of the remainder of the application route, if the Authority is satisfied that bridleway rights can be reasonably alleged to subsist, it has a duty to make a Definitive Map Modification Order to record those rights on the Definitive Map

Evidential Tests

Highways Act 1980, Section 31

7. Section 31 of the Highways Act 1980 states:

“(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

“The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.”

“Where the owner of the land, over which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”

8. Section 31(1) has two ‘limbs’ the first provides that proof of twenty years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention (by the owner) to dedicate the way as a highway defeats the claim. In determining a claim based on public use of an alleged highway under Section 31 it is therefore necessary first to establish whether or not there has been use by the public “as of right” for twenty years prior to the right of the public to use the route being brought into question and secondly to determine whether or not there is sufficient evidence of a lack of intention by the landowner to dedicate the way to the public during the period which would have the legal effect of overturning the presumption that the highway legally exists.

9. Section 31 is supplemented by Section 32 of the Highways Act 1980, which states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

10. It is therefore appropriate in determining applications for Definitive Map Modification Orders for the Authority to consider what, if any, relevant documentary evidence exists.

Common Law

11. Highways may also be established under Common Law. At Common Law, a landowner must be shown to have intended to dedicate the right of way over his land. The question of dedication is purely one of fact and public user is no more than

evidence, which has to be considered in the light of all available evidence. Public use will not, therefore, raise the inference of dedication where the evidence in its totality shows that the public right of way status was not intended.

12. At Common Law, there is no specified period of user, which must have passed before an inference of dedication may be drawn. It is necessary to show, in order that there may be a right of way established, that the route has been used openly, "as of right", and for so long a time that it must have come to the knowledge of the owners of the fee simple that the public were so using it as of right.
13. If the landowner has done exactly what would be expected from any owner who intended to dedicate a new highway, the time may be comparatively short. However, as a matter of proof at Common Law, the greater the length of user that can be demonstrated, the stronger the inference of dedication will (usually) be.

Legally irrelevant matters

14. Factors such as desirability, suitability, financial viability, need or public safety, whilst genuine concerns, cannot be taken into account by the Authority when making a decision. Therefore, whilst there may be some genuine concerns about the possible damage to the surface of the alleged bridleway by use of the route for horse-riding, and concerns about possible conflict between walkers and riders these concerns cannot be taken into account when determining the applications to modify the Definitive Map.

Applications for a Definitive Map Modification Order

15. The Council has received a duly made application for a Definitive Map Modification Order. The application was received on the 30 January 2006 from Mrs Ann Hayes, on behalf of the Tatsfield Bridleways Association.
16. An interview day was arranged on 2 March 2010 and witnesses who had completed user evidence forms were invited to attend to clarify and expand upon their evidence. The evidence collected is considered below.
17. The landowners, where known, were contacted and given the opportunity to submit evidence. A plan showing landownership (where this has been ascertained) is at Plan 2 (Annex 2). Comments and evidence submitted by landowners is summarised at Annex 7. Consultations with user groups and statutory undertakers were carried out in accordance with the Rights of Way Review Committee Practice Guidance notes. Evidence collected from this process is considered below and a summary of consultation responses is included at Annex 3.

Consideration of Evidence

Documentary Evidence

18. The documentary evidence considered in the investigation of this application is summarised at Annex 4.
19. It is not possible to list exhaustively the documents that may be relevant in the matter of a claimed public right of way, but there are documents and records that are commonly considered to be core documents. A starting point is any Inclosure Award, and tithe map and apportionment for the area. In this case, however, there is no Inclosure Award or tithe map and apportionment for the area.
20. Avenue Road/The Avenue is a physical feature of long-standing but its origins and ownership are unknown. Historically, there was vehicular access to a scrap-yard on

the section claimed to be a bridleway and a number of adjoining landowners have private rights of access along it.

21. The 1910 Finance Act final record plan (held at the National Archive at Kew) shows that The Avenue/Avenue Road was excluded from the adjoining hereditaments. This suggests public vehicular rights were considered to have existed. But in the absence of other supporting evidence is not considered strong enough to record this part of the claimer route as a byway or restricted byway, especially since ownership of The Avenue/Avenue Road is unknown (and the exclusion from adjoining hereditaments may reflect uncertainty about ownership).
22. Other documents such as deeds, estate plans, quarter session records and highway maintenance records may also be relevant in any particular case, however a search of the online catalogues of the National Archive and of local repositories has not indicated any documents that appear to be relevant to this case.

Evidence of Use

23. The evidence of use from witnesses is analysed in Annex 5 and Annex 6 to this report. Each user is given a user reference number, which is used to identify them in the body of the report.
24. Twenty-nine user evidence forms were received in support of the Definitive Map Modification Order application. All witnesses were invited for interview, and nine attended for interview, one witness was unable to attend and was interviewed on the telephone.
25. After interviewing witnesses in March it became apparent that use of The Avenue/Avenue Road section of the claimed route differed markedly from use of the other sections of the claimed route. Eighteen witnesses who had not attended for interview (these being those whose forms were not clear as to whether or not the whole claimed route had in fact been used) were contacted to ask for clarification. Four of these witnesses responded with clarification of use.
26. As the user evidence varies in respect of different sections of the claimed route these are considered separately below.

The Avenue/Avenue Road (Z-Y on Plan 1a)

27. From user evidence forms and from those witnesses who were interviewed it is clear that the route from The Grove to Bridleway 639 (in Surrey) has been used by horse riders for a considerable length of time. User 6 first started using the route in 1949 and Users 12, 16, 17 and 26 started to use the route in the 1950s. Users 1, 8, 10, 14 and 28 started to use the route in the 1960s, with Users 2, 4, 5, 7, 11, 18, 27 and 29 starting to use the route in the 1970s. Users 15, 20 and 22 started to use the route in the 1980s with the remaining users starting to use the route in the 1990s.
28. Many users continue to use the route and it remains open and available for use. No users report being turned back or challenged on this route and none report seeing any signs. This is consistent with the evidence of adjoining landowners, none of whom have raised any serious evidential objection to the status of the route as a bridleway. Although the application was only for the section Z-Y on Plan 1a it is clear that users have in fact used the whole route from A-B-C-D on Plan 1b.
29. Although rails and steps existed (as evidenced in the Council's records) at the junction of The Avenue/Avenue Road and The Grove they do not appear to have impeded horse riders and the rails appear to have been removed at some point.

Date of bringing into question for The Avenue/Avenue Road

30. In order to make out a case under Section 31 of the Highways Act 1980 it is first necessary to establish a date when the right of the public to use the route have been brought into question. In respect of The Avenue/Avenue Road there has been no physical interruption of use and no challenge to users by way of personal challenge or a sign. Section 69 of the Natural Environment and Rural Communities Act 2006 provides that an application for a Definitive Map Modification Order may be an action that brings into question the right of the public to use the way. The Definitive Map Modification Order application was made in 2006, so it is considered that the relevant twenty-year period for the purposes of Section 31 of the Highways Act 1980 is 2006 – 1986. User evidence for that period is analysed at Annex 6.1.

Clarence Road and Footpath 279 (V-X and Y-X-W on Plan 1a)

31. Although there is a prima facie case that Users have ridden Footpath 279 and Clarence Road, users themselves report that stiles were erected on Footpath 279. Users 1, 3, 4, 5, 8, 12, 14, 15, 18, 19, 20, 21, 24, 25 and 26 report stiles being erected at various points and at various times. Stiles and adjoining fencing are reported by Users to have been broken at various times. Some Users report 'getting around' stiles, stiles being broken and getting through broken fencing (Users 3, 18, and 25). There is no suggestion that any of the users themselves broke or damaged stiles or fencing.
32. It is not always clear from user evidence forms which part of the claimed route has been used and during which periods. It has been possible to establish from interview and through written clarification with some witnesses that there has been less use of the Clarence Road and Footpath 279 section of the claimed route than of The Avenue/Avenue Road. Users 4 and 16 used this section of route until the 1970s when a stile was erected. User 12 used this section of route until 1990 when a stile was erected. Users 5, 6, 9, 11, 22, and 23 mostly used The Avenue/Avenue Road. User 10 never rode this section of route. Additionally few users rode the top section of Footpath 279 between the end of Clarence Road and Main Road, use of this section was minimal; it is very narrow and barriers are known to have existed at the Main Road.
33. It has not been possible to clarify the user evidence in all cases. In some cases user evidence forms appear to have been circulated with the claimed route already completed, where this is the case and where it has not been possible to clarify further that Footpath 279 and Clarence Road as well as The Avenue/Avenue Road have been used by the user, then it is not possible to place great reliance on the evidence.
34. Of the users where evidence has been clarified by interview or written clarification: User 11 used the Footpath 279 and Clarence Road as a young woman and Users 12 and 24 have used the route regularly and frequently and have not been prevented from using it by stiles or fencing until the 1990s.
35. It has not been possible to identify who owns the majority of the land crossed by Footpath 279 or who owns Clarence Road. Mr Rudd owns some land crossed by Footpath 279 but other owners or suspected owners have not responded to consultation. Mr Rudd states that the footpath has always had stiles on it. Mr Williams erected stiles in 1966. Stiles and repairs to stiles are recorded in the Council's maintenance records in the period 1981 – 2003. Stiles and barriers are recorded on the Footpath in the original survey carried out for the Definitive Map and Statement under the National Parks and Access to the Countryside Act 1949. Mr Burridge, Mr D Reeks, Mr R S Reeks and Mr Parfitt all recall stiles, with Mr R S Reeks stating that stiles have always been in place in two sites on the footpath.

36. Although it is not clear who has erected the stiles (with the exception of the two Mr Williams erected in 1966 and those erected in replacement by the Council) it is likely that the stiles were not erected by the landowner. However, irrespective of this, stiles undoubtedly restrict or prevent use by horse riders.
37. The evidence about the stiles is in conflict. The Survey records stiles in 1950 and Mr R S Reeks recalls stiles always being present, but user witnesses from that period do not recall encountering stiles. Mr Williams recalls erecting two stiles in 1966, but user witnesses recall no stiles until the 1970s. Council maintenance records only date back to 1981, but these record erection/replacement and maintenance of stiles from that date. Other than the Survey and the Council records no written contemporary evidence seems to exist regarding the stiles.

Legal Considerations

The Avenue/Avenue Road

38. This route is not at present shown on the Definitive Map and Statement so consideration of the Definitive Map Modification Order application comes under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. This provides that an Order should be made by the Authority on *“the discovery of evidence which (when considered with all other available evidence to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates....”*

These two separate tests were considered in R v Secretary of State for the Environment ex parte Bagshaw [1994] 68 P & CR 402 and R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1:

Test A: Does a right of way subsist?

The Authority must be satisfied on the balance of probabilities that there is clear evidence of public rights over the way, and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a public right of way subsists?

If there is a conflict of credible evidence but no incontrovertible documentary evidence that a right of way cannot be reasonably alleged to subsist, then the Authority can find that a public right of way has been “reasonably alleged” and make an Order on that basis.

39. In this case it is the view of the Consultant that there is clear evidence of public rights over The Avenue/Avenue Road and that evidence suggests that rights of at least bridleway status subsist. There is no credible evidence that public bridleway rights do not subsist. There is some evidence that public vehicular rights may exist, but on balance, the evidence supports a public bridleway.
40. If an Order is made to add The Avenue/Avenue Road to the Definitive Map and Statement it will have to include a width for the route. There is no documentary evidence of width. The route is bounded by trees on both sides with some fencing. User evidence suggests that the width available for use has not changed and was always as it is now. The Authority’s attention is drawn to Advice Note 16 and the related letter of advice from Defra and should an Order be made it is recommended that survey measurements be taken to establish the present physical width of the route and that these should form the basis for any width included in any Order.

Clarence Road and Footpath 279

41. In respect of Clarence Road, this route is also not presently shown on the Definitive Map and Statement and therefore falls to be considered under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (as above). However, in practice use of this

route cannot be divorced from use of Footpath 279 and any inference of dedication as bridleway has to be considered for the route as a whole.

42. Footpath 279 is already recorded on the Definitive Map and Statement as a public footpath. Therefore this section of the claimed route falls to be considered under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981. This provides that an Order should be made by the Authority on *“the discovery of evidence which (when considered with all other available evidence to them) shows that a highway shown in the map and statement ought to be there shown as a highway of a different description”*.
43. In cases where no right of way at all is shown in the Definitive Map and Statement Section 53(3)(c)(i) provides for a slightly lower test i.e. “Test B” to enable an Order to be made. There is no such provision in Section 53(3)(c)(ii).
44. Some riders have spoken of ‘getting around’ the stiles by using a slightly different route to access junction with The Avenue/Avenue Road. The use by riders of a variant of a route to get around obstacles (in this case gates) was considered in R v Secretary of State ex parte Blake 1984 JPL 101 the Court held that the gates were clearly physical interruptions to use and that it was not possible to add the user of two variant routes together to make out a claim of use for twenty years. Other riders have spoken of using the route when fencing next to the stiles was broken or the stiles themselves were broken. There is no suggestion that the riders themselves broke the fencing, but use when fencing or stiles were broken amounts to use by force and cannot be taken as use as of right, either at common law or under Section 31 of the Highways Act 1980.

Consultant’s Comments

45. Applications for Definitive Map Modification Orders do not seek to create or extinguish public rights of way; they simply seek to record, on the Definitive Map, those routes, which already exist, at their correct status. In determining this application, the Authority can only take into account evidence relating to the existence, or otherwise, of public rights. Factors such as: desirability, suitability, privacy, private rights, financial viability, need or public safety; whilst genuine concerns, cannot lawfully be taken into account when making a decision.

Consultant’s conclusions

The Avenue/Avenue Road

46. There is clear evidence of public use of this route as a bridleway for at least twenty years from the date of bringing into question in 2006 to 1986. There is no evidence that any landowner has taken actions that would amount to a lack of intention to dedicate the route during that period of time. Further use of the route by the public on horseback is evidenced from at least the 1950s, which is evidence of the public reputation of the route as a bridleway. There is no evidence that suggests that public bridleway rights do not exist. Use has been over the whole route as shown A-B-C-D on Plan 1b.

Footpath 279

47. Although this route has been used by the public on horseback, at times use has been despite the existence of stiles in various places. Stiles are documented to have existed in 1950, stated to have been erected and kept in place in 1966 and documented in the Council’s records from 1981 onwards. There is evidence that some use of the route was prevented by the stiles in the 1970s and that some riders at least got around stiles or fencing clearly erected to prevent access.

48. Mr Williams challenged users in 1965.

49. Evidence of use is unclear from the user evidence forms, but there appears to be a limited amount of user of the route by users who have not been prevented by stiles and fencing or have 'got around' or 'got through' stiles or fencing. Although the evidence is not completely clear or consistent, it is the Consultant's view that use in such circumstances does not amount to enjoyment by the public as of right.

Decision Required

50. The Authority is required to determine the Definitive Map Modification Order application. It may:
- a) Refuse to make any Order at all.
 - b) Make the Order as applied for in which case it should resolve to make an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the routes shown from Z to Y and from V to X and make an Order under Section 53(3)(c)(ii) for the route shown from Y to X to W on Plan 1a.
 - c) Make an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the route shown from A-B-C-D on Plan 1b and refuse to make an Order for the sections Y to X to W and X to V on Plan 1a.
51. Where an Order is made it does not come into effect unless and until it is confirmed. Orders have to be published and advertised and the public may object to them, where objections or representations are received the Authority may not itself confirm the Order but must refer the Order together with the objections and representations to the Secretary of State for determination.
52. Where an application, or part of an application, for an Order is refused the applicant has a right of appeal to the Secretary of State who will review the evidence and may direct the Authority to make an Order.

Recommendation

It is recommended that the Authority:

Seeks delegated authority from Surrey County Council and on receipt of that authority:

Makes an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the route shown from A-B-C-D on Plan 1b (which incorporates Z-Y on Plan 1a) and refuses to make an Order for the sections V-X and W-X-Y on Plan 1a.

That if no objections are received to the Order made, or any objections that are received are subsequently withdrawn, the Order be confirmed

That if any objections to the Order made are received, and not subsequently withdrawn, the Order be passed to the Secretary of State for determination.

In the event of an appeal being successfully lodged against refusal of part of the application, and the Secretary of State directing the Authority to make the Order requested, a further report be presented to enable the Authority to decide how to proceed throughout the Order process.

List of Annexes to the report:

- Annex 1 – Plans: Plan 1a showing the route of the claimed public bridleway
Plan 1b showing The Avenue/Avenue Road relative to authority boundaries
- Annex 2 – Plan 2 showing landownership
- Annex 3 – Consultation responses
- Annex 4 – Summary of map evidence
- Annex 5 – Summary of user evidence
- Annex 6 – Graph of user evidence
- Annex 7 – Summary of landowner evidence

Other background papers

The applications with accompanying documents, additional user evidence forms and statements are held by the Council on file.