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| **Order Decision** |
| Site visit made on 7 December 2021 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 02 February 2022** |

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| **Order Ref: ROW/3254506** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Holmfirth Restricted Byway 231 – Bridge Lane, Holmfirth Public Path Modification Order 2018.
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| * The Order is dated 14 May 2018 and proposes to modify the Definitive Map and Statement for the area by the recording of Restricted Byway 231 between Bridge Lane and the Sands Recreation Ground in Holmfirth as shown in the Order plan and described in the Order Schedule.
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| * There were three objections outstanding when Kirklees 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 the modification set out in the Formal Decision.** |
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Procedural Matters

1. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.
2. Whilst I note references to the availability of evidence, I have taken this decision on the basis of the evidence before me, which has been available to all parties to the matter.
3. The Order contains a matter which will be corrected by modification, as my decision is to confirm the Order. It seeks to record the alignment of section C-D of the route as north north-west. However, it is apparent from the Order plan that this section follows a north north-easterly direction. This is a relatively minor modification in the interests of accuracy, which does not require advertisement.

The Main Issues

1. Kirklees Council made the Definitive Map Modification Order (DMMO) under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that a restricted byway which is not shown in the map and statement subsists over land in the area to which the map relates.
2. User Evidence Forms (UEFs) are submitted in support of the application. As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be 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 is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. If statutory dedication is not applicable I shall consider whether dedication has been shown at common law. Such a dedication requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.
4. The standard of proof for confirmation of a DMMO is the balance of probability.

Reasons

*Background*

1. The Order route runs from Bridge Lane in a generally northerly direction passing Bridge foundry, the pavilion and the cricket ground on their eastern side before meeting Council-owned land at the north-east corner of the cricket ground. There is then a gap in the route before it recommences in a generally north north-easterly direction along the eastern edge of a car park adjacent to the bowling green. It terminates at the southern edge of the Sands Recreation Ground.
2. User, documentary and landowner evidence has been submitted in respect of the Order.

*When the right of the public was brought into question*

1. It is submitted in opposition that users of the Order route were challenged in 1985 and 2001/2002, and that both of these actions comprised a bringing into question of the right of the public to use the route.
2. However, the 1985 incident reportedly resulted from a refusal to pay for entry to an event, and the 2001/2002 incident concerned a refusal of permission (for health and safety reasons) for a route to be promoted through the foundry area. The means employed to form a bringing into question must make it likely that some of the users of a way are made aware that the owner has challenged their right to use it as a highway. Actions such as these incidents, which were directed at a single individual in each case, cannot be taken to be directed to the public as a whole. Therefore the public were not aware that their right to use the route was being challenged at those points. Thus, the 1985 and 2001/2002 incidents did not form a bringing into question.
3. The Council submits that a chain on the route near the cricket terrace was installed in March 2011, prompting the submission of the DMMO Application. A chain bearing a “car park” notice was fixed to the wall at this approximate location at the time of my site visit. A number of the UEFs completed in 2011 refer to the presence of a “new” or “recent” chain along the route.
4. The DMMO application was submitted in April 2011, which brought the right of the public to use the way into question and results in a relevant twenty year period (the statutory period) of 1991-2011.

*Order route*

1. The gap in the Order route arises from the Council’s assessment that public use of the “spur” of Council-owned land (which it would have been necessary to cross between points B and C if users were to circumvent a large pile of earth and stone which, it is suggested, was present on the spur from the mid-1980s) was by right rather than as of right. The land in question was conveyed to the Council in 1969, and was retained and managed by the Council as publicly-accessible open space over the statutory period. As a result, I concur with the submission that it was not possible for a public right of way to arise over the land between B and C over the period, because use by the public would have been by right.
2. A metal gate lay adjacent to the route and near the pavilion at the time of my site visit. It would be possible to close this across the route by the use of an attached wheel, and fixtures on the opposite wall. A separate pedestrian gate lay next to this.
3. The user evidence is formed of two groups: those who submitted evidence in 2011, and those who submitted it in 2017 (and, in one case, 2015). Some of the 2017 evidence refers to occasionally having found the wheeled gate locked across the Order route and having deviated from the route via the pedestrian gate instead. However, there are no such references in the 2011 evidence, which comprises a substantial number of witnesses. Furthermore, a number of the 2011 respondents refer to never having encountered closed gates on the Order route. Any locking of the gate across the route consequently did not affect the route used over the statutory period.
4. Thus, in light of the above considerations, the evidence as a whole supports the route of the way shown in the Order.

*Evidence of use*

1. User evidence from 118 people is submitted in support of the DMMO, showing use between the years 1947 - 2017. The UEFs of 65 people record use of the route on foot over the whole of the statutory period. Almost half of this number used the route weekly or more often. Reasons given for use include for dog walking, accessing the play area, running, going to the doctor, visiting the recreation ground and cycling.
2. Section 31 1A (b) of the 1980 Act (as amended by section 68 of the Natural Environment and Rural Communities Act 2006) provides that use by pedal cycles can be taken to contribute to the establishment of a restricted byway when considering whether dedication has occurred under the 1980 Act. Whereas the application made to the Council was for the addition of a public bridleway, the Council concluded that the evidence of use by bicycles was sufficient to show that a restricted byway had been reasonably alleged to exist.
3. Nine people record use on foot and bicycle of a frequency between daily and weekly over the statutory period. One further person records use on foot and bicycle a couple of times per year. Of the nine, two people or their family members held property or land adjacent or close to the Order route. Their use may therefore have been in exercise of a private right of way and consequently I exercise a degree of caution over the use of their evidence in this assessment.
4. The route has consequently been subject to generally frequent use on foot and by bicycle by eight people over the whole of the statutory period. Whilst the reasons given for use are consistent with use by the public, this is a moderate level of use at such a location even if all the journeys in question were made by bicycle. However, in all cases the use comprised use both by bicycle and on foot. This combination of uses dilutes the quantity of bicycle use so that it is insufficient to constitute the dedication of a restricted byway under Section 31 of the 1980 Act. As the evidence for a restricted byway fails according to the statutory requirements, it is necessary to consider the matter at common law.
5. The period over which the most intensive use of the Order route by people on foot and by bicycle has arisen is the 9 years 2002-2011 (the common law period). Even if the use of the 2 people who may have been exercising private rights is discounted, 16 people used the route by these 2 means over this period. Of these, 9 people used the route at least 3 times a week, and 6 people weekly or twice weekly. One person used it twice a year. Use over the common law period was consequently intensive, and generally very frequent.
6. Furthermore, a significant number of the 2011 UEFs include references to having noticed use by cyclists. This provides support for the notoriety of the Order route as available for use by cyclists over the common law period.
7. If bicycle use had been made of an accepted (but unrecorded) bridleway, it is likely that such use should be attributed to the established bridleway status, in accordance with the case of Whitworth v Secretary for Environment, Food and Rural Affairs ([2010] EWCA Civ 1468). However, the evidence before me does not suggest that the Order route was an established bridleway prior to the bicycle use shown over the common law period. Thus, in view of the above considerations, the identified bicycle use is of a sufficient quality and quantity to demonstrate that the route has been enjoyed by the public as a restricted byway over the common law period.
8. Ownership of the land crossed by the Order route appears to have been consistent over that period, and there is no indication that there was a lack of any owner with a capacity to dedicate.
9. For use by the public to have been “as of right”, it must have been without force, without secrecy and without permission.
10. It is submitted in opposition that a chain across the route was installed in the mid-1990s, and that it was locked whenever the club was not occupied. Nevertheless, I have identified that the consensus of the user evidence is that the chain had been recently installed at the time of completion of the 2011 UEFs, which is supported by a contemporaneous newspaper report of the matter. This accords with the Council’s view that the installation of the chain gave rise to the DMMO application, and there is minimal contradictory evidence of a chain at any other location on the Order route over the common law period. Thus, the evidence does not show that use of the route over the period was made by crossing a chain.
11. Objectors state that gates are locked across the Order route over the Christmas period. Whilst dates are not provided for this, it is suggested that these were installed in approximately 2005. However, there is minimal substantive evidence to support this date. Furthermore, a newspaper report from March 2012 refers to new gates on the route, and states that they will be locked at night and at all times at weekends when the cricket club is not in use. I have found above that any locking of a gate on the route did not affect the route used over the statutory period, and similarly there is no evidential basis on which to conclude that gates across the route were ever locked during the common law period.
12. As a result, the public did not encounter an obstacle to use of the Order route over the common law period. Thus, the evidence does not indicate that force was employed to make use of the route.
13. There is no suggestion that any attempts were made to conceal public use of the route, and indeed there are acknowledgements that public use has occurred amongst the opposing evidence. It has consequently been open use of a type that was capable of being challenged had anyone chosen to do so, and hence was use “without secrecy”.
14. It is submitted in opposition that the Order route was closed to anyone not making payment for entry to two annual events in the vicinity, over the whole of the common law period. These were an annual fireworks event at the Sands Recreation Ground to the north of the Order route and a separate annual duck race event on the river Holme to the west of the cricket ground. Two of the users over the period report use of the route for attendance at the fireworks event, amongst other reasons. One of these people states that the entry to the recreation ground is gated at the fireworks event, so as to charge admission. One person reports use of the route to attend the duck race, amongst other reasons.
15. One person (who used the route over the whole of the common law period on foot only) also records having seen fencing used to restrict the width of the entrance to the recreation ground at point D, so that an entry fee to the fireworks event may be taken.
16. Nevertheless, the fireworks event occurred on adjacent land rather than on land crossed by the Order route. Point D marks the northern termination of the Order route and therefore, even if it had formed a point at which a fee was chargeable for entry to the land on the other side once a year, there is no indication that this would have prevented users from passing and repassing over the entirety of the Order route freely.
17. There is minimal evidence concerning the duck race and the payment of any entry fees for spectators, however even if this were the case the evidence does not suggest that it prevented the free use of the Order route. Furthermore, the river is some distance from the Order route and therefore the route would not form a natural vantage point from which to watch the event.
18. The submitted evidence includes cricket club accounts showing income from gate receipts, and supports the suggested charging of fees to attend matches. Such events could be expected to occur with reasonable regularity at the ground. If access to the Order route had only been possible by paying the entry fee on those occasions, one would expect reference to this to appear in the user evidence, particularly in view of the quantity of such evidence which is supplied.
19. A substantial majority of the total users record use of the route over the common law period. The UEF requests details of any challenges to use encountered, and none of these people refer to having ever been required to pay a fee to access the route over that period.
20. Furthermore, supplementary questionnaires were issued to some users, of whom the majority used the route over the common law period. The questionnaire asks whether use has been made on cricket match days, and whether payment to enter the land between the pavilion and Point B was ever requested. None of these users report having ever been asked for payment, whether they have used the Order route on match days or not.
21. Thus, the quantity and consistency of evidence on the matter demonstrates that, whilst a fee appears to have been charged for entry to cricket matches, this fee was not requested from or paid by concurrent users of the Order route.
22. The evidence consequently demonstrates that use was “without permission”.
23. As a result of the foregoing considerations, I am satisfied that there was sufficient use of the Order route by bicycle, as of right and without interruption, to show acceptance by the public of its dedication as a restricted byway over the common law period.

*Evidence of lack of intention to dedicate a public right of way*

1. An objector submits that an individual was prevented from walking through at the time of an apparent cricket club event in 1985, and was informed that the route was not a public right of way. As identified above, the individual appears to have refused to pay the entrance fee to a cricket match. A further individual was refused permission to include part of the Order route in a promoted route by the foundry owners on health and safety grounds, in approximately 2001/2002.
2. This evidence does not clearly suggest that the incidents were an attempt to indicate a lack of intention to dedicate the Order route as public. Furthermore, no other such incidents are reported to have occurred over the common law period and hence the evidence in favour of an absence of challenge is substantial. In any event, the first incident occurred prior to 2002 and the date of the other is unclear. As a result of these factors, they did not show a lack of intention to dedicate over the common law period.
3. Five people answered that they believed the route was not a public right of way, in response to a question concerning the believed status of the route. Nevertheless, all of them state that this belief arises from the Order route’s lack of depiction on Ordnance Survey maps as a public right of way, and one person adds that neither is it signposted as such. Both of these matters are consistent with a potential unrecorded public right of way and therefore they do not have a bearing on the intention of the owner concerning the route.
4. At my site visit a notice stating “Holmfirth Cricket Club Private Property Notice – Cars parked at owners risk in this car park – pedestrians using this roadway do so at their own risk – Dogs must be on a lead at all times – By Order of The Committee” (the cricket club notice) was present on the wall of the pavilion, facing the Order route. A photograph dated 6 April 2011 shows that the notice was present at that point. It is submitted in opposition that the notice was present after approximately 2002.
5. Notices stating “No public right of way”, “private property” and “permissive footpath” (two of which bore the date 2018) were also present on structures adjacent to the route.
6. The cricket club notice’s reference to the “roadway”, and its location adjacent to it indicate that it relates to the Order route. Whilst the notice’s wording refers to private property, it also acknowledges use of the “roadway” by pedestrians and those accompanied by dogs. However, although it is consequently partially addressed to users of the route, its wording is sufficiently ambiguous on the matter of public access that it does not clearly deny the existence of a public right of way over it, or seek to bar access.
7. The evidence is unclear on the dates over which the cricket club notice was present, however the evidence of a significant number of people demonstrates that they do not recall the notice, and that it did not affect their use. Thus, in view of the cricket club notice’s equivocal wording and its minimal effect on users, it did not demonstrate a lack of intention to dedicate the Order route as a public right of way irrespective of the period over which it was present.
8. Two of the 2011 users refer to having seen a “use at your own risk” notice, and two refer to seeing one regarding keeping dogs off the grass. One refers to a notice regarding vandalism and private property. No other notices are mentioned by the 2011 users.
9. No dates over which the other notices have been present are suggested in opposition, however the 2017 user evidence indicates that the “permissive footpath” notice was present from 2017 only, and there is no evidential basis to take a different view in respect of the remaining notices, which have a relatively recent appearance.
10. I have found above that any fees charged in respect of events or locking of the gate across the route did not affect use of the route over the period to 2011.
11. As the period of use under consideration is 2002-2011, the submitted history of the route over the period 1963-1980s is of minimal relevance to the question of whether a lack of intention to dedicate a public right of way was demonstrated over the common law period.
12. The lack of evidence of action by landowners in respect of public use of the Order route over the common law period results in the inference of an intention to dedicate the route as a restricted byway. Evidence of the use of the way by the public as of right also supports the inference of such a dedication.

*Conclusion regarding common law dedication*

1. The evidence considered above is sufficient to show dedication of the Order route as a restricted byway at common law.

 *Documentary evidence*

1. Ordnance Survey (OS) Maps of 1893 and 1906 depict the route as open to Bridge Lane and partially shown by a single dashed line. They suggest the presence of gates or boundaries across the route near the foundry and at Point B by a solid line. An OS Map of 1931 is similar but a gate appears to be shown where the route meets Bridge Lane, instead of adjacent to the foundry. A 1967 OS Map shows a gate or boundary only at Point B and a partial single dashed line depicting the route. The OS maps demonstrate the existence of part of the Order route as a physical feature over many years. However, they do not purport to record the status of the way shown.

**Other Matters**

1. Whilst I acknowledge concerns raised regarding health and safety, security and requests for an alternative route, I cannot give these concerns weight in reaching my decision as they lie outside the criteria set out within the relevant legislation.
2. A public right of way can co-exist with a private right of way over land and therefore confirmation of the Order does not adversely affect any private rights along the same route.
3. It is submitted that public use of section C-D of the route arose as a result of a lack of maintenance of the Council-owned spur of land to the east. However, it has not been demonstrated that this spur carried a publicly maintainable right of way. Therefore there is insufficient evidence to suggest that use of the section C-D arose as a result of deviation from an established right of way.
4. I note the references regarding the Council’s approach, however, these are not matters for this decision, which I have determined on the evidence before me.

**Conclusion**

1. Having regard to all the evidence before me, I conclude that the DMMO should be confirmed.

**Formal Decision**

1. I confirm the DMMO subject to the following modification:

*Modification to Order Schedule (Part 1):*

* By the substitution of the words “north north-westerly direction” with the words “north north-easterly direction”.

C Beeby

INSPECTOR

**MAP NOT TO ORIGINAL SCALE**

