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| **Interim Order Decision** |
| Inquiry Held on 21 June 2022Site visit made on 20 June 2022 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 27 July 2022** |

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| **Order Ref: ROW/3245044** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cheshire East Borough Council Definitive Map and Statement (Addition of Public Footpath No.29, Parish of Knutsford) Modification Order 2018.
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| * The Order is dated 16 August 2018 and proposes to modify the Definitive Map and Statement for the area by the addition of a public footpath between Nos 95 and 97 King Street to Old Market Place, Knutsford as shown in the Order plan and described in the Order Schedule.
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| * There were 2 objections outstanding at the commencement of the inquiry.
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| **Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.** |
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Procedural Matters

1. The Order was made following a successful appeal under Schedule 14 of the 1981 Act against a decision by the Council not to make an Order. The Council was directed (Ref. FPS/R0660/14A/1) to make an Order in 2017, and consequently took a neutral stance at the inquiry, with the applicant taking the matter forward.
2. I carried out an unaccompanied site visit prior to the public inquiry and a further visit during the afternoon of its final day, when I was accompanied by parties supporting and opposing the Order.
3. 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.

The Main Issues

1. Cheshire East Borough Council made the Order 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 public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates.
2. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists. The burden of proof lies with those who assert the existence of a public footpath.
3. The majority of the evidence in support of this case comprises User Evidence Forms (UEFs). 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.
4. 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.

Reasons

***Background***

1. The Order route passes over an area between Nos 95 and 97 King Street (Nos 95 and 97) before turning to pass through a car parking area and to meet Old Market Place. User, documentary and landowner evidence has been submitted in respect of the Order.

***Documentary evidence***

*Tithe mapping*

1. An undated Tithe Map shows the affected land. No way appears in the vicinity of the Order route.

*Ordnance Survey mapping*

1. Extracts from six undated Ordnance Survey (OS) maps show section A-B of the Order route as an open area between buildings, with the presence of a gate suggested at Point A on some of the maps by means of an unbroken line between the route and King Street. Buildings are shown over much of the section B-C, so that passage across that area does not appear possible.
2. An OS map dated 1936 shows the area between Nos 95 and 97 as open to the street. The buildings which appear over the area B-C on earlier maps are no longer present, and the area is marked “Car Park”. Whilst the area of the Order route appears generally open, no route is marked over the section B-C.
3. The Tithe map does not show the physical existence of the Order route at that time. The early OS maps demonstrate the existence of an open area between buildings at the location of section A-B of the Order route. However, the full Order route is not shown as open land which could potentially have offered a through route due to the presence of buildings over section B-C. Furthermore, the area appears to have been gated over part of the time period covered. The availability of access to the area at the time is consequently unclear.
4. Whilst the land crossed by the Order route is shown as open by the time of the 1936 OS map, no track is marked. Furthermore, OS maps carried a disclaimer by that point to the effect that the representation of a route on the map was not evidence of the existence of a public right of way. Thus, the 1936 OS map does not provide evidence in support of the Order.
5. The submitted documentary evidence consequently does not support the existence of unrecorded public rights over the Order route.

***Statutory Dedication***

*Bringing into question*

1. It is suggested that notices were attached to the wall of No 97 where it bounds the Order route near to Point B, in 1980, 1991 or 1999. The earlier notice (“the Hillcrest notice”) stated “The use of this private driveway is by courtesy of Hillcrest Estates”. The later notice (“the Prego notice”) was attached over the earlier one and stated “Pedestrian access by kind permission of Prego”. Photographic evidence supports the wording of both notices. The Schedule 14 decision of July 2017 notes that both these signs were visible at a recent site inspection, one mainly obscuring the other, and that they appeared to have been in place for a considerable period.
2. In order for a notice to have brought the public’s right to use the Order route into question, it must have been sufficient at least to make it likely that some of the users were made aware that the owner had challenged their right to use the way as a highway.
3. A photograph of sales particulars marked with the date 2006 appears to show a vehicle parked between Nos 95 and 97 close to Point A of the Order route. A photograph marked 2015 shows a vehicle parked in a similar position, with space to pass along its side.
4. The Hillcrest notice was evidently placed in a position of visibility to anyone parking thus in the passageway, and “driveway” is generally understood to be a term denoting an area for the driving and/or parking of vehicles. The Hillcrest notice consequently does not clearly seek to deny the existence of a public right of way on foot over the Order route. Therefore the date on which it was attached could not form a bringing into question of the right of the public to use the route.
5. The Prego notice suggests that permission is given to use the access on foot. A route used with the permission of the landowner is inconsistent with the potential dedication of a public right of way. Therefore the notice could potentially have brought the right of the public to use the route into question, if it is possible to identify the date on which it was attached.
6. Whilst it is suggested that the Prego notice was attached in 1999, the 2017 evidence of Mr Mooney states that he owned No 97 from 2001. His business “Prego” operated from the property over at least the period 2001-2007. He indicates that he placed a sign on the outdoor terrace area suggesting there was no public right of way, although he does not provide a date when this occurred.
7. Two people who supplied user evidence recall seeing a notice along the route. One of these people states that they recall a sign at one point, but not its wording. The other person states that they recall seeing a sign on the flower shop side with the name “Silver Fern Construction” and wording which perhaps said they granted permission to the public to use the way, or that the passage had been made available to the public. Later evidence from both people sets out that whilst they have seen photographs of the Hillcrest Estates and Prego notices, these are not signs they recall.
8. Nevertheless, there is no evidence of the presence of any other notice in the vicinity. Uncertainty regarding the notice seen could arise from the attachment of the Prego notice above the Hillcrest notice. Thus, I consider it to be most likely, given the reported location and wording of the notice seen, that the user has seen one of the two notices which have been present on the wall of No 97. Nevertheless, it is not possible to say with certainty which notice they recall.
9. Their recollection of the notice being located “on the flower shop side” suggests that the memory dates to the period over which the flower shop was in operation from No 97 and displayed flowers on the passageway, namely 1993-2003. Mr Mooney purchased the property in 2001 and states that he attached the Prego notice at some point thereafter. Taken together this evidence suggests that, if the user’s recollection concerned the Prego notice, it was attached at some point in the period 2001-2003. The business operated over at least the period 2001-2007 and consequently the associated notice is most likely to date to that period.
10. Nevertheless, there is insufficient clear evidence of the date on which the Prego notice was attached in order for it to form a bringing into question of the right of the public to use the Order route.
11. The Order route was blocked by fencing in September 2015 according to the evidence of users, the applicant and the Council. This gave rise to the submission of the Order application in May 2016. As the fencing prevented passage along the route it was sufficient to bring home to the public that their right to use the route was being challenged. This results in a relevant twenty-year period (the statutory period) of 1995-2015.

*Evidence of use*

1. User evidence from seventeen people is submitted in support of the Order, showing use between the years 1934 and 2017. The evidence of eight people shows use of the Order route on foot over the whole of the statutory period. Their frequency of use was generally weekly, although one person’s use was daily and one fortnightly, and the use of two people was less frequent than weekly over unspecified periods. Reasons given for use include for shopping, walking and going to school.
2. The Order route differs from the application route from Point B passing north, in that it terminates at a point further to the east. Photographs from the 1980s show surfaced paths to exist at the approximate locations of both the application and Order routes. Three of the eight users spoke at the inquiry and confirmed that their use had been of the Order route.
3. The evidence of one of the eight people shows use of both the application and the Order routes north from Point B. There is no indication of the proportion of their use which related to each route. Whilst their frequency of use of both routes is recorded as “weekly, then fortnightly”, it is therefore not possible to determine their frequency of use of the Order route between Points B and C.
4. Furthermore, their use was partially to access the Prego coffee shop via its rear entrance. The statement of the shop’s former owner confirms that it was open between at least the years 2001-2007, comprising a minimum of six years of the statutory period. Whilst the route was additionally used for other reasons, the proportion of their use of the route as a customer of a business located off it is unlikely to have formed use by the public.
5. I do not attach full weight to the user’s evidence in contributing to a period of public use over the statutory period in respect of the full Order route in view of these factors, and in the absence of having heard and examined their evidence further at the inquiry.
6. The evidence of three further people shows use of a route which is either unclear or which was not the full Order route over the whole of the statutory period. Additionally, three other people show use over part of the statutory period. However, it is either unclear whether they have used the full Order route, or they record use of the application route only. The use of all six people consequently cannot count towards a consideration of whether public use has been sufficient to suggest that a right of way subsists over the full Order route, according to the statutory provisions.
7. One of the eight people drew a sketch of the route which shows the application route with their UEF of 2016, and marked a route showing the Order route on a map which accompanies their statement of 2017. As the sketch is simplistic and shows only minimal features I consider the statement map to be more likely to depict their route with greater accuracy. Thus, I attach greater weight to their evidence of use of the full Order route.
8. Two of those who made use of the route over the full statutory period supplied 2017 statements which indicate that part of their use was to access the rear entrance of the Prego coffee shop at No 97. As a result, a proportion of their use over at least the period 2001-2007 may have been as a customer of a business located off the route. This would not have comprised public use.
9. Nevertheless, both people made use of the route for additional reasons which form use by the public over the full statutory period. Furthermore, both people appeared at the inquiry but could not then recall use to access the coffee shop. If their visits to the coffee shop had been so frequent as to have formed any significant proportion of their use of the route it is likely that they would have recalled this at the inquiry. Thus, it is most likely that any use to access the coffee shop was so limited that it does not reduce the weight attached to their overall evidence of public use of the route.
10. The UEF of another of the eight users over the statutory period is unsigned. However, they reviewed their UEF at the inquiry and confirmed that it accurately recorded their use of the route. Furthermore, their UEF is accompanied by a signed and dated plan, which they considered to reflect the date on which their form was completed. As a result of these considerations and the cogency of their evidence to the inquiry with their written submissions, I attach full weight to their evidence of use.
11. Some of the use of the same person was to access a record shop along the route, which could consequently be considered not to form use as the public. The user could not recall the date when the shop would have closed at the inquiry.
12. References to the record shop do not generally appear in other user evidence and consequently I consider that it is unlikely to have been present for any significant and/or recent period of time. Furthermore, the user additionally made use of the route for reasons which do form use by the public. Thus, any use to access the business was so limited that it does not reduce the weight attached to their evidence of public use of the route.
13. The weight attached to the evidence of one of the eight people who used the full Order route over the statutory period is consequently somewhat reduced, for the reasons given at paragraphs 28-30 above. Nevertheless, the use of at least seven people shows reasonably intensive use of the Order route on foot over the statutory period and thus the route has been actually enjoyed by the public.
14. Turning to whether use was “as of right”, there is no indication that the public use taken into account was made by force or in secrecy.
15. I have found above that the notice stating “the use of this private driveway is by courtesy of Hillcrest Estates” did not clearly seek to deny the existence of a public right of way on foot. In referring to a driveway as private, it additionally does not form a positive act of granting permission for the public to use the Order route on foot.
16. Mr Mooney’s evidence states that he purchased 97 King Street in 2001. His sandwich shop business “Prego” operated from the premises over at least the period 2001-2007, comprising a minimum of six years of the statutory period. The Order Making Authority (the OMA) and the town council consider that his ownership extended to the passageway between Nos 95 and 97 over which the Order route passes, and there is minimal other evidence on the matter before me. Thus, in the absence of substantive contradictory evidence, I consider that Mr Mooney was the owner of the passageway when he attached the Prego notice.
17. The Prego notice was attached over the earlier one and stated “Pedestrian access by kind permission of Prego”. I have found above that it is likely to have been affixed at some point over the period 2001-2007. The notice was located at a point where it would be clearly visible to people using the way. Although the person who recalls the wording of a notice along the route was not amongst the eight people who used the full route over the statutory period, their evidence supports the visibility of a notice granting permission to use the route at the location of the Prego notice.
18. Whilst photographic and witness evidence suggests that a substantial area of vegetation covered part of the wall of No 97 in the vicinity of the Prego notice over part of the statutory period, the notice was found to be visible at a site visit by the OMA of 12 January 2017. The OMA considers that this may have resulted from the recent cutting back of vegetation in the area.
19. Nevertheless, the Prego notice appears to have been affixed for approximately the latter half of the statutory period. Photographic evidence between the years 2009 – 2015 shows the presence of vegetation against the wall of No 97 but it is unclear whether it extends to cover the notice, and indeed the earliest photograph suggests that its limit at that point was close to the notice’s position. The notice was therefore present and potentially visible on the Order route for a substantial period of time.
20. Apositive act by a landowner of granting permission that goes beyond tolerance or acquiescence may establish that public use of a way has been with permission. The position and wording of the Prego notice indicate that it was express permission directed at members of the public using the Order route on foot at that point.

*Conclusion regarding statutory dedication*

1. Thus, I consider that the Prego notice established that public use of the Order route was with permission from the date on which it was attached, at some time during the period 2001-2007, until the point at which it was obscured by vegetation. Public use with permission is not consistent with use of the route “as of right”. Accordingly, the evidence of use cannot qualify for the purposes of establishing a public right of way under the provisions of Section 31 of the Highways Act 1980.
2. As statutory dedication is not applicable I shall consider whether dedication has been shown at common law.

***Common Law***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions (or lack of action) of landowners indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
2. The family of Ms Merryweather Hurst owned No 95 for 50 years until 1982. She considers that the passageway was within the curtilage of No 95 and was a private driveway with no public access.
3. The user evidence form of Ms Milward sets out that she owned No 95 from 1983 to 1992. She states that she has owned land over which the claimed route runs. When she purchased No 95 she carried out some resurfacing works to the Order route, and she appears to have constructed the surfaced path which forms the section B-C. She regards the route as a public footpath because “the route has been made available for public use since August 2nd 1984” and “after so many years of constant use”.
4. Land Registry records from 2009 show the owner of the Old Market Place car park land crossed by approximately section B-C of the Order route to be Cheshire East Borough Council. Whilst this was seventeen years after Ms Milward ceased to own No 95, photographic evidence from the time of her ownership in the 1980s-1990s shows that part of the section B-C was in use for vehicle parking by that point. The 1936 OS Map additionally records a car park at the location. The land consequently appears to have been a public car park for a significant period of time. These matters introduce doubt regarding whether Ms Milward owned the land crossed by section B-C of the route during the period when she owned No 95. As a result, I consider that it has not been demonstrated that Ms Milward had the capacity to dedicate the section B-C over the period of her ownership in the vicinity.
5. Nevertheless, whilst documentary evidence supporting the ownership of the Order route by Ms Milward is not before me, the evidence of both Ms Milward and the owners of No 95 prior to Ms Milward’s ownership shows that they considered that their ownership included at least section A-B of the Order route land.
6. Furthermore, I consider that it is unlikely that Ms Milward would have carried out the suggested works to the route if she had not had an interest in it as owner. Moreover, the works to lay out the route would have been apparent to the owner of the land if they had not been Ms Milward, and as the works were completed, they evidently went unchallenged by anyone else claiming to be the owner.
7. Thus, whilst the evidence does not sufficiently demonstrate her capacity to dedicate the section B-C, I consider that Ms Milward had the capacity to dedicate a right of way over the land crossed by section A-B of the Order route over the eight-year period 1984 (the date from which she considers the route to have been available to the public) to 1992. This is consequently the period over which I must consider any potential common law dedication (“the common law period”).
8. Ms Milward’s statement that she considered the route to be available for public use from August 1984, together with her works to make the route available prior to this and her acknowledgement of subsequent public use of the route, form cogent evidence that she knew and acquiesced in the use of the section A-B as a public footpath. In order for the inference of dedication to be raised it would be necessary for the public to have accepted that dedication through a period of use.
9. Evidence from the objectors suggests that No 95 was leased to a tenant by Ms Milward in September 1991. A tenant under a lease is unlikely to be able to dedicate a public right of way over land unless they do so with the concurrence of the freeholder. However, the evidence of Ms Milward sets out that she considered that the route was “made available for public use since August 2nd 1984 until fence erected in 2015”. This period includes the final year of the common law period and the statement indicates that she continued to concur to the dedication of a public right of way over the land during the period over which she was landlord to a tenant there.
10. Whilst Ms Milward made use of the route over the common law period, I consider that she was likely to have been the owner of part of it and therefore her use would not have been as the public. Seven further people used the route A-B on foot over the period. The maps of two of these witnesses are missing or incomplete. Nevertheless, I am satisfied from the available evidence that their use includes section A-B of the Order route.
11. Their frequencies of use were daily, three times per week, weekly, fortnightly, monthly (two people) and twenty times per year. Use was consequently of a regular frequency which is consistent with the location of the route towards a settlement centre. Their evidence shows that their use of the route was by the public. Furthermore, Ms Milward states that she saw people using the route. Thus, the available evidence shows acceptance by the public of the route A-B on foot over the common law period.
12. It is consequently necessary to consider whether that use was “as of right” and without interruption.
13. One of the users over the common law period recalls the presence of a gate on the route, but states that it “was always open”. The statement of Ms Milward additionally refers to the presence of gates on the route, apparently at approximately point A. This is consistent with the evidence of Ms Merryweather Hurst that the route was gated at one end until 1982. Nevertheless, the gates are not described as ever having been locked over the common law period, and the evidence of Ms Milward is that she made the route available for public use from 1984. Thus, I am satisfied that public use over the common law period was without force.
14. The available evidence does not suggest that use over the period was made in secrecy, and the landowner evidence at the time shows awareness of it.
15. As I have set out above, the Hillcrest notice did not clearly address pedestrians using the Order route. Thus, if it was present over the common law period, it did not render use on foot by permission. The remaining evidence additionally does not suggest that use over the common law period was with permission.
16. Turning to whether use was without interruption, in order to be effective an interruption must be with intent to disabuse users of any belief that there was a public right. Evidence of works at No 95 in 2003 post-date the common law period by a considerable degree and consequently if the route was closed to the public at that point it did not form a potential interruption of the common law period.
17. Whilst there appears to have been some occasional parking of cars in the area between Nos 95 and 97, this appears to have been associated with adjacent businesses and there is no evidence that it was intended to prevent public use of the way. Similarly, if the route’s flagstones became slippery in winter months this was an incidental feature of the surface which was not an action by the landowner or someone acting with their authority with the intention of preventing public use of the way. Indeed, a number of the users state that the Order route was used in preference to Old Market Place in wet or icy conditions. Therefore neither matter formed an interruption to the common law period.
18. Evidence of Ms Drinkwater, who traded from No 97 over the period 1993 – 2003, sets out that she was informed that the section A-B was not a public right of way. Nevertheless, substantive evidence regarding the date when the statement was made, by whom and in what context is not before me. Moreover, it is most likely to have occurred after the common law period and subsequent to Ms Milward’s ownership of the route as a result of the dates over which she traded. As a result, it did not interrupt the period of use considered.

*Conclusion regarding common law dedication*

1. Thus, the user of section A-B of the Order route over the common law period was open and relatively intensive and there is cogent evidence of knowledge and acquiescence by the landowner at the time in that use. As a result, the available evidence is sufficient to show that a public right of way on foot which is not shown in the map and statement subsists over section A-B of the route only. I therefore propose to modify the Order accordingly.

**Other Matters**

1. The inspection or maintenance of a way by a local authority is not necessary in order for the dedication of a public right of way to occur over it and therefore this matter is not relevant to the determination of the Order.
2. Whilst I acknowledge concerns raised regarding economic considerations, health and safety and the management of any recorded public footpath, I cannot give these weight in reaching my decision as they lie outside the criteria set out within the relevant legislation.

Conclusion

1. Having regard to all the evidence before me, I propose to confirm the Order with the modifications referred to in paragraph 66 above.

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:
* In Part I of the Order Schedule (Modification of the Definitive Map): delete the text “then continuing in a generally north easterly and north north easterly direction for approximately 16 metres to O.S. grid reference SJ 7521 7874 (Point C on Plan No. WCA/013A) and its junction with Old Market Place (UW 1764/C)”.
* In Part I of the Order Schedule: amend “A total distance of approximately 27 metres” to “A total distance of approximately 11 metres”.
* In Part II of the Order Schedule (Modification of Definitive Statement): In “Grid Reference”, amend “SJ 7521 7874” to “SJ 7521 7872”. In “Description”, delete the text “then continuing in a generally north easterly and north north easterly direction for approximately 16 metres to O.S. grid reference SJ 7521 7874 and its junction with Old Market Place (UW 1764/C)”. In “Approximate Length”, amend “27 metres” to “11 metres”. In “Widths”, delete the text “At SJ 7521 7874 3 metres”. In “Nature of Surface”, delete the text “then paved”.
* On Order Plan No. WCA/013A: Delete section B-C of the footpath to be added.
1. Since the confirmed Order would (if modified) not show a way shown in the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

C Beeby

INSPECTOR

**APPEARANCES**

**In support of the Order**

For the Applicant:

Mr Adam Keppel-Green Town Clerk, Knutsford Town Council

Who called:

Dr Susan O’Driscoll

Mr Michael O’Driscoll

Ms Phillipa O’Driscoll

**Objecting to the Order**

Mr Nicholas Barnes-Batty

**DOCUMENTS**

None

