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## Order Decision

Inquiry held on 15 September 2015

Site visit made on 15 September 2015

**by Martin Elliott BSc FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 22 October 2015**

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### **Order Ref: FPS/J1155/7/107**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Devon County Council (Footpath Nos. 171, 172 and 172a, Sidmouth) Definitive Map Modification Order 2014.
- The Order is dated 17 March 2014 and proposes to modify the Definitive Map and Statement for the area by adding three public footpaths as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed.**

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### **Procedural Matters**

1. I held a public local inquiry at the offices of East Devon District Council (EDDC), Knowle, Sidmouth on 15 September 2015. I carried out an unaccompanied site inspection on the evening of 14 September when I viewed the Order routes and surrounding area. I carried out an accompanied site inspection following the close of the inquiry. This was limited to the southern entrance to Knowle (also referred to as the Knowle) from Knowle Drive. There were no other issues which made it necessary to revisit the Order routes and their environs.
2. The Order arises from an application for a definitive map modification order, under section 53(5) of the 1981 Act, to add a number of footpaths at Knowle. The application was refused by Devon County Council (the Council) but, following an appeal, was approved in part. The Council were directed by the Secretary of State to make the Order now before me. The Council adopted a neutral stance at the inquiry and the case for confirmation of the Order was made by Mr Dent on behalf of the applicants.
3. The applicants requested that the Order be modified in respect of the section of footpath 172 D to E<sup>1</sup> so as to reflect the route intended to be added by the original application. Although not accepting the existence of public rights the objector raised no opposition to the suggested modification. I will consider this matter further if necessary.
4. Following the close of the Inquiry Mrs Swindell submitted further correspondence to the Planning Inspectorate. Whilst Mrs Swindell provided reasons for submitting the correspondence after the close of the Inquiry I did not consider the circumstances to be extraordinary such that I should accept the correspondence.

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<sup>1</sup> The letters A to F used in this decision relate to the points marked on the Order map.

## The Main Issues

5. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i). The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
6. The test to be applied to the evidence is on the balance of probabilities.
7. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
8. Should the test for statutory dedication fail under section 31 of the 1980 Act then it may be appropriate to consider the dedication of the way at common law. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. For a dedication at common law the burden of proof rests on those claiming the public right of way.

## Reasons

9. In May 2012 the Council received an application for a definitive map modification order (see paragraph 2 above). In accordance with section 31(2) of the Highways Act 1980, as amended, the date of such an application may be taken as the date of bringing the right to use the way into question. Shortly after the application was submitted EDDC erected signs stating 'RIGHT OF WAY ACT 1932 East Devon District Council owns the land surrounding this building and there is no intention to dedicate it or any part of it as a right of way'. These events would have brought the right to use the ways into question and sets a relevant twenty year period of 1992 to 2012.
10. EDDC do not dispute that the ways have been used by the public. My examination of the evidence of use forms which accompanied the application demonstrates use by the public without interruption for the full twenty year period. A number of individuals gave evidence as to their use of the ways and the applicants provided a number of additional statements from others who were unable to attend the inquiry. This evidence was consistent with the information contained in the evidence of use forms.
11. EDDC contend that no dedication of public rights has arisen because use of the Order routes was by right, as opposed to as of right<sup>2</sup> or as if of right, further, that use was with implied permission. If I was not in agreement with these

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<sup>2</sup> Without force, secrecy or permission.

two propositions, which stood independently, EDDC argued that the landowner, EDDC, demonstrated a lack of intention to dedicate the routes as public paths. I was referred to the case of *R (Barkas) v North Yorkshire County Council [2014] UKSC 31* which is relevant to the issue of use by right/as of right.

### **History of Knowle**

12. Before considering the issues raised by the objector it is appropriate to provide some background as to the land at Knowle.
13. In 1973 Sidmouth Urban District Council, the precursor organisation to EDDC prior to the local government reorganisation in 1974, appropriated land at Knowle to section 164 of the Public Health Act 1875 (the 1875 Act). Section 164 allows for the provision of public walks and pleasure grounds and to make bylaws for the regulation of any such public walks and grounds. The land appropriated is in essence the land to the south and east of the Order routes as identified on the Order plan.
14. In 1984 the EDDC approved bylaws in respect of pleasure grounds. Initial drafts of the bylaws did not make reference to Knowle however, subsequent drafts did make reference. The bylaws were made under section 164 of the 1875 Act and came into effect on 2 May 1984 and included Knowle
15. EDDC subsequently adopted further areas of land for use as pleasure grounds and updated the bylaws to include these additional areas. On 30 October 1996 the modified bylaws, under section 164 of the 1875 Act and sections 12 and 15 of the Open Spaces Act 1906, came into force. The bylaws again included Knowle. It is understood that in 1996 notices indicating the existence of bylaws were positioned around Knowle as identified by the objector (tab 21 of the objector's evidence).

### **Whether use by the public was as of right or by right**

16. EDDC argue that for the whole twenty year period the land crossed by the Order routes has been held under the 1875 Act for the purpose of public walks and pleasure grounds. EDDC accept that the appropriation by the former Sidmouth Urban District Council did not relate to the land covered by the Order routes. However, it is asserted that in consequence of the 1984 and 1996 bylaws the inference to be drawn is that the whole of Knowle had been appropriated for the purpose of public walks and recreation. As such any use of the Order routes was by right as opposed to as of right. For a statutory dedication to be made out then the use by the public must be as of right.
17. The first question to be considered is the extent of the land to which the bylaws apply. The bylaws do not include any maps from which the boundaries of the relevant land can be specifically identified. The Schedules identify Knowle as the land to which the bylaws relate but this is not further qualified. At the inquiry it was acknowledged by witnesses for the applicants that the land known as Knowle related not only to the land appropriated in 1973 but also to the land occupied by the EDDC offices. Whilst there are signs indicating the application of bylaws there is nothing on the land which indicates the extent of their application. The entire area land is open and accessible to the public, this also being acknowledged by witnesses for the applicants, with no boundary feature distinguishing the land subject to the 1973 appropriation and the remaining land. Although setting no precedent it is of note that the Inspector,

holding the inquiry into an application to register land known as Knowle as a town or village green in June 2014, concluded, on the evidence before him, that 'the Knowle' or 'Knowle' is the name given to all of the land including the office buildings, car parks and hard surfaced areas.

18. Taking all of the above into consideration it appears, on the balance of probabilities, that the land subject to the bylaws includes not only the land appropriated in 1973 but also the land crossed by the Order routes. The bylaws were made under the 1875 Act and the inference to be drawn from this is that the land crossed by the Order routes was impliedly appropriated for the purposes of public walks and pleasure grounds under that Act. This also accords with the conclusion of the Inspector in 2014 who was of the opinion that the Knowle was appropriated to the purposes of the 1875 Act when the bylaws came into force in 1984.
19. The applicants make the point that when the EDDC came to sell the land in 2015 they did not consider that most of the land crossed by the Order routes was public open space. I note that most of the land crossed by the Order route A to B is excluded from the open space to be disposed of as is the land crossed by C to D (as identified on the 1:10,000 scale plan, appendix 10 of the applicant's Statement of Case). However, sections D to E and D to F cross land included in the disposal which gives a clear indication that the land is regarded as public open space.
20. Whilst parts of the land crossed by sections of the Order routes has been excluded from the disposal I do not consider that this means the land over which these sections of the routes pass cannot be land held for the purposes of public walks and pleasure grounds. The plan only identifies the public open space to be disposed of and does not preclude the other land from being public open space. It is the case that none of the land over which the Order routes pass has been expressly provided as public open space and there will be no record of the same. However, the inference to be drawn in considering the Order, and the use of the ways, is that the land over which the Order routes pass is land held for the purpose of public walks and pleasure grounds by implication of the imposition of bylaws under the 1875 Act.
21. The applicants referred me to the case of *R (Goodman) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) (*Goodman*). The case relates to a decision of an Inspector in respect of an application to register land as a town green. The Inspector concluded that the landowner, Exeter City Council, had impliedly appropriated the land from employment use such that the land became a recreational open space and that use by the public of the land was by right. The decision was quashed and it was held that for an implied appropriation to have occurred there must be evidence that the local authority had directed its mind to and answered the statutory test for appropriation. The management of the land as recreational open space was not in itself sufficient to give rise to an implied appropriation.
22. In respect of Knowle, EDDC had on two occasions directed, since 1973, its mind to the making of bylaws under the 1875 Act which relate to public walks and pleasure grounds. Those bylaws, on balance, applied to the whole of Knowle. In contrast, in *Goodman* the local authority had appropriated the land to use for development purposes. There was no evidence that the local authority had put its mind to appropriation, set out in section 122 of the Local

Government Act 1972, of the land for the purposes of recreation. It is of note that the local authority had not abandoned its intentions to use the land for employment and a link road and had actively pursued this use through the local authority's forward planning process.

23. Whilst I note *Goodman* I maintain my conclusion that on the balance of probabilities it can be inferred that the land crossed by the Order routes was appropriated for public walks and pleasure grounds under the 1875 Act. As such the use of the land was by right as opposed to as of right.
24. It may be the case that a right of way could in some circumstances be established over land which has been appropriated as public open space. However, the 1875 Act provides specifically for public walks and as such any use of the Order routes would be presumed to be in accordance with the Act.
25. Having regard to all of the above I conclude that the use of the Order routes is by right and that any statutory dedication, which requires there to be use as of right, must fail. In view of this it is not necessary to consider whether use was by implied permission or whether any landowner demonstrated a lack of intention to dedicate. Given that use of the Order routes was by right no inference can be drawn that the landowner intended to dedicate the Order routes as public rights of way under common law. Bearing in mind my conclusions it is also not necessary to consider the issue as to the alignment of the route between points D and E.

### **Other Matters**

26. The applicants outlined that they felt strongly about the claimed footpaths which provided access into Knowle Gardens and safe and attractive routes to and from the town. Without the paths access would be much more difficult. The applicants, pointing out that they were not responsible for the defacing of notices, outlined that they and many local residents were incensed by the actions of the Council in erecting notices in 2012 in response to the application. Mr Long raised concerns as to the continued access to the land.
27. I note these issues and can appreciate the concerns (I am also aware of concerns over proposals to develop the land crossed by the Order routes). However, these are not matters which I can take into account in reaching my decision.
28. In representations to the Order a Mr Raby, an applicant for a definitive map modification order in respect of another route at Knowle, raises concerns in respect of that application. These are not matters for my consideration. I have been appointed to determine the Order before me.

### **Conclusion**

29. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed.

### **Formal Decision**

30. The Order is not confirmed.

*Martin Elliott*

Inspector

## APPEARANCES

### **For Devon County Council:**

Mr N Steenman-Clark                      Public Rights of Way Officer, Definitive Map Review

### **The applicant in support of the Order:**

Mr K Dent	Vice Chair of Knowle Residents' Association
who called	
Mrs J Harbour	Local resident and applicant
Mr M Temple	Local resident and applicant
Mrs J Eldred	Local resident
Mrs J Swindell	Local resident

### **Also in support of the Order:**

Mr Long	Local resident
Mr Northover	Local resident and Chair of Knowle Residents' Association

### **In opposition to the Order:**

Mr A Alesbury	Of Counsel, instructed East Devon District Council
Who called	
Mr M Williams	Chief Executive, East Devon District Council
Mr R Cohen	Deputy Chief Executive, East Devon District Council
Ms N Harnett	Principal Project Manager, East Devon District Council
Mr H Gordon Lennox	Strategic Lead-Legal, Licensing and Democratic Services Monitoring Officer

## DOCUMENT

- 1     Google Street View images on Knowle Drive