



Order Decision

Inquiry opened on 13 October 2015

by Peter Millman BA

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

Decision date: 27 October 2015

Order Ref: FPS/P0430/7/51

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Buckinghamshire County Council (Parish of Westbury) Definitive Map Modification Order 2014.
- The Order is dated 20 October 2014 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were two statutory objections outstanding when Buckinghamshire County Council ("the County Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I have confirmed the Order with modifications.

Preliminary matter

1. The objectors are Mrs Jacky Owen, the owner of the land over which the Order route runs, her nephew Mr David Owen, who has a legal interest in the land, and his wife, Mrs Karin Owen. Mr Owen took the lead in objecting at the inquiry, and when I refer to 'the objector' below, I mean Mr David Owen, unless stated otherwise.

Main issue

2. The main issue is whether the evidence shows, on the balance of probabilities, that public bridleway rights exist over the route shown on the Order plan (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980. It reads as follows: *(1) Where a way over any land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 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. (2) The period of 20 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...* The standard of proof is the balance of probabilities.
3. There is also a common law test for the confirmation of modification orders. The question to be answered is this: Can it be inferred from all the relevant evidence, both evidence of use and any other evidence, that the owners of the land over which the Order route runs have dedicated a right of way to the public? If so, has the public, by using the route, accepted the dedication?

Reasons

Background

4. The Order route runs along the line of a dismantled railway. It starts from a public road next to Station House at Fulwell, and runs west-north-west along the track bed for about 150 metres until it reaches a bridge over the River Great Ouse, the centre of which marks the county boundary between Buckinghamshire and Oxfordshire. Westbury Parish Council's application for a modification order included the continuation of the line in Oxfordshire as far as a junction with the existing bridleway between Westbury and Mixbury. Oxfordshire County Council will deal separately with the application as it relates to its Definitive Map.
5. The railway ceased operation in the 1960s and subsequently the track was removed. The land over which it ran was sold off by the British Railways Board in 1971 to Mr David Owen's father and two uncles. His aunt, Mrs Jacky Owen, widow of Mr Jim Owen, one of the uncles, currently owns the land over which the Order route (and the continuation in Oxfordshire described above) runs, Mr David Owen having acquired an interest in it in 2002 for the purpose of accessing a barn which was then converted into a dwelling. Prior to about 2003, when preparatory work on the site of the barn began, the Order route did not connect directly to any dwelling or building. It effectively formed an enclosed lane, easily accessible from both ends, the gate at the Fulwell end being generally open.
6. The county boundary between Buckinghamshire and Oxfordshire runs along the centre of the Great Ouse immediately south of the village of Westbury. The Definitive Map for Buckinghamshire shows two footpaths leading to the county boundary which are not shown continuing into Oxfordshire on Oxfordshire's Definitive Map. In around 2009 there was an application to extinguish these dead-end paths, but the application was subsequently withdrawn. These events seem to have sparked concern in the Parish about rights of way and the paths that local people were using for walking and riding. The application for this Order was made in December 2010.

The statutory test

The date when use was brought into question

7. The County Council initially contended that public use of the Order route was brought into question in December 2010 when the application for the Order was made. However, in closing submissions, it accepted that, depending on my findings as to the wording and effect of notices, 2003 might be the appropriate date, since it was not disputed that notices of some sort were probably placed at the Fulwell end of the Order route in that year.
8. The objector stated that signs were erected in 2003 at the Fulwell end and in 2005 at the bridleway crossing in Oxfordshire. He stated that the wording was the same as on the current notices, i.e. *PRIVATE LAND No access without permission*. However, photographs were provided of a notice with the wording *PRIVATE ROAD No access without permission* at the end of the route in Oxfordshire.
9. There was wide variation, among the 77 completed user evidence forms supplied in support of the application, in estimates of the date when notices first appeared at the ends of the Order route. Three people suggested that

they first appeared in 2003. Several stated that they had seen no notices before 2009 or 2010, while most people did not give a date. There was variation too in recollections of the wording of notices, although most just referred to "Private" notices'. Some people thought that the notices in any one location had always shown the same wording, others that at some time the wording on notices had changed, particularly around 2009. One thing that is clear is that notices at the Fulwell end of the route were not always in the same position. At one time there was a metal five-barred gate across the track with a fence at the side; later a pedestrian or bridle gate replaced the fencing. The notice was, at various times, on the five-barred gate, the fence and the small gate.

10. But whatever the notices stated, or wherever they were positioned, they seem to have had no significant impact on members of the public using the Order route before the end of 2009. That might have been because notices were positioned more prominently in 2009, or that the wording changed then, as some suggested. It might have been because of the local concern about rights of way (see paragraph 6 above) which arose at that time. It is impossible to be certain, but in my view it is rather more likely that the effect was due to the increased local concern, and that the wording if not the position of the notices was more or less the same from 2003 onwards.
11. Evidence was given, at the inquiry and in completed user evidence forms, that the Order route had been used by members of the public for many years, perhaps since the railway tracks were pulled up, and certainly since 1971 when the railway land was sold (see paragraph 5 above). The objectors also conceded that there had been such use. The route had therefore been in use for some 30 years before the notices were first erected. Some witnesses said, about the original effect of the notices, that there was a local feeling that it was all right to continue using the route; that the owner had only put up notices to deter gypsies, or to prevent vehicles from using the route, for example. Certainly there was a sense, expressed in the completed forms, that the landowner continued to tolerate use by local people. Several referred to having met one of the objectors while using the route, one, for example, stating in answer to the question on the user evidence form as to whether the owner was aware that the public were using the route 'chatted to owner on way'. One witness stated that, having known that the route had been used since the demise of the railway, he did not bother about the notices he saw. These views, it seems to me, tend to confirm the presence of notices long before they had any marked effect on use of the route.
12. However, it seems to me that, in considering when public use was brought into question, I should consider the effect of these notices on a reasonable person, perhaps a reasonable newcomer to Westbury or Mixbury, rather than a local person with special knowledge, or in receipt of local rumour and opinion. I accept the objector's view that the wording of the notices made it sufficiently clear that people should not enter the Order route unless they had permission to do so. It is difficult to envisage a reasonable person, considering whether to walk or ride along the old railway track and seeing a notice with the wording described in paragraph 8 above, believing that it did not forbid entry to the track without permission.
13. I conclude that the public's right to use the Order route was brought into question when notices were erected in 2003.

Whether 'the public' used the route

14. Of the 77 user evidence forms, most were completed by people who had walked along the Order route, though there was evidence of use by horse riders and cyclists. The Parish Council gathered evidence by posting a flyer through each door in the village inviting people to complete a form if they had used the route. I have seen no evidence to support any allegation that the user evidence was gathered improperly or in such a way as to suppress any information which might have been of use to the objector.
15. Sixteen people stated that they had used the Order route for the whole of the period between 1983 and 2003, many very frequently, i.e. weekly or more often. Together with those who had used it for parts of this 20 year period this is strong evidence that there was use by 'the public' on foot. That the use was almost exclusively by local people does not mean that it did not represent use by 'the public' as a whole; in a rural area such as this with no significant tourist attractions it would not be expected that many walkers would come from outside the immediate area.
16. The user evidence forms do not reveal much equestrian use in the early part of the 20 year period. Four people stated that they were using the Order route on horseback in 1983, one of whom subsequently asked for permission in 1996. The number of equestrian users gradually rose to a total of 18 by 2003. Other evidence of such use, however, comes from the objector.
17. Mr Owen gave evidence that, having lived away from Westbury, he moved back in 1985. He was familiar with the Order route. He saw people using it once or twice a week. Many were farm workers, but he saw others on foot or riding horses. Most horse riders would have been friends of his uncle who owned the land crossed by the Order route. Mr Owen did not seek to argue that those who stated they had ridden the route had not done so, although he did suggest that the frequency of use claimed by some people who stated that they had used the route daily, for example, would have been exaggerated.
18. Mr Owen's sister gave evidence to the inquiry. The land over which the railway line had run was sold by the British Railways Board to three brothers, who jointly owned it until 1982, after which it was owned solely by one of them, Mr Jim Owen. One of the brothers lived in Mixbury and was a horse rider. He would, said Mr Owen's sister, have known all the people who were riding the Order route. She added that walkers were not challenged for years because no-one lived down there; people would have taken advantage and walked without asking.
19. The evidence from Mr Owen and his sister supports the view that the Order route was in use as an equestrian route by more than a handful of people, and that it was used by 'the public' on horseback throughout the 20 year period. One would not expect the level of equestrian use to be at the same level as pedestrian use. I conclude from the evidence discussed above that the public used the Order route for both walking and riding between 1983 and 2003.

Whether use was as of right and uninterrupted and for the full period of 20 years

20. Use of a route which is 'as of right' is use which is *nec vi, nec clam* and *nec precario*; in other words peaceable, open, and not based on any licence from the owner of the land.

21. The objector did not argue that use was not open or peaceable, but that use throughout the 20 year period was largely by permission.
22. Passive acquiescence by an owner in the face of use by the public would not amount to permission. Permission, in this context, must involve some positive act or acts on the part of the owner – or, in this case the objector, since it is accepted by all that Mr David and/or Mrs Karin Owen were authorised to act on behalf of Mrs Jackie Owen – which is communicated to the users. If, for example, someone who used the route, knowing that it was owned by a member of the Owen family, expressed the view that ‘Mr Owen would not mind’, that is not evidence of permissive use. One witness, in answer to the question on the user evidence form about whether permission had been obtained, wrote ‘Although it runs through agricultural land, the line had no agricultural use, hence very common assumption that it was a public route to enjoy, by foot or horse. The owner(s) tacitly encouraged this view’. One rider wrote on her user evidence form that ‘once the gate at Fulwell was closed and I asked Mr Owen if it was always going to be closed and he said no and that in any event a small gate would always be unlocked for those wishing to ride or walk. Exact date not known but since the work began on rebuilding his house.’ If what they wrote is correct, then the use of neither of these people would have been by permission.
23. Permission has clearly been overtly given to people from time to time since 2003, but Mr Owen’s evidence about the period before 2003 was of a different way of doing things. He stated that most horse riders using the route would have been friends of his uncle, and that their use would have been permissive. When asked how he knew that permission had been given he stated that there would have been a ‘mutual understanding’. His uncle knew everyone. It might have been actual or tacit permission. Neither Mr Owen nor his sister was able to name any particular individual who had been given permission to use the Order route before 2003. No-one who had been given permission before 2003 gave evidence to the inquiry. Mr Owen himself had been reluctant to challenge people using the Order route, he said, since he could not be sure whether his aunt, or uncle when alive, had given permission, and he was reluctant to give offence.
24. Mr Owen’s sister noted that because things were not so formal when the three brothers had owned the land, each might not have known if one of the others had given permission to a rider or walker. In cross-examination she accepted that use of the Order route before 2003 would generally have been unchallenged.
25. I accept that during the period 1983 to 2003 some people, knowing who owned the Order route, and meeting the owners there, would probably have checked that they had no objection and might have been given express permission to use it, but it does not follow from this that use in general was permissive. I conclude that the great majority of public use of the Order route between 1983 and 2003 was without permission.
26. There is no significant evidence of interruptions to use during the period 1983 to 2003. A former employee of the Owens wrote that the gate at Fulwell was closed from time to time when stock was being moved from field to field, but Mr Owen’s sister said that generally the gate had to be kept open for farm vehicles.

The intentions of landowners

27. Apart from an assertion that some people would have been challenged and that others would have been given permission, I have seen no evidence from before 2003 that the owners of the land crossed by the Order route did anything to indicate to the great majority of its users that they did not intend to dedicate it as a public right of way. There is insufficient evidence of a lack of intention to dedicate during the 20 year period (paragraph 2 above).

Conclusions on the statutory test

28. The evidence as a whole is broadly consistent with the following scenario. The railway track was pulled up in the 1960s, leaving what was, in effect, a traffic free lane, easily accessible from a bridleway at one end and a minor road at the other, with no landowner present to deter use. The landowners may not have been concerned at first that it was being used by members of the public, particularly local people, but gave permission to people who were aware of their ownership and asked for it. At any rate, the owners generally tolerated public use and took few or no steps to deter or prevent it. Use would have been unlikely to have caused significant disruption to agricultural operations. It was not until the early years of the 21st century, when Mr David Owen acquired an interest in the land and started to develop a property which was accessed from the track, that he became concerned about public use and notices were erected. However, being reluctant to cause offence, and not being sure whether any users he came across might already have been given permission by his uncle or aunt, he did not often challenge people.

29. I conclude that the Order route was used by the public for walking and riding for the whole of the period 1983 to 2003, as of right and without interruption. There is not sufficient evidence to show that there was no intention, during that period, to dedicate it as a public right of way. Dedication is deemed to have occurred.

30. Because of my conclusion on the statutory test, I do not need to consider the common law test (paragraph 3 above).

The width of the route

31. The Order states that the width of the Order route varies between 3.6 and 5.6 metres. It seems to me that such a width might be justifiable if the boundaries of the route had been positioned with reference to the extent of highway rights. Any physical boundaries were, however, originally placed with reference to the railway.

32. Mr Owen measured the width of the surfaced track as varying between 2.8 and 3 metres. The part in Buckinghamshire, however, is not, in my view, narrower than 3 metres. I have seen no evidence that walkers and horse riders have used the unsurfaced sides of the track. It seems reasonable, therefore, to modify the Order so that it specifies a width of 3 metres for the Order route.

Other matters

33. Mr Owen was concerned that Westbury Parish Council or individual Parish Councillors had acted improperly in deciding to make the application and gathering evidence. Those people who were the chairman and the clerk of the Parish Council in 2009 gave evidence to the inquiry, as well as others who had, at some time, been Parish Councillors. It is not for me to form a judgement

about the general conduct of the Parish Council, but none of the evidence I heard suggested to me that there was anything improper about the application for the Order and the gathering of evidence to support it.

Conclusion

34. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed with a modification to the width of the Order route.

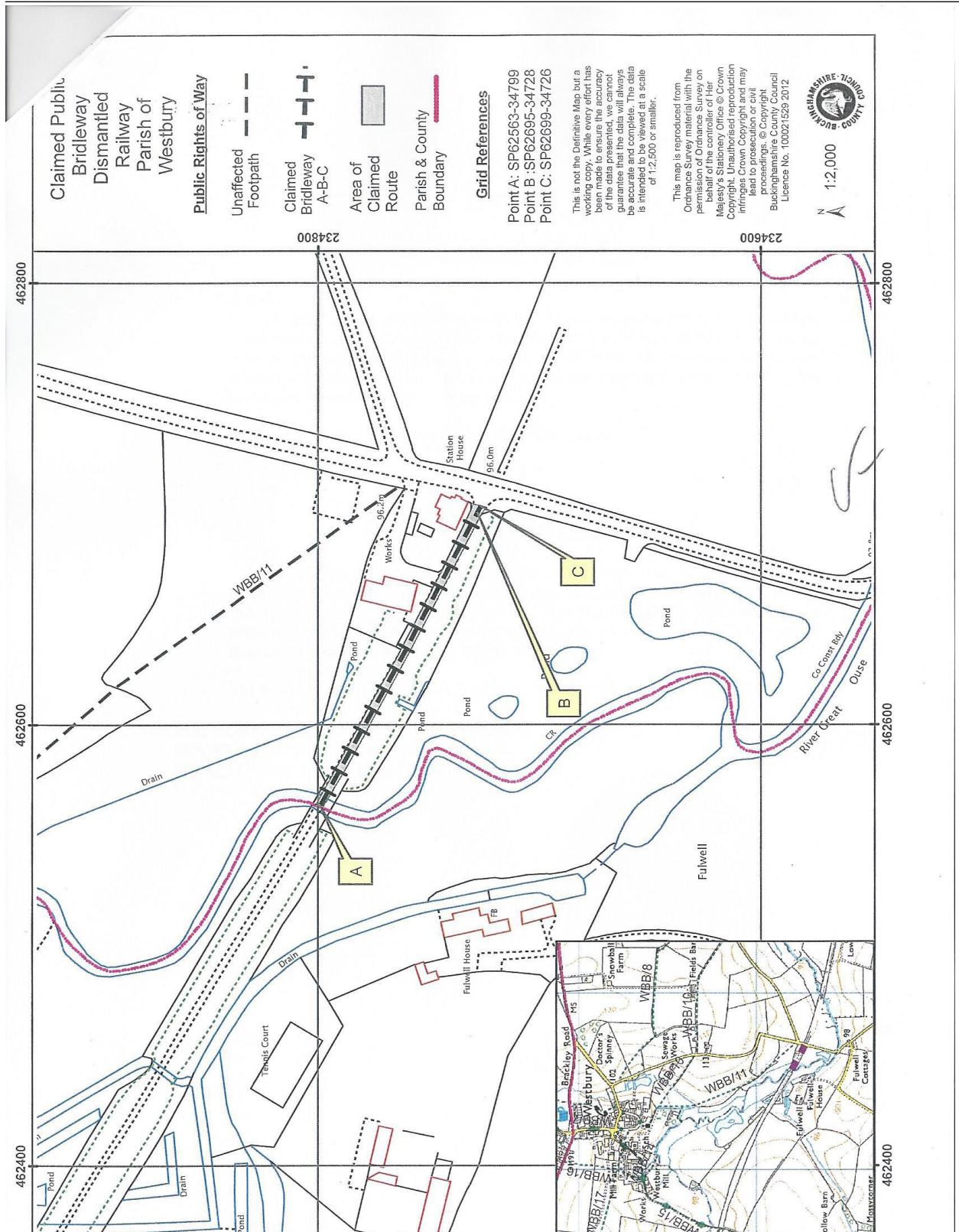
Formal Decision

35. I confirm the Order with the following modification:

- In parts I and II of the Schedule delete the words 'varying between 3.6 and 5.6 metres as shown shaded grey on the map' and insert in their place 'of 3 metres'.

Peter Millman

Inspector



APPEARANCES

For Buckinghamshire County Council

Miss H Emmerson Of Counsel, instructed by Buckinghamshire County Council

She called:

Mr R Carr Robin Carr Associates
Mrs M Cleaver
Mr R Drummond-Hay
Mr M Evans
Mr E Rainbow
Mrs J Taylor
Mr P Winks
Mr J Heal
Mrs J Howatson
Mr J Calvert
Mr C Webb
Mrs V Webb

Other supporters

Mrs C Chrzanowska
Mrs B McLachlan

Objectors

Mr D Owen, assisted by
Mrs K Owen

He called:

Mr T Sadler
Mrs S Fuller

Documents handed in at inquiry

1. Mrs Howatson's proof of evidence and associated documents
2. Letter from Mr Read to Mr Winks, his response, and an extract from the Criminal Law and Police Act 2001
3. Mr Owen's closing submissions
4. Miss Emmerson's closing submissions