



Order Decision

Site visit carried out on 8 December 2015

by Peter Millman BA

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

Decision date: 18 December 2015

Order Ref: FPS/B3600/7/109

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Surrey County Council Footpaths Nos. 632 and 633 (Reigate) Definitive Map Modification Order 2014.
- The Order is dated 24 April 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 was one statutory objection outstanding when Surrey 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.

Preliminary matters

1. This Order was to have been determined following a public inquiry, but the sole objector indicated that he would not attend. Reigate Priory School informed the County Council that a representative would appear at an inquiry as a non-statutory objector. The School was then invited to submit a statement of its intentions, but there is no record of any response. Determination was therefore based on the written representations provided by the parties.

Main issue

2. The main issue is whether the evidence shows, on the balance of probabilities, that public footpath rights exist over the routes 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. It will be seen below (paragraph 14) that the statutory test cannot be applied to part of one of the routes shown on the Order plan. The common law test must therefore be applied to that part. 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 path runs have dedicated a right of way to the public? If so, has the public, by using it, accepted the dedication?
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Reasons

Background

4. The Order proposes to add two paths to the County Council's Definitive Map. The first runs roughly east to west across Priory Park in Reigate, between Bell Street and Park Lane (A to C on the Order plan). The second path leaves the first about a third of the way along from Bell Street and runs north-west then north past Morrison's Supermarket to the High Street (B to D on the Order plan). Where necessary to distinguish between the paths I refer to the first as the Park path and the second as the Supermarket path.
5. The northern part of Priory Park was in private ownership until the late 1940s, when it was bought by Reigate Corporation. The Park path, or a route very close to it, seems to have been in use since then. The site where Morrison's is now situated was at one time occupied by the Mellersh and Neale Brewery. It is accepted by the County Council, and noted by many people who completed user evidence forms, that the line of the Supermarket path was not in use until 1993; for some time prior to that there had been a similar, but distinguishable, route.
6. Both paths are metalled throughout except for the eastern end of the Park path, which runs over grass for a short distance after leaving Bell Street.
7. The application for a modification order, made in 2009, was prompted by planning proposals affecting the grounds of Reigate Priory School (see the Order plan) past which the Park path runs. The applicant was concerned that access through Priory Park might be closed off. The application was accompanied by 57 completed user evidence forms.
8. The land over which the paths run is owned by Reigate and Banstead Borough Council (shown between A-C and B-F on the Order plan), and by WM Morrison Supermarkets PLC (F - D). The land through Cage Yard north to D is leased by Morrisons to Riversong (Reigate) Ltd.
9. None of those who objected to the proposal to make an order maintained an objection once the Order was published. The sole objection at that stage was made by Peter Brett Associates on behalf of Riversong (Reigate) Ltd.

The statutory test

The date when use was brought into question

10. It is not disputed that the date when use of the routes was brought into question for the purposes of the statutory test should be taken as the date of the application for the Order (see s31(7)(B) of the Highways Act 1980), i.e. 7 March 2009.

Whether the public used the routes

11. The application was supported by 57 completed user evidence forms. These are standard forms obtained from the County Council. Each completed form was accompanied by a map on which the user was asked to show the routes used. 39 users showed both the Park path and the Supermarket path, but no others. The remainder, apart from two, showed both these paths and additional paths through Priory Park. Two users showed the Park path and section F - D of the Supermarket path.

12. 56 of the users stated that they had used the paths they had depicted during the whole of the period from 1989 to 2009. The 57th gave no dates but referred to having used the routes 'always'. The forms contained a question about frequency of use. 21 people stated that they had used the routes weekly or more frequently, and a further 31 that they had used them more than once a month. All but one or two of the user forms appear to have been completed carefully and thoroughly.
13. The objector argued that because a variety of different routes had been described, it was not always clear which routes were being referred to when a user described the nature and frequency of his or her use. I accept that it is not clear for the 16 users who showed multiple routes, although in some of these cases the answer to the question on the form 'where were you going?' provides some help. However, as noted above, the evidence of 39 people related only to the Park and Supermarket paths, and in my view their evidence alone – and it is not challenged – would show that sufficient people to represent 'the public' were using these routes during the 20 year period. 25 people acknowledged that the line of the path between D and F had altered slightly when the supermarket was built. Two noted that this was in 1993.

Whether use was for a full period of 20 years

14. Since the Supermarket path between F and D only came into existence on its current alignment in 1993, statutory deemed dedication cannot apply. I consider that section of this path further below at paragraph 27 onwards.
15. The objector argued that the Park route had varied over time as well, but did not supply details. Although the majority of users refer to the Supermarket path having changed position, only two referred to slight changes to the Park path. A greater number specifically stated that it had not altered. The County Council acknowledges that restoration and refurbishment of paths within Priory Park took place in 2007-8 and gave rise to 'some changes on the ground', without stating whether or not the two paths were involved.
16. The Park path as shown on the Order map appears indistinguishable from the path shown on the great majority of the maps, which are dated 2006, attached to the user evidence forms. I conclude that any changes to the Park path between 1989 and 2009 were insignificant, and I further conclude that the Park path, as well as the Supermarket path between B and F, was used by the public for the whole of that period.

Whether use was as of right and uninterrupted

17. I have seen no evidence which shows that use of the Park path, or B-F of the Supermarket path, was interrupted between 1989 and 2009.
18. Use which is 'as of right' is use which is *nec vi, nec clam, nec precario*, in other words neither contentious, nor in secret, nor by revocable permission of the landowner. Use in contravention of a clear sign indicating that use is forbidden will be contentious.
19. User forms do not refer to such signs, but there is no doubt that a sign which states 'Reigate Priory School NO ENTRY' was in place facing east on a vehicular barrier at the vehicular entrance to the school from the Bell Street car park before 2009. There is a gap next to the barrier (shown on the Order plan). The County Council's view is that this sign was clearly addressed to the drivers of vehicles. In my view, had there also been such a sign at the other side of

- the school, i.e. near B and facing pedestrians coming from the west, there might be some doubt about the purpose of the notice. There is no sign there, however, nor any evidence that there was before 2009. I consider that this reinforces the County Council's view that the sign would neither have been intended to deter pedestrian use of the Park path nor would have been taken by pedestrians as intending to deter such use.
20. Although the objector did not raise the issue, the County Council discussed in its statement of case whether, because Priory Park is owned by Reigate and Banstead Borough Council, and is held for recreational purposes, its use might be considered to be 'by right' and not, therefore, 'as of right'. The County Council considered judgments relating to applications for the registration as town or village greens of publicly owned land held for recreational purposes. The most recent, in 2014, is that of the Supreme Court in the case of *Barkas v North Yorkshire County Council*. Lord Neuberger said: *it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right".*
21. This, and other judgments, make it clear that so long as land is held under a provision such as, in this case, the Physical Training and Recreation Act 1937 (now under s19(1) of the Local Government (Miscellaneous Provisions) Act 1976), members of the public will have a statutory right to use it for recreational purposes, and therefore they use the land 'by right'. The County Council's view is that 'highway use' is not the same as 'recreational use'. I accept that there is such a distinction, but my view is that if it were not possible for the Borough Council, when looking at how Priory Park is used, to distinguish between recreational use and use to get from A to B, in other words highway use, then use by those who provided evidence in this case might not be considered 'as of right'. However, it would have been possible for the Borough Council to make it clear, by, for example, putting notices at A, F and C, that use for merely traversing the park was by its permission. I accept, therefore, that use of routes through the Park, specifically from A to C and from B to F, to get from one place to another was not 'by right' but was 'as of right'.

The intentions of landowners

22. When objecting to the proposal to make the Order, Reigate Priory School referred to the notice (discussed at paragraph 19 above) and to a lease between the Borough Council and the County Council; the land on which the school stands is owned by the Borough Council, but the school is a County Council school.
23. For the reasons given above I do not consider that the notice expressed an intention not to dedicate a right of way for pedestrians.
24. A lease of the school property (dated 1997) imposes an obligation on the tenant (the County Council): *to take all reasonable steps to prevent any new... path passage... or easement being made or acquired...* This, the school argued,

was sufficient evidence of a lack of intention to dedicate. I do not accept that argument. In order to demonstrate sufficient lack of intention, it is essential that the intention is communicated to the public using the route. It is not likely that the members of the public using the Park path past the school would have been aware of the lease or its terms.

25. I conclude that there is not sufficient evidence that the owner of the land crossed by the Park path and section B - F of the Supermarket path did not intend to dedicate a public right of way on foot over it.

Conclusions on the statutory test

26. I conclude that the statutory test for deemed dedication is met in respect of the Park path and B - F of the Supermarket path.

The common law test

27. It is clear that there has only been a footpath on the line shown on the Order map and described in the schedule between F and D since 1993. There is therefore not a 20 year period of use before 2009. The County Council, however, argues that the large amount of undisputed public use, together with the provision of a level, well-surfaced and well-lit route, incorporating elements of signage apparently designed to encourage use, points to an intention to dedicate a public right of way.
28. The route between F and D is likely to have been set out on the line referred to in an agreement made in 1992 under s106 of the 1990 Town and Country Planning Act, between, inter alia, the Borough Council and Safeway Stores. I have seen a copy of the agreement, but not the plan, which is stated to have been 'too large to scan'.
29. The objector relies on this s106 agreement to demonstrate that the landowner did not intend to dedicate a public right of way because it imposed an obligation to maintain the footpath provided that: *(a) no legal right of way is created and display signs are erected to that effect along the route of the footpath...* Had signs as described been erected then it would have been abundantly clear that the landowner had no intention to dedicate public rights. However, I have seen no evidence that such signs were ever erected, and I consider that the landowner must have known that he had omitted to erect signs denying the existence of a public right of way. It seems to me that, given the amount of public use over the years since 1993 and continuing, apparently, to the present day, which the landowner must also have been aware of, it can only be concluded that despite the content of the s106 agreement he intended to dedicate a public footpath between F and D and that the public has accepted the dedication.
30. I conclude that the common law test is met with respect to section F - D of the Supermarket path.

Conclusion

31. Having regard to these and all other matters raised in written representations I conclude that the Order should be confirmed.

Formal Decision

32. I confirm the Order.

Peter Millman

Inspector

