



Order Decision

Inquiry held on 10 November 2015

by Mark Yates BA(Hons) MIPROW

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

Decision date: 18 December 2015

Order Ref: FPS/N5090/7/2

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the West Heath Road and Finchley Road Modification Order 2014.
- The Order was made by the London Borough of Barnet Council ("the Council") on 9 May 2014 and proposes to add a footpath ("the claimed route") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There were no objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision.

Procedural Matters

1. I held a public inquiry into the Order on 10 November 2015 at Hendon Town Hall after making an unaccompanied visit to the site. I was unable to walk along the claimed route beyond the points it is currently obstructed but there were no features apparent to me that required closer inspection. After canvassing the views of the parties at the inquiry, I concluded that there was no need for me to make a further visit to the site.
2. The sole statutory objection was submitted on behalf of the owner of the land crossed by the claimed route (Mayfair Charities Limited). However, contracts have been exchanged for the sale of the land to Prosperity Capital Partners Limited ("Prosperity") with a completion date set for 12 November 2015. The objection was subsequently taken on by Prosperity. It is apparent that some additional parties opposed the proposal to add the claimed route to the definitive map at other stages of the process.
3. Notification was received on 6 November 2015 that Prosperity no longer wished to pursue its objection to the Order but it was deemed too late to cancel the scheduled inquiry. Further, a decision still needs to be reached in respect of the Order. Whilst no party wished to speak in opposition to the Order, a number of supporters gave evidence at the inquiry.
4. The Council accepts that the reference in the preamble of the Order should state Section "53(2)(b)" of the 1981 Act rather than "53(2)(a)". However, no prejudice is apparent from this issue and the Council's position has consistently been that reliance is placed on use by the public between 1992 and 2012. In the circumstance, I agree that, if confirmed, the Order should be modified on this issue. I also agree with the Council that the detailed widths for the claimed route, set out in Part I of the Order Schedule, should be replicated in Part II of the Schedule.

Main Issues

5. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
6. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as of right¹ and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
7. If the statutory test fails or is inapplicable, I shall consider the issue of common law dedication. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Evidence of the use of a way by the public as of right may support an inference of dedication, and may also be evidence of the acceptance of a dedication by the public.

Reasons

Statutory dedication

When the status of the claimed route was first brought into question

8. It is clear from the evidence that the status of the claimed route was brought into question by the erection of concrete barriers and accompanying signs in March 2012.

The evidence of use by the public

9. In light of my conclusion above, it needs to be demonstrated that there was public use between 1992 and 2012 ("the relevant period") to satisfy the statutory test.
10. The applicant for the Order (Ms Prais) initially provided twelve user evidence forms ("UEFs") in support of use of the claimed route. A single page form was produced by Mr A. Kasriel and this was mainly distributed to staff and visitors at the St Margaret's Care Home located on West Heath Road². Fifty of these single page forms have been completed. It is apparent that some additional user evidence was provided and this is summarised in the Council's report produced prior to its decision to make an Order. However, unless these people have subsequently clarified their evidence, I cannot rely upon the summary provided by the Council to any significant extent.
11. The forms provided are supportive of use of the claimed route by a number of people over varying periods of time. However, the limited amount of detail included in the forms and the assistance provided by Ms Prais in relation to some of the information contained in the original UEFs will impact

¹ Without force, secrecy or permission

² This care home is now closed but the information provided at the inquiry is supportive of it being open during the relevant period.

upon the weight to be given to this evidence. I give far greater weight to the statements and oral evidence provided for the inquiry. In this respect, nineteen people gave evidence at the inquiry regarding use of the route and a further eight people relied upon their written statement.

12. Those witnesses who lived on West Heath Road provided evidence of use of the claimed route primarily in connection with the bus stops in Finchley Road and the synagogue in Dunstan Road. The southbound bus stop is located at the entrance to the route. Residents of other properties outlined how their use was part of a longer route, for instance to Golders Hill Park and Hampstead Heath. Regard also needs to be given to the supporting evidence of use by members of staff or visitors at the care home for the periods they worked at the home or visited relatives.
13. The frequency of the use was variable but in many cases it occurred on a regular basis. The witnesses outlined periods where the frequency of their use changed due to personal circumstances. There is also some evidence of observed use by others and use with additional family members. It is apparent that some of the supporters used the route at night on occasions despite the limited amount of light available. Bearing in mind the above and the additional evidence mentioned in paragraph 10, the user evidence provided to me is unlikely to fully reflect the number of people using the claimed route during the relevant period.
14. A 1953 Ordnance Survey map indicates that there was a feature across the claimed route which may have hindered access for a period of time. However, there is no evidence of any interruption of the use during the relevant period. The evidence of the witnesses is also supportive of the claimed route being separated from the former adjacent school site by means of fencing and gates.
15. The evidence provided by Mr and Mrs Holt appears to be supportive of a footpath sign being in place for a period of time. Whilst such a sign may serve to encourage public use, there is no other evidence to corroborate the existence of a footpath sign. Nor is there any explanation why a footpath sign would have been erected on a route that was not considered to be a highway. Reference is made by the Council to Mr and Mrs Cohen stating that they were informed by the Council that the route was not a public right of way. However, the fact that these users were aware that the route was not a highway has no bearing on the issue of whether the user was as of right. The witnesses confirmed at the inquiry that their use was not conducted in secret or by way of permission. Nor is there any evidence to suggest that the user was by force.
16. Having regard to the extent of the evidence of use during the relevant period, which has been provided to me, I conclude on balance that it is sufficient to raise a presumption of dedication under Section 31 of the 1980 Act.

Whether any landowner demonstrated a lack of intention to dedicate a footpath

17. No evidence has been provided to indicate that action was taken to indicate that there was a lack of intention by the landowner to dedicate a footpath during the relevant period. This view was endorsed by the evidence of those users who spoke at the inquiry. A security firm was employed during the latter part of the relevant period to patrol the area but it is apparent from

the details provided that this issue had no bearing on the use of the claimed route.

Conclusions

18. For these reasons I find on the balance of probabilities that the claimed route has been dedicated in accordance with Section 31 of the 1980 Act and the test set out in paragraph 5 above is satisfied. In light of this conclusion, there is no need for me to address the evidence in the context of common law dedication.

Other Matters

19. The risk of crime and anti-social behaviour are matters that not relevant to the determination of whether a right of way subsists. This also applies to the granting of planning permission for the construction of houses in the locality of the route.

Overall Conclusion

20. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

21. I confirm the Order subject to the following modifications:

- Delete from the second line of the text in the preamble of the Order "53(2)(a)" and insert "53(2)(b)".
- Insert at the end of the text in Part II of the Order Schedule the final two paragraphs found in Part I of the Schedule.

Mark Yates

Inspector

APPEARANCES

For the Council

Mr J. Connah

Barrister instructed by the Council

He called:

Ms J. Shipman
Cllr J. Cohen

Senior Engineer of Regional Enterprise Ltd

Other Supporters

Mr M. Clark
Ms J. Prais
Mr A. Kasriel

Applicant

He also called:

Lady S. Palmer
Mr C. Potter
Mr J. Kasriel
Ms A. Lyons
Mr A. Tucker
Mrs E. Tucker
Mrs B. Roderick
Mr J. Barnett
Mr D. Ross
Mr D. Dunbar MBE
Dr S. Cohen
Mr N. Primost
Mrs J. Kasriel
Ms J. Elek
Mr J. Davies

DOCUMENTS

1. Statement of Mr Dixie
2. Statement of Mr Mossetti
3. Opening statement on behalf of the Council
4. Copies of site survey plans
5. Closing statement on behalf of the Council

Footpath to be added to the definitive map

MAP NOT TO ORIGINAL SCALE

Aubrey Neal

HEAD OF GOVERNANCE

Initiated by JS	SCHEME: West Heath Road Footpath Claim	Pam Wharfe Strategic Director, Growth and Environment	
Drawn by JS	TITLE: Definitive Map Modification Order Map	North London Business Park Oakleigh Road South New Southgate N11 1NP Tel. 020 8359 2000	DRAWING No. 60695-04
Checked by	Scales 1:2500 @ A4	Acad Ref.	
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