



## Order Decision

Inquiry opened on 14 July 2015

**by Heidi Cruickshank BSc (Hons), MSc, MIPROW**

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

**Decision date: 12 February 2016**

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### **Order Ref: FPS/U1050/7/84**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Derbyshire County Council (Footpaths from Sandy Lane to join Public Footpath Nos. 18 and 23 – Parish of Horsley) Modification Order 2013.
- The Order is dated 2 May 2013 and proposes to record two footpaths on land lying to the west of Sandy Lane and south of Horsley Lane, in the Parish of Horsley. Full details of the routes are given in the Order plan and described in the Order Schedule.
- There were seven objections outstanding at the commencement of the Inquiry.

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

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### **Procedural matters**

1. On 15 October 2003 Horsley Parish Council made applications to Derbyshire County Council, the order-making authority ("the OMA"), under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to add two footpaths to the Definitive Map and Statement ("the DMS") for the area. Having investigated the matter, the OMA were satisfied that this Order should be made to record both routes on the DMS.
2. I made unaccompanied site visits on 13 and 14 July 2015. I held a Public Inquiry into the Order on 14 and 15 July at Horsley Village Hall, Horsley and, due to the availability of parties, continued with the Inquiry at that venue on 5 January 2016. There was no requirement for a further accompanied site visit following the close of the Inquiry on 6 January 2016.

### **Main issues**

3. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

*"(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."*

4. The case in support of the Order relied upon the statute, under section 31 of the Highways Act 1980 ("the 1980 Act"). The sections of particular relevance are set out below:

*(1) Where a way over any land, other than a way of such a character that use of it by the public 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 full period of 20 years, the way is to be deemed to have been*

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*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, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes—*

*(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*

*(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,*

*the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

*(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.*

*(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.*

*(7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the way or land is situated in the City, the Common Council.*

5. Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'called into question'. From the submitted statements of case and proofs of evidence there appeared to be general agreement that use had been called into question in early 2001, not long after part of the affected land changed hands. However, it was argued in objection that use had always been denied and so was contentious, having been called into question at an earlier date. Following *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs, 2007* ("Godmanchester")<sup>1</sup> I shall need to look at these matters to determine the appropriate date and relevant twenty-year period.
6. To give rise to a presumption of dedication, it needs to be shown that there has been use, as of right, that is without force, secrecy or permission, throughout the

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<sup>1</sup> [2007] UKHL 28

relevant twenty-year period, without interruption. There was disagreement as to whether use had been by challenged or interrupted or, in ignoring the interruptions, by force. There was also a question as to whether the claimed alignments had been used or whether there had been general use of the land.

7. If the statutory test fails, then I will consider whether there is any case at common law. I will consider whether the evidence of use of the route by the public, and the actions of landowners, together with all other relevant evidence, enables an inference to be drawn that public footpaths have been dedicated.
8. To confirm the Order I must be satisfied, on the balance of probabilities, that the claimed public rights of way subsist.

## **Reasons**

### ***Ownership and use***

9. The majority of the affected land, crossed by the sections B – D<sup>2</sup> and B – C, is shown on Ordnance Survey mapping as the Warren, with the area known locally as the Old Hills. The recorded footpath no. 23 runs on the western side of the land, being accessed from Coxbench Road to the north. Another recorded footpath, No. 18 runs on the southern side. The claimed routes run on the north-western and eastern edges, with the existing and claimed routes forming a circuit around the Warren.
10. The Warren is in the ownership of the objectors and was purchased by them in January 2001. However, they say that they tenanted this land, with and from the former owner, from at least 1976. I note that a number of the original objections referred to 1972, but it seems that this was a mistake.
11. Bank Plantation, within which section A – B runs, is separately owned. The claimed route runs from Sandy Lane to the east of the Warren. No objection or information was presented to the Inquiry by the owners of Bank Plantation.

### ***Section 31 of the Highways Act 1980 – the statute***

#### *Calling into question*

12. Section 31(2) of the 1980 Act sets out that the period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice or otherwise. It is necessary for me to consider what event was sufficient to call the use into question.

#### Verbal challenges from 1976

13. The objectors said that during their tenancy the former owner indicated that they should direct people who were not on the recorded footpaths back onto those routes and that they did so, including from the claimed routes. There was some reference to asking people to put dogs on leads, which would not show that there was no public footpath. The claim of frequent challenges is not supported by the user evidence forms ("UEFs") with most indicating that people were not stopped or told that the routes were not public until more recently, when rude or threatening behaviour was recalled, with mention of the 'new owner' or the 'present owner'.

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<sup>2</sup> Letters A – B – C – D as used in the Order plan

14. Whilst specific incidents may stick in the minds of the objectors, I agree with the OMA and the Ramblers that any actions were not so open and notorious that they were known by the general public using the routes. It appears that in order to comply with the request of the former landowner, not to upset his neighbours, any action taken was insufficient to demonstrate to the public that their use of the claimed routes was being challenged.
15. By contrast there was clear knowledge of challenges once the land had changed hands, indicating that whatever was said subsequently was unfettered by the desires of the former owner to retain good local relations. I am satisfied that there was sufficient evidence that verbal challenges after 2001 called use into question but not prior to the change in ownership.

#### Fencing from 1976

16. I heard clear evidence from supporters of a 'stile' at point B and disagree with the objectors that there was any indication of confusion with stiles on existing public footpaths in the area. Given that the OMA Officer's site visit, noting no trace of a stile or gate, was not made until 2011, I do not accept the argument of the objectors that this means there was no 'stile' in the period prior to 2001.
17. There was some understanding that the 'stile' had been provided by the former landowner, or his father, in the early 1970s to assist users with children accessing the Old Hills from Bank Plantation. Having viewed some stiles on recorded footpaths in the local area I found it easier to understand how such a structure as described might have been thought by some to be formally provided, albeit that it apparently varied over time.
18. The objectors said that any structure at point B from at least 1976 was part of a fence to prevent stock, particularly sheep and calves, from escaping off the Warren onto the roads. Evidence was given of continual mending of fences in this area in particular and along the boundary with Bank Plantation running south towards point C.
19. I find it hard to reconcile such conflicting evidence and can only reach the conclusion that the users providing evidence to the Inquiry were unaware of barbed wire and fencing because another user had cut or trampled it prior to their use, as claimed by the objectors. One person referred to needing more recently to duck under baler twine, not barbed wire, but did not understand this to be present to prevent his use. By contrast users referred to wire being present prior to the 'stile' because they recalled having to lift toddlers and picnics over it, which was difficult.
20. It seems that such repairs as were made on this boundary were insufficient to demonstrate a lack of intention to dedicate and so call use into question so far as the general users were concerned. I am not satisfied that the evidence as a whole shows actions in terms of the erection and maintenance of fencing sufficient to have potentially called use into question until 2001, when there was evidence of barbed wire being placed on the boundary of Bank Plantation with Sandy Lane. Although this was apparently done without the consent of the owners of Bank Plantation, I agree with the objectors that it is not only the actions of a landowner which can call use into question.

### Signs from 1980

21. The objectors indicated that from 1980 the former landowner had instructed that signs be put up. These were recalled as having various forms of wording depending on who made and put them up. I agree with the OMA that wording such as '*horses working, do not trespass*' and '*keep to the footpaths*' would not be sufficient to call use into question. Users may well have thought that the claimed routes were part of the existing public footpath network on this land.
22. The UEFs did not refer to notices other than during the Foot & Mouth outbreak of February – October 2001 and 'lost dog' type notices being left at point B on the 'stile'. One UEF mentioned that there may have been notices regarding horses.
23. The evidence as a whole does not support the belief of the objectors and their witnesses that notices clearly indicated that people should not come onto the land. When apparently torn down, notice was not given by the owner of the land to the appropriate council that the ways were not dedicated as highways, as set out under section 31(5) of the 1980 Act. On balance, such notices as were present were not worded in such a manner as to have called the use into question in the period from 1980.

### Placing of gorse on the routes, 1999

24. Evidence was given of attempts to block the claimed routes with hawthorn and gorse from the early 1990s, although fairly acknowledged that this was ineffective in preventing use. However, in 1999 a larger operation involving a JCB and telescopic handler did effectively interrupt use.
25. I heard evidence of people diverting from the claimed routes onto alternative lines from the period 1999/2000 and two witnesses felt this may show that the landowner did not want them there. However, it seems that users generally, and reasonably, thought that the works were simply agricultural activities, not related to preventing their use of a particular route. I agree with the objectors that the lack of mention of this matter within the UEFs indicates that it was not noticed nor thought to be important or relevant to the claimed routes. As noted by the OMA any earlier actions, such as this, appear to have ultimately been ineffective or there would have been no need to dig the trench referred to next.
26. On the balance of probabilities, these works were insufficient to have brought to the mind of a reasonable user that their right to use the claimed routes was being called into question at this time.

### Digging of trenches, 2001

27. In 2001, following their purchase of the Warren, the objectors entered uninvited onto the neighbouring land of Bank Plantation and dug a trench across the claimed route A – B, physically preventing use of this part of the claimed routes. Following this, and with escalating verbal challenges and physical barriers, the applications to record the routes as public rights of way were made. I am satisfied that the public recognised that there had been a challenge to their use at this time, to which they responded, and so use was called into question by the events of 2001.

### Summary

28. *Godmanchester* sets out that in "...the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the

*way, would reasonably have understood the landowner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885)<sup>3</sup>, to "disabuse [him]" of the notion that the way was a public highway...It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate...In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness...the objective acts must be perceptible by the relevant audience."*

29. The objectors indicate a number of actions taken by them in the course of their tenancy, which they felt showed that people should have been aware that the claimed routes were not meant for public use. These actions were apparently taken under the instruction of the former owner. However, it was also said that he did not wish to upset his neighbours and from the evidence of the users there was open and unchallenged access. The only conclusion is that any action taken was insufficiently open and notorious to make it clear to the relevant audience, namely the users of the way, that the objective aim was that they should understand there to be no intention to dedicate additional rights of way here.
30. Once the land had changed hands, the objectors were in a position to decide for themselves whether or not to be concerned about upsetting neighbours. The action of digging a trench across the used route was a clear indication of a lack of intention to dedicate and clearly understood as such by the public. I am satisfied, on the balance of probabilities, that this event called use into question and so the relevant twenty-year period is, therefore, 1981 – 2001.

#### *Use of the Order routes*

31. Evidence of use of the Order routes was first submitted on UEFs with the applications. I heard from some witnesses at the Inquiry, some who had and some who had not initially completed UEFs.
32. It seems that the Order routes could not have been used as of right prior to the early 1970s due to fencing at point B. Once the 'stile' was in place users could easily access the Old Hills and referred to walks up to the 'Magic Circle' or 'Druids Circle', as the group of trees on the top of the hill near point C was known, and round routes using the existing recorded footpaths.
33. The cross-examination revealed that there was more general use, for example, some people followed a route closer to the brook below the tree line alongside B – D. Others referred to walking one of several routes through Bank Plantation to get onto the Old Hills, for example gaining access over the wall further south from point B. The objectors indicated that they had found people in the centre of the land mushrooming or metal detecting, as well as picnicking, whilst users also referred to collecting blackberries and sledging elsewhere on the land.
34. I found the evidence of the users to be reliable and unrehearsed in its consistency. I am satisfied, on the balance of probabilities, that those providing evidence of their use have been on the Warren and have followed specific lines, including those claimed.

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<sup>3</sup> [1885] HL 378, 10 App Cas 378

35. However, in being open and honest as to their use I cannot ignore the evidence of the more general use over the land. Of most consequence is the interruption arising as a result of the actions in placing gorse over the routes, leading to deviation from the claimed routes. Whilst people were still attempting to follow the claimed routes, I heard evidence that they were physically prevented from doing so and instead used alternative alignments, in particular crossing the land east/west near the pylon, situated centrally on the Warren.
36. On the balance of probabilities, I consider that during the relevant twenty-year period prior to 2001 the public could not use the claimed routes without interruption from around 1999/2000 due to the interference with the enjoyment of the right of passage. Although people may legitimately deviate from a recorded public right of way, this effectively interrupts the relevant period of use in relation to a claimed route.
37. I am not satisfied that the interruption in itself was sufficient to call use into question at an earlier date and it was clearly not recognised as such by the general public, who simply deviated around it. Taking all the relevant evidence into account, I am not satisfied that a clear twenty-year period of public use, prior to such use being called into question, has been shown to have taken place. As such no presumption of dedication arises under the 1980 Act.

### **Common law**

38. Not being satisfied as to the case under the statute I have considered whether the evidence supports a dedication at common law. However, the evidence provided by the objectors under cross-examination was that the former landowner had instructed them to keep people on the recorded public rights of way only. It has not been shown that there was an intention on the part of any landowner to dedicate the claimed routes as public rights of way and, therefore, I am not satisfied that the burden of proof to demonstrate the dedication of public footpaths over the Order routes at common law has been met.

### **Other matters**

39. The law does not allow me to consider such matters as the desirability or otherwise of the routes in question and so I have not taken account of these issues.

### **Conclusions**

40. Considering the evidence as a whole I am not satisfied, on the balance of probabilities, that it has been shown, either under the statute or at common law, that the Order routes should be recorded as public footpaths.
41. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that the Order should be not confirmed.

### **Formal Decision**

42. I have not confirmed the Order.

*Heidi Cruickshank*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Ms J Gale	Solicitor for Derbyshire County Council
<i>who called:</i>	
Mr P Shimwell	Legal Assistant – Rights of Way, Derbyshire County Council
Mr J Badger	
Mr G Bonsall	
Mr E Foulk	
Mr K Foulke	
Mr D Haslock	
Mrs P Litchfield	
Mrs P Paterson	
Mr R Welsby	

### **Interested Parties in Support of the Order:**

Mr J Morrisey	<i>on behalf of</i> the Ramblers
Mr C Gregory	
Mr O Marshall	

### **In Objection to the Order:**

Ms S Reid	<i>of Counsel, instructed by</i> Bowcock Cuerden LLP <i>on behalf of</i> Messrs Shally & Mitchell
<i>who called:</i>	
Mrs J Cook	
Mr S Lewis	
Mr N Mitchell	
Mrs L Mitchell	
Mr J Shally	
Mr T Shally	
Miss E Shally	

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## **INQUIRY DOCUMENTS**

- 1 The Order
  - 2 Photographs from Mr Foulk
  - 3 Letter from Mrs Toczek
  - 4 Closing submissions on behalf of Derbyshire County Council
  - 5 Comments and Closing submissions on behalf of the Ramblers
  - 6 Letter from Mr Gregory
  - 7 Tree Preservation Order No. 90 plan
  - 8 Photographs near the Brook
  - 9 Conveyance 9 November 1972 and notes
  - 10 Photographs of horse and box
  - 11 British Horseracing Authority letter, 10 July 2015
  - 12 Marked plan of gorse/hawthorn location
  - 13 Statutory declaration of Susan Kelly
  - 14 Closing submissions on behalf of the Objectors
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