



## Order Decision

Site visits made 11 & 12 April 2016

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

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

**Decision date: 5 May 2016**

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### **Order Ref: FPS/F0114/7/20**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Bath and North East Somerset Council (City of Bath Definitive Map and Statement Modification Order)(No. 9 – River Path and Towpath) 2011.
- The Order is dated 16 March 2011 and proposes to add a number of footpaths and a restricted byway to the Definitive Map and Statement on routes within the City of Bath. Full details of the routes are set out in the Order Plans and Schedule.
- There was one objection outstanding when Bath and North East Somerset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is proposed for confirmation subject to modifications set out in the Formal Decision.**

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### **Preliminary Matters**

1. The omnibus Order as made related to twenty footpaths and one restricted byway in the Abbey, Bathwick, Kingsmead, Newbridge, Walcot and Widcombe wards of the City of Bath. As objections were only received in relation to seventeen of the routes, objections to two of which were subsequently withdrawn, Bath and North East Somerset County Council, the order-making authority ("the OMA"), severed the Order<sup>1</sup>.
2. That part of the Order to which there were no outstanding objections was confirmed by the OMA on 4 September 2013. The remaining part of the Order submitted to the Secretary of State for Environment, Food and Rural Affairs ("SSEFRA") therefore only related to fifteen routes.
3. The outstanding objection was raised by the Canal and River Trust ("CRT")<sup>2</sup>. CRT confirmed by their statement of case that their remaining objection only related to the route AQ92a. As the Order had been submitted to the Planning Inspectorate, acting on behalf of the Secretary of State, it could not be returned to the OMA. I have considered the case for confirmation for all remaining routes.

### **Procedural Matters**

4. No-one requested to be heard with respect to this Order and so I made unaccompanied site inspections and dealt with the matter by way of the written representations procedure.

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<sup>1</sup> Powers under paragraph 5 of Schedule 15 to the Wildlife and Countryside Act 1981.

<sup>2</sup> Known as British Waterways prior to 2012

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## **Main issues**

5. The OMA rely on the evidence as a whole in relation to these routes, including evidence from users and landowners, as well as documentary evidence, such as Ordnance Survey ("OS") mapping, surveys and correspondence.
6. Section 32 of the 1980 Act, *Evidence of dedication of way as highway*, sets out that "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."
7. I will consider whether the evidence as a whole is sufficient, in relation to each route before me, to show that it should be recorded as a public right of way as set out in the Order. My decision will be made on the balance of probabilities

## **Reasons**

### ***Evidence of use***

8. During the consultation and research the OMA sought information from landowners, including neighbouring property owners, national and local user groups, residents' associations ward and parish councillors and the public generally. Some responses and user evidence forms were submitted as a result, mostly from adjoining property owners and members of the public.
9. In addition, sixty-one responses were received from members of the public in relation to notices on the routes. There was evidence of use of all the routes, with the exception of BQ43, which is a short link between Beckford Road and the Kennet and Avon Canal towpath, also linking AQ362, for which evidence of use was submitted.
10. For routes AQ27, AQ193, AQ362, BQ44 and CQ114 the evidence only indicated use on foot whilst for the other routes there was at least some use with bicycles as well as on foot. Some of the routes are continuations of already recorded public footpaths. There was also reference to private vehicular use and observed public use by others over some routes.
11. The evidence of use alone is insufficient to support a presumption of dedication at statute or common law. However, I consider it shows continued public use of the routes and will take it into account, with all other evidence.
12. During my site visits I noticed use and/or evidence of use on all the routes in question. Some of this was appeared to be in connection with private rather than public rights, for example, use of the canal towpath in connection with a boat moored alongside. However, on balance, my observations support the case that the routes are in general public use, certainly on foot and in some cases with bicycles.

### ***Physical conditions***

13. The routes closest to the city centre are generally well-made and well-used routes. Sections of AQ91a were closed at the time of my site visit, apparently for essential bridge replacement and flood mitigation works, and so I was only able to walk parts of this route. However, I am satisfied that I was able to walk, and view, sufficient of the route to be able to reach a decision on the matter. There are bridges, kissing gates and steps on various routes, whilst others have a more rural feel, although generally with gravel underfoot. None of the routes are subject to barriers or signs denying public access or rights, with the exception of signs relating to the temporary works already referred to.

### ***Documentary evidence***

#### *Cotterell's Map of Bath, 1852*

14. This map was drawn up on behalf of the Town Council, primarily to show sewerage pipes and gas mains. Many of the claimed routes are indicated on the map, but not all, and some are shaded yellow, some blue and some unshaded. Although there is no key the OMA indicate that the shading appears to relate to the construction of the routes, rather than status.

#### *Ordnance Survey mapping*

15. Whilst the depiction of a way on an OS map is not, of itself, evidence of a highway, the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly in conjunction with other evidence.
16. Reference was made to a number of OS maps dating from 1885, 1888, 1904, 1932, 1936, 1951 and 1960, with comments from the OMA as to how the routes were or were not shown and whether they were annotated, for example with 'Towing Path' or 'FP'. Whilst the comments provided by the OMA appear to have been accepted by the objector copies of the maps were not submitted<sup>3</sup> and, therefore, I have not been able to place weight on the conclusions of the OMA in this respect.

#### *List of Streets*

17. This arises from the requirement under the Highways Act 1980 for every highway authority to make, and keep up to date, a List of Streets ("LOS") within its area of highways maintainable at the public expense. The OMA confirm their LOS to be a record of maintenance responsibilities, rather than of rights, but indicate that they only maintain those highways which carry public rights. Class 4 highways carry vehicular rights and Class 6 pedestrian rights.
18. According to the OMA AQ91c is shown in in the LOS partly as Class 4, partly Class 6 and partly not included. AQ91d and AQ193 are shown as Class 4 and AQ362 as Class 6. However, whilst the objector has not questioned the findings, copies of the map/list was not submitted to me and, therefore, I have not been able to place weight on these comments.

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<sup>3</sup> Except where a base map for another survey, for example the Bath City Engineer's Survey 1957 appears to make use of the 1930 OS map with additions in 1938.

*Bath City Engineer's Survey, 1957*

19. This was a 'Survey of Public Rights of Way: For the Purpose of Part IV of the National Parks and Access to the Countryside Act 1949' undertaken by the City Council Waterworks Engineer's Department. A footnote indicates "All footpaths walked by R.F. Little between June 1<sup>st</sup> & 30<sup>th</sup> 1955". It was not a complete survey, relating only to "...the footpaths and public rights of way in the undeveloped parts of Bath and the footpaths in the built up areas which connect up with these paths."
20. The routes recorded on that survey include AQ27, AQ33, AQ43a, AQ91 (to be recorded as AQ91a - d) and AQ92 (to be recorded as AQ92a - d). The survey included both a map and a list with descriptions of the routes, with all these routes described in the list as 'FP'. Although the OMA indicate that AQ193 is not shown in this survey it is partly the route numbered 25.

*Previous Orders*

21. Sections of AQ91a and AQ91c have been diverted or stopped up by legal Orders in 1971 and 1990. These Orders are not before me, although I note that the OMA have apparently drafted this Order taking account of the effect of those legal processes, undertaken to allow development to take place.

*Other information*

22. I am satisfied that the British Waterways General Canal Bye-laws, agreements relating to licenses and correspondence, indicates that the evidence of use with bicycles, which was obvious on a number of the routes, was effectively with permission and so 'by right'. This is not supportive of higher rights than footpath, as the use is not 'as of right' as would be required.

*Summary*

23. Whilst the original objection submitted to the Planning Inspectorate raised concerns about safety matters these are not issues which can be taken into account in consideration of this type of Order. CRT fairly agreed that they withdrew their objection to all but AQ92a and I consider this to be acknowledgment on their part that the proposed public rights exist over the routes in question.
24. It is the evidence as a whole that needs to be taken into account and the evidence shows that many of the routes have physically existed over many years, some from at least 1852.
25. Taking account of the documentary evidence available to me, the landowner and user evidence and my observations of both use of the routes, which was extensive in some cases, and their physical attributes, I am satisfied, on the balance of probabilities, that public rights on foot have been shown to exist over the majority of the Order routes and that the Order should be confirmed as made for these routes. There are three routes which require further discussion.

**AQ91a**

26. AQ91a is the longest route within the Order, running on the northern bank of the River Avon from Broad Quay to Newbridge on the western side of the city. The route is shown on Cotterell's Map, 1852 and on the 1957 Bath City Engineer's Survey, where it was referred to as 'F.P.'. Taking account of this evidence, the evidence of use, for which the largest number of evidence forms was submitted, and my on-site observations, I am satisfied that the evidence as a whole indicates public footpath rights over the route as a whole.
27. However, subsequent to this Order being submitted to the SSEFRA, the Secretary of State for Transport made an Order affecting part of the route. That Order, made under section 247 of the Town and Country Planning Act 1990, is dated 15 December 2015 and is known as The Stopping up of Highways (South West)(No.38) Order 2015 ("the 2015 Order").
28. I consider that the making of the 2015 Order reinforces the evidence that public rights exist over this route. It has the effect of extinguishing some of the rights to be recorded by the Order before me, as well as creating alternative rights.
29. The Order before me has a relevant date of 26 January 2011 and I am satisfied from the evidence as a whole, that the rights existed on this route at that date and, therefore, that it is appropriate that they be recorded on the Definitive Map and Statement.
30. As the 2015 Order is a legal event arising after the relevant date, and there can be no further objection to the outcome, I consider it would be inappropriate for me to propose a modification to the Order before me, requiring readvertisement and allowing such an opportunity for objection. It is open to the OMA to deal with the matter by way of a separate legal event modification order.

**AQ92a**

31. This route was the only one to which objection was maintained following submission of the Order to the Planning Inspectorate. Whilst the main concern of the CRT was health and safety, this is not a matter I am able to take into account and I have not done so.
32. Cotterell's Map, 1852 suggests a route to the south of the canal, crossing under the Pulteney Road bridge appearing to provide access to the basin. Whilst the lock gates are indicated there is no suggestion of access over them. The 1957 Bath City Engineer's Survey similarly shows a route south of the canal to the west of Pulteney Road but the only route shown on the eastern side of the road is to the north of the canal, with no indication of crossing the lock gates at Deep Lock, points G – F on Order Map 'Part 9' on the eastern side of the bridge.
33. I agree with both parties that the evidence to support the recording of rights on the lock bridge itself is insufficient for confirmation of that part of the Order, although the evidence as a whole is supportive in relation to the rest of this route.
34. CRT indicate that the walkway over the lock bridge gates was removed in late 2014 with a new path created, allowing the public to pass under Pulteney Road via the towpath and up onto the eastern side of the road via a set of steps and

the newly created path. The public footway running alongside Pulteney Road is used to cross the canal and gain access to the northern side of the towpath. I found this route open and in obvious use during my site inspection and agree with the CRT that it clearly matches the pedestrian desire line in this area.

35. The OMA suggested a modification, removing a section of the route from the junction of CQ114, between points B and C on Order Map 'Part 9', point A on Order Map 'Part 19', however, I am not satisfied that this modification is appropriate. In considering the route provided by CRT I am satisfied, on the balance of probabilities, that this route has been created and thrown open to the public. The public have accepted that route through use and, therefore, dedication of this route as a public footpath has arisen at common law. As a result, I intend to propose a modification of the Order to record that route.

### **AQ193**

36. This route was the only one proposed to be recorded with higher rights than public footpath. Whilst the objection to this part of the Order has been withdrawn, and was not specifically directed at matters relating to status, I need to be satisfied that the proposal is correct, on the balance of probabilities.
37. The 1852 Cotterell's Map shows a physical feature, shaded yellow, over the eastern approximately 2/3rds of the route but the western end does not link to AQ92d, the towpath, instead running parallel to it for a distance to the railway. There is no bridge shown over the railway and it is unclear whether this was a dead-end route at that time.
38. The 1957 Bath City Engineer's Survey shows that by the time of at least the 1938 OS survey there was a bridge over the railway. The western part of the route is shown running parallel to AQ92d/BQ44 to that bridge, on the alignment shown on Cotterell's Map. The list associated with the survey refers to the route as 'F.P.' from Hampton Row to Grosvenor Bridge, running "*Over footbridge – then laneway.*" I consider this supportive of footpath rights rather than higher rights.
39. The LOS apparently places the route in Class 4, which relates to vehicular highways. However, the direct evidence is not before me and I bear in mind that the LOS is a document intended to record maintenance, rather than status.
40. I note the comment that this may be the only route which could have provided vehicular access to the former pub The Folly at Grosvenor Bridge, however, I am unsure of the provenance of this information. I do not find the inference sufficient to indicate higher rights, which do appear to have been able to have continued to the west over either the railway bridge or the towpath.
41. I find the documentary evidence supportive of public rights, on foot, over the eastern section but consider the documents before me show a different alignment prior to at least the middle of the twentieth century. The user evidence is limited, with only one person showing use of the route over a 2 year period. However, there was clear evidence of public use on foot and with dogs over the Order route during my site visit, with no signs or barriers to prevent public use.

42. Taking account of all the evidence, I consider that the Order route should be recorded on the alignment shown, but with the status of footpath rather than restricted byway. I have considered whether to propose to record the western section as shown by the mapping, either instead of, or in addition to, the Order alignment; however, I am not satisfied that the two maps before me provide sufficient evidence to propose this. I intend to propose a modification of the Order to record this route as a public footpath rather than a restricted byway.

### Conclusion

43. Having regard to these, and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation, subject to modifications with regard to alignment of part of the route of AQ92a and the status of AQ193.

### Formal Decision

44. I propose to confirm the Order subject to the following modifications:

- for '**AQ92a**':
  - replace "*...The footpath continues in a northerly direction for a distance of approximately 3 m to point F at a footbridge across a lock gate at Grid Reference ST 7555 6426. The footpath crosses the lock gate for a distance of approximately 9 m to where it ends at point G at Grid Reference ST 7555 6427. The footpath continues for a distance of approximately 5m to where it finishes on the towpath (footpath AQ92b) at point H at Grid Reference ST 7555 6427 and shown by a broken black line with short intervals marked A-B-C-D-E-F-G-H on the map numbered Part 9 annexed to this order, the number of this footpath to be known as BCTOW/1. Width 0.76m – 7.1m between Grid Reference ST 7538 6428 and Grid Reference ST 7555 6427.*" with "*...The footpath continues south and then west for a distance of approx. 12 m (on the southern side of the steps) to finish on the footway of Pulteney Road at point X at Grid Reference ST 7555 6427 and shown by a broken black line with short intervals marked A-B-C-D-E-X on the map numbered Part 9 annexed to this order, the number of this footpath to be known as BCTOW/1. Width 1.5m – 7.1m between Grid Reference ST 7538 6428 and Grid Reference ST 7555 6427*";
- for '**AQ193**':
  - replace "Restricted Byway" with "Footpath" throughout;
  - after text "...shown by a..." replace "...bold broken line and small arrowheads..." with "...broken black line with short intervals...";
- Within Part II of the Schedule:
  - for '**Path Number: AQ92a**':
    - for '**Length**' replace "193 m" with "188m";
    - for '**Width**' replace "...0.76m..." with "...1.5m";

- for '**Description of Route, To**' replace "Footpath AQ92b" with "Pulteney Road";
- for '**General Description**' replace "...The footpath continues in a N direction for a distance of approx. 3 m to a footbridge across a lock gate at Grid Reference ST 7555 6426. The footpath crosses the lock gate for a distance of approx. 9 m to where it ends at Grid Reference ST 7555 6427. The footpath continues for a distance of approx. 5m to where it finishes on the towpath (footpath AQ92b) at Grid Reference ST 7555 6427." with "...The footpath continues south and then west for a distance of approx. 12 m (on the southern side of the steps) to finish on the footway of Pulteney Road at Grid Reference ST 7555 6427";
- for '**Conclusive Evidential Provisions**' remove all text and add "None";
- for '**Path Number: AQ193**' replace "Restricted Byway" with "Footpath" throughout;
- On the Order plan:
  - for '**Part 9**' (AQ92a);
    - alter key to refer to route A – D – X;
    - for 'The width of the footpath to be recorded varies between...' replace "...0.76m..." with "...1.5m...";
    - remove text relating to widths between points E, F, G and H;
    - add text "Between Point E and Point X the width of the footpath is 2.0m";
    - add point X on Pulteney Road footway;
    - delete section E – F – G;
    - add route from E – X;
  - for '**Part 13**' (AQ193);
    - replace text "...Restricted Byway..." with "...Footpath..." throughout;
    - show Order route and key as broken black lines.

45. Since the confirmed Order would affect land not affected by the Order as submitted and show as a highway of one description a way which is shown in the Order as a highway of another description, I am required by virtue of paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Heidi Cruickshank*

**Inspector**