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## Order Decision

Site visit made on 5 April 2016

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 4 May 2016**

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### **Order Ref: FPS/W1850/7/11**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the County of Herefordshire District Council (Addition of Footpath MF32 Mordiford) Modification Order 2010.
- The Order is dated 14 January 2010 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Herefordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is confirmed.**

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### **Procedural Matters**

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the site on Tuesday 5 April 2016.
2. There is no dispute between the parties with regard to the use of the Order route on foot by the public, nor is there any dispute that such use had taken place for a considerable period of time. The issues between the parties are the status of the route which is the subject of the Order and the width to be recorded.
3. The sole objection to the Order was made on the grounds that the evidence of use included evidence of use on horseback and that the Order should be remade to record a public bridleway instead of a public footpath. The Council acknowledge that 11<sup>1</sup> of the 29 user evidence forms received indicated use of the route on horseback as part of a much longer route.
4. However, in the Council's view, the evidence of use on horseback was insufficiently cogent with regard to the overall route taken by equestrians and was not of the required quality to support such a claim. The Council submitted that if the objector considered that public equestrian rights subsist, the correct course of action would be for him to make a formal application under Schedule 14 to show the route used by equestrians and to provide evidence of use to support such an application.

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<sup>1</sup> Of the 11 user evidence forms, two individuals completed two forms each at different dates following the application to add the route as a public footpath. The total number of users who claimed use of the route on horseback is therefore 9 and not 11 as claimed by the objector in his submission.

5. As part of his submissions, the objector provided a map showing the route claimed to have been taken by users on horseback. This route commences at Prior's Court, follows footpath MF5 to point A, then runs over Backbury Hill via the Order route to point B before turning south-west along part of footpath MF5 to join bridleway MF6. Even if I were to consider that the evidence of use of the Order route on horseback as part of a longer route was of sufficient quality to demonstrate the existence of public equestrian rights I could not modify the Order as it would not be possible to show the entirety of the route alleged by the objector to have been used as a bridleway on the Order plan.
6. Consequently, I make no comment on the evidence of use on horseback submitted in this case and concur with the Council that the appropriate course of action for the objector to follow would be to make an application to add the route over which he claims equestrian rights subsist and to provide evidence to support his assertion.

### **The Main Issues**

7. The main issue in this case is the requirements of section 53 (3) (c) (i) of the 1981 Act namely, whether the evidence discovered, when considered with all other relevant evidence available, shows on the balance of probabilities that a right of way not shown in the map and statement subsists over the land in question.
8. In a case where there is evidence of claimed use of a way by the public over a prolonged period of time, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
9. If the statutory tests set out in section 31 of the 1980 Act are not satisfied I am required to consider whether dedication of the claimed route has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

### **Reasons**

#### ***The date on which the right of the public to use the way was brought into question***

10. The application to add a public footpath over Backbury Hill was made by Dormington and Mordiford Parish Council on 13 August 1992. The application appears to have been prompted by works undertaken by the Stoke Edith Estate (the owner of Backbury Hill) to widen an estate track on the hillside and create a turning circle as part of a timber extraction programme. The works disrupted access to the top of the hill and the public reaction to those works was reported in the Hereford Journal of 17 June 1992.
11. A number of those individuals who completed user evidence forms noted that their use had been obstructed by felled trees and mounds of earth. It is not disputed by any party that the actions taken by the Stoke Edith Estate in or

around June 1992 brought into question the right of the public to use the Order route. Accordingly, for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period of use is June 1972 to June 1992.

12. The Order route crosses Backbury Hill which is a registered common<sup>2</sup>. An aerial photograph taken in 1968 demonstrates that at that date, the common was open ground and that the Order route was visible on the ground. Successive editions of Ordnance Survey mapping also show the existence of a defined path across the hill top on the alignment of the Order route. Although the Order route may have been clearly defined on the ground prior to 1992, the forestry planting which subsequently took place has obscured the line of the path with the overgrowth and undergrowth now making the path extremely difficult to follow.
13. The Order route is no longer clearly defined on the ground and it would appear that the route has fallen into relative disuse during the 24 years since the parish council made the application to add the path to the definitive map. That the Order route appears to have fallen out of use is no bar to it being recorded if the evidence of use by the public in the 20 years prior to 1992 is sufficient to satisfy the tests set out in section 31 of the 1980 Act.

***Whether the claimed right of way was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question***

14. In total 29 user evidence forms were submitted in support of the application with the earliest claimed use being in 1925. Of those who completed a user evidence form, 9 individuals had walked the Order route throughout the relevant 20-year period which ended in 1992 although each of these users claimed use for many years prior to the start of that 20-year period. The remaining users provided evidence of use between 1972 and 1992 but for varying periods of less than 20 years. The majority of use was on a weekly or monthly basis for recreational purposes with the top of the hill being said to be a popular place for families to go and picnic.
15. The frequency, extent and duration of the use of the Order route by the public on foot is not disputed by any party. As noted above, aerial photography from the 1960s demonstrates that prior to the common being planted with conifer trees, the terminal points of the Order route would have been on open ground. Consequently there would not have been structures which the public would have to overcome to use the path; I conclude that public use was without force.
16. There is no evidence before me that permission to use the path has been sought or granted or that use was conducted in such a manner that the owner of the land would have been unaware of it. I conclude that the use of the Order route by the public was as of right.
17. Other than the works undertaken by the Stoke Edith Estate in 1992, no evidence has been submitted from which it could be concluded that public use of the Order route was interrupted in any way during the relevant 20-year period; the evidence before me is that use prior to 1992 was unhindered in any way.

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<sup>2</sup> Backbury Hill is registered under register units CL 107 and CL 207

18. I am satisfied that the evidence of use of the Order route by the public on foot is sufficient to demonstrate that such use was as of right and without interruption throughout the 20-year period under consideration and is sufficient to raise a presumption of dedication of a public right of way.

***Whether there is sufficient evidence of a lack of intention to dedicate***

19. In order for a landowner to take advantage of the proviso to section 31 of the 1980 Act, there must be some evidence of an overt act undertaken within the relevant 20-year period which demonstrates that there was no intention to dedicate a public right of way. Such actions can include the closing of the path for one day a year in such a way that those wanting to use the path would be made aware of the closure, or by the erection of a suitably worded prohibitive notice. Whatever means is employed, it must be done in such a manner to bring the owner's lack of intention to the attention to those persons wishing to use the footpath.

20. No evidence has been submitted to demonstrate that between 1972 and 1992 the Stoke Edith Estate took any action to disabuse members of the public that the path to the top of Backbury Hill was not a public right of way. In response to the Council's consultation with the estate in 2008 prior to determining the application, the estate gave written notice that it would not be challenging the addition of the footpath to the definitive map and statement.

21. I conclude that there is insufficient evidence to rebut the presumption of dedication of a public right of way on foot raised by the user evidence.

***Common law***

22. Having concluded that the provisions of section 31 of the 1980 Act are satisfied, I do not need to consider whether the documentary and user evidence is sufficient for an inference of dedication to be drawn at common law.

***Width***

23. The objector submitted that the width to be recorded was too narrow as early twentieth century Ordnance Survey maps depicted a track which was of similar width to that of public bridleway MF6 and which was wider than public footpath MF5. The Council responded that the markings on the old Ordnance Survey maps were standard cartographic depictions of a track observable on the ground and did not necessarily reflect the actual width available on the ground at the time of the survey. The 2 metre width set out in the Order was the Council's 'standard' width.

24. Paragraph 9 of Advice Note No. 16 published by the Planning Inspectorate states: "*Determination of the width will, if not defined by any inclosure award, physical boundary or statute, be based on evidence provided during the confirmation process, or, where there is no such clear evidence, the type of user and what is reasonable. Circumstances, such as the nature of the surface and other physical features, may dictate what may be considered reasonable. In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occasional pinch points excepted. This width may well be greater than the width of the "trodden path".*

25. None of the three versions of the user evidence forms completed between 1992 and 2000 contain a question asking the witness to state or estimate the width of the path being used; there is therefore no evidence as to what width was in use at the time the path was in use. Whilst the route marked on the early twentieth century Ordnance Survey map is shown to be wider than the line which represents the course of public footpath MF5, this cannot be taken to be representative of the width used by the public in the late twentieth century. Having considered all the circumstances of the case and having had the opportunity to view the site for myself, I consider that a width of 2 metres would be reasonable for an unenclosed path and would allow two users to pass comfortably. I am not persuaded that the width proposed to be recorded by the Order requires any modification.

### **Conclusions**

26. I conclude that the evidence is sufficient to show use of the way on foot by the public as of right and without interruption throughout the period between 1972 and 1992 and that there is insufficient evidence of an intention not to dedicate a public footpath. It follows that I am satisfied that on a balance of probabilities a public footpath subsists over the Order route.

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

### **Formal Decision**

28. I confirm the Order.

*Alan Beckett*

Inspector