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# Order Decision

Inquiry held on 9 March 2016

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 4 April 2016**

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## **Order Ref: FPS/Y3940/7/18**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Wiltshire Council (Parish of Purton) Path No.161 Definitive Map and Statement Modification Order 2014.
- The Order is dated 24 April 2014 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were four objections outstanding at the commencement of the inquiry.

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

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## **Procedural Matters**

1. I held a public local inquiry into the Order at Purton Village Hall on Wednesday 9 March 2016 having made an unaccompanied inspection of the claimed right of way from public vantage points the evening before. Following a request that I measure the width of the claimed path between points B and C, I made a further unaccompanied inspection of that land following the close of the inquiry.
2. The objector did not call any witnesses and relied solely upon submissions regarding implied permission to use the claimed footpath and upon submissions regarding the width to be recorded. The Council called one witness and I heard from five residents with regard to their use of the claimed footpath.

## **The Main Issues**

3. Whether the evidence discovered is sufficient to demonstrate, on a balance of probabilities that a public right of way on foot subsists over the Order route.
4. 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.
5. For use by the public to give rise to a presumption of dedication, the use has to be 'as of right'; that is, without force, without secrecy and without permission. The principal point of contention between the parties was whether the claimed

use had or had not been with permission. At the inquiry, the oral evidence given by witnesses regarding frequency and duration of use was largely unchallenged by the objector. A further point of dispute was the width of the path.

## **Reasons**

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

6. There are three possible dates at which public use of the claimed path may have been brought into question. The earliest is February 2001 when the objector claims to have erected prohibitory notices on the land and a physical barrier at the Hoggs Lane end of the path to prevent access. The second possible date is March 2001 when a petition was submitted to Purton Parish Council asking the Parish Council to take the 'necessary steps' to ensure that access to the footpath was retained. The third possible date is August 2002 when a formal application was made to the Council to add the claimed footpath to the definitive map and statement.
7. None of the witnesses I heard from had any recollection of notices being present during their use other than those erected in connection with the foot and mouth outbreak in 2001. The objector submits that his notice was quickly removed by persons unknown however, there is no evidence that the objector sought to replace it. If such a notice had been erected, it does not appear to have remained on site for a sufficient period for the public to have become aware of it. I do not consider that use of the claimed route was brought into question in February 2001.
8. I understand that ownership of the land crossed by the claimed path changed around November 2001 when the objector acquired the land. The petition to the Parish Council of March 2001 noted that the land was being sold and that there was no right of way recorded over it. Whilst the petition sought to retain the path, use appears to have been unaffected by the sale of the land; the oral and written evidence before me is that use continued during and after the sale and has continued to the present. I do not consider that use of the claimed route was brought into question by the petition of March 2001.
9. In the absence of any other action which brought use of the claimed path into question, section 31 (7A) of the 1980 Act provides that the date on which an application is made to add the path to the definitive map can serve as the date for the purposes of section 31 (2). Accordingly, I conclude that use of the claimed footpath was brought into question in August 2002. It follows that the relevant 20-year period of qualifying public use would have commenced in August 1982.

### ***Whether the claimed footpath 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***

10. A presumption that a public right of way has been dedicated will arise where there is evidence of the enjoyment of the way by the general public for a period of not less than 20 years ending at the date when the right to use the way was brought into question. Such use has to be as of right; that is, without

force, without secrecy and without permission. In addition, the use must also have been without interruption.

*Use by the public for not less than 20 years*

11. It is likely that in any given location, a public footpath will not be used by all the inhabitants of the country, and is also likely that use will be primarily by a relatively small number of people ordinarily resident within the vicinity of the path. In this case, a total of 21 user evidence forms were submitted in support of the application, of which the Council had discounted the evidence from two of those forms due to insufficient detail having been given with regard to the claimed period of use.
12. Of the remaining 19 forms, 15 respondents provided evidence of use of the path for more than 20 years prior to 2002; one provided evidence of use since 1994; one provided evidence of use from 1985 and one provided evidence of use between 1954 and 1976. In addition to this written evidence, I heard from 5 witnesses at the inquiry whose collective use encompassed the whole of the relevant 20-year period and in the case of Councillor Greenaway extended back to his childhood.
13. The frequency of use by the witnesses ranged from the fairly sporadic use by Dr Pagett of around a dozen times over 25 years to daily use by Mr Wicks and by Miss Austin. All the witnesses I heard from had seen other members of the public walking along the path on the occasions when they had used it. Mrs Woodbridge's house is opposite the southern end of the claimed path and she has a good view of the path from her kitchen window and from her garden; in addition to having used the path since moving to her property in 1985, Mrs Woodbridge has also observed extensive and frequent use of the path by others. The evidence of use given by the witnesses was not challenged by the objector and I found that evidence to be credible.
14. Although the number of people who gave direct evidence to the inquiry was limited, taking the evidence of use as a whole, I am satisfied that it demonstrates use by a sufficiently wide section of the general public and that it was of sufficient frequency and duration over the relevant period to have alerted a reasonable landowner that a public right was being asserted.

*Use as of right*

15. There is no evidence before me to suggest that the use claimed has been secretive in any way; the use was open and undertaken at all times of the day and would have been in full view of the owner and occupier of the land. Nor is there any evidence to suggest that use was as a result of force; although the objector claims that the wall on the northern side of the Hoggs Lane gates had been broken down by vandals, the evidence I heard was that the field boundary had been in a state of disrepair for some time such that it was possible to step over it. Witnesses also recalled a wooden structure being present next to the gate which although not a stile in the formal sense had provided a means of access to the field. In addition, prior to the stile at B being erected, the electric fence which had kept the livestock in the field had been insulated to permit access.
16. It was the objector's contention that use of path was by way of implied permission and that consequently, use of the path was not 'as of right' but 'of

- right' or 'by right'. In support, the objector pointed to a letter written to the Council in August 2002 in which it was stated that the objector had tried to maintain what he described as the 'status quo' whereby local people had access to all parts of the field. In that letter the objector stated that "*I believe the current permissive use can continue to work for many years to the benefit of the whole community.*"
17. In a further letter to the Council dated June 2014, the objector stated that "*I have made it expressively clear that use of the land by the public has been by right as opposed to as of right. As I have stated in my letter in 2002, public use has been granted permissively and I believe I have made this clear to the community. Since the precedent in Beresford has been overturned implied permission can now give way to being held as permission by right. It would not have been reasonable for me to grant permission individually to each and every person that enters the property and the law does not require me to do so. I have been aware of the use of the land by the community and allowed it to continue on the clear inference that it was by no means unconditional but rather dependant upon my consent.*"
18. There is no evidence that the current owner of the land or his predecessor in title had given express permission to any user or group of users or to those users who appeared at the inquiry. As there is no evidence of an express permission having been given, the objector appears to rely upon access along the path being by an implied permission; this is borne out by the contents of the letter of June 2004.
19. In *Beresford* the Court of Appeal held that use of the land at issue for recreation had been by way of an implied licence as the landowners had provided benches and had mown the grass. When that case reached the House of Lords the conclusion reached in the Court of Appeal that recreational use of the land had been by an implied licence was rejected. In the recent case of *R (oao Barkas) v North Yorkshire County Council* consideration was given to the question of whether permission could be implied from inactivity of a landowner when confronted by use by the public of a quality which may be regarded as the assertion of a public right.
20. In his judgement, Neuberger stated '*In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on Easements (19<sup>th</sup> edition, 2010) "The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter, but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However user which is with the licence or permission of the owner is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence".*'
21. In this case, there is a body of evidence of use of the claimed path which runs back at least to the 1950s and has been (during the relevant 20-year period under consideration) at a frequency which would have been apparent to the reasonable on-site owner. Although the current owner submits that the use has been with an implied permission, there is no evidence before me that the owner has communicated that permission to anyone using the path.

22. I appreciate that the current owner does not live in Purton and may therefore not have been on the land with sufficient regularity to give express permission on an individual basis, but steps could have been taken to communicate permission to the community, through a notice on site, or a notice to the Parish Council or by placing a notice in the local newspaper. However, no attempt appears to have been made by the current landowner or his predecessor in title to notify the public that the owner considered use of the path was by permission; none of the witnesses who appeared at the inquiry had sought or had been given permission to use the footpath.
23. Although the current and former owners appear to have tolerated use of the path, I consider that such passive toleration equates to acquiescence in the use; acquiescence is no bar to the acquisition of a public right. I conclude that the inactivity of the current and former owner in the face of the frequency and duration of use by the public demonstrates acquiescence in that use. I conclude that the evidence of use before the inquiry was use without permission and was therefore use 'as of right'.

*Without interruption*

24. With regard to Section 31 of the 1980 Act an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage.
25. Whether any action can be regarded as an interruption is also dependant upon the circumstances of that action; temporary obstructions of a minor nature such as the parking of vehicles on a road<sup>1</sup> or the storage of building materials on a path<sup>2</sup> have been held not to amount to relevant interruptions.
26. The only time when the public appears not to have used the path was during part of 2001 when many public rights of way were temporarily closed in response to the outbreak of foot and mouth disease. The Council submitted photographs of notices at the Hoggs Lane end of the path which it had prepared and distributed to parish councils to post advising that public rights of way were temporarily closed. It is not known whether the notice on the path was erected by the Council or by Purton Parish Council.
27. Advice Note No 15 published by the Planning Inspectorate advises that the temporary cessation of use solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could not be classified as an interruption under section 31 (3). Witnesses at the inquiry spoke of walking along Hoggs Lane during the foot and mouth outbreak but not along the footpath due to the restrictions imposed to help combat the spread of disease. The available evidence suggests that the public restrained from using the path due to the restrictions imposed by the Foot and Mouth Control Order but then resumed use once those restrictions were lifted. In the circumstances, I do not consider that the break in use arising during the Foot and Mouth outbreak was an interruption in use for the purposes of section 31 of the 1980 Act.
28. Although the objector submitted that he had erected a barrier at the Hoggs Lane end of the path in February 2001 to prevent access, whatever form that

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<sup>1</sup> Lewis v Thomas [1950] 1KB 438

<sup>2</sup> Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

barrier took was ineffective as use of the path carried on as before (save for the temporary cessation described above). The objector did not submit any evidence that he had taken any further steps after February 2001 to dissuade the public from using the path. I conclude that use of the claimed path during the relevant 20-year period was without interruption.

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

29. In order to take advantage of the proviso, the owner of the land crossed by the claimed path has to provide evidence of overt and contemporaneous action having been taken against those using the path.
30. In the case of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffman LJ held that in terms of the intentions of the landowner, the *"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 to disabuse him of the notion that the way was a public highway"*.
31. The most common way that the owner's intentions could have been brought to public attention would have been by the erection on the path of a suitably worded notice or notices denying the existence of a right of way. Other than the objector's submission as to having posted a prohibitory notice in February 2001, there is no evidence that any suitably worded notices were ever placed on the path. Although the objector submitted that signs had been repeatedly erected informing the public that use of the land was with permission, no evidence was presented at the inquiry to substantiate those assertions; the preponderance of the evidence is that no signs had been present on site other than those associated with the outbreak of foot and mouth. Even if the objector had erected a notice in February 2001 it was (according to the objector) quickly removed. The objector does not claim to have replaced this notice at any time and had not given notice to the Council under section 31 (5) of the 1980 Act regarding his actions.
32. None of the witnesses at the inquiry recalled seeing any prohibitory notices other than those associated with the temporary closure of the path due to the foot and mouth outbreak. I consider that if the objector had posted a notice in February 2001 it was present for an insufficient period of time for a reasonable user to have become aware that the owner intended to *"disabuse him of the notion that the way was a public highway"*.
33. I conclude that there is insufficient evidence of a lack of intention to dedicate to rebut the presumption of dedication raised by the user evidence adduced in this case.

**Width**

34. The Order specifies that the footpath has a width of 1.82 metres. The Council had arrived at this figure by taking an average of the widths which users had recorded in their user evidence forms. Although the Council had consulted a number of documentary sources as part of its investigation, none of those sources had provided evidence of the width of the path.

35. The objector submitted that a width of 1.82 metres was excessive and referred to published guidance which he considered demonstrated that the footpath only needed to be 1 metre in width. Furthermore, it was contended that the topography of the B – C section of the path was such that the available width was less than 1.82 metres.
36. The guidance to which the objector refers relates to the minimum width to which a landowner must re-instate a cross-field footpath following cultivation of the land<sup>3</sup>. This guidance is of no relevance to the question of the width of a footpath which has come into existence through long use as is the case here. The determination of the width of a footpath is a matter of evidence.
37. 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".*
38. The only evidence regarding the width of the footpath is found in the estimates of the width provided by those who completed a user evidence form. The estimated width varies between 1 and 4 metres and the Council have derived the width to be recorded from an average of the estimated widths. A width of 1.82 metres appears to me to be reasonable in the circumstances with regard to A - B, given that this section of the footpath runs as a cross-field path which is unconstrained by fences.
39. I was asked by the objector to view that part of the path between B and C as part of my second site visit as he contended that this section was not 1.82 metres in width due to the topography and vegetation. I measured this section of the path at various points and found that although the width of the visible trodden line varied between 1.2 and 1.5 metres, the available width at B and at C exceeded 1.82 metres as there are no physical constraints and the space between the scrub on the western side of the path and the downward slope of the land on the eastern side varied between 1.6 and 1.82 metres. The description given in the Order for B – C is therefore a reasonable representation of the width of the path which has been available for the public to use.

## **Conclusion**

40. Having examined all the available information with regard to the presumed dedication of the route between Hoggs Lane and footpath 110 as a public footpath, 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 August 1982 and August 2002. The evidence is therefore sufficient to raise a presumption that the way has been dedicated as a public footpath.

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<sup>3</sup> Section 134 and Schedule 12A of the Highways Act 1980

41. There is insufficient evidence of prohibitive notices having been erected on the land during the relevant period; there is no evidence to suggest that an intention not to dedicate had been brought to the attention of the pedestrians using the path.
42. It follows that I am satisfied that the evidence before me is sufficient to show that, on a balance of probabilities, a public footpath subsists over the Order route. 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.

*Alan Beckett*

Inspector

## APPEARANCES

For Wiltshire Council

Mr R Griffiths                      of Counsel, instructed by the County Solicitor, Wiltshire Council, County Hall, Trowbridge, BA14 8AJ.

Who called:

Miss J Green                      Rights of Way Officer (Definitive Mapping), Wiltshire Council, County Hall, Bythesea Road, Trowbridge, BA14 8AJ.

In support of the confirmation of the Order:

Dr R Pagett

Cllr G Greenaway

Mrs S Austin

Mrs H Woodbridge

Mr N Wicks

For the objector Mr G Fletcher:

Miss A Griffin

Inquiry documents

1. Statement of Dr Pagett
2. Statement of Cllr Greenaway
3. Submissions from Mr Griffiths on behalf of Wiltshire Council

