
Order Decision

Inquiry held on 21 October 2015

Site visit made on 20 October 2015

by Mrs H D Slade MA FIPROW

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

Decision date: 2 November 2015

Order Ref: FPS/T0355/7/3

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Footpath 16 Windsor in the Royal Borough of Windsor and Maidenhead Order 2014.
- The Order is dated 18 November 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 seven objections outstanding at the commencement of the inquiry.

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

Procedural Matters

1. Due to the specific nature of the objections in this case I decided to hold the accompanied site visit the day before the inquiry opened. All parties were invited to attend, and I was accompanied by Mr Hurst (from the Council of the Royal Borough of Windsor and Maidenhead or 'RBWM'), Mr Zammitt (the owner of 38 Priors Road and an interested party), and by Mr Neighbour and Mr Conway (two of the people who had made objections).
2. I also made two unaccompanied visits – one shortly before and one immediately after the accompanied site visit – to fully familiarise myself with the issues and the surroundings.

The Main Issues

3. The Order has been made in consequence of two events set out in Section 53 of the 1981 Act:
 - a) Section 53(3)(b) which provides that the Definitive Map and Statement should be modified where it can be shown that a period of time has expired during which the public enjoyment of the way in question raises the presumption that it has been dedicated as a public right of way; and
 - b) Section 53(3)(c)(i) which provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in it subsists or is reasonably alleged to subsist over the land in question. At the confirmation stage of the Order I must be satisfied that the right of way subsists.

4. With respect to evidence of use, Section 31 of the Highways Act 1980 ('1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been 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 is brought into question, either by a notice or otherwise.
5. It is also open to me to consider whether dedication of the way has taken place at common law. This requires me to examine whether the use of the path by the public and the actions of the landowners or previous landowners (whoever they may have been) were of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances.
6. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
7. In this particular case, the only issue in dispute is the width of the path, particularly over the length A-B as shown in the Order map and schedule. The date of dedication is therefore a material issue.
8. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') and relevant legal judgements and the test I must apply is the balance of probabilities.

Reasons

Whether a right of way has been dedicated

9. No-one has objected to the modification of the Definitive Map and Statement to show a footpath in this location. Although RBWM as the Order Making Authority ('OMA') made its principal case on the basis of a statutory dedication (between 1991 and 2011) there was no dispute that use of the way has taken place for at least 50 years, dating back to the late 1950s when the properties in and around Priors Road were first built.
10. The owners of the land at the time of that development, known as the Keepers Farm Estate, were the Manor Park Construction Company Limited ('MPC'), and they were allegedly required by the local authority to provide a route through to Keepers Farm Close from Priors Road. Keepers Farm Close was a pre-existing development of local authority-owned housing, beyond which there were various local facilities. Mr Neighbour, who has lived at number 2 Priors Road since it was built, gave convincing evidence (for which no contrary evidence has been produced) to show that the builders had to make considerable adjustments to their plans in order to accommodate the route (after their initial plans had been agreed) including moving an electricity sub-

station and thereby delaying the construction of Mr Neighbour's house for about a year.

11. The route was initially left as a dirt track, but later, following negotiations with the local authority, the residents surfaced the track themselves to the required standard for it to be adopted, and a street light was also installed. It is immaterial to my examination of the matter that formal adoption apparently never took place; the circumstances of the case indicate that the respective landowners (MPS and the local authority) offered the route as a public right of way, and that the public used it as one. Mr Neighbour moved into his property in 1959 and, along with several other user witnesses who have provided written evidence of their use dating back to the late 1950s, claims to have used the path ever since. There is no evidence to gainsay this.
12. No evidence has been produced to show that the way existed prior to the development at Priors Road despite Mr Neighbour's assertion that the local authority told MPC that there was a pre-existing right of way that had to be preserved. There is no significant evidence of use pre-dating 1958, and no map evidence to support its physical existence prior to the date of the sales brochure for Keepers Farm Estate submitted by Mr Neighbour, which is undated but which he indicates dates from 1957-8.
13. I consider that, in the absence of any evidence of a contrary intention, the use of the way during the statutory period identified by the OMA would, in itself, be sufficient to demonstrate that a right of way subsists; but I also consider that the dedication of the way can be presumed to have taken place almost from the start of its documented existence. I am satisfied that the route was a public right of way as a result of inferred dedication at common law by at least 1960.

The width of the right of way

14. The fact at issue between the parties is the width of the path as described in the Order, principally over the length from A-B. However, following my examination of the submissions, and as a result of my site visit, I also queried the width of the remainder of the Order route, and explored this issue with the parties at the inquiry.
15. The Order route has recently (in about 2011) been subject to physical alterations due to the erection of new fencing at number 38 Priors Road (Mr Zammitt's property) and the construction of new housing at the Keepers Farm Close end of the path. This new development is called Mantle Close and involved the demolition of several rows of garages associated with the pre-existing local authority housing. New houses, owned by the 'Radian' housing society, have been built on most of the land, with parking spaces on the land previously occupied by the most northerly row of garages.
16. The Order has been drafted to indicate a varying width of between 1.5 and 1.7 metres, most of the route being the minimum quoted width. The parties who have objected to the Order all claim that the width of the route ought to be a minimum of 1.7 metres to better reflect the width that has historically been available. Mr Zammit claims that the path at Point A was never 1.7 metres and that although he is prepared to move his fence and re-instate the path, the maximum that he could achieve would be 1560mm.

17. To the east of Point B, the present situation on the ground is somewhat different from the layout which existed when the path was dedicated. The Order has been drafted to indicate a width of 1.5 metres throughout this length, and Mr Hurst (of the OMA) explained that this was done as there was no clear evidence of the width. The non-statutory guidance on widths in orders¹ had been followed and resulted in the width of 1.5 metres in the Order, that being, in his view, the minimum width sufficient to allow two users to pass conveniently.
18. Nevertheless, Mr Hurst concurred at the inquiry that in the absence of any evidence that the route has been altered or stopped up by means of a legal order, the relevant location and width of the route should be that which pertained at the time of its dedication.
19. The width of the path claimed by the user witnesses is, in most cases, given as 1.8 metres. The applicant, Mr (then Councillor) Evans demurred citing a width of 1.4 metres for Points A-B (the width of the concrete) and 1.5 metres for Points B-D in his application. At the inquiry he explained that this was based on the advice of the local authority at the time, and his use of the way since 2007. He had subsequently been shown evidence which had caused him to alter his opinion of the width between points A and B, considering it to be more reasonable to describe it as 1.7 metres, a figure that appeared to meet with general agreement amongst those who had made statutory objections on the Order.
20. Mr Hurst considered that an 'anonymous' letter, that had been in circulation at the time of the application, may have influenced the witnesses to describe a width of 1.8 metres and that little weight had therefore been placed on this particular aspect of the user evidence. At the inquiry, Mr Conway explained that the 'letter' was merely a means of drumming up support for the application, and that the description of the path as being 1.8 metres wide was taken directly from a conversation which had taken place at that time with Mr Hurst. It had been assumed that the measurement of the width has been undertaken by Mr Hurst and was accurate. There was no intention to influence witnesses or to bias their evidence in any way. The information was intended to be factual.
21. Mr Hurst stated at the inquiry that he had not taken any measurements, but had relied on the width alleged by Mr Neighbour as being the equivalent of 6 feet. Given that the width of the route, particularly between points A and B, was a critical factor in this Order I was a little surprised that Mr Hurst stated at the inquiry that none of the witnesses had been interviewed. It is therefore necessary to rely on the evidence that does exist of the physical condition of the route at the time it was dedicated in around 1960.

Width of A-B

22. Mr Neighbour gave quite detailed evidence, both in writing and orally at the inquiry, about the work that was done by the residents to construct the concrete path between points A and B on the Order plan. Under some guidance from the then owner of number 36 Priors Road, who was a builder, a

¹ A) Planning Inspectorate Advice Note 16: "Widths on Orders" 5th revision September 2009

B) Defra Guidance: "Statutory guidance on the recording of widths on public path, rail crossing and definitive map modification orders" February 2007

- group of volunteers, drawn from the residents of the new houses, laid the concrete in batches; properly constructed with expansion joints and with the aid of shuttering. He stated that the present concrete surface is the original and that it has never required repair; likewise the street light is also the original structure.
23. It was not disputed at the inquiry that the width of the concrete along the length A-B is remarkably consistent at between 5 feet 1½ inches to 5 feet 2 inches (equating to approximately 1.5 metres).
 24. However in 1959/60 the width of the route was defined by the fences of the two properties either side of it, and Mr Neighbour was of the view that the builders had left a route 6 feet wide. This would, he claimed, be logical in the days before metric measurements were routinely used in this country. He was supported in this view by Mr Conway, who had experience in his working life of local authority planning and development. Mr Hurst indicated at the inquiry, in answer to a question from me, that in his experience the normal minimum width in use nowadays for adoptable footways in his local authority is 1.8 metres, which is the equivalent of six feet.
 25. Mr Neighbour described how the preparations for laying the concrete were made, explaining that the shuttering was made from wooden boards or planks about 8 inches wide and about 1-2 inches thick. These planks were kept in place by wooden pegs and a gap was left between the planks and the adjacent chain-link fencing so that the shuttering could be removed and re-used where possible (to keep costs down). When the concrete had set, the shuttering was removed and there was then a gap between the concrete and the fences which provided drainage. He said this gap would be about 4 inches wide or so, on each side.
 26. Taking all this information into account, the minimum width that would have been available between the fences at the time of dedication would have been 5 feet 2 inches (for the concrete) plus 2 inches either side (for the shuttering) plus a further 2 inches on either side (for the pegs) resulting in a width of 5 feet 10 inches or 1.778 metres.
 27. Mr Neighbour and Mr Conway were prepared to concede that when the residents of numbers 36 and 38 Priors Road had erected more permanent fencing, to replace the builder-supplied chain link fencing, it was entirely possible that some encroachment of a few inches may have occurred here or there, reducing the width from its original 6 feet.
 28. I place significant weight on the evidence provided by Mr Neighbour. It seems to me that the evidence of Mr Neighbour, for which no contrary evidence has been submitted, shows clearly that the path which was originally dedicated was probably intended to be 6 feet wide (1.82 metres), and was in any case demonstrably 5 feet 10 inches, or 1.778 metres, wide. Rounded up to the nearest single decimal place would result in a width of 1.8 metres; the width quoted in the 'anonymous' letter and the width alleged by most of the user witnesses.
 29. Mr Hurst was reluctant to accept that the path was a constant width along its length A-B and also reluctant to accept the Ordnance Survey ('OS') or any other mapping as evidence that the boundaries of it were either straight or parallel. Whilst I accept that the scale of OS mapping might preclude absolute

accuracy in showing either the width or any variations in boundary features, I consider that he was being over-zealous in trying to claim that the width of this section of the path was inconsistent.

30. The path was laid out by the developers who would have been using proper surveying techniques to establish property boundaries. At the very least I would have expected the boundaries to be marked out with pegs and string, even if a theodolite had not been employed. All the mapping evidence is consistent with the boundaries being straight and thus I am satisfied that any variation would have been very minimal. Given the consistency of the width of the laid concrete, I conclude that the same applies to the width of the path – any variation would have been too small to be registered. What may have happened in the intervening years (i.e. replacements to fences etc) is not material to my decision.
31. Although the parties who disputed the width given in the Order appear prepared to accept a compromise width of 1.7 metres, I must make my decision on the evidence, which supports a width of 1.8 metres. Whether or not a width of 1.8 metres can actually be achieved in the present circumstances is not a matter for me to determine. I am concerned only with what the evidence shows the width of the right of way to have been at the time of its dedication. There is no evidence of a legal order having been made to alter the original width, and thus that is that original width which should be recorded in the 2014 Order. If re-instatement to that width is difficult or impossible in the present circumstances, it is a matter for RBWM to determine how best to proceed using powers available to them under other legislation.

Width of B-C

32. Mr Zammitt was understandably concerned at the consequences of the Order in relation to his property. He was also concerned to be treated fairly since it was his view that the housing development at Mantle Close had similarly resulted in the width of the right of way having been noticeably reduced. Whilst I understand his concerns about fairness, I made clear at the inquiry that it was not my role to make 'deals'. I must determine the matter on the basis of the evidence.
33. Mr Hurst acknowledge that the width of the path between points B and C did appear to have been altered but considered that there was insufficient evidence now available to establish when that had taken place and what the width might have been. He had therefore resorted to the previously mentioned guidance and determined on a width of 1.5 metres.
34. Mr Zammitt had provided some very useful 'before and after' photographs which in my view illuminated the situation very clearly. He had taken the 'before' photographs because the Mantle Close development affected his own rear boundary and he wanted to ensure that he had some baseline information. As a civil engineer by profession he is used to dealing with such matters. His photographs and measurements indicate that prior to the construction of the Mantle Close development the available width of the route between points B and C was 2.4 metres, measured between the garage wall to number 36 Priors Road and the garage wall on the local authority land. It is now only 1.5 metres wide between a new brick wall with brick pillars (behind 36 Priors Road) and a railing fence on a concrete kerb base on the other side.

35. Mr Hurst considered that it was unsafe to rely on Mr Zammitt's measurements as it was not clear when the garage to number 36 Priors Road had been built, but I think that is slightly disingenuous. Mr Hurst could have carried out some investigations to try to determine the matter, but my view is that it is unlikely to have been constructed significantly inside the garden boundary, whenever it was constructed. The physical evidence on the ground supports the fact that the garage has been in place for some years. Even if its construction had resulted in there being a slight change to the boundary of number 36, the likelihood is that any boundary movement would have been *onto* the path and not *away* from it as property owners are loathe to sacrifice their land. Therefore it is more likely that the width of the path at this point would, if anything, have been reduced owing to the construction of the garage, rather than it being increased. Thus there would be little danger, when using the side of the garage to measure the width of the path, of including in the width of the Order route land which had not originally been part of the right of way.
36. Of course, as part of the Mantle Close development, a new boundary wall now has been built and, as a consequence, the garage no longer forms the boundary feature. The new boundary wall must have been built on land previously available to the public as part of the right of way, and this conclusion is supported by the extent of the old concrete surface visible on the ground between the garage wall and the new boundary wall.
37. On the other side of the path, the wall of the original local authority garages is shown on the OS mapping to have been very slightly to the east of Mr Zammitt's back garden fence, whereas the present railings are about 0.5 metres or so to the west of the line of his fence. Consequently there has also been encroachment onto the public right of way on that side.
38. I consider that Mr Zammitt's photographic evidence and measurements are irrefutable: the width of the path between points B and C which was used by the public prior to the construction of the Mantle Close development has been encroached upon; in total a distance of almost one metre when the relevant measurements are taken into account. I conclude that it was more likely than not to have previously been 2.4 metres wide along this section, and this is the measurement which should be included in the Order.
39. As before, if re-instatement to that width is now difficult or impossible, it is a matter for RBWM to determine how best to proceed using powers available to them under other legislation.

Width of C-D

40. The Order cites a width of 1.5 metres for this section because Mr Hurst concluded that there was insufficient evidence to identify a width for this section from the evidence submitted. As I have already indicated, none of the people who supplied user evidence was interviewed, a course of action which might have assisted in establishing an evidence-based figure.
41. During my site visits, from observations and from using the available OS mapping which shows the locations of the garage blocks, I was able to conservatively estimate that the former garages must have been positioned approximately 8 metres apart. The parties present at the accompanied site visit who were familiar with the area were in general agreement with my assessment of the location of the garages. Clearly the distance between the

rows was likely to have been measured using imperial measurements in those days, equating to a distance of approximately 26 feet or thereabouts.

42. The application map provided by Mr Evans does indicate a route through the garages which closely followed the front of the northernmost line of garages. This is the line which Mr Hurst stated that he considered was a reasonable representation of where the public would have walked, assuming that they took the shortest route.
43. I disagree with Mr Hurst's interpretation of the evidence. Looking at the maps attached to the user-evidence forms, the witnesses show a route consistently either down the centre line between the garages, or slightly to the north of centre. I can find only one, or perhaps two maps which show a line close up against the row of garages. I consider it more likely than not that people walked a comfortable distance from the garages, given the space available to them, and did not walk within a narrow band of 1.5 metres away from the front of the garages.
44. Given the available width of approximately 8 metres, and the fact that most people indicate a route between the centre line and the northernmost row of garages, I consider a better interpretation of the evidence in respect of the width of this section of the public right of way would be 4 metres or half the available width.
45. I also consider that the Order plan does not accurately reflect the direction of the route used by the public when the garages were present. The line on the Order plan would not have been available to them in its entirety, and I intend to modify the plan to rectify that.
46. If the construction of the present housing now prevents the use of the full recorded width, the local authority will need to take appropriate measures using the powers available to them.

Width of C-D

47. Mr Neighbour and Mr Conway considered that the route between Keepers Farm Close and the location of the former garages had not altered appreciably since the new development was built. This would accord with the OS map evidence which shows a route of a similar width. The only difference now is that the road has been surfaced with brick paviors and provided with an upstanding kerb on one side and a pin-kerb on the other. It is considerably wider than the 1.5 metres cited in the Order.
48. The same principle applies on this section as to the rest of the route: the width of the right of way should be based on the historic width used by the public. Mr Hurst implied that there was no evidence on which to base an accurate assessment of the width and so he had resorted to the minimum reasonable width, as per the guidance.
49. During my site visit I measured the width of the entrance track between the kerbs outside 31 Keepers Farm Close (3.8 metres) and between the same pin-kerb and the garden fence to number 30 Keepers Farm Close (4.0 metres). I place considerable weight on the view of Mr Neighbour and Mr Conway that the width of the route at this point has not changed except for the introduction of the kerbs (and the removal of the garden wall to number 30). There was no demarcation of a footway in the past, and there remains no such demarcation.

I consider it more likely than not that the entire width was available to, and used by, the public. I conclude therefore that the width of the public right of way for this section should also be 4.0 metres.

Other Matters

50. There is a lamp post situated part way along between points A and B which narrows the available width at that point. As I have already indicated, the lamp post has been present since the path was surfaced in 1959/60. I queried whether or not this lamp post ought to be included in the schedule to the Order as a limitation. Mr Hurst explained that it was not the usual practice of the authority to include such structures as limitations, and there was no suggestion by the objectors that it ought to be so shown. I have therefore decided not to modify the Order to record it.

Conclusions

51. 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

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

- In Parts I and II of the Schedule to the Order, where the width of the path is described, delete the existing descriptions and substitute with the following in each case:
 - A-B 1.8 metres
 - B-C 2.4 metres
 - C-D-E 4 metres
- On the Order plan, delete all references to the width of the path shown in rectangular boxes and with arrows at seven locations, and re-align the path as indicated by a dashed red line

Since the confirmed Order would affect land not affected by the Order as submitted, Paragraph 8 (2) of Schedule 15 to the Wildlife and Countryside Act 1981 requires that notice shall be given of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Helen Slade
INSPECTOR

APPEARANCES

FOR THE LOCAL AUTHORITY:

Miss Felicity Thomas
She called
Mr Anthony Hurst

Counsel instructed by RBWM
Principal Public Rights of Way Officer, RBWM

OBJECTORS:

Mr Philip Neighbour
Mr Stephen Conway
Mr James Evans

INTERESTED PARTY:

Mr Richard Zammitt

DOCUMENTS

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|----------|---|----------------|
| 1 | Statement with Appendices and Proof of Evidence | RBWM |
| 2 | Statement, Proof and appendices | Mr R Zammitt |
| 3 | Statement, proof and appendices | Mr P Neighbour |
| 4 | Statement, proof and appendices | Mr S Conway |
| 5 | Closing submissions | RBWM |