



Order Decision

Inquiry opened on 25 October 2016

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 01 December 2016

Order Ref: FPS/G4620/7/2

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 and is known as The Borough Council of Sandwell (Dudley Road East, Brades Hall, Tividale, Rowley Regis, West Midlands) Definitive Map Modification Order 2013.
- The Order is dated 3 December 2013 and proposes to record two footpaths on land lying to the south-east of the Gower Branch Canal, north-east of Dudley Road East, Brades Village. Full details of the routes are given in the Order plan and described in the Order Schedules.
- There were two objections outstanding at the commencement of the Inquiry.

Summary of Decision: The Order is not confirmed.

Preliminary matters

Application and objection

1. On 26 June 2009 an application was made to Sandwell Metropolitan Borough Council, the order-making authority ("the OMA"), under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to add a footpath 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 two routes, A – B – C – D – E – F – G and C – H¹.
2. The applicant objected to the omission of an additional claimed section to the north-west of point G, back to the towpath on the Gower Branch Canal ("the canal"). Unfortunately the applicant passed away before this matter was resolved and his objection was taken forward to the Inquiry by a member of the Sandwell Ramblers. This objector supported the case made by the OMA in relation to the Order routes and sought addition of this additional section.

Order drafting

3. I raised two matters at the Inquiry regarding the drafting of the Order. One related to the use of section 53(2)(a) to the 1981 Act rather than section 53(2)(b) and the other to the drafting of the Schedules, with submissions made as to how these matters could be addressed. However, as I am not confirming the Order, it is not necessary for me to deal with this further.

Procedural matters

4. I made an unaccompanied site visit on 24 October 2016. I held a Public Inquiry into the Order on 25 – 28 October at West Bromwich Town Hall. There was no requirement for a further accompanied site visit following the close of the Inquiry.

¹ Letters A – H as used in the Order map

Main issues

5. The Order is made under section 53(2)(a) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the DMS 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."
6. The OMA referred to the case in support of the Order under both section 31 of the Highways Act 1980 ("the 1980 Act") and at common law.
7. The sections of the 1980 Act 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 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...
8. 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'. The OMA had referred to 2006 and 2009 as possible dates initially, although relying on 2006 by the time of the Inquiry. The Temple referred to other matters which were said to show their lack of intention to dedicate and which may, therefore, call use into question. Following *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs, 2007* ("Godmanchester")² I shall need to determine the appropriate date and relevant twenty-year period.
9. To give rise to a presumption of dedication, it needs to be shown that there has been use, without interruption, as of right, that is without force, secrecy or permission, throughout the relevant twenty-year period. The Hindu Temple, the Shri Venkateswara (Balaji) Temple of the United Kingdom³ ("the Temple") argued that the claimed use had not been seen throughout their occupation and ownership. By reference to the documentary evidence, and personal knowledge, it was argued that the claimed alignments had not been available for use throughout the claimed period.
10. If the statutory test fails, then the OMA argue that dedication can be shown at common law. In such a case the question is 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. The burden of proof at common law lies on the person asserting

² [2007] UKHL 28

³ Also known as the Tividale Tirupathi Balaji Temple

the dedication and even quite a formidable body of evidence may be insufficient for such purposes.

11. It is open to the OMA to make an Order where they are satisfied that a public right of way can be reasonably alleged to subsist, that is Test B, by reference to *R v Secretary of State for Wales ex parte Emery, 1996*⁴ ("Emery"), quoting with approval *R v the Secretary of State for the Environment ex parte Norton and Bagshaw, 1994*⁵. However, I can only confirm the Order where I am satisfied, on the balance of probabilities, that public rights of way subsist, that is Test A.

Reasons

Ownership and use

12. The majority of the affected land, crossed by the sections B – C – D – E – approximately point F and C – H, is within land owned and used by the Temple. I understand the majority of this land to have been purchased from the Black Country Development Corporation ("the BCDC") in 1998.
13. The land crossed by the section A – B, along with land to the south-east, has been owned by the OMA since 1998, with an additional area having been transferred to the Temple in 2015. I understand the area to be used as public open space, with a formal children's play area and all-weather pitch.
14. I understand the land crossed by the section on which point F – G is situated to be owned by another section of the Temple, whilst an area around point F is unregistered land. The OMA refer to the area bounded to the north-east by the River Tame ("the river") and the north-west by the canal, as amenity land. The area known locally as Monks Tip is situated on the southern section of this generally triangular area, partly on the land occupied by the Temple.
15. The canal runs on north-western side of the affected land, parallel to the Order route, A – B – C. There is a canal towpath, which is used as by the public, running along the full length of the canal in this area.

Calling into question (Section 31 of the Highways Act 1980 – the statute)

16. 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. Whilst I agree with the OMA that only a landowner can demonstrate a lack of intention to dedicate, actions by others can be sufficient to call use into question. However, whatever occurs, and whoever causes the question to arise, the action must be sufficient to bring it to the attention of the users of the route that their right to use it has been challenged.

Planning application process, 1992 onwards

17. An outline planning application was made for the "*Construction of Hindu Temple and associated buildings, structures, infrastructure and landscaping*" on 16 December 1992. I understand that the owner of the site at the time was the BCDC, who were also the relevant planning authority.

⁴ [1996] 4 All ER 1

⁵ [1994] 68 P & C.R. 402

18. The Temple indicated that the plan for permissive access was part of the intentions from the outset and discussed in planning meetings, which were open to the public. However, no minutes of the meetings were provided and there was no record of attendance. None of the users referred to such meetings in the information supplied by way of user evidence forms ("UEFs") and associated material from the applicant.
19. The planning application was amended in February 1993 and outline planning permission was granted on 8 June 1994. Reserved matters approval was granted on 23 January 1995.

Public meetings, 1993

20. The Temple indicated that the plan to develop the Temple on this site led to public meetings in local churches to explain the proposal and that these were well attended, as the development was a 'hot topic' in the local area. It was made clear at these meetings that the public would be allowed to continue to use the land, but this would be with permission and subject to closures on certain days.
21. There is no record of these meetings to show who was present or what was said. None of the users referred to having attended such a meeting or having any knowledge of what was intended.

Radio interview, 1993

22. At around the same period the Temple indicated that an interview was held on local radio regarding the development. Again it was made clear that the public would be allowed to continue to use the land with permission.
23. As with the meetings there is no record or transcript of the interview. None of the users referred to having any knowledge of this.

Press briefing, 1993

24. The Temple also met with local reporters to explain the development, including access to the land. No press cuttings were supplied and the users did not mention any relevant press reports.

Section 106 Agreement, 1994

25. As part of the planning process an agreement was drawn up between the Temple and the BCDC. The Temple fairly acknowledged that the agreement under section 106 of the Town and Country Planning Act 1990 was made by BCDC in their role as the planning authority, rather than as landowners.
26. Paragraph D(i) of the agreement, dated 8 June 1994, set out that "*For so long as the Property shall remain in use for religious purposes to permit the public to have access on foot to the areas of the Property shown cross hatched on Plan 1 as a privilege and not a right (without by reason thereof dedicating the same to the public either presently or in the future as a highway common village or town green open space under the Open Spaces Act 1906 or any other right other than as hereunder granted) between the hours of 08.00am and 7.30pm or dusk if earlier save on the following Hindu Festival days:*

<i>Date</i>	<i>Festival</i>
<i>14th January</i>	<i>Sankranthi (Pongal)</i>
<i>Variable (October/November)</i>	<i>Diwali</i>
<i>Variable (last Sunday in October)</i>	<i>Kalyana Utsavam</i>
<i>and on the annual dedication</i>	<i>Festival Day</i>

"...AND PROVIDED ALWAYS FURTHER that the Applicant may temporarily deny such access to the public in general for a continuous period of up to three months in any one calendar year..."

"...AND PROVIDED ALWAYS FURTHER that the Applicant may decide permanently to deny such access to the public in general thereafter..."

27. Such agreements are generally considered private matters between the parties concerned and, as with the rest of the planning procedures mentioned above, there is no evidence to show that this was known about and in the public domain.

Next step leaflet, November 1994

28. In connection with the progression of the planning the Temple provided a copy of a leaflet which was produced and circulated in the local area. The leaflet indicates that *"It is not intended to fence off the boundaries of the site and visitors will be welcome to walk on the open parts of the land each day throughout the year between 08.00am and 7.30pm, or dusk if earlier, except on four festival days (Dawali, Sankranthi, Kalyana Utsavam and Dedication Day)..."*

29. I am satisfied that the evidence shows that this leaflet was circulated and so 960 local households, which would be most likely to be home to the main users of the land, should have been aware of this. The one local witness who gave evidence said that she did not recall having received this leaflet, although fairly admitting that she often missed out on circulars, or received two, due to her house numbering. None of the UEFs referred to having received this leaflet.

Fencing and locking of gates, 2006

30. Following some incidents of theft from the Temple site, the decision was taken to fence it, locking the gates overnight. It appears that it was this event which led, eventually, to the making of the application. The Temple were able to supply an invoice for this work dated 16 October 2006 and it was accepted that the gates were locked overnight from around this time.

Summary

31. *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)⁶, 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*

⁶ [1885] HL 378, 10 App Cas 378

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."

32. In this case I consider that there are a number of acts which could objectively be seen to indicate an intention on the part of the Temple to allow access under certain conditions, subject to the ability to withdrawn such permission to use the land. However, the Temple were not the freehold owners of the land until 1998 and so I agree with the OMA that their actions were incapable of demonstrating a lack of intention to dedicate a public right of way prior to that time. There is no evidence of communication to the public, for example by on-site notices, of a lack of intention to dedicate the land to public use, even on taking ownership in 1998.
33. Although I consider that these matters could have called the use into question, there is insufficient evidence of successful communication to the users. The clear evidence that the public were aware that their use of the routes was being challenged arises from the recognition of the fencing blocking them, leading to the application to record the routes as public footpaths. It may be that there are people who were aware of, and took account of, the matters raised through the planning processes and so did not use the routes nor complete UEFs, but I cannot make that assumption without evidence that this is the case. I am satisfied, on the balance of probabilities, that the fencing and locking of gates was the event called use into question and so agree with the OMA that the relevant twenty-year period is, therefore, October 1986 – October 2006.

Documentary evidence

34. A large number of documents were submitted to the Inquiry. Whilst I have taken account of them all, I shall deal only with the main relevant points here. Concerns were raised about annotations and additions on the documents, made by both sides no doubt in an attempt to assist me. I have, wherever possible, reverted to the 'clean' document in analysing the evidence.

Ordnance Survey maps

35. The OMA refer to the Ordnance Survey ("OS") maps as showing that the routes claimed could have been walked, whilst the Temple say that they show that the routes were physically impassable and so no right of way could have been established. The formation of OS was a response to a military need for accurate maps. Over the years a variety of maps have been developed to meet the growing need for up-to-date maps of the UK. Since 1888 OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey. They do not show whether any route was public or private but may assist in conjunction with other information. I shall assess what can be taken from the OS mapping against this background.
36. The earliest OS map dates from 1884 (with maps from the mid – late 1880s provided) and shows the general area as 'Colliery' with shafts and a disused pit noted in the area near point A and old shafts near point D. Bradeshall Farm⁷

⁷ As it was then marked by OS although subsequently referred to as Brades Hall Farm

(“the Farm”) is shown to the east of point B with an access coinciding in part with the northernmost section of the route A – B. Even making allowance for the difficulties in overlaying maps the physical route north-east to the cottages, which were formerly sited north-west of points H – C – D, appears to lie a little to the north-west of the Order route B – C.

37. Section E – F crosses land shown as '*Liable to Floods*' on one version of the early mapping. I agree with the Temple that a partially coloured map version shows that points E and G were within a pond. Reeds and marshy ground are increasingly shown in this area throughout the OS mapping series, suggesting it was becoming more subject to overgrowth. However, a pond is identified on the 1960s mapping and appears to affect the alignment E – F, along with what seems to be a ditch or drain running south-west from this area.
38. There are also fields and associated boundaries which affect the Order route alignment D – E from the mid-1880s onwards. Changes to the south of the canal basin on the 1938 map, with further alterations in the 1960s, would also have affected the section C – D. The 1971 OS map shows that parts of the section D – E – F – G would have passed through a refuse tip and two ponds.
39. The 1976/78 OS is effectively a blank with only the Canal basin and the electricity pylons marked as physical features, with the towpath alongside the canal. One version of the 1976 OS map suggests that the alignment from point A may have been in that location by that stage. An annotation denotes the general area as '*Refuse Tip*'. OS mapping from the 1980s continues to show little detail within this area. Although the OMA suggest that this means the land was capable of being walked without any material obstruction, the OS did not identify any route on this land which actually was being walked.
40. By the early 1990s OS are showing the section A – B – C – D as a physical track running to the '*Gas Pumping Station*', which sits just to the south-west of the canal basin. There are lines across the track as it leaves the road, Dudley Road East, as well as further to the north-east, suggesting gates or barriers.
41. The OMA seek to rely on the OS mapping to show that a route could have been walked but I agree with the Temple that this mapping supports their contention that it could not. Although the OMA accepted that parts may have been obstructed at times, they suggested, by reference to *Lewis v Thomas, 1950*⁸, that an interruption, by for example flooding of a footpath, would not be sufficient to bring home to users that a landowner had an intention to deny a public right of way. I agree with this but think it misses the facts of this particular case; the physical conditions recorded by the OS, of altering boundaries, ponds and ditches, suggest that the public would have been unlikely to choose, indeed unable, to walk on this alignment over much of the time relied on by the OMA as being supported by user evidence, that is from 1928 onwards. With the exception of section A – B – C – D, OS surveyors have not recorded a physical feature on the Order route alignment at any time.

Photographs

42. The 1938 aerial photograph shows part of a track, which may correlate to the section around point C, with the cottages and fields to the south. Monks Tip

⁸ [1950] 1 KB 438

appears as an industrial area, subject to tipping, given the other evidence. The shadowing on the 1961 photograph suggests that there were areas of higher ground on Monks Tip and the amenity land by this time. By 1969 there were vehicular tracks through the area, which, with the exception of parts around point C, do not appear to align with the Order routes. There is a feature across the route near point G which appears to be a culvert. The 1970 photograph shows only a small section to the southern end of the site, where a track must have run from Dudley Road East, although not clear on this photograph.

43. The 1980 aerial photograph shows a physical track on the route A – B – C – D, leading into the area of Monks Tip, which as in earlier photographs appears to be a working area. I do not consider there to be any indication of the Order routes beyond points C or D. The 1985 photograph shows a similar situation, although with clearer indications of a continued vehicular route beyond point D, not on the Order route alignment.
44. The aerial photograph from 1989 in conjunction with the set of photographic views from June 1989 show the Monks Tip area covered with bare earth, as part of the restoration works. To the south of the mound, around the location of the main Temple building, was a reasonably flat grassed area. However, works were clearly being carried out on the mound itself at this time, with machinery and vehicle tracks visible on the bare earth. The OMA have overlain their interpretation of the Order route on one of the photographs, suggesting that it shows that the public could have walked on this land. I find there to be no indication on the 'clean' photograph that the public were in fact walking on the route suggested.
45. The photographs suggest that there was a route alongside the river, to the north-east of the pylon between points F and G. However, I consider, even if that is what is shown, the alignment differs from the Order route, being directly along the riverbank. The aerial photograph is of such a scale that it does not show a physical route alongside the river, even where seen on the other photographs.
46. The view shown by a photograph taken in August 1992 caused some disagreement. The OMA thought that it showed an opening on the route C – H in the post and rail fencing, which ran alongside the canal towpath. The Temple argued that the fencing was shown to run along the entire length and so there was no way through at this point. It seems some confusion was caused by the print copying introducing lines. I am satisfied that the photograph shows fencing separating the site from the towpath, and there were remains of that fencing still onsite at the time of my visit. The location of the route C – H is difficult to identify in an oblique photograph and must be taken into account with other relevant evidence, such as the survey plans, referred to later.
47. The December 1993 photographs of Monks Tip show 'ledges' on the mound edge, which on balance are likely to have been the vehicular routes created and used during restoration. I agree with the Temple that fencing can be seen but it is unclear whether this crosses the track. The 1994 aerial photograph shows a route on the ground apparently on the Order route alignment, which is likely to be the 'ledge' seen on the earlier photograph. There are also other routes in the area of Monks Tip, which has by this point greened over. The situation remains much the same in 2000, by which time parts of the Temple were in place. This is also shown by the photographs dating from 2001, 2004 and 2006.

48. Photographs cannot provide evidence of the status of a route, only that it might be seen on the ground at the date the photograph was taken. I consider that the early photographs demonstrate, on the balance of probabilities, that there was no route on the Order alignment, apart from sections of A – B – C – D. The earliest photograph which demonstrates a physical route on the Order alignment dates from 1994, whilst the 1989 photographs, which are within the relevant twenty-year period under the statute, do not show a route. None of the photographs are of a scale or quality to show a route on the alignment C – H.

Waste disposal, planning applications and associated documents

49. Following the mining of the land, as identified on the OS mapping, the area was subject to tipping. It seems this was already occurring by the time Staffordshire County Council gave permission for *"...the tipping of waste materials on the east side of Gower Branch Canal and at rear of Brades Hall Farm..."* as they referred to *"...existing refuse deposits..."*.
50. Further permissions have been given for tipping on various parts of the site as well as plans from 1961 onwards for development for *"Residential and ancillary purposes including public open space, shops, schools."* The planning related to the land crossed by the Order routes as well as the now-developed land to the west of the canal. The description of the 55 acre site indicates that *"The land is undulating and in part marshy. The eastern part of the site is occupied by a farm [unreadable addition here], and the land is mainly used for agricultural purposes...Footpaths also cross the land."* This was outline permission and there were no details of the location of any footpaths or any indication as to whether they were public or private routes.
51. In 1965 permission was granted for tipping of inert material to level the site prior to residential development. It seems that there was tipping of canal dredging's on the land to the north, whilst the land to the south was used for foundry sand reclamation in the late 1960s and early - mid 1970s, with the Farm used as the site office area. The Temple argues that the sand processing would have been an industrial use of the land, incompatible with public access.
52. In October 1974 a planning application was made for open space and playing fields with the previous use noted as being a refuse tip and present the tipping of foundry sand. The West Midlands Metropolitan County Council comments at consultation were reported as *"...in view of the existing vehicular access to the private tip at the rear of the site the design around the children's play area should minimise the possibility of children dashing into the path of lorries. Details of the final access arrangements and car parking provision to be agreed with the County Surveyor."* The children's play area was intended to lie to the south-west of points C - D. The original letter indicates that *"Access to the canal towpath should, if possible, be facilitated."* I agree with the Temple that this suggests that there was no existing access to the towpath at that time.
53. A letter from the Metropolitan Borough of Sandwell to Leigh Land Reclamation Limited in March 1986 indicates that *"It has recently been brought to my attention that your company has erected gates across the access road from Dudley Road East to your land currently undergoing reclamation...the access road is owned by the Council and your company has right of passage over the track. I have no record of the Council's permission being given as landlords, to the*

erection of these gates. While I have no objection, I would be grateful for a spare key...in order that I can gain access to the land...". The point was made that West Midlands Gas would also require a key for their proposed compound.

54. The response indicated that the Council had been advised by telephone "...on 10 September 1984...that the gates were being reinstated to comply with Planning Permission." This suggests that the gates may have been put in as early as 1984, with the reference to 'reinstatement' suggesting that there had previously been gates over the route. The relevant waste disposal licence, SL 374 covering the Monks Tip area, was accompanied by a letter of 14 July 1982 stating "*May I draw your attention to condition 9...regarding fencing requirements and site security...I may have to ask for more stringent measures to be implemented if it is apparent that these initial fencing requirements are proving inadequate.*"
55. Condition 9 sets out that "*No deposit shall take place until the site is bounded by fencing and a gate provided at the site entrance...fencing required...shall be maintained...the gate shall be locked outside operating hours and all other reasonable precautions shall be taken to prevent unauthorised access to the site.*"
56. The OMA point out that condition 10 states that "*Any definitive public right of way shall remain unobstructed or alternative route provided.*" There was no definitive public right of way on the site; otherwise there would be no need for this Order.
57. Similar conditions were set out in relation to earlier waste disposal licences, SL75 granted 4 November 1977 and SL76 from 8 August 1978. Although the OMA suggest that any associated fencing was for safety reasons, and not to challenge a public right of way, I consider that this would have clearly interrupted use during the periods of time in which some of the UEFs indicate people to be walking on this alignment.
58. In June 1988 the BCDC began a compulsory purchase process indicating that the "*purpose of the acquisition is to secure the regeneration of the area...*". In December of that year there was an attempt to vary the conditions for site reclamation of Monks Tip, as the initial time limits could not be met due to use of the land by other parties, which affected the tipping rates. As a result, they sought that the completion to agreed levels would be achieved by 31 December 1990, grass seeding by Spring 1991 and landscaping in the period October 1990 – March 1991; this was not agreed. A letter from BCDC to the occupiers dated 21 March 1989 shows that tipping, albeit unauthorised, was being carried out in an area affecting part of the alignment E – F.
59. Despite arguments that there were no signs in connection with the landfill site, the audit of 1989 clearly refers to the boundary being fenced at this time with a large sign at the entrance, although there is no information as to the wording. It was noted that re-grading was taking place, with a letter indicating that the gates would be closed on Friday 5 May 1989 for grading.
60. The OMA sought to place weight on a "SKETCH LAYOUT" submitted with the December 1992 application as showing that the Order routes existed and were accepted by the Temple. As the representative for the Temple at the Inquiry had also been their representative during the planning process, the Inquiry was in a good position to clarify these matters. I agree with the Temple that the dotted line indications of paths do not correlate to the Order routes, with no route shown on the alignment C – H. Other routes were shown in the same way in connection

with the proposed Temple buildings, which did not then exist. Some confusion may have arisen as the fencing, shown on the Order base mapping, does not in fact follow the then ownership boundary.

61. The "*Description of the Site*" mentions the towpath and the roadway leading to the gas compound but makes no mention of any other existing paths. The OMA noted that the section on "*Landscaping*" said that there would be "...*parkland around the perimeter: largely grass, with a wide surrounding band of trees, the pond, public paths, car parking, and play areas...*". The Temple representative indicated that his intention had been to refer to paths available for the public, rather than public rights of way and in particular to draw a distinction between recreational areas and the inner areas intended for worshippers. This would be in line with the section 106 agreement, which eventually formed part of the planning permission. I am satisfied that these documents are insufficient to support the suggestion that the Temple either recognised pre-existing public rights or intended to dedicate such subsequently.
62. Other uses of the site were discussed, such as a care home and road improvement of the A457, which would have cut through the Order route alignment. An unsuccessful application to register a Town or Village Green ("TVG") in July 1993 was fairly noted by the applicant to have been motivated by heavy opposition to the building of the Temple, in an attempt to prevent construction and retain the area for community use. BCDC objected to the TVG application as the intention had always been for the development of the land.

Surveys and other information

63. In around 1974 the Farm was damaged by fire and subsequently demolished. The estate intended to sell the land, now known generally as Monks Tip and running north to the river, and there appears to have been a question over access to the site. In 1975 a Trustee made a statutory declaration identifying the route D – C – B, and then south to the road on the old alignment west of A, as having been used by them for at least twenty years for all purposes connected with the use of the land.
64. A survey of Monks Tip "*as existing February 1977*" showed no physical feature representing an existing footpath on the Order route alignment. There was a vehicular access track from around point D towards point E but a pond and culvert would have blocked any use of the claimed alignment F – G. Although there was a clear intention to fill and cap the land from the 1970s it seems that tipping continued, with continued approval for landfilling into the 1980s. The permission for the "*Final phase of land reclamation to approved levels by controlled land filling including final shaping and seeding at Monks Tip...*" was granted in 1983.
65. There is evidence that in the period 1986 – 1988 Severn Trent Water Authority were carrying out works in connection with the river. The access crossed and/or followed parts of the Order route F - G. I do not consider that the documents support the assertion of the Temple that site compounds for this, or in connection with the Gulf Oil Refinery, covered the Order route. Although I agree with the OMA that this appears to show a route running north from approximately point F, I note that the access is from the east, not west along the line of the Order route.

66. A site survey from January 1986, in connection with that proposed land purchase for the gas compound, shows the gates referred to in connection with Monks Tip and also confirms the location of a gate to the north-east of point D. The gate was still in place according to the July 1992 survey in connection with developing all-weather football courts.
67. A survey from 1989 shows the existing fence line enclosing Monks Tip. This ties in with the fence shown in the 1986 site survey and although no gate is shown on the later survey I consider it reasonable to assume that there was still a gate giving access to the site from the south. The Land Use Consultants sketch design of April 1989 similarly shows the existing fence with no gate. I agree with the Temple that the plans show that the existing fencing was buried by the landscaping works, explaining why those users giving evidence to the Inquiry were unaware of fencing. The design also shows a "fence line" and return in the fence north-east of the route C – H. Both "*existing vegetation*" and "*proposed planting*" are identified the plan. It also shows a number of "*proposed paths*", which do not in my view match the Order routes, but no 'existing paths'. This is not supportive of there having been paths already in use by this time, three years into the relevant twenty-year period.
68. A report of October 1990 by Parkman Consulting Engineers referred to Monks Tip indicating that "*In accordance with the existing waste disposal licence, the tip is currently being landscaped, by the addition of a low permeability cap. The bulk of the site, formerly occupied by Brades Hall Farm, consists of a grassy plateau. It is currently used as recreational open space...A track exists on the bank of the Gower Branch Canal which leads to the British Gas Compound...A flat, 4m wide, terrace of land exists between Monks Tip and the River Tame. The terrace has been grassed and is occasionally mown...*".
69. A topographical survey dated 7 March 2000 identifies a "*1.2 m high wooden post & rail fence*" along the western side of the hard-core track with no indication of a break in the fence to the south of the return, on the alignment C – H.
70. The area, in particular of Monks Tip, was planted up as part of the Black Country Urban Forest from the early 1990s. A leaflet of walks in the area produced in 2004 and, I understand still available on the BBC website, refers to Monks Tip saying that "*Although the site is open and has several paths that lead over the mound, it is private property and there are no formal public rights of access onto the mound from the towpath.*"
71. The OMA felt that the location of gates in the 2006 fencing matched public access, meaning that the Temple knew that use was occurring. The Temple indicated that the gates at F were for the Environment Agency to reach river floodplain, although the OMA demonstrated that this gate had altered in period 2011/13 and did not appear to have been available as anything other than a pedestrian access prior to that, placing doubt on the reason for it.

Summary

72. The OMA have placed weight on the depiction of parts of the routes on certain plans at certain times. I consider that most maps, photographs and surveys are potentially helpful evidence of the physical existence of routes, especially if consistently shown. However, they are less helpful in terms of determining the

status of any routes shown. The documents may be more helpful in conjunction with other evidence and all should be considered together.

73. I consider that the documentary evidence shows a physical feature giving access to the Farm, and the cottages beyond, from at least the 1880s. However, I do not consider that the route initially matched the Order route over any significant length. The 1965 OS map still shows access to the Farm on the old alignment and it is not until the 1980 aerial photograph that a physical route on the route A – B – C – D is seen, although there is a suggestion it may have been in place in the mid-1970s.
74. The 1975 statutory declaration relating to use of the route to access the site, and reference to it in the 1974 planning application as existing vehicular access to the private tip, support the argument of the Temple that this was a private vehicular access. Of course, public and private rights can co-exist but there needs to be evidence of the public rights. If this was a public highway, it would not have been possible for the southern alignment to be altered without due legal process. I note the reliance on *Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales, 2001*⁹ (“*Fernlee*”), on this point but do not consider that it assists in relation to the matter. *Fernlee* found that a route had existed for the full 20 years without interruption other than, possibly, ones of such a very temporary works related nature as not to be significant. In this case the evidence demonstrates a permanent, and I consider significant, alteration to the route on the ground at the south-western end, which is unsupportive of there having been any recognition of the route as a public highway at that time.
75. There was also evidence of fences and gates affecting different parts of the Order route over time which, although not necessarily inconsistent with a public right of way, raise some questions over the reliability of the information on some of the UEFs. It would be an offence to erect gates, even unlocked ones, over an existing public footpath without permission. No such permission was sought for the gate which had been erected and locked across the access road near point A by at least January 1986, if not from 1984, until the 1990s or the gate north-east of point D.
76. The OMA relied on the applicant indicating that landscaping was completed by the late 1970s to show that use was possible. On the basis of the documentary evidence, I believe this may relate to the southern section of the site only. In relation to Monks Tip I consider that the evidence shows that it was used for tipping and subsequent reclamation, with approved landscaping contours and levels to be achieved, until the surrender of the licence in late 1990. I am satisfied that the works on site would have directly affected the Order route alignment in this area, with differing heights across the site, throughout the first six years of the relevant twenty-year period.
77. The earlier evidence, OS mapping, surveys and aerial photographs, show on the balance of probabilities that there was no route over Monks Tip. It is not until the 1994 aerial photograph that I consider that a physical route can be seen which, on balance, reflects the Order route A – G in its entirety.
78. I find no indication of the existence of a route on the alignment C – H in any of the documentary evidence. Taking account of the Order base mapping, showing

⁹ [2001] EWHC Admin 360

the return in the fence and a feature on the ground to the south-west, the 1992 oblique photograph and the surveys from April 1989 and March 2000 I consider, on the balance of probabilities, that there was no gap in the fence until after 2000. People may well have been able to climb over or through in order to fish in the canal but there is no indication of any earlier access in this vicinity.

Use of the Order routes

79. The OMA place reliance on the UEFs at face value and suggest that they provide evidence sufficient to give rise to a presumption of dedication. In analysing the UEFs, as was done for the Temple, I agree that there are some matters of concern. There were 24 UEFs attached to the application to record the routes but only two of those who completed UEFs provided evidence to the Inquiry to clarify the details of their use.
80. The application referred to a map dated 11 May 2009, which appears to have been produced by the OMA for the purpose. The first map is noted to be superseded, with a second map of the same date annotated '*AMENDED PLAN*'. Another plan was produced by the OMA dated 1 June 2010. A further amended plan was submitted by the applicant dated 21 September 2011 and I understand that this was the plan on which the OMA made their decision on the application.
81. Although I agree with the Temple that there have been changes to the application route this is not an unusual situation as attempts are made to clarify the route claimed. However, there is an unusual feature in this case as the UEFs rely under question 15 on witnesses having seen the map of the claimed route, rather than completing individual maps. As the UEFs were completed in the period March – June 2009 only some witnesses could have seen the application map dated 11 May 2009 at the time of completing their UEFs.
82. In relation to the earliest periods of use it was clear from the witness to the Inquiry that such use was not in connection with use as a public right. She was visiting friends and neighbours who lived at the Farm and the associated cottages. Another UEF refers to use from 1928 for the delivery of coal, to his aunt and uncles cottage, which appears to be the same cottages, until the Farm was vacant.
83. Although the OMA suggested that user evidence going back to 1928 would be sufficient to overcome temporary obstructions, and so support a public right of way both by 20 years statutory prescription and at common law, I consider that this use, by invitation, would have been 'by right' and not 'as of right', as required. The reliance on there being 78 years use over the Order route is not justified by the evidence as a whole. As discussed above, the documentary evidence shows that the route claimed was not shown to be available in its entirety until 1994, with the section A – B – C – D following an alternative alignment in the early years. Any earlier use may not have been on the alignment now claimed and the earliest evidence does not show use 'as of right'.
84. It appears to have been assumed by the OMA that where people have replied to the question as to how many years they have regarded the route as a public right of way, this is a reflection as to the number of years of use. In the absence of a fair proportion of user witnesses providing direct evidence to the Inquiry I do not consider that this is a reasonable assumption. Reading the responses to the UEFs in a straightforward manner there are a number of individuals who appear to

have taken part in the organised walk on Saturday 22 September 2001. They have subsequently regarded the route to which they are referring as a public right of way but the response to question 2(a), as to when they have actually used the way, suggests, on the balance of probabilities, that they only used it on that one occasion, as argued for the Temple in response to the consultation.

85. The witnesses who gave evidence to the Inquiry included the organiser of the 2001 walk, as part of the development of a local walking strategy. Although one of the witnesses had used parts of the route in earlier years, both began to use the route more recently in the mid-1990s. There was very infrequent use in one case, "...at least once [a year], sometimes more...". For the other, use was daily with a dog in the period from 1994, although only to around point E, as the continuation from there was rough and steep. Both had used parts of the claimed route but also detoured to the top of Monks Tip to look at the views.
86. Although the OMA argue that disturbance to users of the path, by works or restoration, was not likely to be significant, I agree with the Temple that public access would be incompatible with waste disposal. A witness to the Inquiry said that she did not go there when there were diggers working but was aware that youngsters, including her son, would go to play on the tip, even when told not to by parents. The Inquiry was unable to ask questions regarding claimed use in the early period, as those present at the Inquiry did not begin their use as of right until after those works were complete.
87. There appears to be some agreement that the tracks initially created over Monks Tip arose from use by motorcyclists in the early 1990s. The applicant referred to this, indicating that walkers followed the made tracks for ease of use. This suggests that use over Monks Tip began at a later date than suggested by the untested UEFs.
88. I note the comments of the Temple in relation to those who submitted evidence of general use of the area in connection with the TVG application and have subsequently given evidence of using a defined line in relation to this matter. I agree that the inability to clarify why there appear to be differences in the evidence relating to the same land lowers the evidential value. Although the OMA felt that the declarations made in relation to the TVG application showed that the land could be used for recreational purposes, it must be remembered that the TVG application was unsuccessful. I do not place reliance on this user evidence regarding use for lawful sports and pastimes in relation to the claim I need to consider of use to pass and repass over a defined line.
89. Without further information I do not place reliance on a UEF which refers to access to the canal by car and foot for the purpose of fishing as supportive of a public footpath, other than potentially in relation to the section C – H. Mention was made at the Inquiry that some people drove to this area in order to fish. I do not consider I am able to assume that the frequency of use of section C – H is the same as the remainder of the route, as people would be likely to choose either the canal towpath or the section A – B – C.
90. The OMA also placed reliance on a petition of 110 signatures entitled "*CLAIM FOR A RIGHT OF WAY - BALIJI TEMPLE - DUDLEY ROAD EAST*" as indicating use of the routes by a number of people. As discussed at the Inquiry, I do not consider such weight can be placed on this petition. The information asks for the claim to

be accepted "...to aid and obtain the benefits of exercise, health and green environment...". Whilst this reflects a desire for the route, which was reiterated at the Inquiry by the Sandwell Ramblers representative, in my view it provides no evidence that these individuals have in fact used the routes as claimed or, if they have, over what time periods and with what frequency. This is insufficient to provide evidence of use in such a matter.

91. Taking account of the fair clarification of use provided to the Inquiry, which alters the apparent period of use as set out in one of the original UEFs, and the matters I have referred to above, I do not find it appropriate to rely on the UEFs alone as giving the full picture of the use. This is no criticism of those completing the UEFs, or most helpfully assisting me with their own evidence of use at the Inquiry. The Inquiry seeks to clarify the written information and, as a result of that process, I am not satisfied that the written evidence is of sufficient quality in this case to enable reliance to be placed on it.
92. Looking at the user evidence as a whole, placing most reliance on the verbal evidence, along with such of the written evidence as I feel able, I find it insufficient, on the balance of probabilities, to lead to a presumption of dedication of public rights over the land in the period 1986 – 2006. There are a few people who appear to have made more regular use of at least some parts of the route but many only seem to have been there on one occasion and then not following the entirety of the claimed routes. In addition to the regularity of use, the numbers of individuals is low in the earlier part of the relevant twenty-year period. The OMA argue that the location is not a town centre, where there might be an expectation of high levels of pedestrians. However, I find there to be a lower level of use than I would expect in this location, which is within an urban area with housing estates to the east and west, with industrial premises nearby.
93. Although dealing with a case under Schedule 14 of the 1981 Act, *Emery* makes it clear that the point of an Inquiry is to deal with a conflict of evidence. Unfortunately, with only two individuals clarifying their user evidence, one of whom made it clear from her answers that her earlier use was not 'as of right' but rather 'by right' I feel unable to place significant weight on the untested evidence.

Conclusion in relation to Section 31 of the Highways Act 1980 – the statute

94. Taking account of the evidence as a whole I am not satisfied that it has been shown that there has been a route physically available to the public on the claimed alignment A – G prior to 1994. Given that I am satisfied that use was called into question in 2006 this means that, on the balance of probabilities, such use as there was occurred over a twelve year period. I am not satisfied that the documentary evidence shows a physical route on the alignment C – H at any time but, if the fence was open at any point, rather than climbed through or over, then it seems this would have been after 2000, leaving just six years.
95. I am not satisfied that it has been shown, on the balance of probabilities, that there has been sufficient use, by the public, as of right, of a single defined line over any part of the Order routes, or the additional section from point G back to the canal, for a full and uninterrupted period of twenty years prior to such use being called into question, to raise a presumption of dedication. As a result, I do not consider that any of the routes, or parts thereof, can be presumed to have been dedicated as public footpaths under the statute.

Conclusion at common law

96. Reference was made to *Mann v Brodie (1885)* which refers to the situation “...where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.” A public right of way depends on use by the public as of right, continuously and without interruption. The number of users must be such as might reasonably have been expected if the way had been unquestionably a public highway. User must be from one terminus to another, not private use, or use by licence.
97. I do not find the documentary evidence as a whole supportive of the long-term existence of physical routes on the Order alignments. I consider that the general use of the land, for tipping, with plans for development over a number of years, has been without any understanding that there was a public right of way on the site which needed to be taken into account. The physical routes have been altered over time without any legal procedure being followed.
98. The evidence as a whole does not support the suggestion made by the OMA that the evidence of the 24 users shows that the route physically existed in 1974 and therefore Council acquiesced to use from that time. I am satisfied that there has been some use of the Order route, even if the Temple employees were apparently unaware of it. However, the requirements to show dedication at common law present a high barrier to anyone wishing to demonstrate both an intention on the part of the landowner and acceptance by the public.
99. As I have discussed above I am not satisfied that there is evidence of long public use over the Order routes, with the earliest evidence clearly relating to private rights. There is no specific length of time in which to show dedication has arisen but the shorter the period the greater the evidence of use required, to show that the owner, particularly where that owner does not live on site, was aware of the use. In this case, for the reasons already set out, I am not satisfied that the evidence of the extent of use placed before me is sufficient, in terms of frequency or numbers of individuals, to support this contention.
100. The Council now own the land crossed by the section A – B, and previously owned more, if not most, of the Order route, whilst controlling a greater stretch. Reference was made to *Gulliksen v Pembrokeshire County Council, 2002*¹⁰ as supporting dedication by the Council. This was a case of a footway, or pavement, set out on a Council housing estate and I think it a far stretch to suggest that an acknowledged private access road was ‘thrown open to the public’ by the Council in responding to a planning application consultation in 1974.
101. I agree with the Temple that the comments made by the Council in 1974 do not demonstrate that they intended to dedicate, or at that point actually dedicated, a public right of way. It related to safety for users of the children’s play park in conjunction with private vehicular access on a nearby route, which I do not consider was on the Order alignment at that time. I also agree that it would not

¹⁰ [2002] EWCA Civ 968

be expected, given that there was a plan for development, that the Council would have intentionally encumbered the land.

102. The OMA said that the Council had not previously made an Order to expressly dedicate the route due to lack of staff time. However, even at this stage the Order made, and now being considered, was one to test the evidence, rather than dedicate the route. On the balance of probabilities, I do not consider that the OMA, nor those others in support of the Order, have discharged the burden of proof to show dedication at common law over A – G, or the claimed continuation to the towpath. For the section C – H the documentary evidence is unhelpful and the user evidence very limited. It is insufficient on the balance of probabilities to demonstrate dedication at common law.
103. I have given careful consideration to the suggestion of the OMA that certain parts of the Order route might succeed, even if the whole fails. However, I do not find the evidence sufficient, on the balance of probabilities, to support this contention.

Other matters

104. The law does not allow me to consider such matters as the desirability or otherwise of the routes in question; the perceived or actual disagreements or barriers, or potential to build agreement, between local multicultural communities; the operation of the section 106 agreement; whether planning permission was required for the 2006 fencing; or, appropriate control of Japanese Knotweed. I have not taken account of these issues.
105. I note the concern of the applicant that witnesses for the Temple were employees or had an interest in the outcome. I am aware that everyone has an interest in the outcome of these decisions, or they would not engage with the process. I found the Temple and user witnesses to be open and honest about their own experiences in connection with the claimed routes. I have given appropriate weight to all the evidence and interpretation.

Conclusions

106. 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.
107. 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

108. I have not confirmed the Order.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Miss M Thomas	of Counsel, <i>instructed by</i> Sandwell Metropolitan Borough Council
<i>who called:</i> Mr W King	<i>Legal Assistant – Rights of Way, Derbyshire County Council</i>

Interested Parties in Support of the Order:

Mrs R Collins

In Support of and Objection to the Order:

Mr J Scott

In Objection to the Order:

Mr C Knipe	<i>on behalf of</i> the Shri Venkateswara (Balaji) Temple of the United Kingdom
<i>who called:</i> Mr R Aithal	
Mr K Horton	
Mr D Kannappan	

Interested Parties in Objection to the Order:

Dr V Rao

INQUIRY DOCUMENTS

- 1 The Order
- 2 Background documents
- 3 Opening Statement for Sandwell Metropolitan Borough Council
- 4 Rebuttal Statement for Sandwell Metropolitan Borough Council
- 5 Photograph 1992 with enlargements
- 6 Photograph Gate at point F, 2011 - 2013
- 7 Closing Submissions for Sandwell Metropolitan Borough Council
- 8 Invoice 16 October 2006
- 9 Photograph Gate at point F, 2016
- 10 Closing Statement for the Temple
- 11 Sandwell Faith trail booklet