



Order Decision

Site visit carried out on 8 November 2016

by Peter Millman BA

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

Decision date: 25 November 2016

Order Ref: FPS/F0114/7/21

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Bath and North East Somerset Council (Public Footpath BC52/8, Former Fox Hill Site, Bath) Definitive Map Modification Order 2016.
- The Order is dated 6 January 2016 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There was one statutory objection outstanding when Bath and North East Somerset Council ("the Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: I have confirmed the Order.

Preliminary matters

1. The Council originally decided not to make the Order. The applicant appealed to the Secretary of State, who upheld his appeal. The Council was directed to make the Order on the grounds that it could reasonably be alleged that a right of way subsisted (see paragraph 3 below). The Council subsequently took a neutral stance regarding confirmation of the Order.
2. This Order was to have been determined following a public inquiry, but the sole statutory objector (Combe Down Rugby Football Club ("CDRFC")) announced that it would not attend. Officers in the Planning Inspectorate then decided that the Order should be determined following an exchange of written representations and a site visit by an inspector.

Main issue

3. The Order states that it is made in consequence of an event specified in Section 53(3)(c)(i) of the 1981 Act, i.e. *the discovery of evidence which... shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist*. At the order-making stage of the process it is sufficient that the existence of a public right of way can reasonably be alleged. For an order adding a right of way to a definitive map to be confirmed it must be proved, on the balance of probabilities, that a public right of way actually exists.
 4. There are two independent tests which are usually applied to the evidence in order to decide whether public rights exist. There is the statutory test under s31 of the Highways Act 1980 ("the 1980 Act") and the common law test. The satisfaction of either test would be sufficient to prove the existence of public rights.
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5. The relevant part of the statutory test reads as follows: *(1) Where a way over any land... has been actually enjoyed by the public as of right* [see paragraph 7 for the meaning of '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...* The standard of proof is the balance of probabilities.
6. In this case, most of the land over which it is alleged that public footpath rights exist belonged, between 1941 and 2013, to the Crown in the guise of the Ministry of Defence ("MoD") and its predecessors (D-G on the plan appended below). The 1980 Act does not apply to the Crown, and so the statutory test cannot be applied to the section of the Order route between D and G. Only the common law test is applicable to that section when considering evidence concerning the period between 1941 and 2013. The statutory test may be applied to the remainder of the Order route between A and D.
7. The common law test may be described in the following way. Rights of way, with some exceptions, come into existence because they have been dedicated to the public by the owners of the land over which they run. Where there is no evidence of express dedication, an implication of dedication may be shown if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Such evidence would normally consist of oral or written statements detailing use of a route by members of the public over a substantial period. The use must have been 'as of right', i.e. openly and without force or permission. Usually there would also be evidence detailing the actions, or inaction, of landowners in the face of such use, for example evidence about whether use had been tolerated, or took place despite notices forbidding it. I shall consider all the available evidence to decide whether it enables an inference of the dedication by the MoD of public footpath rights over the part of the Order route between D and G to be drawn.

Background

8. The Order route starts from a junction with Bradford Road in Combe Down. At first it runs along an unadopted vehicular road called Bramble Way. The land over which Bramble Way runs is owned by those who own adjoining properties, none of whom has objected to the Order. From the end of Bramble Way the route runs for a few metres over the tarmac entrance track leading to and belonging to CDRFC. It then runs just inside the boundary, but outside the fence which is set back from the boundary, of a now closed MoD site – Fox Hill – for about 500 metres (D to G on the plan attached below) to Pope's Walk.
9. The MoD land was acquired in 1941 by the predecessor of the MoD (probably the Ministry of Works and Buildings), and it is confirmed by the MoD that it was common practice for the boundary fences of its sites to be set a short way inside the boundary so that patrols of the perimeter could be carried out within MoD land. It is likely that this is how the Order route, as a through route beyond Bramble Way, came into existence. The MoD is said to have vacated the site in 2012. It was subsequently acquired by Curo Enterprise ("Curo") in 2013.

10. It is agreed that the principal relevant evidence in this case is evidence of use of the Order route by members of the public and responses to that use by landowners; there is no relevant historical documentary evidence of the existence of public rights on the Order route.

Reasons

The common law test in relation to the ex-MoD land

11. It is not disputed that members of the public have used the Order route, though not always as a through route. At the time the Council made its decision not to make the Order, it had received 23 completed user evidence forms which described use by individual people for various lengths of time. Since the Council made its decision, further completed forms have been provided by the applicant, making 34 in total. Some forms are supplemented by additional questionnaires. The applicant also provided ten statements, which would have been given at the public inquiry had one been held. Nine of these were from people who had previously completed user forms. The Council interviewed, over the telephone, some of those who had completed forms, but none of the evidence provided by the Council has been identified as derived from these telephone interviews.
12. A few of those who completed user forms worked or had worked in the past for the MoD at Fox Hill. Curo, which objected to the making of the Order, but which did not object once the Order was made, argued that the evidence of these ex-MoD employees, along with the evidence of any of their relatives and of any tenants of the MoD should be discounted on the grounds that their use of the Order route would not have been 'as of right' because it was by permission of the MoD (paragraph 7 above). While I accept that use by employees going to and from their work could reasonably be regarded as being permissive, I do not see any reason why use of the Order route by family members and tenants could not have been as of right, nor why the use of those who stopped working for the MoD should not subsequently have been as of right.
13. Curo also argued that although, at common law, there was no required minimum period of public use, it was generally regarded that at least 20 years continuous use was the minimum to establish a right of way. I do not accept that argument; what must be proved is an intention to dedicate on the part of the landowner(s). There is no minimum period for this, accepted or otherwise. Relevant evidence will consist of both user and the reaction to user by the landowner (above at paragraph 7).
14. In this case, as far as the MoD land is concerned (D-G on the plan below) there is limited evidence of use as of right, i.e. from those not working for the MoD at the time, before the start of the 21st century. The earliest evidence of use as of right dates from the mid-1960s by two people. In any one year prior to 2000 there is evidence from fewer than half a dozen people, although 9 different people gave evidence of use before that year. In a reasonably detailed written statement, Mr and Mrs Edwards, who bought 23 Stonehouse Lane in 1974, stated that the Order route was well-used when they moved there, and continued to be until they left in 2003. They and their children used it frequently, going in both directions from their access point. This was via a strip of land crossing a neighbouring property, over which they were granted, in their deeds, a private right to access the Order route. In my view there

would have been little point in granting such a right unless the Order route had some reputation as a right of way.

15. From about 2000 onwards, there is evidence of use of the Order route from more people. Twelve were using the Order route in 2005 and 16 in 2010, some of them daily. Of all the non-MoD employees, 9 used the route weekly or more often for periods of 10 years or more. If there were no evidence of any actions taken by the landowner, this would, in my view, be insufficient to found a conclusion that use was known about and that the landowner acquiesced in it. The evidence from users, however, is that there were no notices forbidding use while the MoD held the land, that the security guards, patrolling inside the fence, knew that members of the public were using the route, yet did nothing to prevent it and indeed chatted with them and cleared vegetation from the route to facilitate use. The evidence that this happened is not of isolated incidents, but an on-going situation. The comment of one user is typical of many: *They [The security guards] always seemed happy that people were using the footpath. They even arranged for the vegetation to be cut back when I reported that the path was becoming overgrown in places.*
16. The evidence of use between D and G was not tested by cross-examination because Curo was not an objector to the Order. Although, therefore, its weight might be reduced to some extent, that it took place is not seriously contested (but see below at paragraph 19). There is no evidence before me of any action taken by the MoD to prevent or deter use of the Order route by the public.
17. I conclude that it may be inferred that, before the MoD sold the site in 2013, and indeed before it vacated the site in 2012, it had dedicated public pedestrian rights over so much of the Order route as was in its ownership.

The statutory test in relation to the route between A and D

18. Between E and G the Order route is bounded on one side by the MoD fence and on the other by an old stone wall which is said to have marked the boundary between the City of Bath and the County of Somerset. The applicant states that until some time in the early 1970s the wall continued from E to D. From that time on there was no visible feature to mark the boundary between land owned by the MoD and land owned by CDRFC. The Order route runs on ex-MoD land between E and D, although there would have been nothing to stop users from straying onto the rugby pitch, particularly when, as is stated by users to have happened from time to time, training equipment was left on the ground against the MoD fence. The Order route crosses land owned by CDRFC only for a few metres between C and D.
19. The rugby pitch is bounded on the north and east by the gardens of houses on Stonehouse Lane, and from time to time CDRFC has made efforts to control the use of its land by residents of those properties. In its letter of objection to the Order, it argued that use of the route crossing its land was permissive because the club had occasionally given permission for use of its land. CDRFC also queried whether use of the Order route had been as great as claimed; it had monitored use for the two months prior to mid-February 2016 and very few people had been seen. It stated that there had been a locked gate at point C until 2000. The Council stated in its investigation report that there had been a locked gate at C until 1990, but it is not clear whether the different date comes from a different source or is simply a mistake. There is no evidence to suggest

- that any of those who completed user evidence forms were employees of CDRFC.
20. In 2007 CDRFC's solicitors wrote to owners of properties in Stonehouse Lane whose gardens backed onto the rugby pitch stating that: *there are no specific rights of way or use granted in favour of the owners of properties in Stonehouse Lane over or across our client's land for ingress or egress purposes or otherwise.* CDRFC argues that this letter demonstrates that use of the Order route between C and D was permissive. I do not agree. The letter was not directed to those using the Order route. It cannot be concluded from it that subsequent use of the Order route by members of the public would have been by permission or contentious.
21. CDRFC's solicitor wrote in response to consultation on the application for the Order that its members, Committee members and players had advised people from time to time that there was no private or public right of way across CDRFC's property. The letter continued to state: *this has resulted in letters sent to adjacent properties highlighting the situation over access.* It seems from this that the Club's efforts were directed at those accessing the rugby pitch from the rear gardens on Stonehouse Lane rather than those passing between C and D. Some of those who completed user evidence forms or who wrote statements referred to permission having been given. In its report, the Council noted 6 users who, it concluded from these forms and statements, had been given permission to use the part of the Order route between C and D. On examination of the user evidence forms and statements, it does not appear to me to be so straightforward. Two of the six, the applicant and his wife, did not make any reference to permission having been given in their forms or other statements. Another explained in a detailed written statement that he had been approached when on the far side of the pitch from the Order route and was told that he could walk across the club's land as long as he did not go on the pitch or allow his dogs to foul it. His wife's statement is similar in this respect. A fifth wrote in his detailed statement that he had never been stopped by anyone from the rugby club or told that he should not be using the Order route. The sixth wrote in her user form that a committee member from CDRFC had given her permission to use the part of the footpath which went through the rugby ground. She had used the route only since August 2013. Taken as a whole, the unchallenged user evidence supports the view that use of the Order route was generally not by permission.
22. No user evidence refers to encountering a locked gate (paragraph 19 above). Mr and Mrs Edwards, who lived in Stonehouse Lane from 1974 to 2003 (paragraph 14 above) mention a gate at C which, they state, was never shut. One of those who prepared a statement to be given to a public inquiry stated that she had used the Order route, including the section across CDRFC's land since 1997. She wrote: *I always followed the fence line when walking near the rugby pitch, because that is the line of the footpath. At the end I would cross over the entrance drive to the rugby club, out onto Bramble Way and then onto Bradford Road. At no time did anyone from the rugby club stop me from walking this route or tell me that I was not allowed to do so. There were never any locked gates which prevented me from using this route...* A further three people who prepared statements and who stated that they had used the Order route before 2000 to get to Bradford Road via Bramble Way gave similar accounts. I have seen no evidence that CDRFC erected notices forbidding use of the Order route across its property. Nor have I seen any evidence that the

public's use of the Order route between A and D was brought into question by any action that was communicated to the public using it, rather than to one or two isolated individuals. In a situation such as this, where there has been no actual bringing into question of the public's rights (see paragraph 5 above), the date of bringing into question for the purposes of the statutory test is taken to be the date of the application for the Order. This was in November 2014.

23. Bramble Way has the appearance of a public road. It has a tarmac surface. No notices, at the time of my visit, differentiate it from the public road network. None of those who own the land over which Bramble Way passes – 4 properties – has objected to the Order. I have seen no evidence of any objection to pedestrian use by the public.
24. Between 1994 and 2014 – the relevant 20 year period for the statutory test – the evidence suggests that at least 23 people used the Order route between A and D. Twelve stated that they had used it for 10 years or more during that period. Most people stated that they used it daily or weekly. There is evidence from fewer people at the start of the 20 year period – only 7 in 1995 – whereas 19 people gave evidence of use in 2013. The numbers are not large, but sufficient in my view for a disinterested observer to be given the impression that the public, rather than a few individuals, was asserting a right. Use would, apart from that of one person (paragraph 21 above), have been as of right. There was no interruption to use. There is no evidence that the owners of the land between A and C took any steps to show that they had no intention to dedicate public footpath rights during that time. CDRFC, although it took some steps to control use of its field by outsiders, took no significant action that was directed or communicated to users of the Order route to show that it had no intention to dedicate public rights of way between C and D. I therefore conclude that dedication of a public right of way can be deemed (paragraph 5 above) to have been dedicated over A to D.

Other matters

Width

25. The Order states that the width across which public rights extend is 4 metres narrowing to 3.5 metres between A and C, 1.8 metres between C and D, and 1 metre for the remainder to G. The applicant argues that the width of the route between E and G should be that between the MoD fence and the boundary stone wall (paragraph 18 above) which is up to 2 metres in places. He also argues that the Order should make it clear that the width is to be measured from the MoD fence.
26. When I visited the site, I observed that the available width between the fence and the wall or vegetation, particularly ivy, growing on the wall was generally no more than about a metre. In places, where the wall was visible, the ground sloped up steeply from the trodden path to the wall, so much so that a width of no more than about a metre would have been usable. It seems to me reasonable of the Council to have taken a width of one metre, rather than having tried to be too precise and taken measurements to within 5 cm at numerous (the applicant had taken around 100 measurements) locations. As for modifying the Order to make it clear that the width of the Order route was to be measured from the MoD fence, it does not seem necessary or even sensible to me, particularly since the fence will almost certainly be removed once the development of the former MoD site for housing (which seems likely)

is complete. If that turns out to be the case, a future reader of the Council's Definitive Statement would not be assisted by knowing that the path was bounded by a non-existent fence. In any event, the Order plan is at a large scale and is very clear.

Conclusion

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

Formal Decision

28. I confirm the Order.

Peter Millman

Inspector

