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## Order Decision

Inquiry held on 6 September 2016

**by Peter Millman BA**

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

**Decision date: 22 September 2016**

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### **Order Ref: FPS/W2275/7/81**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the The Kent County Council (Public Footpath AW377 at Charing) Definitive Map Modification Order 2015.
- The Order is dated 8 July 2015 and proposes to modify the Definitive Map and Statement for the area as shown on the Order map and described in the Order schedule.
- There were two statutory objections outstanding when Kent County 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 with modifications.**

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### **Procedural matters**

1. Kent County Council ("KCC"), having been directed by the Secretary of State to make the Order after its initial refusal to do so, took a neutral stance at the inquiry.
2. No-one formally presented the case for confirmation of the Order, but I heard a number of witnesses (listed at the end of this Decision) who gave evidence in support of the Order. A representative of Charing Parish Council, the applicant for the Order, made a closing submission.

### **Main issue**

3. The main issue is whether the evidence shows, on the balance of probabilities, that public footpath rights exist over the route shown on the Order map (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980. It reads as follows: *(1) Where a way over any land... 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...*
  4. There is, in the alternative, a common law test which may be applied to the evidence. The question to be answered is this: Can it be inferred from all the relevant evidence, both evidence of use and any other evidence, that the owners of the land over which the Order route runs have dedicated a right of way to the public? If so, has the public, by using the route, accepted the dedication?
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## **Reasons**

### ***Background***

5. In 2012 Charing Parish Council applied for a modification order to add a footpath to KCC's Definitive Map. It is shown on the map attached at the end of this Decision. The path starts from the pavement which runs past nos. 1 and 2 Treetops at Stockers Head (point B on the map below) and runs eastwards, parallel and very close to the A252 road. It crosses an access track to the woodland to the south, and then runs between a hedge (which is next to the road) and a wire fence, before crossing a second access track. Near its eastern end it comes closer to the road, passing between the fences to two residential properties, Sherwood and Robin Hood Cottage, and the road. As it approaches its eastern end it runs on a grass surface which is part of the land belonging to the Shakra Centre, before ending on the drive to Longbeech Park, a static caravan park (point A on the map below).
6. KCC did not consider that the evidence it discovered, or with which it was presented, justified making an order, so it refused to do so. The Parish Council appealed to the Secretary of State. An inspector considered the available evidence and decided that it was sufficient to make a reasonable allegation of the existence of public rights (which is the test to be passed if an order is to be made), although she considered that it was not sufficient to show, on the balance of probabilities, that such rights existed (the test for confirmation of an order). KCC was therefore directed by the Secretary of State to make this Order.
7. The evidence considered at the appeal consisted principally of completed user evidence forms describing use of the route, and a petition and associated correspondence from the early 1990s relating to the creation of a path between Longbeech Park and Charing.
8. At the inquiry some of those who had previously completed user evidence forms or had written letters gave evidence. A number of others who had not previously provided written evidence spoke in support of the Order.

### ***The statutory test***

*Whether there is a 'way' (see paragraph 3 above)*

9. The question is whether there is a way, identifiable with reasonable accuracy, which has been used by members of the public to walk between A and B (see copy of the Order map below). If no such way can be identified, the Order cannot be confirmed.
10. There can be little doubt that the Order map represents with reasonable accuracy the route stated to have been used by members of the public, with one exception. A number of user forms suggest that those completing them walked along the road for a few yards just to the west of Sherwood (shown on the map below) rather than using the whole route. At the inquiry the situation was clarified. Some of the sixteen witnesses who gave evidence in support of the Order stated that they had walked in the road itself for a short way because the path at that point was on a slope and difficult to walk. Other witnesses gave clear evidence to the inquiry that they had used the whole of the route shown on the Order map.

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11. I conclude that the line shown on the Order map does represent a route that was walked by members of the public, albeit that on a short stretch to the west of Sherwood there was less use than for the remainder.

*The date when use was brought into question*

12. Mr J Burvill has owned and lived at the property known as Sherwood since 2005. In 2008 he leased a further block of land to its west. He is an objector to the Order. Mr Burvill's evidence is that he erected, in 2008, notices stating that the land he leased west of Sherwood was private. These notices did not, it seems, state that there was no public right of way. He erected notices at both sides of this land in about September 2011 denying that there was a right of way, together with some sort of wooden structure which partially obstructed the route. It is these latter actions which, I consider, brought the public's right to use the route into question. The relevant 20 year period, is therefore between September 1991 and September 2011.

*Whether 'the public' used the route for the full period of 20 years*

13. There is ample evidence of regular and fairly frequent public use of the Order route (including the short difficult section described in paragraph 10 above) from 1993 onwards until 2011. On reading the evidence on paper prior to the inquiry it seemed to me that there was some doubt as to whether there was significant use of the Order route before 1993. This doubt arose for three principal reasons. The first was that there were only eight user evidence forms which referred to use before that year. The second reason was that neither the petition of 1993 asking KCC to provide a footpath or footway between Longbeech Park and the top of Charing Hill, nor the associated correspondence from between 1989 and 1993, mentioned an existing footpath. The third reason was that Mr M Vukcevic, a lessee since 1991 of land crossed by the path between Sherwood and the second access track (paragraph 5 above), wrote, in a landowner evidence form, that the 'area was impassable at time of purchase and for some years after until Seeboard (an electricity supplier whose cables (now presumably owned by UK Power Networks) run above the Order route) cleared that part for their work'.
14. At the inquiry I heard evidence from a number of people who stated that they had used the Order route themselves or had noted its use in the early 1990s and before. Mr Hanning is a retired policeman. He had to drive along the A252 in the course of his duties. From as long ago as 1957 he saw schoolchildren using the path, although he moved to Longbeech Park only in 1995. Mr Keyse had lived at Longbeech Cottage (shown south of A on the map below) since 1968. He worked at Three Ways Engineering, a motor repair business just to the west of B on the A252, until he retired in 1999. During that time he drove past the Order route four times a day on working days. He stated that he had observed it in regular use since 1968. He sometimes used it himself when delivering cars back to Longbeech Park residents, when he would walk back to the garage along the path.
15. Mr Zeen had lived opposite the entrance to Longbeech Park since 1979 and had used the whole of the Order route since then. His daughters used it to get to school, stopping in 1991 when they left. Mrs Kent had lived at no. 1 Treetops (just to the west of point B) since 1983. She was told about the Order route by the previous owner. She used it to walk to work at the gliding club (not shown on the Order map, but just south-west of Squids Gate Farm) every day. She also used the Order route to visit a friend at Longbeech Park. Mr Reed came

- across the Order route before 1984, when he became a Charing Parish Councillor and took an interest in local rights of way. It was well-kept then, although there were later periods, including the early 1990s, when he did not use it. Mr Butler moved to Longbeech Park in 1986 and had used the Order route since then, although he was one of those who used a short section of road to the west of Sherwood, as did Mrs Butler, who also gave evidence.
16. Mr Wheaton bought a lease of the land, shown on the Order map between the two tracks leading south from the A252 towards the western end of the Order route, in April 1990. The Order route was there then, running south of the hedge next to the road. He installed the fence which is on the southern side of the path in 1990 to stop his dogs running into the road, so the path runs partly on his land. Mrs Greengrow moved to Longbeech Park in 1991. From then she had used the Order route frequently with her dogs. Mr and Mrs Wynn, who both gave evidence, moved to Honeysuckle House (shown on the Order map) in 1994. They crossed the road to get to the Order route, which appeared well-used in 1994, and would go in either direction along it.
  17. At the inquiry Mr Burvill stated that when he bought Sherwood in 2005 he walked up the hill from Charing towards it. He used the western part of the Order route as far as the second access track, which is opposite Oakdene (see map below). The Order route, he stated, did not physically exist beyond that point.
  18. I was impressed by the oral evidence given by the people mentioned above who supported confirmation of the Order. It is in part contradicted by Mr Burvill's evidence, but his evidence referred to a single occasion, and on balance the evidence shows, in my view, (taken with the written evidence previously available) that the Order route was in existence and being used by the public in 1993 and for many years prior to that, as well as between 1993 and 2011.
  19. One of the supporters of the Order had, in written evidence, tried to explain the failure to mention an existing path in a petition and correspondence in 1993 and before (see paragraph 13 above) as resulting from the fact that, since most of the residents of Longbeech Park were elderly and some used wheelchairs, they were, in effect, calling for the provision of a smoothly surfaced footway or pavement, rather than a roughly surfaced footpath. It did not support, he argued, the view that no footpath existed before 1993. Had there not been, at the inquiry, very clear evidence of the existence of the Order route prior to 1993 the explanation might still have appeared rather weak, but given that clear evidence of use (paragraphs 14 to 16 above) I accept it as a reasonable possibility, consistent with the other evidence.
  20. The evidence of the lessee, Mr Vukcevic, (paragraph 13 above) is not consistent with the evidence of use given by local people. Mr Vukcevic lives in London, however, and I have no evidence about how often, if ever, he has visited his land. I prefer, therefore, the evidence of those local people who state that they have used the Order route.
  21. I conclude that the Order route was used by the public during the whole of the period from 1991 to 2011.

*Whether use was as of right*

22. Use of a route which is 'as of right' is use which is *nec vi, nec clam, nec precario*; an accepted judicial interpretation of the Latin phrase is 'peaceable, open, and not based on any licence from the owner of the land'. The Latin word *vi* is sometimes translated as 'force', and Mr Burvill argued that use had been forceful because some users of the Order route gave evidence that they had had, on occasion, to 'fight' their way past brambles. I do not accept that view. Another judicially accepted translation of *vi* is 'contentious', so, for example, use of a route when there is a clear notice stating that it is forbidden would be *vi* or contentious, but merely having to force a way through vegetation would not be.
23. Mr Burvill also argued that since the owner of some of the land crossed by the path (Mr Vukcevic) lived in London and did not visit his property, use of the path across it must have been by what he called 'stealth'. I do not accept that argument. The Latin word *clam* means 'secretly', and there is no evidence that people used the path in such a way, for example by using it only at night, or somehow in disguise.
24. One of the witnesses who gave evidence to the inquiry stated that she had asked permission from a previous owner of Sherwood to use part of the Order route. The County Council's Committee Report on the application for a modification order refers to a statement from a Parish Councillor that *following a petition from Longbeech Caravan Park received on 14 September 1993, Charing Parish Council asked for help in providing a footpath for those wishing to walk to and from Longbeech Park. Kent County Council through Councillor Richard King approached the then two landowners who agreed to allow walkers to use path inside [the] hedge. Richard King organised chippings to be laid to improve the surface. Only recently has a landowner seen fit to change this arrangement.* One of the landowners is likely to have been Mr Wheaton, who gave evidence that he was approached about, and agreed to, the laying of chippings. It is not clear who the other owner was, but in any event no permission seems to have been given, orally or by way of a notice or other communication to those using the Order route, nor is there evidence that word of this 'agreement' was communicated to users of the path and I conclude that the great majority of public use was *nec precario*.

*The intentions of landowners*

25. To be effective, a landowner's intention not to dedicate a right of way to the public must be communicated to those using or likely to use the way.
26. Three owners, lessees or sub-lessees of land crossed by the path gave evidence to the inquiry. Mr Wheaton stated that he was happy for the Order route across his land to be recorded as a public right of way.
27. Mrs Briggs (with Mr Briggs) had only bought land across which the path ran in 2015, so had no direct knowledge of the period between 1991 and 2011.
28. I noted above at paragraph 12 that Mr Burvill stated that he put notices on his land in 2008 to the effect that it was private property. I do not consider that this is evidence of a lack of intention to dedicate a right of way, as after all, most, if not all, public rights of way cross private land. The notices and partial obstruction in 2011, however, had the effect, in my view, of both bringing the public's right to use the Order route into question, and showing a lack of

intention to dedicate. This lack of intention, however, was shown at the end of the 20 year period and not during it.

29. KCC asked the freehold owner of most of the land crossed by the Order route to respond to the application, but failed to get any reply.
30. I conclude that during the 20 year period from September 1991 to September 2011 there is no evidence of a lack of intention to dedicate a public right of way on the Order route.

#### *Conclusions on the statutory test*

31. I conclude that the statutory test is met. I do not therefore need to consider the common law test.

#### **Other matters**

32. Mr N Shepherd, who manages the Shakra Centre (previously a restaurant) at the eastern end of the route, stated at the inquiry that he was not objecting to the Order, but pointed out that the lamp-posts, which had been in position for at least 30 years, seemed to impinge on the line of the Order route. I agree that it is possible that they do so, and if I confirm the Order I shall do so with a modification to show that the rights of the public are subject to the right of the landowner to keep and maintain as much of the existing lighting as is within the line of the path.
33. Mr Wheaton, who owns land towards the western end of the Order route called Carvers, stated that when he had cleared a path between the hedge and the wire fence across his land, he had left some trees in place so as not to encourage use of the path by motorcyclists. It was clear at the time of my site visit that in some places the available width is, and must have been for many years, as little as a metre in places where trees grow. It seems reasonable, in my view, to record the presence of some trees as limitations on the right of the public to use a full 2 metre width.

#### **Conclusion**

34. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed with modifications.

#### **Formal Decision**

35. I confirm the Order with the following modifications:
- In part II of the Schedule to the Order, after 'Has a width of 2 metres', add the following: 'The right of the public to use the route on foot is limited by the following; the right of the owner of the property known in 2016 as the Shakra Centre to keep and maintain any lamp-posts and lamps existing on that property in September 2016 which impinge on the line of the right of way and the right of the owner of Carvers to maintain trees within the line of the right of way so long as its width on the ground at any point is not reduced to less than 1 metre.'

*Peter Millman*

**Inspector**



## **APPEARANCES**

### **For Kent County Council**

Mr C Wade                                      Principal Case Officer, Public Rights of Way and Access Service.

### **Supporters**

Mr T Reed                                      Member, Charing Parish Council  
Mr C Butler  
Mr W Hanning  
Mrs J Butler  
Mr M Chapman  
Mr J Ray  
Mr P Zeen  
Mrs N Wynn  
Mrs J Kent  
Mr S Wynn  
Mr P Hobbs  
Mr T Hayward  
Mr L Wheaton  
Mrs C Greengrow  
Mrs D Greaves  
Mr R Keyse

### **Objectors**

Mr J Burvill  
Mrs D Briggs

### **Neutral parties**

Mr N Shepherd                                      The Shakra Centre

### **Documents handed in at inquiry**

1. Tree and vegetation clearance consent form



