

Order Decision

Site visits made 23 November 2016

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 15 December 2016

Order Ref: FPS/F0114/7/22

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Bath and North East Somerset Council (City of Bath Definitive Map and Statement Modification Order)(No. 11 – Bathwick and Combe Down) 2015.
- The Order is dated 12 August 2015 and proposes to add a number of footpaths and a bridleway to the Definitive Map and Statement on routes within the City of Bath. Full details of the routes are set out in the Order Plans and Schedule.
- There were three objections and representations outstanding when Bath and North East Somerset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Preliminary Matters

1. The omnibus Order as made related to sixteen footpaths and a bridleway in the Bathwick and Combe Down wards of the City of Bath. As objections were only received in relation to two of the routes, Bath and North East Somerset Council, the order-making authority ("the OMA"), severed the Order, confirming that part to which there were no objections or representations on 20 January 2016. The remaining part of the Order submitted to the Secretary of State for Environment, Food and Rural Affairs related to only two routes.
2. The outstanding objections and representation were made in relation to Footpath AQ34¹ ("AQ34"). Although referring to their correspondence as 'representations', I consider that the matters put forward by those with an interest in Smallcombe Farm ("the farm"), through which part of the footpath passes, should be treated as objections to the recording of the route in this location. Interested parties, including Bathwick Hill Residents' Association, gave evidence in support of recording the route as a public footpath.
3. The objection from Bath Golf Club to the recording of Footpath AQ36² ("AQ36") was withdrawn prior to the severing of the Order. However, on reviewing the matters raised, the OMA agreed that the Order did not reflect the walked line and so have requested a modification with regard to this route.

Procedural Matters

4. No-one requested to be heard in relation to this Order. I made unaccompanied site inspections and dealt with the matter by way of the written representations procedure.

¹ Also referred to as BC54/40

² Also referred to as BC64/1

Main issues

5. The OMA rely on the evidence as a whole in relation to these routes, including evidence from users and landowners, as well as documentary evidence, such as mapping, surveys and correspondence.
6. Section 32 of the Highways Act 1980 ("the 1980 Act") for, *Evidence of dedication of way as highway*, sets out that "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."
7. I will consider whether the evidence as a whole is sufficient, in relation to these routes, to show that they should be recorded as public rights of way as set out in the Order. My decision will be made on the balance of probabilities

Reasons

Evidence of use

8. Part of the OMA research was informal consultation with landowners, including adjoining property holders, national and local user groups, residents' associations, ward councillors, parish councils and members of the public. Additionally, responses were received from members of the public following the placing of notices on the routes and by web consultation, with evidence submitted of public use on foot over both routes. During my site visits I noticed use and/or evidence of use on both routes in question. Whilst some of this may have been in connection with private rather than public rights, for example, for access to property, on balance, my observations support the case that the routes are in general public use on foot.
9. For both routes there is evidence of use from the 1960s onwards. A former resident of the farm, whose family lived there from the 1950s to the 1980s, said that there was a stream flowing down the path but AQ34 was always a public right of way, in regular use. In relation to AQ36 there was some recognition that the route had altered slightly over time but, on balance, it appears that the currently used route was available and used from the 1970s.
10. The evidence of use is supportive of a presumption of dedication at statute or common law, giving a picture of extensive and regular use, which is backed up my on-site observations. I am satisfied, on the balance of probabilities, that it shows public use on foot of both routes, which should be taken into account with all other evidence.

Physical conditions

11. The route of AQ34 is in part a tarmac route along a field edge, with a section running along the bottom of gardens, situated between walls and fences. Some parts have gravel underfoot whilst the section running south-west from

point G leads to step, with a handrail, and then shares access along a track associated with the farm. There are pedestrian gates, 'public footpath' signs and waymarks at various points along the route. At either end of the area associated with the farm there are signs indicating "PRIVATE PROPERTY. YOU ARE VERY WELCOME TO USE THIS SECTION OF FOOTPATH BUT PLEASE KEEP DOGS ON LEADS AT ALL TIMES. CAUTION VEHICLES IN TRANSIT".

12. FP AQ36 passes through a wooded area running downhill and crossing Golf Course Road to a field, before joining the existing recorded section of Footpath AQ36. The route is generally a worn muddy path, which is obviously well-used. Neither route is subject to barriers or signs denying public access or rights.

Documentary evidence

Cotterell's Map of Bath, 1852

13. This map was drawn up on behalf of the Town Council, primarily to show sewerage pipes and gas mains, showing various routes shaded yellow, blue or unshaded, which the OMA say indicated how they were constructed. I agree that AQ34 is indicated on the map, with small gaps only due to the way in which the individual sheets fit together. The western section, from point A³ to around point F is shaded blue and some unshaded. The section from south-west of point G to point J is unshaded, although clearly marked at the north-eastern end as "Footpath from Smallcombe Valley to Bathwick Hill". The area directly alongside the farm buildings, J – L, is shaded yellow.

14. The area crossed by the route of AQ36 is not covered by this map.

Cotterell's Map of Bath, undated

15. Part of this map was submitted, entitled as a complete map of Bath and its environs showing "All Footpaths, Bye Roads, Highways, &c, in the Vicinity." In objection it was argued that the map did not show the route of AQ34. The key shows a reference to boundaries, with no indication that any highways were to be coloured or marked in some way to show status, although I note that some roads are named. I consider that there may be a physical feature on this map, but it is difficult to be sure, as the provided copy is unclear.

16. A feature appears to be shown on the route of AQ36.

Unspecified map, 1886

17. It was argued that this map did not show AQ34 but a farm track and water course. I am satisfied that the map shows an existing physical feature from a point to the south-west of point G to point L.

18. The area crossed by the route of AQ36 is not covered by this map extract.

Ordnance Survey mapping

19. Whilst the depiction of a way on an Ordnance Survey ("OS") map is not, of itself, evidence of a highway, the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly in conjunction with other evidence.

³ Points A – L indicate the route of AQ34 on the Order map 'Part 2'

20. Reference was made to a number of OS maps dating from 1885 - 1960. I agree with the OMA that AQ34 is shown in whole or part on the OS maps, labelled 'FP' on the 1920s and 1930s mapping. The 1885 map appears to show the northernmost section running south-west below the field boundary. However, it seems that the map shows a feature on the Order route alignment, although difficult to see on the provided copy. I agree that AQ36 is shown from the earliest mapping, although it formerly followed an alternative route.
21. My attention was drawn to the disclaimer on a 1947 OS map that "*The representation on this map of a Road, Track, or Footpath is no evidence of the existence of a right of way.*" I agree with the OMA that OS maps, at least since the end of the nineteenth century, have a similar disclaimer. They do not show that a way is public, only that it physically exists at the time of the survey. As noted above, this is part of the overall evidence.

Finance (1909 - 1910) Act

22. The Finance (1909 - 1910) Act ("the 1910 Act") provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. The 'assessable site value' of land allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any public rights of way or any public rights of user, to the right of common and to any easements.
23. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. In objection it was said that only a farm track and field access was shown, with no deduction for "*public rights of way or user*" in the valuation book.
24. The OMA note that there were no deductions at all for public rights of way in the present day Bathwick Ward. As it seems unlikely that there were no public rights of way at all in this ward, I agree that this does not provide evidence that there was no right of way in this particular location, but neither is it supportive of its existence.
25. The area crossed by the route of AQ36 is shown on this map extract and I note the annotation "*F.P.*" on the OS base map, which the OMA indicate is the 1904 OS map. The relevant valuation book entry is not supplied, as the objection related only to the recording of AQ34.

List of Streets

26. This arises from the requirement under the 1980 Act for every highway authority to make, and keep up to date, a List of Streets ("LOS") within its area of highways maintainable at the public expense. The OMA confirm their LOS to be a record of maintenance responsibilities, rather than of rights, but indicate that they only maintain those highways which carry public rights.
27. According to the OMA those parts of AQ34 leading into Bathwick Hill are adopted highway whilst AQ36 is not included. Copies of the map/list were not submitted and, therefore, I have not been able to give weight to this.

Bath City Engineer's Survey, 1957

28. This Engineer's Survey was a 'Survey of Public Rights of Way: For the Purpose of Part IV of the National Parks and Access to the Countryside Act 1949' undertaken by the City Council Waterworks Engineer's Department. A footnote indicates "All footpaths walked by R.F. Little between June 1st & 30th 1955". It was not a complete survey, relating only to "...the footpaths and public rights of way in the undeveloped parts of Bath and the footpaths in the built up areas which connect up with these paths."
29. AQ34 is identified in its entirety and described as "F.P", starting at the Canal at Sydney Buildings and finishing at Smallcombe Vale. AQ36 is also "F.P", from North Road to Sham Castle. The route shown differs from that used currently.

Smallcombe Farm, scheme for improvements, 1958

30. Only the first page of this letter was submitted but the OMA appear to accept that there was no mention of a public right of way, although there was detail on other matters. It is possible that there was no right of way at that time, as implied in objection, or that the existence of it was not seen as being relevant to, or impacting upon, the improvements being discussed. The survey of the farm appears to show a feature on the alignment of the Order route.

Diversion AQ36, 1962

31. *The Stopping up of Highways (City and County Borough of Bath) (No.1) Order, 1962* was made on 30 January 1962 by the Ministry of Transport. This diverted part the route of AQ36 as recorded on the 1957 Bath City Engineer's Survey onto the alignment west of point A⁴. The OMA indicate that the diverted section will be dealt with by way of a Legal Event Modification Order and so it is not part of the Order now before me. I agree with the OMA that the legal alteration of the continuation of the Order route implies that public rights existed over the whole route.

Smallcombe Farm, Authorisation for gate and stile, 1963/64

32. On 16 October 1963 the tenant of the farm applied for permission under the Highways Act 1959, section 125, to erect a gate and stile across the drive to prevent cattle straying onto the road. The submitted plan clearly identifies that section of the Order route passing through the farm as a footpath. This was agreed, noting that there was a need for access in order to cut "...the grass, etc. along the footpath from the Farm to Bathwick Hill...". I consider that this shows that both the tenant and the Town Council accepted the existence of a public footpath on the route running generally north-east from the farm to Bathwick Hill.

Smallcombe Farm, Waymarking of route, 1993

33. In 1993 a member of the public queried the erection of a 'Private property' sign at the farm entrance. The reply from the Assistant Director (Engineering) set out that "...the route from Smallcombe Access Lane at the Bathwick Cemetery end through to Bathwick Hill is a definitive public right of way...the wicket gate

⁴ Points A – I indicate the route of AQ36 on the Order map 'Part 4' as made

is only secured by a latch and a public right of way marker disc is attached to the wicket gate post...".

34. I agree with the OMA that the waymarker appears to be in the same position now as seen in the 1993 photographs. It is reasonable to presume that it has been waymarked as a public right of way for at least the last 23 years.

Smallcombe Farm, Section 31(6) Deposit, 2012

35. On 14 August 2012 a deposit was made under section 31(6) of the 1980 Act. The attached plan identifies the route of AQ34 from approximately point H to point L and the statement, signed by one of the signatories to an objection this Order, sets out that, as the owner of the farm, *"I admit that the route shown coloured green on the said plan is the only public footpath over the Land which is dedicated for use by the public."*

Smallcombe Farm, Grass-cutting

36. It was suggested that photographs from June 2014 showed the site to be completely overgrown. The OMA supplied an extract of the vegetation cutting schedule showing that this route was cut twice a year across the full width. In 2005 the owner of the farm telephoned to complain that the top part of the footpath was overgrown.
37. Overgrowth is to be expected in the countryside in the summer growing months. I agree with the OMA that this does not mean the rights cease to exist.

Smallcombe Farm, Diversion application and consultation, 2009

38. The OMA indicate that a diversion application was made in 2009 and those in support of recording the route referred to a consultation on this proposal. I understand that the land onto which it was proposed to divert belongs to the National Trust and their feedback at the time was not to support the proposal. The landowner subsequently withdrew the application to divert the route. I agree with the OMA that, by entering into a formal process for diversion, the owners indicated acceptance of the route as a public footpath.

AQ34

39. I agree with the OMA that the route was shown on the Cotterell's Map, 1852 and that it was recognised as a footpath, although this does not necessarily mean that it was a public route. It has been shown on mapping since that time. Although I agree that the section north-east of the farm is not always as clearly identified on the mapping as other sections, I consider it unlikely, on the balance of probabilities, that this means that it did not exist. It is acknowledged that there was a watercourse, which may have been the physical feature shown on some mapping, but that the route of the right of way existed concurrently with that feature.
40. The earliest evidence, which I consider refers to public rights over the physical route arises from the middle of the twentieth century, when it was recorded on the Engineer's Survey; the tenant and Council agreed, by use of Highways Act procedures, to the erection of limitations on the route; and user evidence is available. However, I consider it likely, on the balance of probabilities, that the

public rights were already in existence by this time. The recognition of such rights continued with the current owner seeking to divert the route through procedures appropriate to a public footpath and making a section 31(6) deposit to that effect.

41. The route is waymarked as a public footpath and obviously well-used, as evidenced on the ground and by the submitted user evidence, notwithstanding that it may occasionally be affected by overgrowth.
42. Taking account of the evidence as a whole, I am satisfied that public rights on foot have been shown to exist over the Order route AQ34 and that this part of the Order should be confirmed as made.

AQ36

43. The OMA indicate that this route has existed since 1885 and it seems that a feature on this route is shown on the late nineteenth century Cottrell's map of Bath, supplied in objection. It is shown in the 1904 OS base mapping used in the 1910 Act documentation and so has existed for over one hundred years.
44. The route was recorded on the Engineer's Survey in 1957, which I consider to be an acknowledgement of public rights over the route. The 1962 diversion procedures for the western end make it clear that this was an accepted public highway; if there were no public rights, there would be no need for legal procedures to alter the route. As the Order route is a continuation of the diverted section I am satisfied that the rights extend over the whole.
45. I agree with the OMA that the eastern end of the route has altered in the latter half of the twentieth century and it no longer follows the alignment on the Engineer's Survey. However, taking account of the evidence as a whole, including that of use of the route, dating back over at least forty years, I am satisfied, that the public rights should be recorded on the proposed alignment.
46. The OMA seek a modification to the Order as made, to deal with matters brought to their attention by the now withdrawn objection. I am satisfied, on the balance of probabilities, that this modification is appropriate. The Order description and map 'Part 4' will require modification.

Other matters

47. Although the objections to the recording of AQ34 related to a desire to divert the route out of the immediate area of the farm, this is a separate process, irrelevant to the matters before me. A desire was also expressed to have the matter dealt with under provisions expected to arise from the implementation of the Deregulation Act 2015. However, once a Definitive Map Modification Order has been made, there is no opportunity to withdraw it; this Order had to be determined under the relevant legislation and evidence.

Conclusion

48. Having regard to these, and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation, subject to modifications to the alignment of part of the route of BC64/1. That part of the Order relating to BC54/40 should be confirmed as made.

Formal Decision

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

- for '**BC54/40' (AQ34)** no modifications are proposed and this part of the Order is to be confirmed as made;
- for '**BC64/1' (AQ36)**;
 - after text "...point B at Grid Reference ST 7653 6490..." replace "...where the direction changes to generally easterly. The footpath continues for a distance of approximately 2 metres to where it meets Golf Course Road at point C at Grid Reference ST 7653 6491. The footpath continues for a distance of approximately 4 metres across Golf Course Road to point D at Grid Reference ST 7653 6491. The footpath continues for a distance of approximately 42 metres to point E..." with "...running through Point C at Grid Reference ST 7653 6491, Point D at Grid Reference ST 7653 6491, Point E at Grid Reference ST 7654 6491, Point F at Grid Reference ST 7654 6491, Point G at Grid Reference ST 7656 6491 to Point H..."
 - after text "...17 metres to point..." replace "...F..." with "...I..."
 - after text "...8 metres to point..." replace "...G..." with "...J..."
 - after text "...6 metres to point..." replace "...H..." with "...K..."
 - after text "...19 metres to point..." replace "...I..." with "...M..."
 - after text "...A-B-C-D-E-F-G-H-I..." add "...-J-K-L-M..."
- Within Part II of the Schedule:
 - for 'Path Number: BC64/1';
 - for '**Length**' replace "...151..." with "...153..."
- On the Order plan:
 - for '**Part 4**' (BC64/1);
 - alter key to refer to route A – M;
 - delete section B – C – D – west of E;
 - add route from B – C – D – E – F – G;
 - alter lettering E – F – G – H to H – I – J – M;
 - add lettering K and L.

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

Heidi Cruickshank

Inspector

Bath & North East Somerset Council

Public Footpath BC64/1 at Bathwick Ward, Bath. City of Bath Definitive Map and Statement Modification Order (No.11 - Bathwick & Combe Down) 2015

Key

Footpath to be added to the Definitive Map and Statement.

A-B-C-D-E-F-G-H-I
ST 7648 6488 ST 7659 6486

J-K-L-M
The width of the footpath to be recorded is 1.8m, narrowing to 0.8m at point B

Order Map



Scale 1:1500



Public footpath already legally recorded

