
Order Decision

Inquiry opened on 18 July 2017

by Helen Slade MA FIPROW

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

Decision date: 07 December 2017

Order Ref: ROW/3166460

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Buckinghamshire County Council (Parish of Iver) Definitive Map Modification Order 2016.
- The Order is dated 26 September 2016 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 13 objections outstanding, and one representation in support, at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I opened the Inquiry at the Jubilee Pavilion in Iver on 18 July 2017, having carried out an unaccompanied site inspection of the area the previous day. Due to the number of witnesses who wished to speak it was not possible to complete the Inquiry in the allotted time and it was necessary to adjourn the remainder of the event until later in the year.
2. I resumed the Inquiry on Tuesday 21 November 2017 and closed it the following day. I undertook a further site visit on Wednesday 22 November 2017 when I was accompanied by representatives of the parties concerned.

The Main Issues

3. The Order has been made in consequence of an event set out in Section 53(3) of the 1981 Act. Section 53(3)(b) provides that the Definitive Map and Statement should be modified where a period of time has expired during which the enjoyment of a route by the public raises a presumption that the way has been dedicated as a public path.
4. With respect to evidence of the existence of a highway, Section 31 of the Highways Act 1980 ('1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.

5. I also need to consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.
6. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. This includes aerial photographic evidence.
7. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') in Circular 1/09 on Public Rights of Way, and to relevant legal judgements.
8. I note that the Order Making Authority (or OMA), in its report to the Rights of Way Committee in June 2016, stated at paragraph 73 that the Committee needed to '*determine whether or not to accept the application and whether it is reasonable to allege that public rights subsist on the route shown...*'. The report then goes on to set out two recommendations at paragraph 74(a) and (b) which relate to the test for a common law dedication and the test for a statutory dedication respectively.
9. The criterion relating to whether or not it is reasonable to allege that a public right of way subsists is contained within Section 53(3)(c)(i) of the 1981 Act. Since this Order has been made in consequence of an event set out in Section 53(3)(b) the test relating to the reasonableness or otherwise of the allegation is not relevant. For the avoidance of doubt, I shall be considering the evidence in relation to the criteria set out at paragraph 3 above, and cited in the Order itself. The test I must apply is the balance of probabilities.

Reasons

Background

10. In March 2012, Mr Paul Graham wrote to the OMA enclosing 19 user-evidence forms, completed by local residents, for a footpath from Grange Way to Colne Orchard. The evidence of use spanned many years from the late 1940s up to, and including, 2011. Mr Graham considered that the relevant 20 year period to consider in respect of a statutory dedication under Section 31 of the 1980 Act was 1991 to 2011. However, there was no indication at that time that there had been any action which brought the use of the claimed route by the public into question. Thus there was no date from which to measure, retrospectively, the requisite period of 20 years for the purposes of a statutory declaration.
11. The Natural Environment and Rural Communities Act 2006 amended Section 31 of the 1980 Act to provide for the submission of a formal application made in accordance with Schedule 14 to the 1981 Act to constitute such a 'bringing into question'. Mr Graham submitted a formal application two years after his original claim in September 2013, having notified the relevant landowners of

the situation. As identified by the OMA, this resulted in there being a gap of two years where there was no evidence of public user. This gap was subsequently filled by the gathering of additional evidence during the time when the application was being investigated by the OMA.

12. The area surrounding the Order route has been developed for housing over the years, through the acquisition of former agricultural land. The development to the eastern end of the route (Colne Orchard) is of an earlier date than the development to the western end (Grange Way). I am not aware of the date of construction of the housing development which included Colne Orchard, but the development of Grange Way took place after the compulsory purchase of the land in 1964. The earliest Ordnance Survey map to show the development is that submitted by the objectors dating from a survey of 1969, and this is consistent with the evidence of Mr Leo Smith that he moved into 97 Grange Way in that year. The beginning of the period of claimed usage pre-dates the construction of Grange Way, dating from the mid-1940s.

The Order route

13. I consider that it is necessary for me to start by describing the Order route because the first criterion on which I must be satisfied is that there has been, in use, an identifiable route which is of a character capable of giving rise to a presumption of dedication at common law.¹
14. The route as shown on the Order plan (A-B-C-D-X-E) starts at the southern terminus of Grange Way, Iver, and runs in an easterly direction close to the back of the houses for a distance of approximately 90 metres. At that point it begins to drift to the south, in two stages, to reach the boundary between land owned by the Hurley family ('the Hurley land'), and land owned by the Blackman family ('the Blackman land'). Once onto the Blackman land, it runs close to the northern boundary of the field to meet the definitive line of footpath IVE/15, which then exits the field via a gate or gap into a short alleyway linking to Colne Orchard. The description of the footpath to be added to the map given in the Definitive Map Modification Order ('DMMO') itself is as follows:

"From point A at TQ03523-80957 generally east for approximately 150 metres to point C at TQ03665-80944 then south east for approximately 28 metres to point D at TQ03684-80925 then generally east for approximately 91 metres to point E at TQ03775-80935 as shown by a bold broken line and having a width of 2 metres throughout as shown on the map"
15. This route differs from the route shown on the application map and the maps attached to the completed user-evidence forms ('UEFs'). Those maps show a route in red which, from point A, takes a dog-leg route to the south with two changes of direction, and then runs due east to point E via point X. It lies considerably further away from the rear of the properties in the adjoining estate.
16. In April 2016 the OMA wrote to the applicant and asked him to clarify with the witnesses the line of the path that they had used. The OMA provided a list of the witnesses, and supplied copies of an unmarked map. Of those witnesses who responded (nine of them in total) eight showed on the map two different

¹ See Section 31 of the 1980 Act

routes: one following a more northern line nearer the field boundary on the Hurley land, and one following a more southerly route corresponding more closely to the application route. All of the witnesses indicated that the route had changed over time, due to overgrowth and the depositing of rubbish and litter, but the dates were not consistent ranging between 10 years and 20 years prior to 2016.

17. The route shown on the DMMO plan does not accurately reflect either of the routes shown on these maps, and neither does it accurately reflect the application route. I have therefore studied the aerial photographs closely to see if they can shed any light on the situation.

The Aerial photographs

18. A not insignificant time was spent at the inquiry looking at various of the aerial photographs submitted in evidence and I include below a summary of my examination of them²:

May 1974 (OMA bundle)	Monochrome	Shows clear single route between Grange Way and Colne Orchard close to field boundary with gentle curve from Point X. Boundary between two types of agricultural use lies to the EAST of the point shown on the Order plan as Point X. Also shows clear line along the route of IVE/14 but NOT IVE/15. Use of a route to the south of the allotments indicated, leaving IVE/14 towards recreation ground.
March 1985 (OMA bundle)	Monochrome	Routes in general less obvious due to state of ground. Boundary between fields moved to equivalent of Point X. Eastern field clearly ploughed and planted. Western field appears partially bare ground, partially rough vegetation. Route indicated nearer to garages and rear of properties in Grange Way until western end where usage appears splayed out. Suggestion of multiple access points at western end, including possibly into the alleyway behind the houses in Grange Way. Route through into garage area in addition to route through eastern field. No sign of any polytunnels on western field. Route of IVE/14 not so clear, and no obvious sign of use of IVE/15. Possible use of route down boundary between west and east fields south towards industrial estate and around field edges. Signs of route running along south side of the allotments towards recreation ground.
16 May 1992 (objector's bundle)	Colour	Shows a number of routes clearly. Blackman land cultivated and under grass just beginning to show. Route visible across the northern headland. Hurley land uncultivated rough vegetation showing multiple routes. Claimed route indicated as in 1985 photo, but with additional exit into garage area much clearer, and obvious curve to the south west near Point A. No clear

² Reference to the fence-line Point K relates to the fence-line shown on maps submitted by Mr Hurley in his evidence and referred to at the inquiry as 'fence K'.

		line for IVE/15 but IVE/14 very clear.
19 June 1998 (objector's bundle)	Colour	Too oblique to show useful detail. Blackman field cultivated.
? 1999 (OMA bundle)	Colour	Month of photo not given but vegetation green and trees in leaf. Eastern field shows faint ploughing lines under grass. Western field is rough and uneven vegetation. Route shown very similar to that in 1974 picture but with curve to the south from small building (electricity sub station) near A to join new access track behind gates. Northern part of IVE/14 rather overgrown. Clear use of southern part of IVE/14 south of new access track opposite where route towards recreation ground joins. Number of other routes across Hurley land including one lying west/east from new access track (at junction with recreation ground path) towards IVE/15 but then appearing to turn north along field boundary, within Hurley field. No apparent use of IVE/15 itself, but possibly obscured by notation.
9 September 1999 (objector's bundle)	Colour	Vegetation beginning to brown. Only shows area near Grange Way. Route into alleyway clear. Less clear is curving route to south west. No obvious access at Point A except via alleyway. Possible indication of fence 'K' and path running south alongside.
? 2003 (OMA bundle)	Colour	Month of photo not given but trees in leaf. Western field rough ground and rather sparse, coarse vegetation. Eastern field ploughed and down to grass. Clear route along northern boundary of Blackman land. Multiple clear routes across Hurley land, West of point X routes diverge: one due south along boundary; one south west towards path from recreation ground and one to north west to rear of houses largely along the line of the DMMO route ('order route'). Clear path into alley behind 97 Grange Way, and clear path south along fence-line 'K', continuing around in circuit to east and then north within Hurley land. Also clear route curving to south at electricity substation to meet access track south of gates. A route then leaves track a short distance to the south running towards junction of several paths identified on previous photo. Route to east of that junction that crosses Hurley field towards IVE/15 and then curves north is very clear. Use of northern part of IVE/14 clear, and a route towards recreation ground south of the allotment boundary. Now also a clear link between IVE/14 and circular route round Hurley land at south western point of fence-line 'K'.
December 2003 (objector's bundle)	Colour	Paths clear. Access into alleyway behind Grange Way very clear. Path due south alongside line of fence 'K'. Curving path to farm access track also clear. No obvious route to Point A.

? 2010 (OMA bundle)	Colour	Month of photo not given. Trees in leaf, vegetation fairly green. Western field ploughed to line level with northern boundary of eastern field, leaving wide area of rough ground to northern boundary. Eastern field ploughed and down to grass. Very clear route across Blackman field beside northern boundary. Routes across Hurley field less obvious, but multiple routes still visible. 'Order route' now matches line on DMMO but not clearly distinguishable from other adjoining routes. Circular route round field still visible, and also two other paths across field; one from IVE15 and one from Point X as before. Use of northern part of IVE14 clear, and link from southern part to the circular route round Hurley field also very clear.
June 2013 (objector's bundle)	Colour	Clear route along line resembling application route at Point A and to the east over Hurley land.

19. Other aerial photographs were included in the bundles, but did not expand on what was visible from the ones I have mentioned above.
20. There was no dispute at the inquiry that the public had been walking a route (amongst others) between Colne Orchard and Grange Way. From the evidence, both oral and photographic, it would seem that, although such a route has existed for many years, it is beyond doubt that the route mainly in use has not always followed a consistent course. This may have been for a variety of reasons including, but not exclusively, for example: because of the conditions underfoot due to the time of year; because of the depositing of rubbish in certain locations; because the purpose of the journey was different (e.g. dog walking, going to school, shops or other services, going beyond to other locations, etc); because of the presence of animals in the fields; or because of agricultural operations.
21. I am satisfied that it is possible to identify one or more routes, following the general direction of the Order route, some of which have the character capable of giving rise to a presumption of dedication at common law. The relevant routes link to a highway at each end (IVE/15 at the eastern end and Grange Way at the western end). The question I need to address is whether or not any one of these routes can be considered to be the Order route and, if so, whether or not the necessary criteria to demonstrate such a dedication have been fulfilled. I shall first of all examine the possibility of a statutory dedication, before moving on to consider the question of dedication at common law.

Statutory Dedication: Section 31 of the 1981 Act

The date on which the use of the route by the public was brought into question

22. The OMA supported the confirmation of the Order based on the presumed dedication of the route partly under the statutory procedures and partly at common law, by dealing with the claimed route in two parts: the eastern part from Point E to Point X and the western part from Point A to Point X respectively. The reason given for this was because the OMA recognised that the western half of the route, across the Hurley land, has not always followed

- the same route. It was not possible to identify a period of 20 years during which the route was the same throughout its length. Consequently they applied the statutory procedures only to the eastern half of the route where there appears not to have been any alteration.
23. I have found this approach unhelpful. It seems to me that the route must be considered as a whole, from A through to E. A route ending at Point X cannot, it seems to me, have the character capable of giving rise to a presumption of dedication, from whichever direction it arrives. That is not to say that a rural cul-de-sac can never be a highway but in this case, Point X is not a legitimate destination for the public. Furthermore, it is not a place that the evidence supports was the objective for users of the route. They did not walk to Point X and then return the way that they had come. The evidence is that people continued on in the same direction. I accept that the evidence of Mr Beary suggested that sometimes he walked his dog from Point A to Point X and then walked south along the fence to continue a circular walk, but in my view that is not evidence of use of the claimed route *per se*.
24. I find the approach of the OMA, to consider the route in two halves, is an artificial device employed to overcome a difficulty, rather than an objective approach to the evidence. I consider that I must address the route as a whole and apply the relevant tests accordingly. If the evidence does not support dedication of the route by statutory means, then I am entitled to look at a potential common law dedication for the whole route.
25. With respect to a statutory dedication, there was no dissent at the inquiry between the parties that in the absence of any other event, the submission of the application in accordance with Schedule 14 of the 1981 Act qualified as the date on which the right of the public to use the way was brought into question.
26. In opening, Mr Stedman Jones appeared to suggest two other dates as candidates for events which brought the use of the way into question: 1993 (when a fence was erected on the Hurley land in an attempt to deter unlawful grazing of horses); or 1995 (when Mr Blackman took control of his land and repaired the fence at Point X and allegedly erected a sign)³. In closing, another date was added: 1998 when Heras fencing was erected on the Hurley land in an attempt to secure the property. These possibilities were not seriously explored in this context at the inquiry and I find it hard to agree that they qualify as such events, since the public apparently continued to use a route across the land, by one means or another, without complaint. Furthermore, the user witnesses who provided evidence of use did not acknowledge any of these events as causing them to think that their right to use the route was being challenged, if they acknowledged them at all, which most of them did not.
27. No other event has been demonstrated to me to have been capable of triggering any other period of 20 years. In the first instance, therefore, I need to examine the use of the way during the 20 years dating back from 2013.

Whether there is a route of the appropriate character

28. As I have previously mentioned, the OMA accepted that the route used had not always followed the same course, and the evidence provided by a number of

³ Mr Blackman himself gave the date of the first sign as 1996

the user witnesses confirms this. It appears to be common ground that the route was at one time much closer to the rear of the properties in Grange Way which lie adjacent to the Hurley land and that, for a variety of given reasons (e.g. dumped rubbish, overgrown vegetation, ploughing) the route has migrated further south. It may also have wandered back and forth at times.

29. The line of the route shown on the DMMO appears to me to most closely resemble the line of a route which can be discerned (for the majority of its length) on the 2003 aerial photograph and in totality on the 2010 photograph but, as far as the Hurley land is concerned, it is only one of several routes. This does not prevent me considering the Order route in the context of dedication as a highway, but it does mean that I have to be sure that this accurately reflects the route which was in use for the relevant 20 year period.
30. To try to determine that I am heavily reliant on the evidence provided by the aerial photographs, and the user evidence itself. Unfortunately very few of the people who provided written evidence of use actually presented themselves at the inquiry.
31. Mr Warren, whose period of user spanned the last five years of the relevant period (2008-2013) was clear that he had used the route shown on the 2010 aerial photograph which corresponds most closely to the order route. He was adamant that, despite his sketch map and his signature on the application map, he had never used any other route than the one shown in the Order. He made mention specific mention of having used a well-trodden path and of the dog leg shown on the Order plan. However, the photographs submitted by the applicant which were taken in 2011 more closely resemble the line of the route shown on the application maps (i.e. continuing in a direct line to the west of Point X), turning only to the north towards the exit at Point A. There is thus a conflict between the evidence of Mr Warren's pattern of use and the line shown on the application.
32. Those witnesses who were asked by Mr Graham to respond in 2016 to the queries from the OMA about the actual line of the path clearly indicated that the route that they had used had changed over time. Of those witnesses that gave a date of any change of route, it varied between 10 and 35 years ago: Mr Goodliffe suggested that it moved about 10 years before (i.e. 2006); Mrs Gale considered that it moved over 10 years before; Mr and Mrs Gibbons stated that the path had moved to a more southerly route about 15 years before (i.e. about 2001) ; Mrs Metcalfe stated that the old route got overgrown and moved further south about 20 years ago (i.e. about 1996); and Mr Graham himself said that the northerly route was in use from 1981 and then it moved further south in 2008, moving again in 2010 when Mr Hurley ploughed the field. Mrs Thornhill stated that that the southerly route came into being in about 1982.
33. This is a good example of how unreliable memory can be, but also corroborates the evidence of the aerial photographs which show that since 1974 multiple routes have come into existence through usage. In order to obtain a clearer picture I am forced to rely on the evidence contained in the aerial photographs as being snapshots of what was actually happening on the ground. From these I can conclude that the route shown in the DMMO came into being for the most part at some point after 1999, and before 2003 when a clear deviation south started to appear on the Hurley land. However, at that point in time, there does not appear to have been a well-used exit onto Grange Way at Point A.

34. The 2003 photograph appears to show an exit into the alleyway behind the houses in Grange Way (to the north) and both the 1999 and the 2003 photographs show an extension in a south westerly direction to the access track. Mr Hurley confirmed that the poultry unit had been built in 1998 and new gates and fencing (Heras-type) were erected at Point A. He also said that, since 1993 when a fence had been erected on their land to prevent unauthorised horse grazing, people had been using the alleyway as access to the field. This access is not obvious on the OMA's 1999 photograph, but it is very clear the objector's map of the same year, and on the 2003 photograph, supporting Mr Hurley's view that the Heras-type fencing had caused an alteration in the route that people took, but not, perhaps, the 1993 fence.
35. The access onto Grange Way appears to be shown on the 2010 photograph, which corresponds to the year in which Mr Hurley stated that the new electric gates and block wall were built. At that time he said that a gap was left beside the wall to allow access for workers to operate the gates if required. This is corroborated by Mr Goodliffe's evidence that a gap was left, although he ascribes it to Mr Hurley's agreement to leave access for walkers.
36. Nevertheless, by the time that Mr Graham took his photographs for the application the following year, the path had clearly moved further south. Mr Graham believed that the path, having previously moved further south then moved north again when Mr Hurley ploughed the majority of the field. However, others implied that because Mr Hurley ploughed the field that year, people took advantage of the flatter ground and trod out a path on the more level part of the field, avoiding the rough overgrown area to the north which Mr Hurley had avoided.
37. Whatever the truth of the matter there is no doubt, therefore, that the route of the path has varied on the Hurley land during the relevant 20 year period and, furthermore, the precise access point at the western end also appears to have altered. Despite none of the user witnesses acknowledging that they had used the alleyway behind the houses in Grange Way, other evidence does suggest that at least some people who were accessing the Hurley land must have used that means of access. It does not, of course, mean that they also used the remainder of the Order route since there are multiple routes across the Hurley land visible on the aerial photographs. Mr Pitman, in his written evidence, does say that on occasions the gate at Point A was locked and so access was taken via the recreation field or alongside the allotments. This would help to explain the worn route, visible on some of the aerial photographs, curving to the south west to meet the access track. It would then have been possible to gain access to IVE14 (alongside the allotments) or the unrecorded path that appears to run directly towards the recreation path on the south side of the allotments.
38. The applicant argued that deviation to avoid an obstruction should be considered in the same way as any other deviation would be treated in relation to avoiding obstacles on a public highway: it should be disregarded, and all the used routes considered as being one and the same. I cannot agree. Whilst it may be legally permissible to deviate from a highway to avoid an obstruction, when one is trying to establish whether or not a way is a highway it is necessary to show that the use of the route would have demonstrated objectively to a landowner (whoever that might be) that the public were exercising a right in using it. To apparently willingly deviate from the route does not give that impression.

39. Furthermore, it patently cannot be considered to be use of the claimed route. If the deviation along another route takes place over a sufficiently long period, and that route is not already a highway, there may then be a case for rights to have been dedicated over the alternative route. But that would depend upon the circumstances and the basis on which the highway status was being claimed. In the case of *Dawes and Hawkins*⁴, to which I was referred indirectly by the objectors, a substitute path was not found to be a highway, but that case was determined at common law, the statutory provisions not having been enacted at that time.
40. I agree with the submissions of Mr Westaway that to establish a public right on land depends on proof of the use of an exactly demonstrated course⁵ and that a right of way cannot be a moveable feature. In any case, I am being asked to consider a route following the line on the Order plan, and not any one or other of the variations shown as having been in use based on the evidence of the users and implied by the aerial photography. Furthermore, I have not been requested to modify it.
41. By the OMAs own admission, the route has changed where it passes over the Hurley land during the relevant period. This was why the report to the Rights of Way Committee chose to rely on a common law dedication of the western part of the route. The evidence given at the inquiry and provided by the documentation merely serves to confirm the fact that the Order route has always not existed on the line shown in the DMMO, and indeed does not accord with the line of the originally claimed route.
42. Even if all those people who walked from Grange Way to Colne Orchard or vice versa used an access at Point A, I am not satisfied that there has been use of a consistent route across the Hurley land for a full, uninterrupted period of 20 years dating back from 2013, the date on which the use of the route was brought into question. I cannot accept the arguments put forward by both the applicant and the OMA in closing that the deviations are of no matter in this respect and thus the deemed dedication by statutory means cannot succeed.

Other issues in relation to the relevant statutory period

43. The question of another exit point at the site of the former garages off Colne Orchard was a matter of some debate, but it is not relevant to my consideration of the Order route.
44. If I could have been satisfied that a slightly different route from that shown in the DMMO had been used sufficiently consistently during the relevant period, it would have been open to me to consider modifying the Order accordingly (and advertising my modifications accordingly). However, I am not so satisfied so this option is not open to me.
45. As I have explained in paragraph 26 above I do not consider that the alternative dates postulated by Mr Stedman Jones in closing have any merit in having brought the use of the way by the public into question, and in my view it is therefore inappropriate to look at a statutory dedication based on any of those events. I decline to do so.

⁴ *Dawes v Hawkins* [1860]

⁵ *A-G v Brotherton* [1992] 1 AC 425

Common law dedication

Background

46. The provisions for statutory dedication, now contained within the 1980 Act, were first enacted in the Rights of Way Act 1932 as a means of trying to overcome the difficulties of proving the existence of public rights of way at common law. However, the statutory provisions do not prevent the operation of the common law in this respect, although the difficulties remain. The burden of proof lies with the person or persons claiming the right.
47. A common law dedication relies on the dedication of a way by the landowner, and the acceptance of that way by the public. There may be an express dedication (e.g. evidenced by some sort of written document) but more usually any dedication has to be inferred. An inference can be drawn from the combination of factors: the public use as of right; the landowner's recognition of that use; and the owner's acquiescence in that continued use. The classic comment on the common law is usually taken from the judgement in *Mann v Brodie* [1872] 27 L.T. 672 where Lord Blackburn said that in order to constitute a valid dedication to the public of a highway by the owner, there had to be an intention to dedicate, of which the use by the public was evidence and no more. A single act of interruption carries more weight, in looking at the question of intention, than many acts of enjoyment (or use) of the route by the public.
48. An additional hurdle to overcome is the question of the legal capacity (or ability) of the landowner to make such a dedication. Where a landowner did not have such capacity, there is, effectively a 'dead' period during which a common law dedication cannot be inferred.
49. In this case, I am being asked by the OMA to consider common law dedication for the western half of the claimed route (Point A to Point X) but for the same reason that I have set out in paragraphs 23 and 24 above I consider that I can only examine the alleged existence of public rights over the route as a whole. Nevertheless, both the OMA and the objector consider that there are a number of 'dead' periods during which dedication cannot be inferred due to the existence of a mortgage or other charge on all or part of the land concerned

Relevant period

50. The objectors state (and this was not challenged) that all the land crossed by the claimed route was subject to a mortgage during the period 1952 to 1964 when it was owned by C and G Stevens Ltd. This mortgage appears to have been released in 1964. Subsequently, the land owned by Mr Hurley was used as surety against a loan for the construction of the poultry unit. This period covers the years 1988 to 2012.
51. The existence of a mortgage in itself does not produce a 'dead period' because both parties to such an arrangement could, in theory, dedicate a public right of way across the land. In practice, however, it will usually be the case that one party to the mortgage, or other charge, cannot dedicate without the agreement of the other party. This effectively prevents dedication being inferred since it requires the knowledge of the use of the land by the mortgagor, or other third party in order to be able to infer their consent.

52. I therefore accept that any dedication at common law will have to have arisen during the period when neither parcel of land was subject to any such charge. This would seem, from the evidence, to be the period 1964 to 1988, during which part of the land changed hands.

The use route of the path during this period

53. No serious effort was made by the OMA at the inquiry or in their submissions to address the question of a common law dedication, and I agree with the objectors that the evidence from this early period is very scant, both in terms of the user evidence and any evidence of the landowner's intentions. The burden of proof, lying as it does with those who claim the right, lies with the OMA and the applicant.
54. Only two of the witnesses who gave oral evidence of use of the path in support of the Order claim to have used the path during the period prior to 1988: Mr Graham and Mrs Morgans. Of the remaining user evidence in support of the path, 16 people claim use of the path towards the latter part of the period, and four people in 1964. Clearly with the passage of time it is harder to obtain evidence of use, and I am aware that some of the witnesses who completed UEFs have sadly passed away.
55. I need to rely on the evidence of the aerial photographs to try to identify whether or not there has been one consistent route in use for a sufficient period of time. Two of the aerial photographs are relevant to this period: 1974 and 1985. Both of are in black and white but the definition is reasonable. The earlier of the two photographs shows a clear desire line from Point A to Point E, on a different line from that shown in the Order but without any apparent obstacle. This supports the fact that it must have been in regular use before that time. The evidence of the two relevant photographs is compromised slightly by the depiction on the later photograph of other routes in addition.
56. The UEFs show that 10 people claim to have been using a route in 1974 between these two points at that time, and it might be reasonable to assume that they were making use of the trodden route shown on the 1974 photograph. However only the only oral evidence given of use at that time was by Mrs Morgans. Her claimed use of the way stretches over a long period (from 1970 to about 2015) and, probably as a consequence, her memory of events was not as clear as it might have been. She was nevertheless clear that the route she had used had originally run nearer the edges of the respective fields, and that the deposition of rubbish (some of which she had helped to clear at times) had forced the path further out into the field. This recollection is consistent with the information gathered by the applicant on behalf of the OMA in 2016. But it does not help in determining how and when the line of the path altered.
57. Mr Graham, who used the path during the latter part of this period, stated at the inquiry that he had used both the route shown on the application map (that he prepared) and also the route shown on the Order plan, or variations of them. In the early years of his use the path ran nearer to the houses. He started to use the path in 1981, but his use of the path was very occasional.
58. Up to six of the witnesses who completed UEFs claim to have used the Order route (or a route from Point A to Point E) prior to 1964. This is difficult to reconcile with the fact that, although the houses in Colne Orchard were in

existence at that time, the estate at Grange Way had yet to be built. I therefore cannot rely on any user pre-dating 1969 as the topography was quite different and I cannot be sure that the witnesses were actually using a route between those two points.

59. Despite the lack of oral evidence of use, the two aerial photographs are consistent with the evidence of use available to me by way of the written representations. I am satisfied that a route across the two fields between Points A and E was used during the years 1974 to 1985 (the dates of the two aerial photographs) and that the clarity of the route on the earlier photograph supports the fact that the route had been in regular use by that time. In the absence of the opportunity to test earlier evidence of use, I can place no weight on user prior to 1969.

Actions of the landowners

60. For the period prior to 1984 (when Mr Hurley senior bought part of the land) the landowners were C and G Stevens. It was implied by Mr Blackman that they knew of such use, because when he bought his field (in 1994) the issue of the public walking across it was mentioned. The evidence of the aerial photographs suggests that very little use, if any, was being made of the recorded public footpath IVE/15, so it is more likely that the comments did refer to the use of the claimed route across that field.
61. In respect of the remaining land, Mr Hurley junior⁶ pointed out the requirement on the purchasers of the Grange Way land (in 1964) to securely fence the agricultural land from the development site. The inclusion of such a condition is not an action consistent with the dedication of a public footpath. This strengthens my view that no route existed between Points A and E prior to the construction of Grange Way. Mr Hurley also stated that after his father had bought the land from the Stevens he insisted on repairs being made to the fence on a number of occasions which indicates that it was, to at least a degree, still in place in 1985. These are not the actions of a landowner who intends to dedicate a public right of way.

Conclusions on common law dedication

62. There is some photographic evidence of the development of a desire line between the development in Colne Orchard and the development in Grange Way. It is likely that this usage developed very shortly after the houses were built in Grange Way and by 1974 was well established. The landowners at the time may or may not have been aware of such use, but had nevertheless agreed to a condition in the conveyance of the land (in 1964) that a secure fence would be erected against the development by the developers. This is not the action of a landowner who is seeking to dedicate a public footpath across his land.
63. Quite how, or exactly where, the public began to access the land and start to form a trodden path has not been identified but, given that at least some of the security fencing was still in existence when the land was purchased by Mr Hurley in 1985, it would suggest that the initial user was by force. The repeated requests for repair by Mr Hurley senior (to the party responsible for the repair of the fencing) are equally not consistent with dedication.

⁶ Giving evidence on behalf of his father who was suffering from ill health

64. I accept that it is difficult at this distance in time to find evidence of actions taken, or not taken, by the previous owners of the land, C and G Stevens, in connection with the public access to their land. But the comments allegedly made to Mr Blackman (and not challenged by any party) indicated that the use of the land by the public at that time was an issue which caused them problems. The comments are not consistent with an intention to dedicate a public footpath, either at that time or at any time previously.
65. In the absence of persuasive evidence to the contrary, I conclude that there can be no inference of dedication at common law because, although there is some evidence of use of a route from Point A to Point E, the evidence available to indicate the attitude of the landowner is not consistent with dedication. Furthermore, the route likely to have been used at that time is not consistent with the route shown on the Order plan. Although it would be open to me to modify the route, had I concluded otherwise, the evidence on which I would have to rely is sketchy in the extreme.

Other matters

66. A great deal of the time at the inquiry was taken up with issues relating to the question of whether or not there had been regular repairs undertaken to the fence at Point X, and whether user had consequently been forcible. Given my conclusions in relation to any potential statutory dedication I have not needed to address this matter. It would not be relevant to any potential common law dedication as Mr Blackman's ownership of the land post-dates the appropriate period.
67. Neither has it been necessary for me to examine the effects, if any, of the unlawful occupation or use of the land for the purposes of grazing horses.
68. The question of the creation of a cycle track along the line of the claimed route was raised in the evidence. The issue of whether or not a right of way has been dedicated over the claimed route has no bearing on any separate issue of the possible creation of a bridleway or a cycle track. If it is considered desirable or necessary to have such a facility, other powers are available to the local authority to achieve those ends.

Conclusions

69. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed.

Formal Decision

70. I do not confirm the Order.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Mr D Stedman Jones	Counsel appointed by Buckinghamshire County Council
He called:	
Mrs Helen Francis,	Interim Definitive Map and Local Land Charges Team Leader

IN SUPPORT OF THE ORDER:

Mr Paul Graham	Applicant
Ms Carol Gibson	
Mr Paul Warren	
Mrs Diana Morgans	
Mr Ciaran Beary	

FOR THE OBJECTORS:

Mr N Westaway	Counsel
He called:	
Mr John Blackman	Landowner
Mrs Barbara Blackman	
Mr Michael Blackman	
Mrs Karen Blackman	
Ms Kielly Blackman	
Mr Peter Blackman	
Mr Tim Hurley	Landowner
Barbara Power	
Mr John Andrews	
Mr Andrew Dunton	
Ms Wendy Cox	

DOCUMENTS

- 1 Proof of Evidence of Mrs Helen Francis
- 2 Statement of Case and associated bundle: Buckinghamshire County Council
- 3 Statement of Grounds on which the Order should be confirmed: Buckinghamshire County Council
- 4 Original submission bundle submitted by the Order Making Authority
- 5 Closing Submission: Mr D Stedman Jones on behalf of the Order Making Authority
- 6 Proof of Evidence of Mr Paul Graham, the applicant
- 7 Closing statement: Mr Paul Graham
- 8 Statement of case on behalf of the objectors and associated bundle
- 9 Proof of Evidence on behalf of the objectors and unsigned statutory declarations and statements
- 10 Bundle of signed statutory declarations and witness statements on behalf of the objectors
- 11 Copies of calendar entries made by Mrs Barbara Blackman and family
- 12 Closing Submission: Mr N Westaway on behalf of the objectors

Wildlife and
Countryside
Act 1981
Claimed Public
Footpath, Iver

Public Rights of Way

Claimed
Public
Footpath
A-B-C-D-E

Unaffected
Public Footpaths
Grid References

Point A: TQ03523-80957
Point B: TQ03629-80939
Point C: TQ03665-80944
Point D: TQ03684-80925
Point X: TQ03693-80925
Point E: TQ03775-80935

This is not the Definitive Map but a working copy. While every effort has been made to ensure the accuracy of the data presented, we cannot guarantee that the data will always be accurate and complete. The data is intended to be viewed at a scale of 1:2,500 or smaller.

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