
Order Decision

Inquiry Held on 8 August 2017

Site visits made on 7 and 8 August 2017

by Helen Slade MA FIPROW

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

Decision date: 21 August 2017

Order Ref: FPS/N1160/7/6

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the City of Plymouth (Footpath No1, St Budeaux) Definitive Map Modification Order 2016.
- The Order is dated 24 February 2016 and proposes to modify the Definitive Map and Statement for the area by adding a footpath from Normandy Hill to Wolseley Road as shown in the Order plan and described in the Order Schedule.
- There were four objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I carried out an unaccompanied visit to the area the day before the inquiry when I was able to walk along most of the claimed route. The central 20 metres or so was inaccessible due to the growth of vegetation. I also walked along a nearby path linking Wolseley Road to Vicarage Gardens which had been mentioned by the objectors in their submissions.
2. I arrived at the inquiry venue, Ballard House, in good time, but learned that there had been a power cut in the building, affecting the original inquiry room. The replacement room which had been set aside for the inquiry was far too small. A second room was found, but this too was inadequate and consequently, after two short adjournments, the venue was moved to another Plymouth City Council building (the Warspite Room in the Civic Centre) where I was finally able to open the inquiry properly at 12 o'clock. With the agreement of the parties present, I conducted the inquiry without a further break for lunch, and I was able to close at 3.20pm.
3. It became clear during the inquiry that an accompanied site visit was required, and I conducted that at 4.00pm, following the close of the inquiry, in the company of representatives of the statutory parties.

The Main Issues

4. 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.

5. 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.
6. Sub-section 7(B) of Section 31 provides that the date of an application made in accordance with Paragraph 1 of Schedule 14 of the 1981 Act can be treated as the date on which the use of the way was brought into question.
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. The test I must apply is the balance of probabilities.

Reasons

Background

9. The Order was made by Plymouth City Council ('the Council') in 2016 in response to an application which had been submitted by Mr Edward Hammond in July 2010. The application was not validated until September of that same year. Mr Pearce, the Officer at the Inquiry, confirmed that he had not been the officer dealing with the application but he indicated that the application had been deemed by the Council to have been compliant with the legislative requirements as set out in Paragraph 1 of Schedule 14 of the 1981 Act.
10. Mr Treeby, one of the objectors, considered that the application had not been properly made as he, as a landowner and living on the site, had not been notified of the application by the applicant, despite him living in close proximity. Mr Pearce explained that the Council expects applicants to make reasonable efforts to trace landowners, but not to go to any expense. In this case, some of the landowners had been identified by the applicant, and the Council had subsequently identified the remaining landowners. Mr Pearce made the point that all the landowners had been identified and information sought from them, in advance of the report to the relevant Committee and the decision to make the Order. All their comments had been taken into account.
11. It is open to a Council to make an Order in the absence of an application, although it appears that Plymouth City Council chooses only to make evidential Orders on receipt of applications. Nevertheless, I am satisfied that the Council did identify and engage with the relevant landowners when they began their investigation into the application, and that no-one had been prejudiced by not being notified by the applicant.

The date on which the use of the way was brought into question

12. It was the view of the Council that the use of the way was brought into question shortly after Mr Treeby bought the property known as The Kloof and erected notices on site regarding use of the path. Alternatively, the Council relied upon the date of the application as being the relevant date.

13. Mr Treeby disputed that the application was prompted by any signage, and claimed that Mr Hammond had made the application in response to comments made by Mr Treeby on a nearby planning application, in which he (Mr Treeby) had disputed the public status of the route which is the subject of this Order. Mr Treeby stated that Mr Hammond had apparently objected to the planning application on the grounds that there was a public right of way involved.
14. Mr Hammond did not attend the public inquiry, and I was therefore not able to seek further information from him on this matter. I must rely on the evidence on his application form and his user evidence form. The application appears to rely principally on historical documents showing the route of the path, together with 12 completed user witness forms. The applicant is not obliged to indicate on the application form why it is being submitted, but on his user evidence form Mr Hammond referred to signs having been erected, gates having been put up and a van being parked inconveniently on the path, although he states that the owner had never challenged his use. He provides no dates for any of these issues, but indicates that the van had been positioned to make access difficult 'recently'.
15. It is difficult to conclude that any of these issues actually brought the use of the way into question, as Mr Hammond clearly had not been prevented from using the way. I therefore conclude that I must rely on the date that the application was deemed to be compliant with the legal requirements as being the date on which the use of the route was brought into question, in line with the provisions of Section 31(7) of the 1980 Act. The date on which the Council states that the application was validated in this respect is September 2010.
16. This makes only a marginal difference to the relevant period of 20 years as far as my examination of events is concerned. The relevant period is the 20 years dating back from September 2010 (i.e. October 1990 to September 2010).
17. Further user evidence was submitted by individuals after this date, suggesting that some conflict was arising between users and the landowners, and where that user evidence provides information about the relevant 20 year period I am able to take it into account. But it does not affect the statutory period identified in accordance with the requirements of Section 31 of the 1980 Act.

Whether use of the way took place during the relevant 20 year period

18. Mr Treeby completed the purchase of The Kloof in 2010, although he had been familiar with the area since childhood and had used the route himself, both as a child and during the period of his house purchase. Nevertheless, as far as relevant period of 20 years is concerned, his knowledge of the route was second-hand except for the last year or so.
19. Mrs Lewis, the daughter of the owner during most of the period in question, explained that she had lived at the property between 1948 and 1960, and been a regular visitor since that time until her mother finally moved out in 2006. She had continued to visit the property after that date to try to keep the garden tidy and the property monitored. She stated that the family was well aware that the route was in regular use, and that her parents had been advised to erect notices disclaiming any liability for injuries etc. Her mother, Mrs Ware, was the person who took responsibility for practical maintenance, and erected signs to that effect.

20. In response to questions from Mr Gigg, Mrs Lewis agreed that there was clear evidence of significant use of the path due to the amount of dog litter which was obvious. At one time, she said, her sister had arranged for signs asking people not to allow their dogs to defaecate, but that simply resulted in the waste being bagged up and then thrown in an overgrown corner, later discovered during a clear up. Despite the amount of use which appeared to be taking place, she herself had never seen many people. Nevertheless she acknowledged that people did not ask permission to use the route, they just walked up the lane.
21. I conclude that the evidence of the user witnesses is largely corroborated by the evidence of Mrs Lewis and that use of the route clearly took place throughout the period of her family's occupancy and ownership of The Kloof. This covers the majority of the relevant 20 year period.
22. Mr Treeby's ownership commenced in 2010 and he started work on the property to bring it back into a good condition. He stated that he did not see people using the route, despite being on the premises most of the time. However, he did erect some signage shortly after he moved in, on the advice of his solicitors, to indicate that use was by permission. Clearly he would not have felt the need to do that if there had been no use of the path.
23. I therefore conclude that, throughout the relevant period of 20 years, there has been use of the way which does not appear to have been interrupted in any way.

Whether the use was by the public

24. The evidence of use submitted by 42 people indicates a good spread of people from the local area or with local connections. There is nothing to suggest that the use of the way has been limited in any other way to a particular class of people. I am satisfied that the use of the way which has taken place has been by the public.

Whether the use has been as of right

25. For use to be considered to have been as of right it must have been exercised openly, without force and without permission – just as one would have used any other highway.

Whether the way has been used openly

26. The use of the way has been acknowledged by Mrs Lewis and Mr Treeby, whether they actually saw anyone using it or not. I do not consider that the level of use indicated by the user evidence was conducted secretly. It may simply have taken place unobtrusively, which is quite different. Several of the user witnesses recall having spoken to Mr Ware when he was alive, but I cannot be sure whether that relates to the relevant period (it may have been prior to 1990 for example). However it does support the evidence that the family knew of the use, which consequently must have been conducted openly.

Whether the use of the way was by force

27. Although Mrs Lewis and Mr Treeby made several references to incidents of vandalism, these did not relate to people forcing their way along the path. Rather they involved damage to adjacent property (garages and vehicles) and

to depositing of litter and rubbish. Neither Mrs Lewis nor Mr Treeby suggested that anyone had used force to access the path, and there is no evidence to show that use of the path involved any force.

Whether the use of the way was by permission

28. All the objectors considered that the use that had been made of the path had been enjoyed by permission, but none of them was able to provide any details of specific permissions. Mrs Lewis and Mr Treeby relied upon the signs which they erected to indicate that user was by permission only, and the Leverton Trust, the owners of the northern part of the claimed route, merely stated that some dog walkers had used the path 'at their discretion'.
29. It is necessary to examine the wording of each sign to appreciate its impact in this respect. The earliest signs which appear to have been erected (by Mrs Ware) are said to be the ones which contain the following wording:

"PRIVATE LANE USERS DO SO AT THEIR OWN RISK"

One of these signs is fixed to a tree on the western side of the path north of The Kloof on land still owned by Mrs Lewis's family. Mr Treeby claimed that the sign had been there when he bought the property. I did note that it was clearly visible and not covered in ivy, unlike a sign erected much more recently by Mr Treeby himself (see paragraph 34 below).

30. Whether the sign was present before he moved in to the Kloof or not, I do not consider that this wording conveys the message to users that they are using the route by permission. Many lanes which are private also carry public rights of way, and using any highway carries a degree of risk.
31. A sign, which may have been designed by Mrs Edgar on behalf of Mrs Ware, is present near gate G1 on the Order plan and carries a picture of a dog defaecating, with a diagonal line through it, and states as follows:

"No dog litter"

This sign issues a request to users of the path which is perfectly understandable, but does not convey to users that they are using the path with permission of any sort. It has been a legal requirement for some years to pick up after your dog in public places, which includes many highways. Another more recent sign, of a more conventional design, requests people to take their dog litter away with them, and is of similar effect in terms of permission.

32. Mr Treeby confirmed at the inquiry that he was unaware of the application made by Mr Hammond until December 2011, as recorded in a note of a telephone conversation he had with Mr Pearce on 14th of that month. He stated in that call that he had thought that the path might have been a public right of way but when nothing came up in the property searches he assumed it was not. He never turned people away or stopped them using it, but he put up notices to say that people used it at their own risk. From this information and the accompanied site visit, I therefore conclude that the first signs he put up, in 2010 or 2011, are the ones which state as follows:

"PRIVATE PROPERTY ENTER AT OWN RISK CCTV"

This accords with the information given on his landowner evidence form completed in 2014 in response to enquiries by the consultant engaged by the

Council to investigate the definitive map modification application. There are two of these signs: one on each of the gates at the southern and northern boundaries of his property.

33. These signs may or may not have been present during the relevant period of 20 years. Nevertheless, almost all public rights of way cross private property, and CCTV is, these days, a common feature of public places. Where it is present in such places, signs advertising its presence are a legal requirement. Consequently no matter how intimidating some people might find the presence of CCTV, I find that these signs do not convey to people that they are using the route by permission only.
34. Signs erected more recently by Mr Treeby (in 2014) do indicate that access along the route is permissive ("*PRIVATE DRIVE PERMITTED ACCESS ONLY CCTV*") and it may be these signs which prompted the flurry of user evidence submitted in that year. However, these signs were not erected until after the relevant period of 20 years which I have identified in accordance with the requirements of Section 31 of the 1980 Act. They therefore have no effect in terms of whether or not user was as of right during the appropriate period.
35. I therefore conclude that, despite the assertions of the objectors that use of the way was by permission, no evidence has been provided to me to show that permission was, in fact, granted to anyone.
36. I am therefore satisfied that the use of the route by the public, which I have already accepted did take place during the relevant period, was enjoyed as of right.

Whether there is sufficient evidence of a lack of intention to dedicate the route as a highway during the relevant period

37. Highways, which include public footpaths, come into being through a process of dedication, which requires an offer of a route (on the part of a landowner) and the acceptance of that route (on the part of the public). Most dedications are implied, or must be inferred, rather than being expressly recorded.
38. Section 31 of the 1980 Act provides that once the acceptance by the public has been shown to have taken place (by satisfying the criteria I have examined above) then the dedication of the highway is deemed to have taken place, unless there is sufficient evidence that the landowner had no intention to do so. Over the years judgements in the courts have determined how this requirement should be interpreted. In particular, the *Godmanchester and Drain* judgement in the House of Lords¹ examined the relationship between the various parts of Section 31 very thoroughly. Simply put, any action of a landowner sufficient to show that he had no intention to dedicate a public right of way is likely to be an act which also brings the rights of the public into question.
39. In this case I have already concluded that it cannot be shown with any degree of certainty that it was an act of the landowner which brought the rights of the public into question. Even if it was shown to be the statement of Mr Treeby in connection with a planning application which triggered Mr Hammond's application, it is likely that only a matter of few months separated the comments made in the planning response and the validation of Mr Hammond's

¹ R (on the application of Godmanchester Town Council and Dr Drain) v SSEFRA and others [2007] UKHL 28

application. The user evidence is unchallenged for many years prior to October 1990 and thus bringing forward the beginning of the period of 20 years by those few months would be more than adequately covered by user of the same quality that I have already concluded has taken place in the 20 years I have previously identified.

40. However, the evidence from the landowners that no challenges to users have ever been made, coupled with the evidence of the signage I have already discussed, significantly outweighs, in my view, any opinion expressed by Mr Treeby in response to a planning application which did not relate to land in his ownership.
41. No evidence has been provided by the Leverton Trust of any actions taken by it or the trustees in relation to use of the path.
42. I conclude therefore that there is insufficient evidence to show that, during the relevant 20 year period, there was no intention to dedicate a public right of way over the claimed route. Consequently I find that, on the balance of probabilities a public right of way can be deemed to have been dedicated over the claimed route.

Other Matters

43. A number of other matters were raised by the objectors, both in writing and orally, but which do not have a bearing on my decision. Whilst distressing, vandalism, theft and other unlawful or antisocial behaviour is not a matter I can take into account. Neither can I consider whether it is desirable or not in terms of the environment to have a path in this location. My decision must be based on the facts, weighed against the criteria set out in the legislation. Other powers are available to the Police and to the Council to deal with criminal and antisocial activity.
44. With regard to liability in respect of nearby trees etc. the risk is the same now as it was when the path was effectively dedicated, which was nominally at the beginning of the 20 year period. The confirmation of the Order brings no additional liabilities.

Conclusions

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

Formal Decision

46. I confirm the Order.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

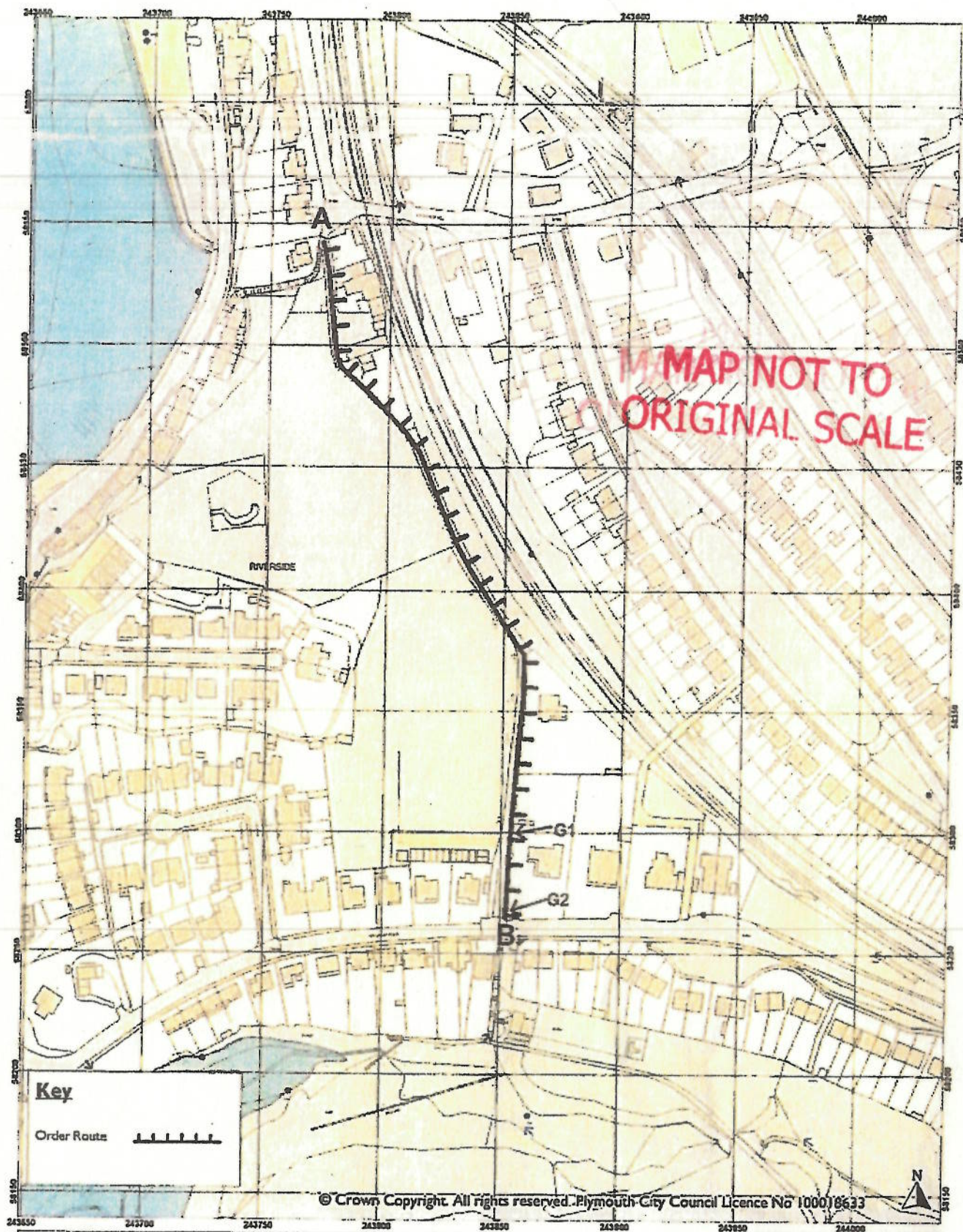
Gareth Pinwell	Solicitor, instructed by Plymouth City Council
He called	
Robin Pearce	Public Rights of Way Officer, Plymouth City Council
Philip Sargent	User Witness

FOR THE OBJECTORS:

David Treeby	Landowner
Pamela Lewis	Landowner

DOCUMENTS

- 1 Proof of evidence, statements and appendices provided by Robin Pearce
- 2 Statement and appendices provided by Nigel Gigg
- 3 Statement and supplementary statement provided by David Treeby
- 4 Statement provided by Pamela Lewis and Jennifer Edgar
- 5 User summary tables provided by Robin Pearce



WILDLIFE AND COUNTRYSIDE ACT 1981
ADDITION OF A PUBLIC FOOTPATH FROM NORMANDY HILL
TO WOLSELEY ROAD

Scale 1:1980



