
Order Decision

Inquiry held on 28 November 2017

Site visit made on 27 November 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 14 December 2017

Order Ref: ROW/3172296

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Swindon Borough Council Footpath 30 Haydon Wick Modification Order 2016.
- The Order is dated 22 June 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 was one objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns the addition of a public footpath from point A on the plan attached to the Order, its junction with Blackthorn Lane and Footpath 30 Haydon Wick, proceeding in a generally northerly direction through points B, C, D and E, to point F, its junction with Bridleway 18 Haydon Wick¹, at Seven Fields local nature reserve. From A to B, the Order route is bounded on one side by the gardens of properties situated on Kennet Avenue (Nos. 20 to 58) and on the other by Whitworth Road Cemetery.
2. The Order was made by Swindon Borough Council (the Council) following a direction by the Secretary of State. The Council adopted a neutral stance at the Inquiry but assisted with the smooth running of the event. The case in support of the Order was made by Peter Gallagher of The Ramblers² (the Supporters), and the case against the Order was made by David Peacey representing 15 residents of Kennet Avenue opposed to the claimed footpath between points A and B (the Objectors).
3. I visited the Order route on the afternoon before the Inquiry when I was able to view it from points A and B and to walk the route from B to F. At the Inquiry, the parties agreed that it was not necessary for me to make a further visit to the site.

The Main Issues

4. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires me to consider whether,

¹ Also referred to as Pond Street

² Representing the applicant, Seven Fields Conservation Group

on a balance of probabilities, the evidence shows that a footpath subsists along the Order route.

5. The evidence adduced is of claimed use by the public³. This requires me to consider whether dedication of the way as a public footpath has occurred through public use. In this case, the Supporters rely on a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
6. This requires me to establish the date when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowners to dedicate public footpath rights.

Reasons

When use of the claimed route was brought into question

7. The Council fenced off the Order route in December 2014 following complaints from residents of Kennet Avenue about antisocial behaviour and other activities associated with the claimed path. It is not disputed that the Council's actions brought the right of the public to use the way into question.
8. There are, however, other possible dates and events to consider. It is claimed a field gate across the track, at the rear of Nos. 30 and 32 Kennet Avenue and at the then northern extent of the Cemetery, was locked. At the time, it provided access to fields where livestock including horses were kept. It is not clear when this gate was locked, and I heard from Mr Lucas that it was damaged in around 1974/5 and not replaced. Although some of the user evidence forms (UEFs) refer to the presence of gates, none makes reference to encountering a locked gate.
9. The other possible date to consider is when the Order route was temporarily obstructed by fencing panels put up by residents at points A and B to prevent access. The details concerning this event are disputed. The Objectors maintained that they erected the obstructions in August 1998. For the Supporters, Richard Beale's evidence was that he encountered the obstruction at A when grass cutting for the Council and reported it to his Supervisor as he was unable to complete his work schedule. This would have been in the late 1980s or early 1990s, and no later than 1992. His is the only evidence in support of the Order that refers to the obstruction. Notwithstanding when the obstruction was in place, it was removed within 72 hours. Few of those providing written evidence of use stated they had walked the Order route daily, and not all were using it in 1998 when the residents said it had been closed off, or indeed earlier. Accordingly, it is not surprising that the closure did not come to the public's attention.
10. For the public's right to be brought into question, then at least some of the users must be made aware that their right to use the way is being challenged.

³ Several documents including property deeds and conveyances were also submitted and are relevant to the background and recent history of the Order route

This does not appear to have been the case for either the locked gate or the obstruction put up by the residents, whichever date is preferred.

11. On balance, I conclude that the date of bringing into question is December 2014, giving a twenty year period of December 1994 to December 2014.

Whether the claimed route was used by the public as of right and without interruption

12. Evidence of claimed use is provided in 23 user evidence forms totalling 25 individuals. Claimed use covers a period from the 1950s through to 2014, although some early maps available to me indicate that the Order route did not exist as a physical track on the ground throughout its length in the early years⁴. Thirteen people claimed use throughout the relevant 20 year period, with a further 8 having used it during this time. Claimed use is consistent with a public footpath, for leisure and recreation purposes including dog walking, and varied in frequency from daily to occasional use with most people stating monthly, weekly or more frequent use.
13. There is nothing to indicate that use was not open, nor is it suggested use was by force during the 20 year period. Indeed, correspondence between the residents and the then Council⁵ in the early 1990s confirms that the way was being used by the public, albeit the residents' were concerned about acts of anti-social behaviour, dog fouling, criminal activity and so forth. At the Inquiry, residents acknowledged that the public had been using the Order route and that there had been no issue with its use other than by those engaging in non-legitimate activities.
14. It is suggested that claimed use was permissive. However, use by the farmer to access livestock via the Order route and use in connection with riding stables, on the available evidence, predates the 20 year period under consideration. Similarly, a 1977 licence drawn up between the then Council and Barnfield Road Rovers Football Club predates the period under consideration. It afforded a right to use the Order route to access the football pitch on foot. Yet, as the Supporters argued, whilst permission was granted to a specific group of people to use the way, this does not preclude the general public from using it without permission⁶. Use of the football pitch ceased when the Cemetery was extended in the 1980s, again prior to the 20 year period.
15. The main focus of the Objectors' case was that their fencing off the Order route amounted to an interruption to public use. It was intended to prevent use, in particular with regard to anti-social behaviour. Further, the residents believed that they owned the land⁷. I heard a great deal of detail about the obstruction itself, its materials and construction, by whom and when it had been erected and by whom and when it had been taken down. However, the accounts of this event and the date it took place differ. In short, the Objectors stated the obstruction was put up in 1998, on Mr Fisher's evidence on a Wednesday afternoon, then removed the following Saturday morning by the residents in the presence of the Council; and, on the Supporters' evidence, it was removed

⁴ Although this does not necessarily indicate that there was no means of access

⁵ Thamesdown Borough Council

⁶ Beresford Trustees v Secretary of State for the Environment and Cumbria County Council, 1995 and Secretary of State for the Environment v Beresford Trustees, 1996

⁷ I note that ownership of the land between A and B remains disputed by the Objectors. Some residents claim to own it, although the Council submits it is the landowner. However, determining who owns the land is not a matter for my decision

by Council employees, including Mr Beale, in the late 1980s/early 1990s. What is not disputed is that the Order route was fenced off and that the obstruction was removed within 72 hours (or 3 days).

16. Accepting 1998 as the date of the obstruction, it seems to me that a closure of such short duration that did not come to the attention of those using the Order route, or at least some of them, would not amount to an effective interruption to use⁸. In this regard I agree with the Supporters' view that the obstruction was of insufficient duration to constitute an interruption⁹.
17. On balance, I conclude that use by the public for the period December 1994 to December 2014 was as of right and without interruption.

The evidence and actions of the landowners

18. If some of the residents were the landowners in 1998, as is claimed, then (accepting 1998 as the date it was fenced off) their obstruction of the Order route (at A and B) could, I consider, amount to an intention not to dedicate the Order route as a public right of way. However, in order to rebut a presumption of dedication, there must be *sufficient* evidence of a lack of intention. As stated above the obstruction was of very short duration (72 hours) and did not come to the attention of the public using the way. Only one claimant, Mr Beale, was aware of the incident as it prevented him from completing his work as a Council employee, and his evidence places the event before the 20 year period. The intentions of the residents were not made clear to the public using the route.
19. The presence of the field gate (paragraph 8) predates the 20 year period, and none of the UEFs refer to it being locked.
20. There is no evidence of any intention by the Council not to dedicate the Order route as a highway, for example by putting up notices of a contrary intention or by submitting a statutory declaration. Reference is made to notices, but these concerned action being taken by the then Council to remove the obstruction placed across the Order route by the residents, and prohibiting use by motorcycles. This suggests the Council regarded the way as one that should remain open for public access on foot.
21. Documents provided by the Supporters demonstrate that in the 1990s the then Council regarded the Order route as enjoying the status of a public right of way on the basis of 20 years use, albeit one that was not recorded in the Definitive Map and Statement¹⁰. Indeed, consideration had been given at the time to closing the route under the provisions of the 1980 Act, but subsequently rejected¹¹. This conclusion by the then Council predates the 1998 action by the residents, and is consistent with their subsequent measures to have the obstruction removed straight away, an action with which the residents (albeit begrudgingly, they stated) acquiesced. The barriers were not subsequently re-erected.

⁸ The same would be true accepting the late 1980s early 1990s as the date of the obstruction, albeit this places it outside the 20 year period under consideration

⁹ *Ali v Secretary of State for Environment, Food and Rural Affairs and others* [2015] EWHC 893 (Admin)

¹⁰ Report to the Arts and Recreation Committee, 4 October 1990 and Report to the Leisure Services Committee, 18 June 1992

¹¹ Minute of the Public Works and Services Committee, 21 June 1994, reported to the Leisure Services Committee, 7 September 1994

22. It seems to me that, on balance, the action taken by the residents does not amount to sufficient evidence such as to satisfy the test.

Conclusions on the Section 31 tests

23. I have concluded that December 2014 is the date of bringing into question when the Council closed off the Order route at points A and B, thus preventing use by the public. I am satisfied that there is sufficient evidence of use by the public as of right and without interruption during the relevant 20 year period to raise a presumption of dedication. I have concluded that there is no or insufficient evidence of a lack of intention to dedicate a public right of way on behalf of the landowners, and indeed positive evidence that it had been regarded as a public right of way. It follows, in my view, that a public right of way subsists over the Order route, and the Order should be confirmed as made.

Other matters

24. The Objectors expressed concerns about safety, criminal acts and antisocial behaviour related to the claimed path, referring to incidents that had taken place over a period of many years prior to its closure by the Council in 2014. Whilst I understand these genuinely held concerns and the detrimental effect of these incidents on the residents, and indeed the fear of potential future incidents, these matters are not ones that I am able to take into account, as the law does not permit me to do so.
25. Neither am I able to take into account the existence of a nearby surfaced and lit route as an alternative to the Order route. It follows that my decision is based on the evidence as to the existence or otherwise of the claimed route as a public right of way.

Conclusions

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

Formal Decision

27. I confirm the Order.

S Doran

Inspector

APPEARANCES

For the Council:

Kehinde Awojobi

Swindon Borough Council

For the Supporters:

Peter Gallagher

of The Ramblers' Swindon and North East
Wiltshire Group *representing* Seven Fields
Conservation Group

who called

Richard Beale

William King

For the Objectors:

David Peacey

representing 15 residents of Kennet
Avenue

Steven Reddock

Stuart Fisher

H K Lucas

DOCUMENTS

1. Letter from Mr J Stooke
2. Confirmation Notice regarding advertising the Public Inquiry, submitted by Swindon Borough Council
3. Proof of Evidence of David Peacey
4. Email and Statement of Roy Millard in connection with the Schedule 14 Appeal, submitted by Peter Gallagher
5. Closing Statement of Steven Reddock on behalf of the residents of Kennet Avenue

Prepared by M.J.Enright 09.06.16
 Swindon Borough Council
 Highways and Transport
 4th floor Wat Tyler House West
 Beckhampton Street
 Swindon SN1 2JH
 Tel: 01793 445500

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Seven Fields
 local nature reserve

Penhill
 Recreation Ground

MAP NOT TO
 ORIGINAL SCALE

Old Events Field

Cemetery Field

Whitworth Road
 Cemetery

Oldbourne Cheney

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Order map
Footpath 30 Haydon Wick

Grid reference at point A: SU 14759 87268

Path to be added (A-B-C-D-E-F):

Existing public rights of way:

Scale 1:2 500 (in A3 format)