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## Order Decision

Inquiry held on 21 June 2017

Site visit made on 21 June 2017

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 25 July 2017**

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### **Order Ref: FPS/U1050/7/108**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Derbyshire County Council (Footpath from B5057 via Gold Close to Public Footpath No 7 – Parish of South Darley) Modification Order 2010.
- The Order is dated 16 September 2010 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Derbyshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is confirmed**

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#### **Procedural Matters**

1. This case concerns the addition of a public footpath at Darley Bridge from point A on the plan attached to the Order, its junction with the B5057, proceeding to point B on Gold Close, then to point C, its junction with Footpath No 7. The Objector to the Order is Peter Greaves, representing some 15 members or past members, of the Derwent Bowmen Archery Club ('DBAC') whose land is crossed by the Order route for much of its length between points B and C on the Order plan.
2. Although the original application concerned only that part of the route crossing the Archery Field in use by the DBAC, the Council concluded it should be extended to include part of Gold Close which is an un-adopted road, as this was where people had walked as described in the user evidence forms. I consider this further below.
3. At the Inquiry, Peter Greaves gave evidence in his own right as well as representing the DBAC.
4. I carried out an unaccompanied visit to the Order route on the afternoon of Tuesday 20 June and an accompanied visit following the close of the Inquiry with a representative of Derbyshire County Council ('the Council') and Peter Greaves.

#### **The Main Issues**

5. 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,

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

6. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication under common law.
7. Section 31 of the 1980 Act 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.
8. The evidence may also be considered under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowners, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowners were aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

## **Reasons**

### ***Presumed dedication under Section 31 of the 1980 Act***

#### *When the claimed route was brought into question*

9. In early 2003 a gate was installed and initially locked at the Gold Close end of the Order route by the DBAC: its purpose to deter unwanted vehicular access to the land. The three users giving evidence to the Inquiry and others who had completed user evidence forms, however, found it to be open in 2003. Soon after its installation, pedestrian access was provided to one side of the gate by the landowners, Trustees of the DBAC, for the benefit of Club members. Subsequently the access track was fenced off from the Archery Field by posts and netting.
10. Prior to this, challenges to users had been made by DBAC members from 1998 onwards – this is the date when the DBAC became owners of the land. Also, in 1985 a secure metal store had been placed at the junction of the Order route with Footpath 7, close to point C, which it was said obstructed the route causing users to deviate around it.
11. A 'bringing into question' arises when at least some of the users are made aware that their right to use the way as a highway has been challenged, so that they have a reasonable opportunity to meet that challenge. I find nothing in the evidence to support the secure metal store as such an event. None of those giving evidence of use to the Inquiry either recalled it or that it obstructed their use, and none of the evidence forms refer to it. Neither do I find that the reported challenges brought use into question. Again, the

evidence of users, both oral and written, was that they were not challenged on the Order route; and any challenges that did take place do not appear to have come to the attention of the public at large. However, the installation of the gate in 2003 led to the gathering of user evidence culminating in the application which I conclude did bring the public's right to use the Order route into question. This gives a 20 year period of 1983 to 2003 to consider.

*Use by the public*

12. Some 43 user evidence forms were provided in support of the claim, with claimed use extending back well beyond the 20 year period in question<sup>1</sup>. Of these, 9 forms did not specify the years of claimed use and accordingly attract less weight. Fourteen individuals claimed use throughout the 20 year period with a further 17 having used it for lesser periods. Claimed use is consistent with activities associated with a public right of way - for recreation, dog walking and to reach the local public house and allotments (via Footpath 7).
13. All 3 users speaking at the Inquiry had used the Order route when archery was in progress and had never been stopped or given permission whilst doing so. Similarly, all had regularly seen other users on the route. All recalled the DBAC stopping use of the Archery Field itself, but that the public's use of the Order route had not been challenged. All had walked anywhere between the boundaries of Gold Close.
14. John Mills had used the Order route from 1964, when it was a field edge path, between his home adjacent to Gold Close and Footpath 7. His use varied from daily to weekly, to occasional from 1982-1988. He recalled the route through the Archery Field was a wheeled track. Richard Binns had used the Order route from his home some 300 metres or so away from Gold Close since 1983 daily or twice a day dog walking. Both he and Ruth Marchington recalled seeing red warning flags on Footpath 7 when archery was taking place, but did not recall any notices. Ruth Marchington had used the Order route from her home close to Gold Close daily or weekly for over 25 years to access other destinations and walks.
15. As regards the user forms, six referred also to accessing the school sports/playing field where sports days were held<sup>2</sup>. This field is located behind the properties on Gold Close and east of the Order route. All three user witnesses described following Gold Close to the location of the gate accessing the Archery Field near point B, and then proceeding along the boundary of No.12 Gold Close to reach that field. In addition, prior to the DBAC purchasing the Archery Field, local people were in the habit of using it and the adjoining sports field for general recreation. I would not consider this to be evidence of use of the Order route A-B-C: use to access the sports field was permitted under the terms of a licence between the DBAC as landowners and the Council. Furthermore, the user evidence forms do not identify use to access the sports field separately from use of the claimed footpath, so it is not possible to establish the frequency of use of the Order route itself. Neither do the forms ask witnesses to indicate the frequency of use of the Order route. DBAC witnesses spoke of having observed several people crossing the Archery Field diagonally from the access near point B to reach a stile at Footpath 7, rather

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<sup>1</sup> A further two forms were discounted by the Council as they referred to a private right of access to the land over which the Order route passes

<sup>2</sup> One form indicated solely for this purpose

than following the Order route, which again I would not regard as relevant use. However, none of those giving oral evidence of use claimed to have done so, although John Mills had not always stayed on the field edge as it depended where he was going, and Richard Binns had on occasions cut across the field.

16. Some five forms also suggest that use included or was to visit elderly friends or relatives resident in Gold Close rather than use of the Order route to reach point A; and five forms were from residents of Gold Close itself. It is not clear if these people used the Order route in its entirety, for example as part of a longer circular walk.
17. Peter Greaves submitted that the user forms derived from only 28 households comprising a third of the total number in the area. Whilst that may be so, and the bulk of claimed use is by local people, there is nothing to suggest to me that the user evidence does not represent use by the public.
18. There is nothing to suggest that claimed use of the Order route was by force, or was carried out in secret: indeed the witnesses spoke of acknowledging and being acknowledged by DBAC members. None referred to having sought or been expressly granted permission to use the Order route. Apart from one reference in a user form to challenges to children, which does not specify where this occurred, none of the users indicated they had been interrupted in their use of the Order route. Indeed, none referred to any obstruction to their use of it. There is reference to a notice requesting that dogs not be allowed to enter the field, but no other signs that related to the Order route.
19. The evidence of users speaking at the Inquiry was that the route they had used along the edge of the Archery Field prior to 2003 equated to the route depicted on the Order plan. Accordingly, I do not consider that the secure store obstructed the route used by claimants causing them to deviate. However, if I am wrong in this conclusion, I consider that any resulting deviation was *de minimis* (or insignificant) in terms of its effect on the Order route. In any event, there is nothing to suggest that the secure store was placed near C with the intention of interrupting public use, although I note the DBAC said it was not aware the route was considered to be a right of way by the public.

#### *The evidence of the landowners*

20. The DBAC explained that the existing public right of way, Footpath 7, and the Order route were treated differently. Warning signs and red flags were erected at both ends of Footpath 7 when shooting took place, and the public were never stopped from using the route: indeed archery ceased when walkers wished to pass. There is no evidence that this system operated on the Order route.
21. Whilst the DBAC did not issue special instructions to its members as regards the Order route, all of its witnesses referred to the 'rules of shooting' which they said clearly lay down what can and cannot happen. All had known of and/or used the Archery Field for many years, including prior to the 20 year period under consideration.
22. When the Archery Field was (and is) in use, a Field Captain is responsible for halting shooting when there is risk of a distraction, for reasons of health and safety. Accordingly, the Field Captain would monitor use. In contrast to

Footpath 7, the Field Captain would stop users of the Order route and ask them to wait until shooting had finished before allowing them to proceed.

23. Peter Greaves had been Field Captain on four occasions a year and recalled stopping groups, but this had not been a frequent occurrence. On all occasions the public had complied with his request. Sarah Wallis attended the Archery Field at least twice a week, and had known it since 1974. She had seen members of the public use the Order route and had seen them challenged, but not on every occasion, and commented that people had been challenged on the Archery Field itself. Anthony Fletcher had been a DBAC member since 1985 and, although he had seen members of the public on the Order route, did not recall seeing them challenged. This was the case also for Shelagh Fletcher. Derek Woodhouse had challenged a couple of people prior to 2003 and told them it was not a public right of way. He was there often and had seen users at different times of the day, but not many. People crossing the field diagonally he said, were challenged. Susan Humberstone also spoke of people having been challenged on the field, as did Brenda Greaves. She had spent a lot of time at the Archery Field and had known it since 1973, but did not often see people on the Order route. She indicated that the public were told it was not a public right of way, and were allowed to proceed with permission.
24. As stated above, one user form refers to children having been challenged and turned away by the DBAC several times. However, it does not state where these challenges took place, or whether they related to the Order route, to the sports field, or Archery Field itself.
25. There is nothing to suggest the placing of the secure store near C from 1985 was an intention on behalf of the landowner not to dedicate the Order route. Indeed, the DBAC did not become landowner until 1998, and the evidence on balance is that the store was not on, nor prevented or interfered with, the Order route.

#### *Conclusions on presumed dedication*

26. I have concluded that the relevant 20 year period for the purposes of Section 31 of the 1980 Act is 1983 to 2003. Notwithstanding the lack of clarity in some of the user evidence forms and the reduced weight attached to some, there is a body of evidence claiming use of the Order route as of right, that is, without force, secrecy or permission.
27. The DBAC argued that use was by permission since users were stopped when archery was in progress and allowed to continue once it had ceased. However, the evidence of the users both at the Inquiry and from the evidence forms is that no challenges took place on the Order route<sup>3</sup>. Further, the evidence of the DBAC witnesses is that this practice was not consistently applied. Challenges to people attempting to cross the Archery Field are mentioned, but not all those using the Order route were routinely stopped, despite having been seen or acknowledged by DBAC members. The evidence is that use of the Archery Field itself was stopped (when the DBAC purchased the land) but that use of the Order route continued. Further, the DBAC accepted that use of the Order route by the public had taken place when they were not using the field, and that they did not object to users on the path in a spirit of good neighbourliness. I note that use since 2003 has been on a concessionary basis.

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<sup>3</sup> The location of the challenge made to children in one of the evidence forms is not identified

28. I conclude on balance that use was not by permission, nor was it effectively challenged by the landowners from 1998<sup>4</sup> such as to indicate a lack of intention to dedicate the Order route as a public right of way. I note that the DBAC has a high regard for the health and safety of both its members and of the public such that it would not overtly dedicate a public right of way over its land. However, users appear either to have proceeded unhindered when shooting took place, or stopped when asked for health and safety reasons. On balance I find that there is insufficient evidence that the actions of the landowners demonstrated an intention not to dedicate a public right of way on foot such as to rebut the presumption of dedication raised by the user evidence.
29. Accordingly I conclude that a right of way on foot subsists over the Order route and the Order should be confirmed. Since I have reached this conclusion it is not necessary to consider the evidence at common law.

### **Other matters**

30. Peter Greaves argued there was a conflict between the Order plan and description in Schedules I and II as regards the position and width of the Order route along Gold Close and between points B and C, and requested a modification to record a width of 2 metres at the rear boundary of the houses on Eversleigh Rise.
31. I agree with Mr Greaves that the route shown on the Order should correspond with the route that was in use during the relevant period (1983 to 2003) rather than reflect what existed on the ground when the Order plan was drawn up. However, as regards A-B, the evidence given to the Inquiry was that users had walked anywhere along that part of Gold Close. Accordingly I consider that the width between boundaries, to include both the pavements and road surface, is the appropriate width to record for this section of the Order route. There is nothing to suggest to me that a varying width of between 7.9 and 8.1 metres is not appropriate. As regards the section from B to C, I note that witnesses considered the present track to be consistent with the route they had used during the 20 year period and with the Order as drafted. In the absence of clear evidence to the contrary I decline to modify it as suggested by Mr Greaves. My reading of the Order is that the width becomes 2 metres where the path leaves the present track for a short distance to join with Footpath 7 at C. The dashed line on the Order plan I take as representing the position of the path, its width more accurately defined in the Schedules to the Order.

### **Human Rights**

32. Peter Greaves argued there had been a breach of human rights under Article 6 of the Human Rights Act 1998, the right to a fair trial. Article 6 states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
33. I consider that concerns raised about the Council Officers' enquiries and recommendation to the Committee which authorised the making of the Order are not a matter on which I can comment, but are more appropriately directed to the Council through other avenues. As regards concerns that there has been undue delay in concluding the proceedings between the initial application and ultimate Inquiry, I recognise that everyone has the right to a hearing within a

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<sup>4</sup> There is no evidence regarding the actions of the landowner(s) before this date

reasonable time. I note that key witnesses for both parties have passed away in the intervening 12 years or so, and the opportunity to test their evidence has thus been lost. Whilst clearly undesirable, it is not unusual for applications resulting in opposed Orders to take similar, or sometimes longer periods of time to reach their conclusion. However, in *Alconbury*<sup>5</sup> the House of Lords held that, when taken as a whole, the appeal process, which includes the safeguard of being able to challenge the legality of an appeal decision in the High Court, is compatible with Article 6.

### **Conclusions**

34. 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**

35. I confirm the Order.

*S Doran*

**Inspector**

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<sup>5</sup> R v Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd and others [2001] UKHL

## **APPEARANCES**

### **For the Order Making Authority**

Sarah Boyle	Solicitor, Derbyshire County Council
who called	
Angela Greateorex	Legal Assistant, Rights of Way
John Mills	
Richard Binns	
Ruth Marchington	

### **Interested party supporting the Order**

Ruth Marchington	<i>representing</i> South Darley Parish Council
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### **Objector**

Peter Greaves	<i>representing</i> Derwent Bowmen Archery Club
who called	
Sarah Wallis	
Anthony Fletcher	
Derek Woodhouse	
Susan Humberstone	
Shelagh Fletcher	
Brenda Greaves	

## **DOCUMENTS**

1. Covering letter to Derbyshire County Council dated 18 January 2007 accompanied by bundle of evidence questionnaires from the Derwent Bowmen Archery Club, submitted by Derbyshire County Council
2. Enlarged plan of the area surrounding the Order route, submitted by Derbyshire County Council
3. Closing submission on behalf of Derbyshire County Council



