
Order Decision

Inquiry held on 9 January 2018

Site visit made on 9 January 2018

by Susan Doran BA Hons MIPROW

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

Decision date: 18 April 2018

Order Ref: FPS/U1050/7/110

- 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 Public Footpath No 36 to Public Footpath No 37 – Parish of South Darley) Modification Order 2015.
- The Order is dated 6 August 2015 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 were 6 objections 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 at Wensley in the parish of Darley from point A on the plan attached to the Order, its junction with Footpath No. 36, running in a generally west-south-westerly direction to point B, its junction with Footpath No. 37. From A, the Order route crosses behind Yew Tree Cottage, Rose Cottage and Oaker Terrace, including through garden areas.
2. The Order was made by Derbyshire County Council ('the Council') following a direction by the Secretary of State. The Council adopted a neutral stance at the Inquiry. The case in support of the Order was made by Mrs J Regan, and the case against the Order was made by Mr D Naylor.
3. In addition to the statutory objections, a representation opposing the Order and two representations in support of the Order were received by the Council. Four interested parties in support of the Order have since come forward.
4. I visited the Order route on the afternoon before the Inquiry when I viewed it from points A and B. Following the close of the Inquiry I made a further visit to inspect the route accompanied by Mrs Regan, Mr Naylor and a representative of the Council. At this accompanied visit a resident of Oaker Terrace, Ms Aylett-Green (the original applicant), queried our presence on her property. At the time of the accompanied site visit it was my understanding that the necessary landowner permissions to access the land had been granted, and the Council's representative confirmed this was the case.
5. In reaching my decision on the Order I have taken into account all of the written submissions available to me both in respect of the Inquiry itself and those provided previously by the parties; the matter originally being scheduled for determination by means of the written representations procedure.

The Order plan

6. It was brought to my attention that the plan attached to the Order does not accurately reflect the situation on the ground. However, having heard submissions from the Council and from Mrs Regan on this matter, it is apparent that the discrepancies relate to the Ordnance Survey (OS) base mapping rather than to the accuracy of the depiction of the Order route's alignment itself. Whilst there are powers of modification available to me in the event I should decide to confirm the Order, these do not extend to altering the information contained in the base mapping. I note, however, that whilst the plan shows the Order route crossing a boundary to the south of the word "Thatch", on the ground there is no physical boundary obstructing it at this location.

The Main Issues

7. 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 route¹.
8. The evidence adduced is of claimed use by the public². 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. In this case, the supporters of the Order rely on a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
9. 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.

Reasons

Documentary evidence

10. Several OS maps were provided. Those dated 1939, 1967 and 2006 show the area crossed by the Order route as open. However Mr Naylor argued that those dated 1979, 1986, 1989 and 1994 did not; the 1986 edition in particular showing the land at Yew Tree Cottage and Rose Cottage enclosed. The 1986 OS edition forms the base map for the information contained in Land Registry documents for Yew Tree Cottage. However, the annotations relating to the Land Registry information make it difficult to determine features on the base mapping. If the land was enclosed at this time, this would not necessarily preclude the existence of a means of crossing any boundary present. In any event, whilst the OS mapping can be useful in indicating the physical features

¹ At the Schedule 14 stage it is only necessary to demonstrate that a public right of way is reasonably alleged to subsist to justify an order being made. At the Schedule 15 stage the test is higher and requires on a balance of probability a finding that a public right of way subsists for an order to be confirmed

² Documentary evidence largely comprising Ordnance Survey maps and Land Registry documents was also provided

in existence at the dates of the maps, they provide no evidence as to the status of the Order route.

11. Land Registry documents for Oaker Terrace indicate that neighbours enjoy a private right of way over each other's properties, but this does not extend across the remainder of the Order route³. Mr Naylor believed there were reciprocal rights for the owners of Yew Tree Cottage and Rose Cottage across each other's property.
12. Two photographs dating from the 1970s and another from 1984 show part of the Order route at the end of Oaker Terrace looking towards A. They show evidence of wear consistent with the position of the Order route. A further photograph dating to around 1990 shows steps which were referred to by some of those giving evidence to the Inquiry.
13. The documentary evidence described above is not determinative of the status of the Order route. I turn next to consider the evidence in relation to Section 31 of the 1980 Act.

When use of the claimed route was brought into question

14. In 2010 fencing was erected at Yew Tree Cottage which prevented use of the Order route and led to the application to add it to the Definitive Map and Statement.
15. Mr Naylor had put up notices on the land in 1989 and again in 1994 indicating the garden of Yew Tree Cottage was private, and also planted a boundary hedge. However, these had been removed by persons unknown within a couple of days. He had put up notices on other occasions, but could not recall when. In addition, occasional challenges had been made to users, although Mr Naylor indicated that he had not wished to upset his elderly neighbour who was acquainted with many of those living on Oaker Terrace and Eagle Terrace and who used the Order route⁴.
16. A 'bringing into question' arises when at least some of the users are made aware that their right to use a 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 notices as such an event. None of those giving evidence to the Inquiry mentioned having seen them, and none of the user evidence forms (UEFs) refer to them. Neither do I consider the reported challenges brought use into question as the evidence of users, both oral and written, was that they were not challenged on the Order route.
17. Whilst I find neither of these actions was effective, the fencing in 2010 clearly came to the attention of the users and I conclude brought their right to use the way into question. This provides a twenty year period of 1990 to 2010.

Whether the claimed route was used by the public as of right and without interruption during the 20 year period

18. Evidence is provided in 23 UEFs with claimed use extending back to the 1940s. For the 20 years under consideration, 11 users claim to have walked the Order route for the full period and the remainder for part of it. Of these, 5 are current residents of Oaker Terrace, 2 are former residents, and 2 own a

³ In addition, Mr Gent referred to a private right to dry washing on his land, which is crossed by the Order route

⁴ Mr Naylor had not been resident during this time

property there. Use is described as varying in frequency between daily, weekly, monthly and less than monthly, and between 3 and 56 years. Several describe use to The Square in Wensley, to access the Main Road, to the Dale and other footpaths in the village. Several refer to visiting Oaker Terrace and/or Eagle Terrace.

19. As stated above (paragraph 11) the residents of Oaker Terrace enjoy private rights across each other's properties which I consider would extend to visitors by invitation, including friends and neighbours. Whilst their use of part of the Order route may have been permissive, there is no indication that such rights extended across the remainder of the Order route. I would also regard use described by delivery persons as use by invitation.
20. I heard from 4 witnesses and attach greater weight to this user evidence which has had the benefit of being tested. Mr Gent has lived at Oaker Terrace since 1962. His use varied from 2-3 times a day to perhaps daily, when he was able to access his property by car. He had never been challenged and had not seen any signs. Like others he had used it as a 'short cut' to access The Square avoiding a bend on the road where the pavement was narrow and regarded as dangerous. He described the path as rubble and grass until the section at Oaker Terrace was surfaced.
21. Similarly, Mrs Taylor who has lived at Eagle Terrace since 1962 also used the Order route twice a day to access The Square when she worked at the shop there, and to a visit relative. She referred to steps having been put in latterly, behind Yew Tree Cottage/Rose Cottage. She also spoke of taking shopping for Mrs Taylor at Rose Cottage which I would regard as use by invitation.
22. Miss Boulton⁵ recalled the shop in The Square which she used until it closed, some six or seven years after she moved into Oaker Terrace in 1983. She had never been given permission to use the Order route, nor told it was a not a public right of way. She knew Mrs Taylor and Mrs Elliot as neighbours, but had never been stopped from using the route which she used at weekends and during school holidays. She believed the steps (paragraph 12) were installed in the late 1980s/early 1990s.
23. Ms Marchington had rented Yew Tree Cottage for a couple of months in 1993 and had seen people using the Order route that she knew as villagers. She said her tenancy agreement did not mention it, or any requirement for her to challenge users. She had used it with her sons to deliver papers, although I regard this as use by invitation to properties on Oaker Terrace rather than public use. However, she also used it for walks into the Dale when resident there, and elsewhere in the village, from 1986 up to 2001 about twice a month.
24. Mrs Regan's written evidence was of use from around 1987, and she had never been challenged.
25. There is no evidence that any of those providing written or oral evidence had used the Order route by force, or in secret, or with permission, despite Mr Naylor's contention that use was with the permission of Mrs Elliot, the former owner of Yew Tree Cottage.
26. Neither is there anything to suggest that use was interrupted or prevented. Although Mr Gent recalled building materials on the Order route at Yew Tree

⁵ This witness had not submitted one of the 23 UEFs

Cottage, he did not recall whether he attempted to use it at that time. Mrs Taylor said that she was able to get through when the rubble was there. Neither Mr Gent nor Mrs Taylor recalled a previous owner's car obstructing the route. There is nothing to indicate that either the building works or any temporary obstruction caused by a parked car was intended to prevent use of the Order route by the public.

27. On balance and having regard to the evidence as a whole, I consider that use has been as of right and without interruption for the 20 year period under consideration.

The evidence and actions of the landowners

28. As stated above (paragraph 15), Mr Naylor had put up private notices at least twice and challenged users on occasions whilst at Yew Tree Cottage. His evidence was of one or two people using the Order route when he was carrying out renovation work at the property which he regarded as use by locals rather than by the wider public, to access the village as a short cut. At that time, daily helpers visiting Mrs Taylor were allowed to access the back door of Rose Cottage across his garden. He had not seen anyone he did not know and from time to time, probably once a month, questioned use, although he did not see many people using it. He was aware that people stopped to chat with Mrs Taylor and believed their use to be with her permission. As they knew her, he did not wish to upset his neighbour. Challenges to users were also said to have occurred when the Cottage was occupied at holiday times, and people were told there was no right of way.
29. No copy of an affidavit referred to by Mr Naylor and signed by Mrs Elliot and Mrs Taylor to the effect that there was no public right of access across the rear of their properties, except for private access across both, was available to me. I have been unable to see the original wording or its context and accordingly the weight I can attach to it is reduced. A letter from Mrs Elliot's daughter, Mrs Wilson, however, contradicts the evidence of the users. In it she writes that *"The garden to the rear of the cottage was on occasion used by one or two residents of Oaker Terrace as a short cut, this was by permission of my parents and not a public footpath or right of way"*.
30. As stated above there is no evidence that users were given permission to use the Order route by Mrs Elliot and/or Mrs Taylor. It may be that rather than express permission the owners of Yew Tree Cottage and Rose Cottage tolerated or acquiesced in use. The challenges referred to by Mr Naylor are consistent with a lack of intention to dedicate. However, as stated above, there is no evidence from users that they were challenged. Use is claimed not just by the residents of Oaker Terrace but also of Eagle Terrace and by people living elsewhere in the village, so not just by those living closest to the Order route. It seems to me therefore, that even if one or two residents of Oaker Terrace had been given permission to use the Order route across land belonging to Mrs Elliot, this amounts to only a proportion of those claiming use.
31. The renovation work undertaken at Yew Tree Cottage in 1994 resulted in building materials being placed on the land for some 6 months, and in the past, a parked vehicle was said to have blocked access along it. None of the UEFs referred to any obstructions along the Order route, and none of those speaking at the Inquiry had been unable to get through. There is nothing to suggest that either the parked vehicle or building materials had been placed with the

intention of preventing passage along the Order route, albeit their presence may have restricted the width available. Reference was also made to washing lines across the land at Oaker Terrace but no evidence they interfered with access. It is not clear who installed the steps described by some users, but these replaced a slope and were described as facilitating access.

32. On balance I find that the actions of the landowners were insufficient to indicate a lack of intention on their behalf to dedicate a public right of way over the Order route.

Conclusions on the Section 31 tests

33. I have concluded the relevant 20 year period for the purposes of Section 31 of the 1980 Act is 1990 to 2010. There is a large amount of claimed use, with some during this period (and earlier) provided by persons living along or close to the Order route, with references made to visiting neighbours. However, use is also claimed to other parts of the village, for example to and from The Square. Collectively I find the evidence (oral and written) is capable of amounting to use by the public as use can be wholly or largely by local people, notwithstanding that some of the users enjoyed a private right over part of the Order route, though not across the remainder. Such private rights would apply to 9 people for all or part of their claimed use, leaving 14 who enjoyed no private rights across any part of the Order route of whom 5 claim use for the full 20 years and the remainder for parts of it.
34. Although it was asserted that use was by permission, and there is some evidence from Mrs Elliot's daughter to support this, I have concluded on balance that use was as of right that is without force, secrecy or permission. In addition, I find that use was uninterrupted. I have also concluded that the actions of the landowners were insufficient to rebut the presumption of dedication arising from the evidence of use as of right.

Other matters

35. The suitability, desirability and usefulness of the Order route as a public right of way, as well as safety, security, privacy and anti-social behaviour issues were raised. Whilst I understand these matters and the concerns held, the 1981 Act does not enable me to take them into account. My decision must be based on the evidence as to whether or not a public right of way exists as claimed. It follows that I have not placed weight on these arguments.

Conclusions

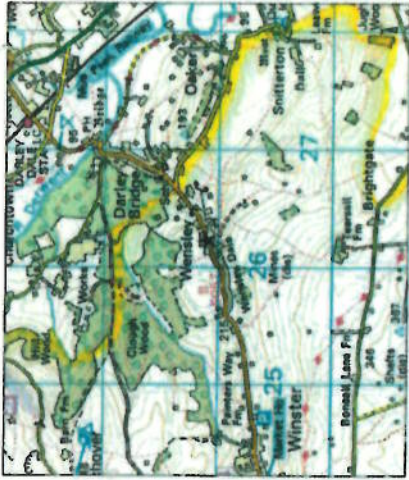
36. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should be confirmed.

Formal Decision

37. I confirm the Order.

S Doran

Inspector



Wildlife and Countryside Act 1981 S.53
The Derbyshire County Council
(Footpath from Public Footpath
No 36 to Public Footpath No 37
Parish of South Darley)
Modification Order 2015

KEY

Footpath to be added — — — — —

Existing Footpaths - - - - -

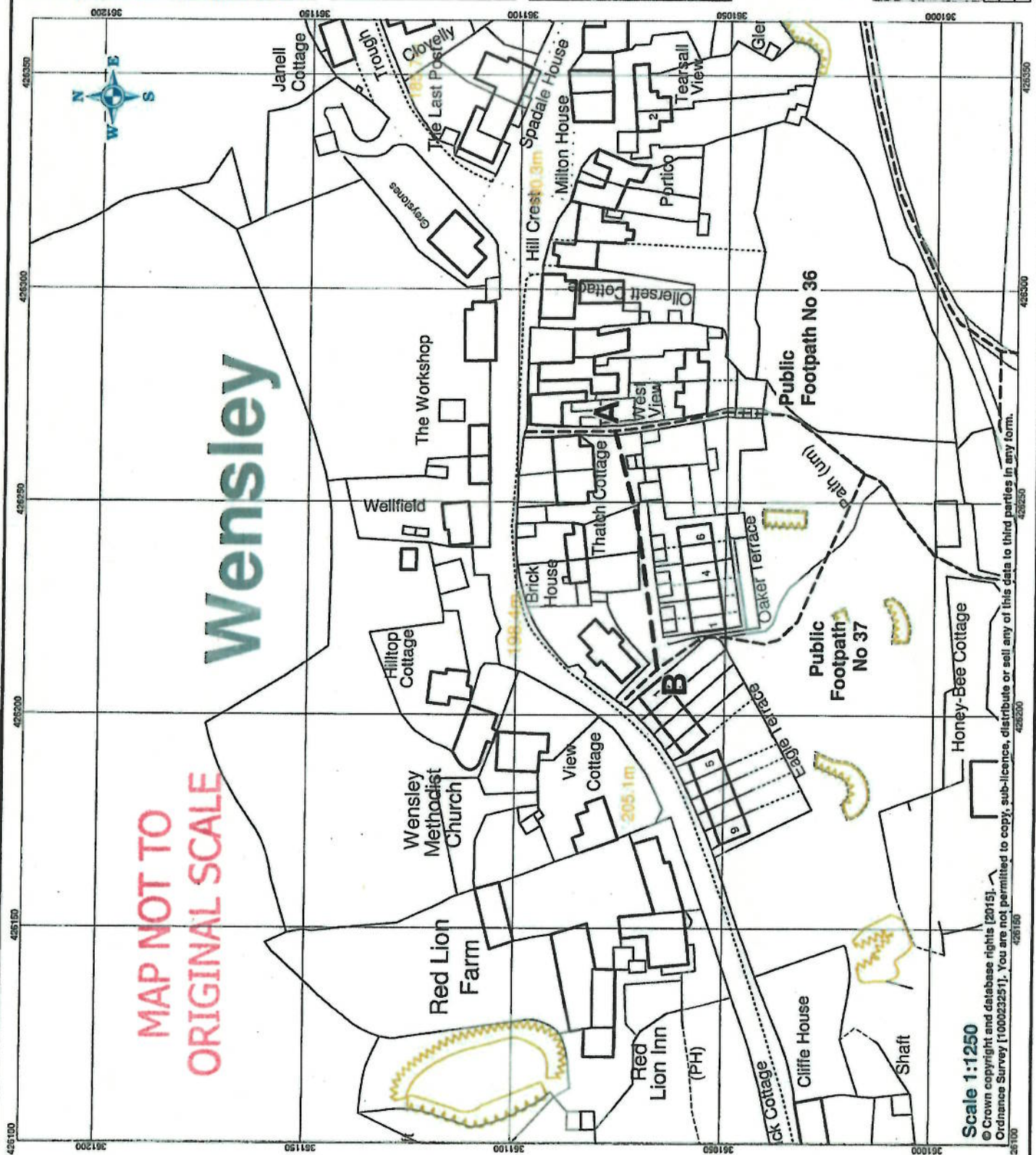


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MAP NOT TO ORIGINAL SCALE

Wensley

Scale 1:1250

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