The Planning Inspectorate

Order Decision

Inquiry opened on 18 September 2018

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 31 October 2018

Order Ref: ROW/3191558

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Wiltshire Council (Parish of Bratton) Path no. 42 and the (Parish of Edington) Path no. 36 Definitive Map and Statement Modification Order 2017.
- The Order is dated 4 July 2017 and proposes to record a public footpath within the Parishes of Bratton and Edington. Full details of the routes are given in the Order plan and described in the Order Schedule.
- There were three objections outstanding at the commencement of the Inquiry.

Summary of Decision: The Order is confirmed.

PROCEDURAL MATTERS

1. An application was made to Wiltshire Council, the order-making authority ("the OMA"), under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), to add a footpath to the Definitive Map and Statement ("the DMS") for the area. The OMA were satisfied that an Order should be made to record the route, which is proposed to be recorded in two parts as it passes through two parishes, Bratton and Edington.

2. I made an unaccompanied site inspection on 17 September 2018 and opened a Public Inquiry into the Order on 18 September, closing it on 20 September. No one requested an accompanied site visit following the close of the Inquiry. I made a further unaccompanied site visit to satisfy myself, by viewing from the roadside, with regard to a couple matters raised during the Inquiry.

3. Judgments referred to in closing were not submitted in hard copy during the Inquiry, as would normally be expected. I allowed the relevant documents to be submitted electronically[1].

4. Sadly, due to the funeral of a former owner of some of the affected land, some parties were not available to give evidence on the final day of the Inquiry. The likely duration had been discussed during the opening of the Inquiry and I also offered an adjournment to hear additional parties. At the request of the objector[2] I have considered the written statements, rather than adjourn to a later date.

[1] Inquiry Documents 5 and 19

[2] Unless otherwise stated, when I refer to 'the objector' in this decision I am referring to the current owner of Luccombe Mill, who made case to the Inquiry.

MAIN ISSUES

5. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the Definitive Map and Statement on the discovery of evidence which, when considered with all other relevant evidence available, shows:

> *"(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."*

6. The OMA relied on the statute, section 31 of the Highways Act 1980 ("the 1980 Act"). The sub-sections of particular relevance are set out below:

> *(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*
>
> *(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*
>
> *(3) Where the owner of the land over which any such way as aforesaid passes—*
>
> *(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*
>
> *(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,*
>
> *the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway...*
>
> *…*
>
> *(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.*
>
> *(6) An owner of land may at any time deposit with the appropriate council—*
>
> *(a) a map of the land […] , and*
>
> *(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;*
>
> *and, in any case in which such a deposit has been made, declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—*
>
> *(i) within the relevant number of years from the date of the deposit, or*

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section.

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(6A) Where the land is in England—

(a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,

(b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and

(c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.

…

(7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) , (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.

7. Before a presumption of dedication can be inferred under the statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'brought into question'. The OMA identified the date of a deposit made under section 31(6) of the 1980 Act as the date at which use was brought into question. This gives rise to a twenty-year period of 1996 – 2016.

8. The case for the objector referred to notices erected within that twenty-year period and interruption. Should I be satisfied that such matters were sufficient to show a lack of intention to dedicate, I would need to consider whether any of these matters may have called use into question, leading to an earlier twenty-year period.

9. To give rise to a presumption of dedication, it needs to be shown that there has been use, without interruption, as of right, that is without force, secrecy or permission, throughout the relevant twenty-year period. The objector indicated that, in addition to there had been some use by force and other such use as occurred was by permission, being controlled by the owner in such a way that use of it must have been 'by right' rather than 'as of right' as required. These are main issues for my consideration.

10. If the matter failed under the statute then I would need to consider whether there was evidence of dedication at common law.

11. I can only confirm the Order if I am satisfied, on the balance of probabilities, that a public right of way subsists.

REASONS

Background

12. The particular disputed section of the land crossed by the Order route is that to the north, which is part of Luccombe Mill, Bratton, section A - C[3]. Luccombe Mill changed hands in 2016, with the attorney for (and son of) the former owner making the section 31(6) deposit prior to the sale. The southern section, C – B, is in the ownership of Wessex Water ("WW") and no objection has been made by them in relation to the Order route over this land.

13. People have referred to the route as the Watercress Walk, by reference to the former watercress beds, at which some older residents had previously worked. It was said that the route A – C came into existence to provide access to and from the watercress beds. The main spring within the WW land, past which section C – B leads, is referred to by many as Paradise Pool.

14. There has been some mention of an additional or alternative route, running west of point A to Imber Road by the driveway of Luccombe Mill, in front of the house. This is not part of the Order before me.

Documentary evidence

15. It was noted by the objector that there was no documentary evidence of the route being recorded as a public footpath or path. I agree with the OMA that this does not in itself indicate that no right of way subsists; whether or not the route should be recorded is the point of the Definitive Map Modification Order process.

16. The documentary evidence which does exist is that relating to the section 31(6) deposit. This indicates a clear knowledge of the existence of a route, referred to as a 'private footpath' and that this was "…an area of particular concern…".

Section 31 of the Highways Act 1980

The relevant twenty-year period

17. The period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice or otherwise. There was general agreement that the relevant twenty-year period ran from January 2016, when a statutory declaration was made under section 31(6) of the 1980 Act, which gives rise to a relevant period 1996 – 2016.

18. The application to record the route was made in 2016 following the change in ownership of Luccombe Mill and the physical blocking of the route by way of barbed wire and signs erected at points A and C.

19. The groundsman for Luccombe Mill from 2010 indicated that, although he was never instructed to do so by his employer, and so not indicative of a lack of intention to dedicate on the part of the owner, he usually told people he had not seen before that the land was private. This could potentially provide an earlier twenty-year period, 1990 – 2010 (at the earliest in relation to the dates of employment) if directed at the public as a whole; however, as said in *Fairey v Southampton County Council (1956)*[4] for there to be sufficient evidence of a lack

[3] For ease of discussion of relevant matters I have annotated the Order map with 'C', indicating the approximate position of the property boundary between Luccombe Mill and the Wessex Water land.
[4] [1956] 2 QB 439

of intention to dedicate, and by extension bring use into question, more must be done than telling a stranger to the locality, who had no reason to dispute it.

20. The former landowners' sons indicated that they reminded or informed people that the land was private and not pick the flowers. They would on occasion remind people that it was not a public path, especially when they walked in front of the house. It was understood that the Order route was a nice walk and their father was tolerant of that but it was part of the garden if going the other way to the drive.

21. I agree with the applicant, who called evidence to the Inquiry, that there is no corroboration of such challenges in the evidence of users. The claim of challenge was at odds with the information from those who had conversations with the landowners, including on the route itself, and who were not told not to walk the route or that their use was permissive. On the balance of probabilities, whatever was said, to whomever and wherever, was not so open and notorious that it was clear that there was an assertion that the public had no right to use the Order route, although it seems from the evidence as a whole that it was sufficient to question and prevent use of the route running in front of the house.

22. I shall deal with notices in detail later in the decision. I simply say here, that as a result of those findings, I am not satisfied, on the balance of probabilities, that such notices as were present have been shown to be sufficient to have brought use into question.

Evidence of use

23. The evidence of use within the relevant twenty-year period arises from the user evidence forms ("UEFs") submitted in connection with the application, e-mails, letters and evidence given to the Inquiry. I agree that the number of users is not the only issue to consider but the quality of that evidence and I have approached it in that regard.

24. I note the concerns that were was a 'campaign' to get evidence to support the application but I am unclear how evidence may come forward in these cases unless someone gathers it together to make an application. I accept that these matters can become emotive but I saw nothing to suggest that the evidence had only arisen in response to a campaign and was, therefore, unreliable. It was open to cross-examination and I do not consider it was demonstrated that the user evidence should be discounted.

25. I agree with the applicant that it is not reasonable to say that the evidence of those living or working on the land is likely to be more accurate than the user evidence. Each person comes to the matter with their own understanding of the situation from their perspective. The effect of potentially unreliable memory and convergence retrospectively around a desired outcome relates to both sides of the case. I take that into account in considering the evidence as a whole.

26. There was some criticism of UEFs on the basis that some were, on the objector's evidence, written by the same hand. I am not a handwriting expert but I agree with the applicant that in general those UEFs that the objector believed may have been completed by one hand do not appear to have been. However, it appears that in some cases one person completed more than one UEF, for example, within a family and in relation to some UEFs which appear to have been completed by one of those assisting with the application process. Nonetheless, there is no

indication that the statements and maps have not been individually signed. I have to agree with the OMA that this is of less concern in terms of individual responsibility for evidence than the statements relied upon by the family of the former owners, with identical typed statements being produced.

27. I do not consider that there was evidence of cherry-picking of witnesses for the Inquiry. There were opportunities for anyone to provide evidence to the Inquiry and four people did so separately to the called witnesses. I agree with the applicant that what is required is that there are witnesses representative of the evidence as a whole. I also agree with the OMA that it was open to the objectors to call people they thought might assist their case.

28. In relation to the WW land I understand it was an active pumping station, put in place at some time during or just after the Second World War. In the early 1960s WW approached the owners of Luccombe Mill for access to the pumping station via the Order route, as this was apparently easier for them than the access over their own land from point B. WW clearly recognised that their use of section A – C was permissive.

29. It was suggested by the objector that the WW land was a closed area, with signs to keep out, whilst it was operational. However, this was not demonstrated from the user evidence given under cross-examination, which covered this period. It was not clear when the site became non-operational, although suggested it could have been around twenty-years previously, within the beginning of the relevant twenty-year period. There was no evidence from WW regarding what they did, or did not do, on their own land in relation to use, fencing or signage. On the evidence before me I am not satisfied that it has been shown that use of this land was prevented by the landowner or anyone else in the relevant period.

30. There was a suggestion from objector witnesses that the access to point B was not that used historically, with the route being southerly to Happy Valley. No users indicated this to have been the route they were using either historically or during the relevant twenty-year period and I would note that such use would also be at odds with the claimed prevention of any use of the WW land.

31. Despite the limitations naturally placed on evidence on paper I am satisfied, on the balance of probabilities, that approximately 50 – 70 people used the route in each year of the relevant twenty-year period. A few people referred to use of Luccombe Mill path only, A – C, due to mobility issues, and others focussed on this area, because it was the area of contention. However, I am satisfied there has been use of the Order route as a whole.

32. The main reasons for use were as might be expected, that is walking, including with dogs and/or children. There was also use by groups such as Health Walks, school trips and the youth club. The frequency of use varied, ranging from occasional to frequent, for example, weekly walking a dog.

33. There was an unusual amount of evidence available in this case in the way of photographs of people walking their dogs or children on the route, or picturesque views of sections of the route itself. These were spread over many years and add weight to the evidence that there was open use of the route. I also note that the vast majority of users indicated that they had seen others using the route.

34. There was reference by a couple of people to historic use of a route to the west of point A. This was also mentioned by a statutory objector in relation to people

having had picnics opposite the house. However, there was insufficient evidence to suggest that a public right subsists over this area of land.

35. In my view witnesses on both sides made fair concessions to their evidence on cross-examination, clarifying matters which could not easily be set out on a standard UEF and agreeing that mistakes had been made in witness statements. I am satisfied that I can place reliance on the user evidence and that the Order route was used by the public in the period 1996 – 2016.

Use as of right

36. In order for that use to give rise to a presumption of dedication it is necessary to look at matters relating to whether or not that use was 'as of right'. To be as of right the use must be without force, without secrecy and without permission. There was no suggestion of use by secrecy. The issue of force was raised and the matter of permission was a main focus of the Inquiry. I need to be satisfied that the use was not either by force or permission, either expressly or impliedly, and therefore 'by right' rather than 'as of right' as required.

Force

37. One person referred to a fence being placed across the route, although not specifying when or where. No other party mentions this, and I queried the matter directly with family members. The lack of evidence of existence of such a fence across the Order route means that evidence of use by force in removing it has not been shown.

38. Signs were referred to predominantly in relation to permission, as discussed below. However, it was suggested that the removal or defacing of signs would show use by force. As indicated by Sauvain it would be an academic question as to whether use following such acts would be by force as they would usually amount to a bringing into question of public use of the way. I consider that for this to be the case the notices would need to be shown to have brought use into question and I agree with the OMA that in such circumstances it is surprising that the objector has not sought to suggest an earlier twenty-year period as a result.

39. There was some comment that notices regarding 'birds nesting', 'no cycling' and 'dogs on leads' had not been mentioned in UEFs. In fact some people did refer to this type of sign in UEFs and others fairly agreed at the Inquiry that they had seen such signs, as well as 'do not pick flowers'. To be fair to those completing UEFs, question 9 was quite specific saying "*Have you ever seen any signs or notices suggesting whether or not the application route is a public right of way? (For example "Private", "Keep Out", "No Right of Way "Trespassers will be Prosecuted").* I do not think that people were trying to hide anything in answering 'No' to this question, as the vast majority did. The picture arising was that these signs were infrequent, being in place in spring, as required. Some people were aware of them and others not, probably because the signs were not present at the times they were walking.

40. I note that although one witness for the objector had referred to 'No public right of way' notice in his typed statements of evidence he, very fairly, withdrew that evidence in cross-examination. I therefore do not place weight on the untested typed statements referring to such notices, which are not mentioned by any of the users in their evidence.

41. There was limited evidence of a sign or, possibly signs, with wording relating to private, private land or private property, with one witness indicating that the removal of one such sign after a very short space of time had angered the landowner. The evidence on this is very limited; the UEF question specifically asks about "Private" and not one person indicated having seen such a notice in either UEFs or cross-examination, although referring to the other signs mentioned above. Family members did not generally appear to be aware of such signs and another objector witness recalled such a sign only once, alongside the stile at point A. As indicated by a photograph given in evidence[5], public rights of way do cross private property.

42. Taking account of *R. (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust v Oxfordshire County Council (2010)*[6] "*The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known…The notice should be read in a common sense and not legalistic way…The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did…".*

43. *Paterson v the Secretary of State for Environment, Food and Rural Affairs & others, 2010*[7] *("Paterson")* also indicates that how a range of members of the public have in fact understood signs in a particular context may well be a helpful indicator as to how a reasonable person would interpret a sign in that context.

44. I do not agree with the case for the objector that there was evidence of numerous signs over long periods. As noted by the applicant the signs were said by the objector witnesses to not have been intended to be permanent and to be 'polite', which fits with the known desires of the landowners. The evidence suggests some signs were erected in the spring, although there is insufficient evidence to say that they were in place even annually.

45. It is clear that the majority of users with knowledge of signs did not find them to be contesting their use, or requiring them to behave in a way other than might be expected on a recorded public right of way. I do not consider the understanding of two individuals that they were being stopped, or occasionally asked not to use the route when swans were nesting on the mill pond, indicates an instruction and interruption to use which was understood or followed by the users generally.

46. I note the argument of the objector that I should give greater weight to this 'negative' evidence put in by those supporting the Order, however, this evidence was untested in cross-examination. None of the family members referred to such stopping of use, either in statements or in person. The cross-examined user evidence indicated that users did not understand that notices were doing more than requesting that nesting birds were not disturbed, with no knowledge of the route being stopped up for this reason. If it was the case that there was an effective interruption to the use then the relevant twenty-year period may move

[5] Inquiry Document 8
[6] [2010] EWHC 530 (Admin)
[7] [2010] EWHC 394 (Admin)

back to an earlier date and, again, the objector did not seek to refer to any earlier period.

47. There is a difference in relation to the 'no cycling' signs as these gave a specific direction not to do something and clearly brought any use by cyclists into question at that point in time.

48. There is clear evidence that the landowner was well aware of the type of wording required to control access on his land. Stradbrook Field, a little further north-west along Imber Road on Stradbrook Square, was part of the estate and a stile and sign were present at the time of the Inquiry, as I understand to have been the case for some time with the current sign replacing an earlier one around fifteen years ago. The sign states "*PRIVATE LAND NO RIGHT OF WAY Access for Children's games ONLY*".

49. Although it was suggested that this land was treated differently as it was further from the house, it is in fact only a relatively short distance. I agree with the objector that this was consistent with the generous nature of the landowners, who invited children to use the field, whilst controlling the use that they did not want. However, I do not consider it unreasonable that local members of the public, seeing such a clear sign on one part of the landholding, would draw an inference from the lack of a similar sign in relation to the Order route.

50. In relation to signs which the applicant had referred to in an email there was no evidence from the objectors as to a proliferation in signs in this particular period, which appeared to be from around 2014, or different signs being put up to any which might have present previously. The matter was not pursued in cross-examination with the applicant and I give no weight to the suggestion that there were signs which challenged use in some way. If they were sufficient to do so then, at most, they might suggest a slightly earlier twenty-year period.

51. Such signs as may have been present were not maintained as referred to in section 31(3) of the 1980 Act. As noted by the OMA there was no notice given to the relevant Council in relation to signs having been torn down, which is a procedure offered under section 31(5) of the 1980 Act in such situations. Neither was a deposit made under section 31(6) until such time as the land was up for sale and 'concerns' apparently raised.

52. On the balance of probabilities, such notices as were present were not inconsistent with the dedication of the way as a highway and so not sufficient to indicate to a reasonable user that there use was being brought into question. As a consequence, continuing use has not been demonstrated to be contentious, or use by force.

Permission

53. I agree with the OMA that it is wrong to try to give technical legal meaning to terms being used by the general public in an ordinary context and disagree with the objector that the context of the application meant that UEFs were completed in full knowledge of the legal significance of the terms being used. Nonetheless, it was clear that by the time of the Inquiry, or at least as it unfolded, the legal significance of the term 'permission' was starting to be understood. I have considered the evidence taking such matters into account.

Wessex Water, C - B

54. In relation to the WW land to the south a small number of people indicated the route C – B as a 'permissive path' on their UEFs or attached maps. It is unclear what they mean by this reference given that in response to UEF question 12 "*Did the owner or occupier ever give you permission (or did you seek permission) to use the application route?"* the majority indicated 'No'. One gentleman noted he sought permission for use from the owners of Luccombe Mill in 2001 during the period of Foot & Mouth Disease but with no indication that he had sought a similar concession from WW.

55. The vast majority of the user evidence does not refer to permission in relation to this section of the Order route and there was no evidence from the relevant landowner that they had ever given permission for the public to use it. Whilst the objector suggested it was common sense that WW could exclude users should operational reasons require it, there is no evidence that this occurred or was even intended by the relevant landowner. Taking account of the evidence as a whole I am satisfied, on the balance of probabilities, that the use of this section of the Order route was not permissive and was 'as of right' as required by the statute.

Luccombe Mill, A - C

56. In relation to the Luccombe Mill land, A – C, some people indicated that they had asked permission from the landowners, some only in relation to specific circumstances, for example, taking groups along the route at night time. Others had asked after they had already been using the route without permission for some time. I do not agree with the objector that when people said that the former owners were 'happy' or 'didn't mind' the use, this indicated any permission being sought or granted. Indeed it was said that the landowner was aware that people were walking and granted no express permission.

57. On the basis of the evidence in writing and heard at the Inquiry, including in particular that of the former owners family members, I do not consider that there is evidence of a significant number of individuals having sought or been granted express permission to use this section of the Order route. The evidence that some individuals had such permission does not, in my view, diminish the vast majority of evidence arising from those who indicated that they had neither sought, nor been granted, express permission to use the route.

58. Turning then to the matter of implied permission I do not agree with the objector that people referring to use of the path 'respectfully' or finding it a 'privilege' to use indicates that they recognised their use was by some sort of permission. As the OMA indicate, people were speaking of privilege in the ordinary sense of being lucky to be able to experience the route.

59. In a similar vein some people were aware that this was not a public footpath, as it was not shown on an Ordnance Survey map and did not have a signpost from the road. There was, as noted by the OMA, some confusion that the Inquiry process sought to create a right of way, rather than record one, if shown to subsist. Knowledge it was not recorded does not indicate knowledge of permissive use.

60. The objector sought to indicate that there was a known blanket permission for local people to use the route, however, I do not consider that the 'community awareness' of permission suggested in objection has been shown. Whilst some

people may have felt it was well-known that people were allowed to use the route without any need to ask, this was not the case for the majority of witnesses. As noted by the OMA the concept of a general permission to the public is difficult, raising the question as to how it can be demonstrated bearing in mind it will usually be impossible to ensure every member of the public is aware of it.

61. A notice would be sufficient, as would closure from time to time. I have discussed matters relating to interruption below and, having found there to be insufficient evidence of any effective interruption, I do not consider that it has been shown that there has been a closure of the route from time to time. There was no evidence of any notice saying 'permissive path' and no indication of permission being communicated to the public by way of, for example, notice to the Parish Council, a notice on a village noticeboard or in the local parish magazine, the White Horse Churchman.

62. I agree with OMA that whilst the case law indicates that the courts would be slow to imply the creation of rights from acts of beneficence, repeated acts of acquiescence in public use by the landowner is likely to be construed as evidence of dedication. If the landowner's position is that use is by his licence then he must do something to make the public aware of that fact so that they know that the route is being used by them only with permission and not as of right.

63. Although *R v City of Sunderland ex parte Beresford, 2003*[8], indicates no objection in principle why the implied grant of a revocable licence or permission could not be established by inference from the relevant circumstances, Lord Bingham stated that "…*a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put*".

64. As noted in *R (oao Newhaven Port and Properties Limited) v East Sussex County Council and another*[9] once one concludes that there is "an implied revocable permission" for an activity, it follows that there is a licence, which renders the activity in question being carried on "by right" not "as of right". However, even then Lord Carnwarth noted that there might have been a case for treating the use as tolerated trespass, or use "as of right", had not the whole area been brought under formal regulation by the making of the byelaws.

65. Whilst I understand the argument of the objector to be that the very existence of the byelaws was giving an implied permission to use the beach, I do not agree that the signs known about here can be seen in the same way. On the objectors own evidence they were not intended to be permanent and cannot be equated to permanent byelaws which created a statutory license for recreational activities, authorising the use of the beach by implication. There was no evidence that there was any enforcement of conditions, for example, people being stopped from using the route if they did not comply with the requests made. The 'polite' signs could not be viewed as a rule which the owner required to be observed and, in my view, did not make the use of the way on foot conditional or by licence.

66. The picture arising is of a family of a generous and civic minded nature who tolerated use of the Order route by local villagers. They had a community spirit and generous easy going approach to the use of the path. The use increased over the years, perhaps as the permissive use by WW took effect and led to some improvements to the route for their own purposes. Some older villagers, and

[8] [2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160
[9] [2015] UKSC 7 on appeal from [2013] EWCA Civ 276

closer neighbours, may well have been aware of that permissive use and sought permission themselves. However, even where a landowner's original intention is that there should be a permissive path it would still be necessary for them from time to time to take steps to draw to the public's attention that their use continues to be by way of permission.

67. As the use increased, rather than try to prevent it, or make permission clear with an appropriate notice as elsewhere on land in the same ownership within the village, there were efforts to minimise the effect of the use to something the landowner could live with and so not cause upset in the village. I do not consider that this demonstrates either express or implied permission to the general public, but rather a tolerance or acquiescence in the use, which leaves it 'as of right'.

Interruption

68. *Lewis v Thomas (1950)*[10] makes clear that 'interruption' means interruption in fact, although the presence or absence of a challenge may well be a relevant circumstance in determining whether in truth there has been interruption. Of course, it is recognised that a single act of interruption by the owner would be of much more weight upon the question of intention to dedicate than many acts of enjoyment. However, this must be an effective act of interruption in the sense that it is acquiesced in.

69. I understand there to have been a period of around 3 months from Christmas 2013 to March 2014, when a beech lay across the route near point A. Photographs of the tree were supplied by the objector and one of the UEFs had an attached photograph of the fallen tree. Although it was clear that this did interrupt the use for some people, others indicated that they were able to climb, or get around the tree trunk. I do not consider that the evidence as a whole shows that this interrupted use, nor was intended by the owner to interrupt use, during the relevant period.

70. There is insufficient evidence to support an interruption within the relevant twenty-year period as a result of any fencing, see paragraph 37.

71. As discussed in relation to notices above, paragraphs 45 and 46, I accept that a couple of people chose not to use the route when swans were nesting. However, for the reasons mentioned, I am not satisfied that it has been demonstrated that this was an interruption in fact to use by the general public.

72. On the balance of probabilities, there is insufficient evidence to show that there was an effective interruption to use by the landowner during the relevant twenty-year period.

Conclusions

73. The frequency and quality of the use is such that I am satisfied, on the balance of probabilities, that the evidence of use by the public, as of right and without interruption within and throughout the relevant twenty-year period, is more than sufficient to raise a presumption that the way has been dedicated as a public footpath in the twenty-year period 1996 - 2016.

[10] [1950] 1 All ER 116

74. I would note that, if incorrect in relation to questions of interruption or challenge, it appears likely that the user evidence would be sufficient to give rise to a presumption of dedication over alternative earlier twenty-year periods. However, without clear evidence of an earlier bringing into question I have not found it necessary to look at this matter in detail.

Whether there is evidence of a lack of intention to dedicate a public right of way within the relevant twenty-year period (the proviso)

75. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant twenty-year period then the statutory presumption referred to above can be overturned.

76. I have already dealt with the implications arising from the signs in relation to the suggestion that they may be sufficient to demonstrate an implied licence to use the route. Reference was made to *Trustees of the British Museum v Finnis (1833)*[11] and the 'common course' to show a lack of intention to dedicate a public right of way, which is to shut it up for one day per year. As discussed above, I do not consider that the evidence supports the suggestion of the land being shut up to users at all, let alone for one day per year.

77. Looking at whether the signs, or any other actions, were sufficient to fulfil the proviso I take account of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs, 2007* ("*Godmanchester*")[12]. This sets out that in "*…the true construction of section 31(1),"intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is…objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885)*[13]*, to "disabuse [him]" of the notion that the way was a public highway…It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate…In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind…the objective acts must be perceptible by the relevant audience*."

78. For the reasons referred earlier I am not satisfied that any of these matters were sufficient to show a lack of intention to dedicate a public right of way on foot over this land on the part of the landowner at the relevant time. As such, they do not satisfy the proviso.

Alignment

79. One witness indicated that he had made repairs to the route near the stile at point A in around 2014 as some people were walking a little way around to avoid a muddy area. The works, which along with other works were agreed to by the landowner, involved placing wood chippings on the route. I was referred to *Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales, 2001*[14] with regard to this matter, which in fact related to a far greater

[11] [1833]5 Car & P 460
[12] [2007] UKHL 28
[13] [1885] HL 378, 10 App Cas 378
[14] (QBD)[2001] CO/3844/2000, [2001] EWHC Admin 360, [2001] 82 P & CR DG19, [2001] 24 EG 161 (CS)

change in alignment than anything suggested here. I am satisfied that the avoidance of mud, by those who apparently did avoid it, did not amount to a change in the used route.

80. The matter of any change in alignment on the WW land was not evidenced in cross examination of the users.

81. I note the reference to use of a route in front of the house in the past. However, the evidence of use of that route is very limited. It does not suggest to me that I need to propose a modification to the Order to record that route as a public footpath and does not detract from the overwhelming evidence of use of the Order route.

82. On the balance of probabilities the Order route is correctly indicated by the Order Schedules and attached plan.

OTHER MATTERS

83. The law does not allow me to consider such matters as the desirability or otherwise of the route in question, privacy or security concerns. My decision must be taken on the basis of whether or not public rights exist as a result of what has occurred historically and so I been unable to take these points into account.

CONCLUSIONS

84. Considering the evidence as a whole I am satisfied, on the balance of probabilities, that the Order route should be recorded as a public footpath. The way has been used by the public as of right and without interruption in the twenty-year period 1996 – 2016 and there is insufficient evidence of a lack of intention to dedicate a public right of way on the part of any landowner during that period.

85. 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

86. I have confirmed the Order.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Mr T Ward	of Counsel, *instructed by* Wiltshire Council
who called:	
Mr C Harlow	Rights of Way Officer (Definitive Map and Operations), Wiltshire Council

In Support of the Order:

Mr P Workman	Applicant
who called:	
Mr P Brabner	
Mr A Brook	
Mr F Compton	
Mrs P Fairclough	
Mr I Humphrey	
Mr M Pearce	
Mr R Townhill	
Mr B White	
Mr C Hatcher	
Mrs J Forbes	
Mrs A Monica	

In Objection to the Order:

Mr P Village	of Counsel, *instructed by* Goughs *on behalf of* Mr H Pelly *assisted by* Mr J Darby
who called:	
Mr T Goode	
Mr M Grey	
Mr R Martin	
Mr F Seymour	
Mr J Seymour	
Mr B Davis	

INQUIRY DOCUMENTS

1 The Order

2 Wiltshire Council Document Bundle

3 Closing submissions on behalf of the OMA, with appendices

4 Closing submissions appendices

5 Attachments to closings, submitted by email

6 Applicants Opening Statement

7 Documents associated with the pre-application process

8 Photograph signs on existing rights of way

9 Annotated plan, Mr Compton

10 Applicants Closing Statement

11 Statement Jill Forbes

12 Opening Submissions on behalf of Mr Henry Pelly

13 Photograph fallen beech tree

14 Draft witness statement Mr Martin

15 Annotated plan, Mr Martin

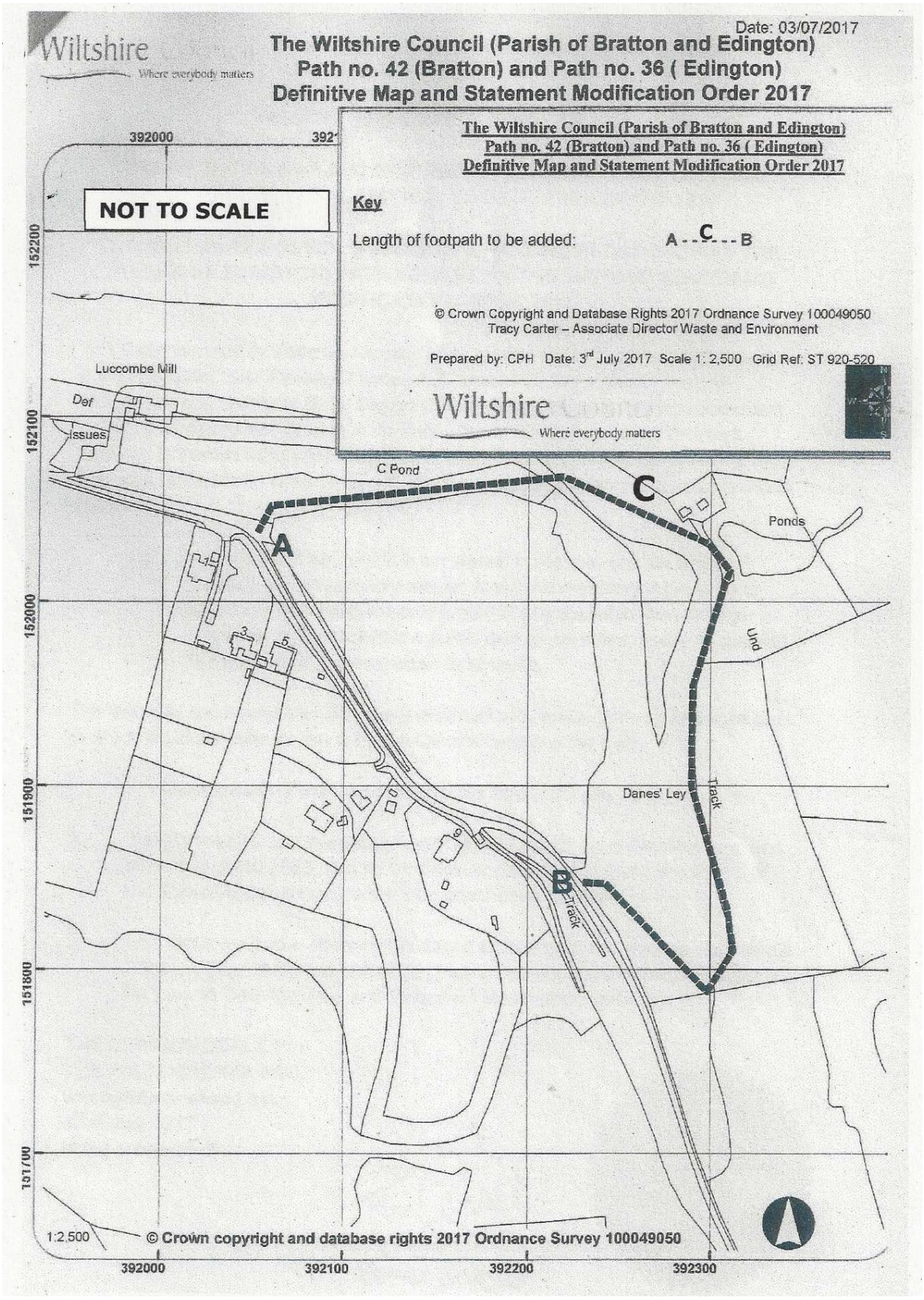
16 Section 31(6) land plan

17 Closing Submissions on behalf of Mr Henry Pelly

18 Objectors response to legal points made by the OMA

19 Attachments to closings, submitted by email

20 Statement Brian Davis


Wiltshire
Where everybody matters
Date: 03/07/2017
The Wiltshire Council (Parish of Bratton and Edington)
Path no. 42 (Bratton) and Path no. 36 (Edington)
Definitive Map and Statement Modification Order 2017
The Wiltshire Council (Parish of Bratton and Edington)
Path no. 42 (Bratton) and Path no. 36 (Edington)
Definitive Map and Statement Modification Order 2017
NOT TO SCALE
Key
Length of footpath to be added: A - - C - - B
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Tracy Carter – Associate Director Waste and Environment
Prepared by: CPH Date: 3rd July 2017 Scale 1: 2,500 Grid Ref: ST 920-520
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