



## Order Decision

Inquiry opened on 27 March 2018

Site visit made on 29 March 2018

**by Martin Elliott BSc FIPROW**

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

**Decision date: 19 December 2018**

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### Order Ref: ROW/3178391

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Liverpool City Council Definitive Map and Statement Modification No. 5 Order 2016.
- The Order is dated 15 November 2016 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 five objections outstanding at the commencement of the inquiry.

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

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### Procedural Matters

1. I opened a public local inquiry at Woolton Golf Club on 27 March 2018, I adjourned the inquiry on 29 March until 13 April to give parties an opportunity to consider issues in relation to the Head Lease for Byron Court. I subsequently adjourned the inquiry on 13 April to enable Byron Court (Liverpool) Management Company Limited<sup>1</sup> (the Company) to take advice in respect of the Head Lease and resumed the inquiry on 14 August when I heard the closing submissions.
2. I carried out an unaccompanied site inspection of the Order route and surrounding area on the afternoon of 26 March 2018. I carried out an accompanied site inspection on 29 March.
3. Although five objections to the Order were made in response to the notice of the making of the Order it would appear that one objection, although stating that they object to the confirmation of the Order, considers the order route to be a public right of way. This objector did not give evidence to the inquiry and it was therefore not possible to clarify their position. In addition to the objections 36 representations of support have been received including one from the Gateacre Society, the applicant for the Order.
4. At the inquiry an application for costs was made by the Company against Liverpool City Council (the Council). A further application for costs was made by the Council against the Company. These applications are the subject of separate decisions.

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<sup>1</sup> Although there were five objections to the Order only the Company made a case in opposition to the Order at the inquiry. For convenience I shall refer in this decision to the Company as the objector.

5. At the commencement of the inquiry the objector submitted some additional evidence. An opportunity was given to consider this evidence and there is no evidence of any prejudice arising from the late submission of the evidence.
6. Advice sought by the objector refers to the Council's contention that the objector did not have any standing to object to the Order. In my view the position of the objector was not questioned by the Council. In any event the objector raised an objection during the time period specified in the notice of the making of the Order. The objection was duly made and consequently the objector is a statutory objector to the Order and entitled to make a case in opposition.

### **The Main Issues**

7. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i). The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over the land in the area to which the map relates. The test to be applied to the evidence is on the balance of probabilities.
8. For an order to be made under section 53(3)(c)(i) it is only necessary for the right of way to be reasonably alleged to subsist; this was the basis of the decision to make the Order. However, confirmation requires that the higher test, that the right of way subsists, must be satisfied.
9. In determining the Order it is appropriate to consider the statutory dedication of the way under Section 31 of the Highways Act 1980. This provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question. It is open to me to consider more than one twenty year period.
10. Should the case for a statutory dedication fail then it may be appropriate to consider dedication at common law. This requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.

### **Reasons**

#### ***Background information***

11. Prior to 1977 the various maps submitted by the Council show that there was a route between Acrefield Road and Woolton Park. The maps provide no

evidence as to status. The route formed part of the driveway of the former 'Highfield' which in the 1920s became the Liverpool Babies Hospital and a Children's Admission Unit in the 1960s. Following the closure of the Hospital Glenacres flats and Acrefield Bank, a residential care home, were constructed. The land at this time was owned by Liverpool City Council. The 1971 Ordnance Survey map shows a flight of steps between Glenacres and Acrefield Bank and an opening in the wall at the point where the Order route joins Woolton Park.

12. Between 1977 and 1984 the site of the Children's Admission Unit was sold to Albert Brothers and Woolton Park Close was developed. Following the construction of this development the original route between Acrefield Road and Woolton Park was no longer available. In 1998 Acrefield Bank was closed and sold by Liverpool City Council. In 2000 planning permission was granted so as to permit the demolition of the former residential care home and the erection of a 3 and 4 storey building for 20 flats on the land occupied by Acrefield Bank. This is now Byron Court.

### **Statutory dedication – Section 31 Highways Act 1980**

*When the right to use the way was brought into question*

13. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The leading cases in this respect are *Fairey v Southampton County Council* 1956 and *R v SSETR ex parte Dorset County Council* 1999, endorsed in the case of *R (on the application of Godmanchester and Drain) v SSEFRA* [2007] UKHL 28 (*Godmanchester*). *Applegarth v Secretary of State for Environment, Transport and the regions* [2001] EWHC Admin 487 (*Applegarth*) provides authority for the proposition that actions to bring the right to use the way into question do not have to arise from the actions of the landowner.
14. It is not disputed that in March 2016 a wall was erected on the Order route between Glenacres and Byron Court which prevented the use of the way. This appears to have prompted the application by the Gateacre society in May 2016 seeking the addition of the route to the definitive map. The erection of the wall would have brought the right to use the way into question and would set a relevant twenty year period of 1996 to 2016.
15. The objector argues that the right to use the way was brought into question in 1977, 1979, 1984, 1998/1999, 2002 and from 2003.
16. It is contended that the 1977 planning application for the development of Woolton Park Close and the subsequent closure of the route between Acrefield Road and Woolton Park (see paragraph 12) would have brought the right to use the way into question. However, whilst the Order route formed part of the route between the two roads the Order route did not pass through the proposed development and by 1971 there was an opening onto Woolton Park corresponding with the Order route. It may be the case that The Gateacre Society acknowledge on their website that the 1971 Ordnance Survey map confirms that the route from Acrefield Road to Woolton Park used to run through what is now Woolton Park Close. Nevertheless, notwithstanding the fact that the Order route follows a different alignment, there is no evidence to

- indicate that the right to use the Order route itself was prevented or questioned by those using the way. Consequently I do not consider that the planning application would have brought the right to use the way into question.
17. The Woolton Society newsletter of 12 September 1979 shows that in early July 1979 members of the Society went to visit a resident at Glenacres regarding concerns including the unsightly fencing around the Woolton Park Close development and the loss of access to Woolton Park. A meeting was subsequently arranged on 24 July 1979 in the matron's room at Acrefield Bank when the matron stated that there is '*no public footpath through Acrefield Bank grounds*'.
  18. Whilst the matron made the statement as regards Acrefield Bank the meeting was held to discuss, amongst other matters, concerns over loss of access through the Woolton Park Close development and not access along the Order route. It is however noted that there were representatives of the Woolton Society and other public representatives present, and the statement was recorded in the Woolton Society newsletter which was widely circulated. It is therefore more likely than not that some of those who used the route through Acrefield Bank would have been aware of the statement made by the matron. Whilst Mr Chitty was aware of the statement by the matron he did not use the Order route until 1984. I note that there was a joint meeting between the Woolton and Gateacre Societies on 26 February 1979 but this was for a presentation on the work of the Merseyside Civic Society. I do not accept that it was inconceivable that the matters raised with the Woolton Society were not discussed; there is no evidence to support this suggestion.
  19. Taking all factors into account, although finely balanced, the statement made by the matron was sufficient to bring the right to use the way through Acrefield Bank into question. This would set a relevant twenty year period of 1959 to 1979.
  20. The objector also contends that the right to use the way was brought into question in 1984 on the basis that the planning report relating to the proposed development of Woolton Park Close shows that the developer proposed to delete the footpath which was the path subject to the meeting held in 1979.
  21. Whilst the report does indicate the proposed closure of the link through the Woolton Park Close development this, as noted previously, is not the Order route. Further, although it is accepted that the Woolton and Gateacre Societies had objected to the deletion of the link through the development, this was on the basis that the alternative was not suitable as it was not a public right of way. Given that at that time the alternative, being the Order route, was not considered by the local societies to be a right of way I do not see how the right to use the way would be brought into question at this time. It should be noted that whilst the alternative was not at that time considered to be a public right of way that does not preclude rights from being established at a later date.
  22. I acknowledge that the report refers to there being no right of way across the development site and that access was allowed between Woolton Park and Acrefield Road. However, although the Woolton and Gateacre Society had objected to the proposed deletion of the footpath through the development there is no evidence to show that those using the path were made aware of the observations made in the report. Consequently I do not consider, on the

- balance of probabilities, that the 1984 report would have brought the right to use the way into question.
23. It is noted that an exchange of correspondence between the Council and the Gateacre Society in 2002 refers to the deposit of a map showing claimed public rights of way and a list of the paths in 1994; this includes the Order route. Whilst the Gateacre Society made such a deposit there is nothing to indicate that the right to use the Order route was being challenged. The Society was asking for the routes to be recorded on the definitive map because they were considered to be public rights of way. There is no suggestion from the evidence that the 'claim' was rejected and there is no evidence that any investigations were carried out as to the status of the Order route. Again I do not accept that the correspondence constitutes a bringing into question the right to use the route in 1994.
24. The objector refers to the planning report 99P/1289 (App B 17 of the objector's statement of case) which it is asserted shows that in 1998/1999 there was a planning application for a change of use for Acrefield Bank followed by an application to demolish it and replace with new flats. The report identifies comments made by Councillor Kelly who had expressed concern over the status of the access road between Acrefield Road and Woolton Park. Councillor Kelly indicates that this route should not be used for through traffic. Section 5 of the report outlines that a pedestrian/cycle link is desirable and that local residents are concerned about any potential vehicular link.
25. The objector argues that the references to the provision of a pedestrian/cycle route as being 'desirable' shows that the status of the claimed route was brought into question 1998/1999. However, the concerns raised by Councillor Kelly and residents is the use of the Order route for through vehicular traffic. There is no indication that concerns were raised over the right to use the route. Indeed the report at paragraph 5 refers to the submitted plans including a link restricted to pedestrians and cyclists. This does not suggest any challenge to the right to use the way, rather the provision of access for pedestrians.
26. It is further contended by the objector that the right to use the way was brought into question in 2002 as demonstrated by correspondence to the Council from the Gateacre Society seeking the addition of the Order route to the definitive map. I revert to my previous comments at paragraph 23 above which are equally applicable.
27. The objector also suggests that the right to use the way was brought into question from 2003 onwards in consequence of challenges made by Byron Court residents.
28. Of those who gave evidence to the inquiry on behalf of the objectors Mrs Donnelly, resident of Byron Court since 2004, said that on many occasions she had challenged people herself and pointed out that '*it is private*'. However, in clarifying her challenges she said that between 2004 and February 2018 she had asked people not to use bins, park cars or allow dogs to foul. In one incident, when an individual had parked their car on the premises for a couple of hours whilst shopping, she advised the individual that the land was private. Mr N Rutherford said that he continuously challenged non-residents using the property as a short cut. He said there was an issue of pedestrians and motorcyclists using the property but in cross examination he said that those he had approached had been '*trouble makers*'. Mr N Rutherford identified

- individuals he had challenged; the related incident concerned a taxi dropping off a resident of Glenacres when he explained that there was no such access and that, as a private residence, there was no parking. Mrs Daintith, who does not reside at Byron Court, recalled challenges but these were in the 1980s and therefore not relevant to the right being brought into question from 2003. Mr McKeen, resident of Byron Court since 2003, said that he challenged non-residents when freely accessing the premises only to be met with abuse and threatening behaviour. He challenged anyone coming through the property and not just those engaged in antisocial behaviour.
29. In statements from the objector Dr Campbell, owning a property at Byron Court between 2001 and 2016, outlined in her statement that she was aware of several residents pointing out to people walking and driving across the property and who had engaged in antisocial behaviour that the route was a private road and not a public thoroughfare. Mr Paul Brophy who moved into a property at Byron Court in 2010 said that *'there have been numerous occasions over the last 7 years when I have seen residents of Byron Court challenge pedestrians and even motorcyclists...'* It is not clear as to when the challenges took place but given that the statement was submitted as a proof of evidence to the inquiry it is likely that any observed challenges would have been from 2011; this corresponds with the date on which he moved into Byron Court. The statement also indicates that even before the erection of the wall he had questioned several pedestrians on *'why they felt it was ok to walk through our car park, or take their dogs for a walk...'* He also witnessed a confrontation in 2016 after the erection of the wall. Mr Quinlivan, moving into Byron Court in 2014, assisted in telling people not to cut through the property. Some would ignore him, others gave abuse and some turned around and walked back. He refers to the use of the parking bays by others, dog fouling and the use of the rubbish bins by non-residents. Mrs Quinlivan recalls that, along with her husband, they had told people with dogs and youths not to come through the property as it was private. She recalled other residents telling people not to come through the property and not to use the refuse bins.
30. Whilst challenges were made to those walking through Byron Court it is apparent that some challenges related to those engaging in antisocial activities, parking on the property and using the refuse bins at Byron Court. In contrast there is no evidence from the user evidence forms of any challenges other than one challenge which took place after the construction of the wall. It was the erection of the wall which I have concluded was an event which brought the right to use the way into question. Any challenges on or after that date would not be effective in respect of an earlier bringing into question. Further, none of the witnesses for the Gateacre Society identified any challenges to their use on foot after 2003 and before the erection of the wall. It is also of note that despite any challenges use continued until 2016 and it was not until the erection of the wall that users contacted the Council to complain about the obstruction of the way.
31. Taking all factors into account I do not think, on the balance of probabilities, that any challenges were sufficient to bring the right to use the way into question.
32. Bearing in mind the above I conclude that the right to use the way was brought into question in 1979 and 2016 and the relevant twenty year periods to consider are 1959 to 1979 and 1996 to 2016.

*Evidence of use 1996 to 2016*

33. The original application made by the Gateacre Society was accompanied by 49 user evidence forms (UEFs) relating to 50 individuals. A further 7 UEFs were received by the Council following the submission of the application and the Gateacre Society submitted a further UEF with their Statement of Case.
34. I have examined the UEFs which show use of the Order route by the public as of right and without interruption throughout the twenty year period. Use was on a regular basis varying from daily to monthly use although it is observed that some used the route less than monthly. A number of those who have completed UEFs live in the Glenacres flats. It will be the case that use by these individuals over land associated with Glenacres will have been in consequence of a private right of way and therefore not as of right. However, use of the remainder of the route through what is now Byron Court would have been as of right. Whilst some of the use was not as of right there remain a significant number of individuals who used the route between Acrefield Road and Woolton Park as of right. It is of note that a number of the residents in Glenacres have observed use by the public of the Order route. Others also noted the use of the route by members of the public.
35. The earliest recorded use is from 1958 although use prior to the gap in the wall onto Woolton Park would not have been along the entire length of the Order route; the gap in the wall is shown on the Ordnance Survey map of 1971 and it is therefore likely that the gap was made sometime before this date. Further, there was a wall at the boundary between Acrefield Bank and Glenacres which the objector contends was in existence prior to 1979. The wall is shown on 1971 and 1982 Ordnance Survey maps and a flight of steps which provided access through Acrefield Bank is also shown. The fact that some use was claimed prior to the gap in the wall leading to Woolton Park was created diminishes to some extent the weight to be attached to these forms as they fail to recognise a change in the route used. Additionally the lack of reference to the wall and steps also diminishes the weight which can be given to these forms. Nevertheless there are a significant number of UEFs showing use during the relevant twenty year period.
36. The objector asked that no weight be given to the UEFs where that evidence had not been subject to cross examination. Noting my observations above (paragraph 34), some weight should be given to signed evidence of use forms which declare that to the best of the individual's knowledge the facts stated are true. In addition, noting comments below, a number of individuals gave evidence to the inquiry. That evidence, being subject to cross examination, was in my view consistent with the evidence contained in the UEFs. There is nothing before me to indicate that the evidence in the UEFs should be given no weight but I accept that evidence not subject to cross examination would carry less weight.
37. The objector questioned whether the evidence of the witnesses from the Gateacre Society was given with an over exuberance and whether the evidence would have been different if under oath. The point is made that none of the witnesses, other than Mr Chitty, made reference to the chains, steps, or, in respect of those using the way prior to 1979, the wall on the boundary between Glenacres and Acrefield Bank. Neither is any reference to the same in the correspondence with the City Solicitor. The differences between the

description of the chains in the evidence of the supporters and the objectors also had to be taken into consideration.

38. In respect of the chains only Mr Chitty refers to a chain in his proof of evidence; none of the other proofs referred to such a feature. The reference to the chain by Mr Chitty is brief but in cross examination he said that he recalled chains across the route. He just stepped over them when with his bicycle, otherwise he would go around the side. Other witnesses in cross examination provided descriptions of the chain. Mr Meharg remembered thin bollards and a high chain and said that it was either easy to step over the chain or possible to walk around as there was a gap either side. Mr Collins said that there were removable bollards on the boundary between Acrefield Bank and Glenacres. When Byron Court had been built there were bollards, sometimes with a chain across. Miss Crumpton recalled that when she first used the route she came through from Glenacres and over some chains, it was possible to lift the chain or step over it. Dr Hennessy recalled a chain and said that when on his bicycle he would have to get off but made the point that this was more than 20 years ago. Ms Hicks recalled bollards when Byron Court was built but said that before then there was a chain. She did not refer to the chain in her evidence as she did not think it was significant. In replying to a question from me she said that she just stepped over the chain and said that when Byron Court was built there was a gap around it. Mr Taylor recalled bollards but did not recall a chain. Mr O'Hare, an independent supporter, remembered three wooden and then metal bollards. There was not always a chain present which he described dipping between the posts, scruffy and low, and that it could possibly be missed in the dark. He said that you could just go around the chain.
39. In opposition Mrs Donnelly remembered cutting through Acrefield Bank when it was a residential care home and a locked chain across the gap between the care home and Glenacres. It was necessary to lift the chain to enable the children to push their bikes underneath. In response to a question from me she described the chain as chunky and being in place from 1975 to 1989. In re-examination she said that the chain was waist high. When she moved to Byron Court there were bollards across the gap with a chain through the middle. Although she did not give evidence to the inquiry, the statement of Mrs King refers to a single solid bollard with a chain fastened to it which stopped access through Acrefield Bank. Her statement indicates that it was possible to step over the chain and that occasionally the chain was hung up when it was possible to walk straight through. The chain was in place until the construction of Byron Court started. Mrs Daintith recalled a chain across the route to prevent people coming down to the shops in Woolton.
40. Having regard to all of the evidence, whilst there are some discrepancies in the description of the chains across the route I do not consider that the differences between the evidence given on behalf of the Gateacre Society and the objector are of such significance as to raise doubt as to the validity of the evidence. Similarly whilst the chains may have been placed at the request of the fire prevention officer this has no consequence as to the use of the way. Given the variations in the evidence relating to the chain I do not accept that the evidence of witnesses for the Gateacre Society was changed to reflect the evidence of Mr Chitty.
41. Whilst there is little recollection as to the wall across the route it is perhaps not surprising that this is not referred to in the evidence as access was possible



- using a flight of steps which commenced at the wall. The wall would have no impact on the use of Order route.
42. For the above reasons I do not see any significance in the absence of any reference to the chain or wall in correspondence with the Council.
  43. In respect of Mr Chitty, my observations at paragraphs 40 and 41 in respect of the chain and wall are equally applicable to his evidence. In relation to the reference to the announcement of the matron (paragraph 17 above), the inclusion in his proof of evidence arises from reference to the incident by the objector in their statement of case. A proof of evidence should focus on matters of dispute. Mr Chitty, in his proof of evidence, whilst accepting that the matron made the comments as to the status of the route, makes the point that the owners of the land did nothing to discourage or prohibit use by pedestrians. Given the above I do not consider that the absence of prior reference to the observations made by the matron, despite Mr Chitty being made aware of the same, casts doubt on the reliability of his evidence.
  44. The objector suggested that it is apparent from examination of the UEFs and cross-examination of the witnesses that many of the forms were simply copied word for word. Whilst I note the suggestion I do not agree that many of the forms have been copied word for word. It is accepted that responses to some of the questions are very similar but by the nature of the questions that is not unexpected. I also note that in some cases the path details on some of the forms have also been prepopulated. It is also acknowledged that the UEF of Christine Vane and Vivienne Hicks are similarly worded. However, in cross-examination Ms Hicks was clear that she had not advised Ms Vane as to the wording. Mr Chitty advised that he had been given the names of users and provided them with forms; forms were also put on the Societies web site. It was also acknowledged by some witnesses that they were members of the Gateacre and Woolton Societies. Looking at the evidence as a whole there is no evidence of collusion such that the UEFs should be discounted or their evidence diminished. Nevertheless it has been acknowledged that less weight can be given to the UEFs.
  45. A number of witnesses gave evidence to the inquiry in respect of their use of the way. This evidence was subject to cross examination by the objector. Whilst there was some variance in the evidence and some were unable to recall certain information there is nothing from the examination of the evidence to suggest that the various individuals did not use the way. I note the suggestion of the objector that there was an over exuberance in giving the evidence and I accept that the Gateacre Society, being the applicant for the Order, would wish the Order to be confirmed. However, bearing in mind the evidence was subject to cross examination, there is nothing to indicate that the evidence was exaggerated or that had evidence been given under oath the evidence given would be different. There is also nothing to indicate that the Gateacre Society influenced the evidence included in the various proofs of evidence. In my view the evidence in the proofs and the live evidence to the inquiry was consistent with that contained in the UEFs which consequently means that more weight can be given to those forms although as noted above less weight can be given to evidence which has not been tested at the inquiry.

46. Having regard to all the evidence I take the view that the Order route was used by the public as of right and without interruption for the full twenty year period. Such use was sufficient to raise a presumption of dedication.

*Statutory incompatibility*

47. The objector contends that it is necessary to consider the issue of statutory incompatibility, reference being made to the case of *British Transport Commission v Westmorland County Council [1958] QB 126 HL (Westmorland)*. It is asserted that the route prior to 1977 was across the hospital grounds of The Royal Liverpool Babies Hospital which was a statutory undertaker/company and that whilst Acrefield Bank was a residential care home use of the route was incompatible with the statutory function as a residential care home.
48. In respect of this issue following the closure of the Hospital a residential care home was constructed on the site. The care home closed in 1998 and therefore, in the context of the twenty year period the issue of statutory incompatibility needs to be considered in relation to 1996 to 1998. *Westmorland* establishes that dedication must be compatible with the purpose for which the land is held. A public right of way can be dedicated over land provided that public use of the footpath was not incompatible with the statutory purposes. It is a question of fact as to whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties.
49. Section 31(8) of the 1980 Act provides that '*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes.*'
50. Plans (Annex 16 of the Statement of Case of the Gateacre Society) show that in 1992 the land occupied by Acrefield Bank was in the ownership of Social Services Committee. However, as pointed out by the Council, the Social Services Committee is a decision making body whereas the owner was Liverpool City Council. It is noted that the Council will have been required under the Local Authority Services Act 1970 to establish a Social Services Committee, appoint a Director of Social Services and carry out functions set out in Schedule 1 of that Act. Further, to carry out functions under the National Assistance Act 1948.
51. It is accepted that Liverpool City Council will have statutory responsibilities in respect of social services, however, the City Council is not a Statutory Undertaker. Whilst the evidence suggests that on occasions the staff took exception to people passing though the site, for example Mrs Donnelly was given a '*good telling off for disturbing the elderly residents*' and Mr N Rutherford was told off by staff for entering the grounds, this does not mean that the dedication of a public footpath would be incompatible with the running of the care home. As a public footpath there would be a right to pass and repass on foot. Although the Council would have responsibilities in respect of the residential care home the use of a way by the public would not prevent the Council from delivering its services. Further, there is no evidence of any statutory provision that would prevent the acquisition of public rights through the grounds of a care home. As such I conclude that statutory incompatibility does not arise.

*Evidence of Lack of intention to dedicate*

52. In view of my findings it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way. For there to be sufficient evidence that there was no intention to dedicate the way, other than those specifically provided for in Section 31 of the 1980 Act, there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public. I was referred to the case of *Godmanchester* which is relevant in this respect.
53. *Godmanchester* indicates that it is hard to imagine actions which bring the right to use the way into question which did not also evidence a lack of intention to dedicate. However, it remains the case that not every action bringing the right to use the way into question will necessarily be sufficient to demonstrate a lack of intention to dedicate.
54. There is no evidence that any landowner deposited a map and statement or made a subsequent statutory declaration in accordance with Section 31(6) of the 1980 Act.
55. The objector contends that statutory dedication cannot arise between 1996 and 2016 as there is sufficient evidence of a lack of intention to dedicate by Social Services during the period 1996 to 1998. Furthermore, challenges made by tenants of Byron Court from 2003 brought the right to use the way into question such that the relevant period to be considered is 1983 to 2003. I have already concluded that the challenges from 2003 did not bring the right to use the way into question such that the relevant period to be considered should be 1983 to 2003. The objector also argues that the erection of the wall is sufficient evidence of a lack of intention to dedicate. However, it was the erection of the wall which brought the right to use the way into question and this will have no retrospective effect.
56. As regards the actions of Social Services I have already considered the statement made by the matron of Acrefield Bank in 1979 and the 1984 planning report in the context of bringing into question the right to use the way. However, this evidence has no bearing on the relevant twenty year period. It is also noted that in the 1984 planning report the Director of Social Services objected to the deletion of the proposed link as it would formalise the use of the link through Acrefield Bank. That statement provides nothing which would disabuse the public of the notion that the Order route was public but again this falls outside the relevant twenty year period.
57. Bearing in mind the above I do not consider that these events would have demonstrated a lack of intention to dedicate.
58. I note the verbal challenges to some by the matron and nuns at Acrefield Bank. However, Mrs Donnelly said that the challenge to her was between 1975 and 1989 when she was told that the property was private and that she was disturbing residents; she continued to use the way. Mr N Rutherford described being told off for entering the grounds with his friends. Mrs Daintith recalls being often scolded by the matron who told her that the land was private; she

- thought that she, and those she was with may have been a bit noisy. There is no evidence that any challenges were during the relevant period or that the challenges disabused users of the notion that the way was public. The challenges appear, in the main, to be made on the basis that residents were being disturbed. Use continued and, in any event, there is nothing to indicate that the matron, or indeed the nuns, would have had authority on behalf of the landowner to demonstrate a lack of intention to dedicate.
59. Mrs Daintith referred to her brother being told by the matron that she would report any Council vehicles coming through the property as she was concerned about the safety of the residents. However, there is nothing in this statement which would have disabused the public of the notion that the way was public. The matron's concerns related to the safety of residents arising from Council vehicles passing through; no reference was made to public rights.
60. In respect of challenges by tenants of Byron Court, the land is registered to CPM Securities Limited (now Hayne Securities Limited). Byron Court was constructed by Wimpey Homes North West Limited in around 2001. On 27 March 2002 Wimpey Homes Holdings Limited granted a head lease to the Byron Court (Liverpool) Management Company (the objector). The Head Lease relates to the whole of the property including the apartments, car parking areas and common areas. However, the Head Lease was not registered with the Land Registry. In consequence the objector cannot show legal title or a legal leasehold interest in the property.
61. The issue to be considered is whether the Head Lease is sufficient to enable the Company to effectively challenge users such as to demonstrate a lack of intention to dedicate.
62. For the purposes of demonstrating a lack of intention to dedicate the landowner is defined (Section 31(7) of the 1980 Act) as the person who is entitled to dispose of the fee simple in the land. I agree with the advice to the objector (inquiry document 10) that *Applegarth* is authority for the proposition that the burden lies with whoever needs to rebut the presumption; in this case the objector. It is also agreed that it is irrelevant that the fee simple owner may not have provided direct evidence. Nevertheless it is necessary to provide evidence which is sufficient to demonstrate a lack of intention to dedicate and the test is set out above at paragraph 52. In respect of the owner fee simple it should be noted that Haynes Securities Limited have not raised any objection to the Order neither is there evidence that they took any steps to demonstrate a lack of intention to dedicate.
63. Had the Head Lease been registered then this would have, in effect, subject to terms and conditions, conveyed the property to the Company. As such the Company, whose membership includes residents of Byron Court, would have the necessary locus to challenge use by the public. Whilst the Head Lease is unregistered some weight should be given thereto; there is nothing to indicate that the Head Lease is invalid such that it carries no weight.
64. I have already considered the challenges in respect of bringing the right to use the way into question. In respect of a lack of intention to dedicate, whilst I accept that some residents challenged users of the way use continued throughout the relevant period and none of those giving evidence as to the use of the way had ever been challenged until after the erection of the wall. Other challenges related to those engaged in antisocial behaviour, parking cars and

using refuse bins. These challenges would have no effect in bringing it home to users of the way that there was no intention to dedicate the way; the challenges were for specific purposes not related to the use of the way. On balance I do not consider that the challenges were sufficient to demonstrate a lack of intention to dedicate.

65. The Council observe that positioned at the entrance to Glenacres, off Acrefield Road, are notices saying private road which would appear to predate the construction of Byron Court. Mrs Donnelly says that 'private' property signs were placed at the entrances to Byron Court which were continually torn down or defaced. She also referred to notices relating to the bins and car parking. Mr N Rutherford referred to private property signs, which were removed or damaged, private car park signs, private bin store signs and polite notices on cars of non-residents. Mr Quinlivan referred to signs at the entrances which were torn down. Other than Miss Crumpton none of those using the way could recall any notices on the route. Miss Crumpton said the notice said '*private land*'.
66. Whilst there were notices on the land these related to the ownership of the land or concerned specific issues such as the use of bins and car parking. Although notices referred to the land being private it is the case that public rights of way are rights over private land. I do not dispute that notices were on the land but there is nothing to indicate that the wording led users to understand that there was no public right of way, use continued. It may be that some of the notices were torn down but no further action appears to have been taken to prevent use until the erection of the wall. If the landowner had not intended to dedicate the way it is likely, given the ongoing use, that further steps would have been taken. I have concluded above that the challenges were insufficient to demonstrate a lack of intention to dedicate.
67. The section of the Order route A to D crosses land currently in the ownership of Liverpool Mutual Homes having previously been owned by Liverpool City Council. There is no evidence that any of these landowners demonstrated a lack of intention to dedicate.
68. It is suggested by the objector that a decision not to adopt the driveways for both Acrefield Bank and Glenacres is consistent with a lack of intention to dedicate a right of way. Whilst the Council have not 'adopted' the driveway that does not preclude the existence of public rights. The adoption of a highway means that the highway authority has accepted the way as a highway maintainable at public expense. It should be noted that since the route is not recorded as a public highway it is not surprising that the route has not been 'adopted'. I do not therefore accept that the fact that the way is not adopted demonstrates any lack of intention to dedicate. It only serves to show that the way is not regarded as a highway maintainable at public expense.
69. Having regard to all of the above I have concluded that the use of the way raises a presumption that the Order route has been dedicated as a public footpath. There is insufficient evidence to show that the landowner demonstrated a lack of intention to dedicate. As such the statutory dedication is made out in consequence of use during the period 1996 to 2016. In view of my findings it is not necessary to consider the statutory dedication of the route between 1959 and 1979 or dedication at common law and the submissions thereon.

### **Other Matters**

70. It is noted that the deeds to Byron Court make no reference to a right of way and that the Council's planning and highways departments confirmed the same prior to the construction of the wall. However, this does not preclude the existence of public rights or such rights being shown to exist at a later date.
71. Concerns are raised in respect of antisocial behaviour, criminal activity and the effect on personal lives. The point is also made that alternative routes are available. Whilst I can appreciate these matters the 1981 Act does not allow such issues to be taken into account. I also note Counsel's opinion in respect of the prospect of future registration of the Head Lease and concerns raised by the applicant as to the progress in creating and maintaining a definitive map. These are not matters for my consideration.

### **Conclusions**

72. 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**

73. I confirm the Order.

*Martin Elliott*

Inspector

## APPEARANCES

### **For Liverpool City Council:**

Mr R Mann	Solicitor, Liverpool City Council
who called	
Mr M Cassidy	Highway Engineer

### **Also in support of the Order:**

Mr M Chitty	Gateacre Society
who also called	
Mr B Meharg	
Mr B Collins	
Miss J Crumpton	
Cllr M Kelly	
Dr M Hennessy	
Ms V Hicks	
Dr W Taylor	

### **Also in support of the Order:**

Mr P O'Hare

### **In opposition to the Order:**

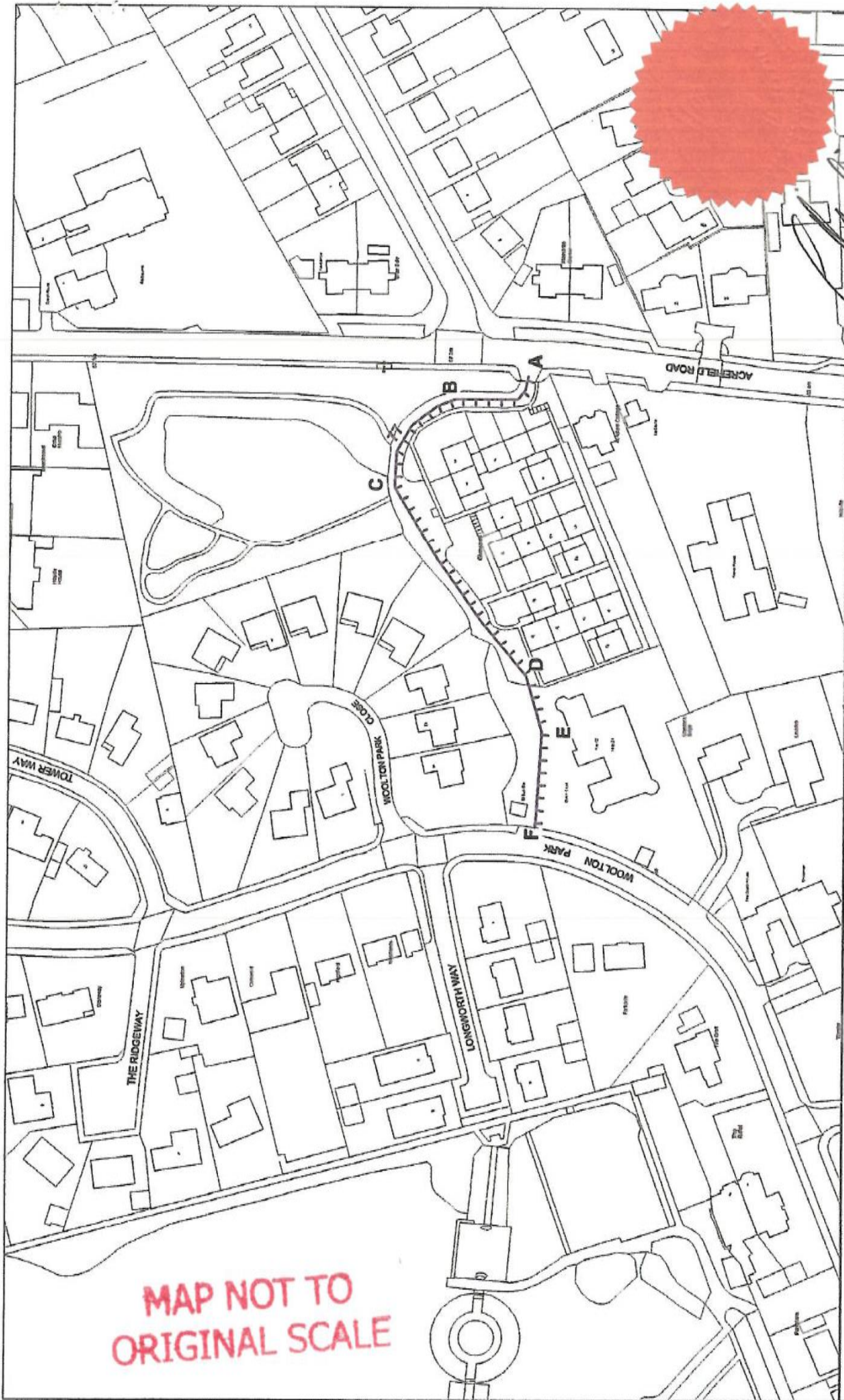
Mr C Rutherford	For Byron Court (Liverpool) Management Company Limited
who also called	
Mrs J Donnelly	
Mr N Rutherford	
Mrs E Daintith	
Mr M Reynolds	
Mr K McKeen	

## **Documents handed in at the Inquiry**

- 1 Appendix F to Statement of Case of Byron Court (Liverpool) Management Company Limited
- 2 Opening Statement for Liverpool City Council
- 3 Opening Statement Byron Court (Liverpool) Management Company Limited)
- 4 Minutes of Planning Committee (Special Meeting) 29 February 2000
- 5 Lease - Title Number MS477077
- 6 Correspondence 4 April 2018 St Helens Law to Mrs Sylvia Quirk (Notes for purchasers solicitors attached)
- 7 Form AP1, Application to change the register (Title number MS402176)
- 8 Agreement for Head Lease 29 September 2000 (Wimpey Homes Holdings Limited and Byron Court (Liverpool) Management

- Company Limited)
- 9 Agreement for Sale of Freehold Reversion (undated) (Wimpey Homes Holdings Limited and CPM Securities Limited)
- 10 Closing Statement (and associated documents) of Byron Court (Liverpool) Management Company Limited
- 11 Closing Statement of The Gateacre Society
- 12 Closing Statement for Liverpool City Council





**MAP NOT TO ORIGINAL SCALE**

**PROW No. 77. ACREFIELD ROAD TO WOOLTON PARK**

Date: 1/09/2016  
 Scale: 1:1000@A3  
 Prepared by: *[Signature]*  
 Liverpool City Council

DRAWING NO:  
**LS 52522**

LENGTH: 174 METRES.

OS : SJ . 4287 SW      GRID REF: SJ 342453, 387298 TO SJ 342322, 387295

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