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## Order Decision

Inquiry opened on 24 April 2019

Site visit made on 25 April 2019

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 23 July 2019**

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### **Order Ref: ROW/3206702**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Borough Council of Calderdale (Woodroyd Gardens to Rose Grove Lane) Order No.1, 2017.
- The Order is dated 13 January 2017 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is proposed for confirmation subject to a modification set out below in the Formal Decision**

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### **Procedural Matters**

#### *Validity of the Order*

1. I note arguments about the validity of the Order on the grounds the decision-making process adopted was flawed as it did not follow the Calderdale Council ('the Council') Constitution, so was incapable of confirmation. However, I take the view that the matters aired relate to the Schedule 14 procedure and I have been appointed to determine the Order under paragraph 10(1) of Schedule 15 to the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not been appointed to determine whether any of the procedural requirements with regard to the Schedule 14 stage have been met.
2. I consider the correct course of action for a party aggrieved by alleged procedural irregularities at the Schedule 14 stage is to seek judicial review of the surveying authority's decision. If such action has not been followed, then the opportunity to question the validity of the Order on the grounds of procedural defects at the Schedule 14 stage will have lapsed.
3. A further matter was the evidential event under which the Order had been made, in this case Section 53(3)(c)(i) of the 1981 Act, the 'discovery of evidence' that a right of way subsists or is reasonably alleged to subsist. This Order relies mainly on claimed use by the public. An order based on a presumption of dedication following the end of a period of use by the public will be made under Section 53(3)(b) of the 1981 Act. However, I see no reason why, following the end of such a period, an order cannot be made under Section 53(3)(c)(i). It follows in my view that the use of Section 53(3)(c)(i) in this case does not invalidate the Order.
4. I am therefore satisfied there is a valid order before me for determination.

### *Modifications*

5. The Council requested modifications to the Order Schedule to amend the length of the Order route currently recorded as 81 metres, which appears to be a typographical error, and 132 metres, to 134 metres. In the interests of clarity and certainty both for the public and for the landowners I shall modify the Order if I decide to confirm it.

### **Preliminary Matters**

6. This Order concerns the addition of a public footpath between Woodroyd Gardens and Rose Grove Lane, Luddendenfoot near Sowerby Bridge, points A to E on the plan attached to the Order.

### **The Main Issues**

7. I must consider whether, on a balance of probabilities, the evidence shows that a public footpath subsists over the Order route. Dedication through public use arises either by presumed dedication as set out in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication under common law. The Council relies on both tests having been met.
8. The 1980 Act requires me to establish the date when the public's right to use the Order route was brought into question, then determine whether use by the public has been as of right (without force, secrecy or permission) and without interruption for a period of not less than 20 years ending on that date. Finally, I need to consider whether there is sufficient evidence to show the landowners did not intend to dedicate public footpath rights during that period.
9. At common law, a right of way may be created through expressed or implied dedication and acceptance. The claimant needs to show that the landowner (who must have the capacity to dedicate) intended to dedicate a public right of way; that public use has gone on for so long that it could be inferred; or they were aware of and acquiesced in public use. Use by the public must be as of right, however, there is no fixed period and, depending on the facts, may range from a few years to several decades.
10. In this case it is argued that no consistent defined route has been used; a different route was in use by the public, parallel and to the north of the Order route emerging at the junction of Rose Grove Lane and Timmey Lane, with Hill Top Lane<sup>1</sup>; use was private to access garages; and, reliance has been placed on Ordnance Survey ('OS') maps to define the route.

### **Reasons**

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

##### *When use of the Order route was brought into question*

11. The Order route was obstructed by fencing at Woodlands Manor in late 2010. This led to the gathering of user evidence and submission of an application to add a footpath to the Definitive Map and Statement. There had been previous requests to the Council for user evidence forms and some were submitted in 2003. However, no application had been forthcoming at that time. Use had continued, apparently on an understanding that the path would be reinstated

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<sup>1</sup> Also known as Hollins Lane

following completion of the dwelling. I conclude that 2010 is the date when the right of the public to use the way was brought into question (as agreed by the parties) and the 20-year period to consider for the purposes of the 1980 Act is 1990 to 2010.

#### *Use by the public*

12. Users spoke of going to the shops and other facilities in Sowerby Bridge using the Order route as a short cut, to go to work, to visit friends, as a pleasant woodland walk, to get to the canal and park, for dog walking, and taking children to and from school. Some referred to use by their relatives, and its regular use by others was described. Users included residents of Woodroyd Gardens and people from other parts of the locality.
13. Witnesses were clear that the route was defined, a single well-trodden path that had not altered its course during the years they had walked it. Some knew it as 'Daisy Bank'. They recalled stone or concrete steps below the garages (at A), and stepping stones or bricks placed along the route from time to time, when muddy, to aid passage. Prior to the development of Woodlands Manor, there had been a small 'quarry' with a number of garages on Rose Grove Lane, above which the path passed.
14. Collectively, claimed use by individuals covered the 20-year period, and by some was 2-3 times a day or daily, and by others frequent, often, or monthly on average. I have discounted use where access was gained from back gardens at Woodroyd Gardens as it did not extend to the route as a whole.
15. There is nothing to indicate claimed use was with force, by stealth or with permission. Neither does the evidence suggest that use was to access the garages on Rose Grove Lane below the Order route, although one or two individuals may also have used it in this regard.

#### *Alignment*

16. There is a discrepancy between the route marked in the majority of user evidence forms ('UEFs')<sup>2</sup> and the Order route itself. However, I do not share the view that only one UEF depicted it. There are many variations in the UEFs including marking the route on the west side of the garages from A, and even through the garden of No.22 Woodroyd Gardens; a route approximately mid-way between the Order route and the south side of the boundary of the Meadows<sup>3</sup>; and a similar route but ending at E. Some are shakily hand-drawn lines and some are drawn using a ruler. But some correspond with the Order route. Indeed, users spoke of the line they had drawn as being indicative or representative of the Order route, rather than an accurate portrayal of it. This is apparent having considered their evidence as a whole.
17. Similarly, evidence regarding the eastern termination of the Order route was not wholly consistent. Some users were sure the path exited at E opposite the gable end of Gate Head Farm, others indicated a point further north on the application route (roughly where the three roads meet), or somewhere between the two. Some witnesses recalled stepping up from or down to the road, others that the path exited level with the road. Some recalled the path widened out where it met the road. One recalled exiting beside a 'well' or stone

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<sup>2</sup> Those dating to 2003 contained no plan

<sup>3</sup> This is more or less the route claimed in the definitive map modification order application

trough near the application route's eastern end. Most users described the path exiting onto Timmey Lane. However, the point where Timmey Lane ends and Rose Grove Lane begins is not entirely clear and whether the route exits onto one or other Lane is, to a degree, a matter of interpretation. Nevertheless, all spoke with conviction of using a single path that remained on the same alignment.

18. The northerly termination point described is more consistent with the line drawn on most UEF plans, but not with the Order route. The latter, however, is consistent with the line marked on OS mapping, with aerial and with other photographic evidence, all pointing to a route terminating at E as described by several of those giving evidence.
19. There is nothing to support the use of a route along the southern boundary of The Meadows or within the former fields. Indeed, one witness said the former landowner did not allow the public to use the fields, although there is no other evidence in this regard. Reference was made to wooden steps leading from the rear garden of a property on The Meadows, but there is nothing to indicate this was anything other than a private access. No one spoke of crossing or walking along a stone (retaining) wall at The Meadows, although some recalled it when describing the Order route.
20. The Order route was available throughout the 20-year period and the only available route from around 2002. On balance I find the evidence taken together supports an alignment that follows the Order route throughout the 20-year period rather than an alternative following the application route or one passing through The Meadows.

#### *Width*

21. The Order provides a width of 1.2 metres. Witness estimates varied between a narrow trod of a few centimetres and 2 metres or more where the path widened out to meet the road. Some described it as wide enough to push a bicycle along, or to use with a pushchair. The UEFs gave varying widths of between 0.75 and 2 metres. On balance I consider that a width of 1.2 metres is representative of the type of use, allowing two people to pass with ease, and not inconsistent with the widths generally described.

#### *The evidence and actions of the landowners*

22. A sign at A was not recalled by most witnesses. However, I am satisfied it does not relate to the Order route but was intended to deter vehicles from parking at the garages beyond A. Indeed, the landowners here support the Order.
23. There is no evidence of any actions by any landowners to indicate there was no intention to dedicate a public right of way along the Order route during the 20-year period. In 2006 the planning application for Woodlands Manor acknowledged and accommodated the presence of a path along the Order route's alignment.

#### *Conclusions on presumed dedication*

24. I am satisfied that the use was brought into question in 2010. There are inconsistencies in the evidence. However, on balance and having regard to the evidence as a whole. I conclude that there has been use of a single route consistent with the Order route, given for example the descriptions of steps

and stepping stones which are only present on it and have been for many years. Further, I conclude that use of this way by the public has been as of right and without interruption throughout the 20-year period 1990 to 2010, and there is no evidence to demonstrate that the landowners did not intend to dedicate it for public use. It follows in my view that the tests are met and a right of way subsists.

25. Having reached this conclusion, it is not necessary for me to consider whether a case is made out at common law. However, since the Council relied on both section 31 of the 1980 Act and on common law, I shall do so for completeness.

### **Common Law**

#### *Documentary evidence*

26. Notwithstanding a slight alteration in alignment near A where the garages (built in the 1980s) stand, a double pecked line marked on a 1961 OS map is consistent both with the Order route and the path described by several witnesses. OS mapping provides good evidence of the physical features evident at the time of the survey. Although not providing evidence as to status, the marking of the route as 'FP' or footpath is indicative of the physical characteristics of the way mapped. A 2010 map marks an unmetalled path in the same position. The maps show other lines or features, though none continue to the road so are unlikely to represent a through route.
27. The earliest photograph taken from the air, dated 1988, shows a feature partly obscured by trees following the line of the Order route. The steps at the garages are visible at A, and the feature meets the road at E. Aerial photographs dating between 2002 and 2009 consistently show a very well-defined path on an alignment equivalent to the Order route. To the north, in 2002, are various features on the farmland although they are less clearly defined and do not appear to be continuous between Woodroyd Gardens and the Lane. It is not possible to determine whether or not they represent wear lines from use on foot. The user evidence is not consistent with use here.
28. By 2006 The Meadows development is nearly complete and the well-defined wear line consistent with the Order route clearly visible. In 2009 the worn line is seen terminating at E where the word 'SLOW' is marked on the road. A further photograph dating between 2007 and 2009 shows a clear wear line emerging at the same point, as does a street-image photograph dated 2009.
29. An electricity pole seen on the photographs and marked on plans for Woodlands Manor lies north of E where the application route was claimed. This area was shown to be overgrown on images from 2009 with no visible trod exiting onto the road; and none of the users referred to it.
30. The aerial photographs are consistent with the OS maps and with the user evidence of a well-trodden path exiting onto Rose Grove Lane at point E. They do not support a route exiting directly opposite Hill Top Lane, or beside the stone trough to the north, where the gradient is steeper.
31. Photographs taken by the Council in 2010 before the route had been fenced off and the development of Woodlands Manor begun, show a well-defined trod running east-west on generally level ground with no indication of a parallel route to the north. These are consistent with the description of the route given by users, albeit some believed it exited further up the Lane.

32. Deeds relating to Gate House Farm refer to a right of way which in all likelihood is a private access connected with Rose Grove Cottages. No evidence is provided to support the contention that steps constructed by the new garages in the 1980s were installed because it was considered a public right of way.

*User and landowner evidence*

33. Claimed use extended back to the early 1950s and some believed there had been a path in use there since the 1930s. However, the earliest route followed a slightly different alignment from A, passing closer to No.22 Woodroyd Gardens prior to the construction of the garages when it moved slightly to the east and the flight of steps were put in.
34. Previous landowners have either expressed support for the Order, or through their actions acknowledged the Order route passing through their land. When planning permission was applied for in 2006 for Woodlands Manor the footpath's existence was acknowledged and was to be unaffected by the proposal. The subsequent owner closed the path when development began with the intention of reinstating it following completion – indeed a clause in the planning permission required this (as shown in the site layout plans), although this was subsequently removed following appeal on change of ownership.

*Conclusions on common law dedication*

35. A well-defined path consistent with the Order route is clearly evident in the OS and photographic sources. There has been use of this defined route as of right from the 1980s onwards. The evidence points to the landowners being aware of and acquiescing in use of this way by the public. Accordingly, I conclude that the tests at common law are also met.

**Conclusion**

36. Having regard to these and all other matters raised in the written representations and at the Inquiry, I conclude the Order should be proposed for confirmation with a modification to the length of the Order route.

**Formal Decision**

37. I propose to confirm the Order subject to the following modifications:

- In Part I of the Schedule to the Order, under the description of the path or way to be added, in the last line recording the approximate length of the path, delete "81" and replace with "134"
- In Part II of the Schedule to the Order, under the heading "Approx. length Metres" delete "20" and "112" and replace with "21" and "113"

Since the confirmed Order could affect land not affected by the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*S Doran*

**Inspector**

## **APPEARANCES**

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

Philip Robson *of Counsel* representing Calderdale Council

who called

Phil Champion Rights of Way Officer, Calderdale Council

### **Others who spoke in support of the Order**

Madeline Amos

Clive Bates

Philip Brayshaw

Davina Broadbent

Kenneth Cheslett

Elaine Cheslett

Janet Clarke

Mary Farrar

Simon Hemingway

Anne James

Linda Juma

Annabel Nairn

Thomas Pettengell

Leslie Roper

James Sanderson

### **For the Objectors:**

Andrew Dunlop representing Richard and Ashley Haigh



## **DOCUMENTS**

1. Opening submissions on behalf of Calderdale Council
2. Opening submissions on behalf of Mr and Mrs Haigh
3. Local Government Act 2000, Chapter 22, Arrangements with respect to Executives etc., and Statutory Instrument No.2853 The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, submitted on behalf of Mr and Mrs Haigh
4. Statement of Annabel Nairn
5. Statement of Simon Hemingway together with 3 'street view' images of Rose Grove Lane dated July 2009
6. Aerial photograph c1988 submitted by Anne James
7. Statement of Madeline Amos
8. Statement of Janet Clarke
9. Letter from Philip Brayshaw
10. Statement of Kenneth Cheslett
11. Statement of Elaine Cheslett
12. Document C2f from Council bundle (user evidence form of Clive Bates)
13. Colour photographs A-D taken at the junction of Rose Grove Lane and Timmy Lane, and aerial photograph dated 6 May 2016 showing the area of the Order route, submitted by Calderdale Council
14. Document D2i from Council bundle (email dated 7 November 2007)
15. Executive Summary, Report to Head of Highways and Transportation and Discussion of Evidence concerning the determination of the Definitive Map Modification Application, submitted by Calderdale Council and Mr and Mrs Haigh
16. Closing submissions on behalf of Mr and Mrs Haigh
17. Closing submissions on behalf of Calderdale Council, together with extracts from Calderdale Council's Constitution



MAP NOT TO ORIGINAL SCALE



**KEY**

----- Path to be added

**Calderdale Council**

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Woodroyd Gardens to Rose Grove Lane,  
Luddendenfoot

Sheet Ref: SE02NE 0625

Date: 06/01/2017

Scale 1:1250

Drawn By: PC