



Order Decision

Inquiry opened on 24 October 2018

by Sue M Arnott FIPROW

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

Decision date: 13 September 2019

Order Ref: ROW/3193877

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Wiltshire Council (Parish of Idmiston) Path no. 9 Definitive Map and Statement Modification Order 2016.
- The Order is dated 28 November 2016. It proposes to modify the definitive map and statement for the area by adding a footpath in Porton between High Street and the recreation ground, as shown on the Order map and described in the Order schedule.
- There were twenty three objections¹ outstanding and five representations in support when Wiltshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is confirmed.

Procedural matters

1. On 24 October 2018 I opened a public inquiry at the Memorial Hall in Porton, having visited the site of the claimed public footpath, unaccompanied, during the previous afternoon.
2. Early in the proceedings, on behalf of Wiltshire Council (WC), Mr Ward reported that a procedural problem had arisen in relation to the service of notice on parties with a legal interest in the Order route. Through recent investigations into a different matter, WC had discovered that ownership of a part of the route appears to still lie with the original developers of Bourne Close in Porton, rather than being vested in adjacent property owners. As a result, it was accepted that the statutory requirement to notify all affected parties had not been fully complied with.
3. In the circumstances I considered it prudent to continue with the inquiry on the scheduled day since many witnesses were in attendance. However, at the end of the afternoon I adjourned the proceedings pending completion of the notification requirements and receipt of any representations in response.
4. After adjourning the event on 24 October, I made a further inspection of the Order route, on that occasion accompanied by supporters of the Order (Ms Green representing WC and Mr D Adams) and objectors (Mr A M Jones and Mr R Grimshaw).
5. Subsequently, one further representation was submitted (from Ms J Parker-Smith); written confirmation was provided by Dr M Adams of evidence that he had presented verbally at the inquiry from a previous landowner, and

¹ Two of these were later withdrawn

additional documentary evidence was discovered by WC during its research. All this information was circulated for further comment and three responses were received (from Mr Jones, Mr Grimshaw and Wiltshire Council).

6. Having considered the additional material, I concluded that it was not necessary to resume the adjourned inquiry but instead invited closing submissions in writing. This prompted four final responses: from Dr M Adams, Mr A M Jones, Mr D Adams and from WC. I have taken all relevant submissions into account in reaching my conclusions.

The Main Issues

7. The main issue here is whether the evidence is sufficient to show that, in the past, the Order route has been used in such a way that a public footpath has been established.
8. Wiltshire Council made the Order on the basis of events specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act). Therefore if I am to confirm it I must be satisfied that, on a balance of probability, the evidence shows that a public right of way on foot subsists along the route described in the Order between the points labelled A, B and C on the Order map.

Reasons

Background

9. The case in support of the Order is based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question such as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
10. Whilst WC had examined a number of historical maps and other relevant documents, there is no evidence to support the existence of a public way of any kind before the mid-twentieth century.
11. Planning permission was granted in 1955 to Mr G and Mr T A Burchmore for residential development of the former Manor Farm site, now known as Bourne Close. The recreation ground which is located to the north of the five properties in this development was established by Idmiston Parish Council in the late 1960s/early 1970s with a planning application being made in 1974 to change the use of a former farm access to a pedestrian one from Bourne Close to the playing field. Permission was duly granted subject to the installation of bollards to restrict the access to pedestrians only. (These bollards are located at a point I shall refer to as C1 at grid reference SU 1872 3661.)
12. According to former parish councillor Mr Gould, Idmiston Parish Council purchased the land for the recreation ground from the Burchmore brothers; initially there had been no entrance from Winterslow Road, the only access being from High Street. However, whilst the sketch plan attached to the 1974

permission suggests it was envisaged the parish council's path (C-C1) would continue southwards via Bourne Close, there is nothing to indicate whether the section A-B was in fact available at the time².

13. It appears that ownership of Bourne Close itself remained with the original developers (and now their successors in title). The road is not recorded on WC's list of highways maintainable at the public expense and no public rights are recorded over it at present.

The case for statutory dedication

14. When considering the evidence in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question so as to set the relevant 20 year period for examination.

Bringing into question

15. It was not disputed this had occurred when, in March 2015, the owner of the grassed area over which section A-B passes (Mr Jones) erected temporary 'Heras'-style fencing around the site, thereby preventing people from walking part of the route in question.
16. Later, in 2016, a permanent fence and notices followed, but it was this initial barrier which prompted an application to be made to WC in November 2015 to record a public right of way from High Street to the recreation ground in Porton. This application was accompanied by statements from 27 people providing evidence of their use of the claimed footpath.
17. I have no hesitation at all in concluding that the erection of barriers across the Order route at A and B in March 2015 brought into question the extent of the public's rights here.
18. Nevertheless, I have also considered whether this may have occurred on an earlier occasion, specifically when a planning application for residential development on the site³ was submitted in November 2014. This proposal was withdrawn a month later, as was a revised application submitted in May 2015; a re-submission of this proposal in November 2015 was refused permission.
19. WC argued that the first application did not bring into question the public's rights: it did not deny or prevent use of the claimed footpath but, in any event, there are procedures to allow for diversion of any pre-existing public path. Further, the application was made to the planning authority and cannot be construed as giving notice to the highway authority of any denial of a public path or a lack of intention to dedicate the way for public use.
20. In my view the planning application in November 2014 could quite easily be interpreted as challenging the public's right to walk between points A and B. However, it appears that the proposal raised objections of a more substantial nature in planning terms such that the right of way issue seems to have been overlooked at that stage⁴. The application was swiftly withdrawn and did not re-surface until after the fencing brought the status of the claimed path into question in March 2015.

² However Mr Bright recalled there had once been a gateway enabling people to use a path in the 1960s.

³ The intended layout of the dwelling made no clear provision for a public path.

⁴ Mr Jones submits this undermines the veracity of the claimed user.

21. I anticipate the outcome would be no different if the route had been brought into question in November 2014 rather than four months later, but I am not persuaded the evidence shows the first planning application actually did so.
22. In conclusion, I am satisfied that the status of the Order route was brought into question in March 2015. I will therefore examine the claimed use by the public during the twenty years preceding this date.

Evidence of use by the public (1995-2015)

23. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.
24. In support of the claimed route is the written evidence of use from 27 people who completed standard forms, of whom 7 also gave evidence verbally at the inquiry and answered all questions put to them to verify the details of their use. Nine of the claimants had used the route throughout the full 20 years; others had done so for lesser periods. Whilst I accord greater weight to the evidence of those people who gave evidence in person and submitted to questioning, the written statements from the remaining claimants are consistent with the oral evidence.
25. In addition, written evidence forms were completed by the owners of four of the five properties in Bourne Close and by Mr Jones, owner of the grassed area. One of these (Dr Appleyard) also gave evidence in support of the Order at the inquiry, confirming her knowledge of, and personal use of, the Order route dating back to 2004.
26. In addition to Mr Jones, the owners of one of the houses in Bourne Close objected to the Order stating that, during their occupation since 2010, they had not seen adults use the claimed way, but occasionally children and dogs taking a short cut. This was similar to the testimony of several other objectors who themselves had always used the vehicular road (Bourne Close) to reach the recreation ground, not the grassed area.
27. In his submission, Mr Jones questioned the motives of some of the claimants and, on his behalf, Mr Grimshaw argued that the evidence from users was biased by their intention to frustrate Mr Jones' planning proposals.
28. After listening to the evidence given at the inquiry by supporting witnesses, that was not the impression I gained from their answers to questions put to them in cross-examination. It was clear that these claimants *had* used the Order route unchallenged for many years, choosing to walk across the grassy path whilst other people clearly used the tarmac option.
29. I have studied closely the various photographs submitted, the earliest being taken around 1980. On one dated 1993, a very clear worn path is visible across the grass between A and B; this obviously pre-dates the relevant period but it offers some evidence to support use shortly before the start of that period. A photo taken in February 2004 in snowy conditions exposes a trampled line across the grass from a point between A and the junction of Bourne Close with High Street (at a point I shall refer to as X) but shadow across the eastern side of the site makes interpretation too difficult to be reliable.

30. The scale of aerial photographs taken in 2001, 2005/6 and in 2014, and shadow from the adjacent hedge, are not helpful in discerning any trace of use but I do not take this to be proof that no use took place. Being taken at much closer quarters, a photograph from Google Street View captured in February 2009 does reveal worn marks on the ground between points A and B and shows a car parked on the grass near B. I accept Mr Jones' submission that some of these marks will have been made by vehicles pulling onto the grass but when the image is viewed from point A I can clearly detect a single worn trod broadly parallel to the boundary with Rose Cottage.
31. I can accept as true Mr Jones' statement that he did not see people using the claimed path, either whilst he lived in High Street or since leaving the village in 2007 considering he admitted working long hours and weekends. However, that does not mean people did not do so.
32. Mr Jones carried out an exercise in September 2018 in which he collected the signatures of 90 people who supported the statement: "*When I go to Porton Playpark, or to any of the houses in Bourne Close from High Street, I have always used the tarmac road as access, not the patch of grass.*" This included 6 of the witnesses who spoke against the Order at the inquiry (including Mr Jones himself). I can only give this survey limited evidential weight since further details for 84 of the people concerned are not available, in particular their period of use, and there was no opportunity to question them. More significantly, the statement endorsed by the signatories does not state whether other people were seen using the Order route.
33. In his evidence to the inquiry, Mr Gould reported that the gates onto the playing field (at point C) have occasionally been closed, for example during heavy flooding. In addition, Mr Marsh noted that during his period of use prior to 2000, the gates were regularly closed at dusk. This raises a question about the 'cul-de-sac' nature of the claimed right of way if and when the gates are locked. However, given the fact that this route leads to a community facility, a cul-de-sac highway may be easily explained, but there is no evidence of any interruption to use of the Order route itself.
34. In summary, after considering all the information submitted, I am satisfied that between 1995 and 2015, prior to the temporary fencing being erected, use of the path across the grassed area by the public was continuous throughout this twenty-year period, that it was not by force or with the express permission of the landowner, and that use did not take place in secret. Consequently, I find the evidence before me sufficient to raise a presumption that the route (A-B-C) had been dedicated as a public right of way on foot.
35. I have already noted, from information submitted by objectors as well as other witnesses, that many local people have walked along the vehicular road (X-B) either in preference to or as an occasional alternative to the grassy Order route (A-B). As I explained at the inquiry, the determination of this Order is not a matter of deciding which of these two is a better option on merit; the issue is where people have actually walked, over what period and in what circumstances.
36. Although the Order does not propose to record X-B as a public footpath, on the basis of the evidence that has been presented to me, I consider there to be a strong prima facie case for doing so. However, I am not satisfied that there is sufficient detail available to me to be certain about the periods of use referred

to by the many people who claim to have walked via Bourne Close. In these circumstances I am not inclined to propose to modifying this Order so as to include X-B in addition to A-B. However, that does not prevent WC from considering a further definitive map modification order if it is satisfied there is sufficient evidence to show that X-B subsists as a public right of way.

The intentions of the relevant landowners

37. No evidence has been put forward to show that, at any time during the relevant period, the owners of any part of the land affected took steps to directly challenge the public's use of the Order route.
38. Indeed former owner of the grassed area Mr Pike confirmed⁵ that: "*All the time (he) was at Porton (July 98 to March 2004) the local populous used to walk over the land, occasionally cars would also be parked.*" Further he stated: "*Obviously I had no objection to the locals walking over the plot, indeed I felt it would have been antagonistic to try to prohibit it by fencing the plot.*"
39. It is hard to interpret his statement in any other way than that, during the six years of his ownership, he was content to accept the public walking across his land without challenge.
40. There is no evidence of any specific actions prior to July 1998 that might be interpreted as the owner conveying to the public a lack of intention to dedicate a right of way across the grass.
41. During Mr Jones's ownership from 2004 onwards, he submits there have been vehicles parked on the grass which will have prevented people from walking the claimed route. However there is no evidence of any other challenges made by him, or on his behalf, for example in the form of notices on site. Neither have people been stopped from walking across the grass via A-B other than an incident which reputedly involved a dog-walker failing to pick up his dog's excrement.
42. I accept that Mr Jones' planning application did not acknowledge the existence of any claimed public footpath and, to an extent, could be taken to indicate he had no intention of recognising any public right of way. Whilst I agree it provides *some* evidence of his position as regards the claimed route, I cannot construe this as sufficient to make clear to users of the way that he challenged their right to do so⁶ or that he had no intention that it should be recognised as a public path.
43. As regards the remaining parts of Bourne Close where ownership stayed with the original developers, there is no evidence at all of any intervention that might be interpreted as rebutting the seemingly widespread presumption that the public was entitled to walk this without restriction.
44. Between C and C1, the land over which the claimed route passes is owned by Idmiston Parish Council⁷ and it is clear from the planning application in 1974 that its intention has always been that this should be a public path affording access to the recreation ground. There is no evidence that its position has changed in any way during the twenty-year period that is relevant here.

⁵ In emails to Mr M Adams dated 14 March and 16 March 2018 (Document 25)

⁶ Indeed, had it done so, it would have brought into question the public's rights and brought forward the relevant 20 year period

⁷ With a narrow strip on the eastern side belonging to 'Appledown'.

45. I therefore find no substantive evidence to show that between March 1995 and March 2015 any of the landowners concerned made clear to the public using the Order route that they did not intend to dedicate it as a public right of way.
46. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met: that, on a balance of probability, a public right of way on foot has been shown to subsist along the Order route and consequently that the Order should be confirmed.

Other matters

47. I have noted above that the relative merits of the Order route A-B and Bourne Close between points X and B are not the issue here. Nevertheless, many of the submissions before me voice worries over the relative safety of these routes for pedestrians. Whilst I recognise that this is a matter of serious concern to many people, and may have influenced the routes people have chosen to take over the years, it is not one that I can take into account when determining an Order of this nature.
48. On the site visit after I adjourned the inquiry on 24 October 2018, I recorded various measurements of the width of Bourne Close on the basis that I may have decided the evidence was sufficient to modify the Order to record X-B as a public path. After careful analysis of the evidence, I have concluded that I do not have sufficient detail to warrant that. However, I am satisfied that the width identified in the Order Schedule for A-C1 (1.46m) and C1-C (3.15m) reflects the widths used by the claimants as stated in their evidence.

Conclusion

49. Having regard to the above and all other matters raised at the inquiry and in the associated written representations, I confirm the Order.

Formal Decision

50. I confirm the Order.

Sue Arnott

Inspector

APPEARANCES

In support of the Order

For the Order-Making Authority:

Mr T Ward Of Counsel; instructed by Wiltshire Council

Who called:

Ms J Green Rights of Way Officer; Wiltshire Council

Also giving evidence in support:

Dr P A Appleyard

Mrs V Creswell On behalf of the applicant

Mr M Adams

Mr S Castellano

Mr D Adams

Mr J Lowther

Mr R Marsh

Miss W Bright

Mr W Bright

Opposing the Order

Mrs P Grant

Mrs J Slater

Mr A M Jones

Mr R Grimshaw

Mr R Gould

Mr R Green

Cllr Mr N Hewitt

DOCUMENTS

1. Copy of the statutory objections and representations
2. WC's statement of grounds for seeking confirmation and statement of case with appendices
3. Email sent on 27 April 2018 to the Planning Inspectorate from Mr S Castellano attaching 4 photographs
4. Email sent on 11 May 2018 to the Planning Inspectorate from Mr K Bradley
5. Statement by Mr D and Mrs R Adams
6. Email sent on 2 August 2018 to the Planning Inspectorate from Mr A M Jones
7. Statement of case submitted on behalf of the applicant by Mrs V Wilkinson
8. Email sent on 3 August 2018 to the Planning Inspectorate from Mrs Wilkinson attaching evidence from Mr N Gallop
9. Letter to the Planning Inspectorate received on 8 August 2018 from Mr J Lowther
10. Statement of case submitted by Mr M Adams dated 6 August 2018
11. Email sent on 6 August 2018 to the Planning Inspectorate from Mr R Marsh
12. Statement of case submitted by Mr S Castellano on 7 August 2018
13. Statement of case submitted by Dr P A Appleyard on 7 August 2018
14. Statement of case submitted by Miss W Bright on 7 August 2018
15. Email sent on 8 August 2018 to the Planning Inspectorate from Mr D Adams
16. Letter to the Planning Inspectorate dated 8 September 2018 from Mr R Grimshaw
17. Letter to the Planning Inspectorate dated on 18 September 2018 from Mr A M Jones attaching results of questionnaire
18. Proof of evidence of Ms J Green for Wiltshire Council
19. Letter to the Planning Inspectorate dated 25 September 2018 from Ms R Pope
Submitted at the inquiry
20. Map prepared by Wiltshire Council showing alternative route to be added
21. Extracts from the Land Registry records for property in Bourne Close, Porton
22. Letter to WC from Mr Jones dated 4 February 2016
23. Extract from the definitive statement for Idmiston submitted by Mr R Green
Submitted post-inquiry
24. Email sent on 27 October to the Planning Inspectorate from Ms J Parker-Smith
25. Email sent on 2 November 2018 to the Planning Inspectorate from Mr M Adams
26. Letter to the Planning Inspectorate dated 21 December 2018 from WC
27. Letter to the Planning Inspectorate dated 18 January 2019 from WC
28. Letter to the Planning Inspectorate dated 23 March 2019 from Mr R Grimshaw
29. Letter to the Planning Inspectorate dated 24 March 2019 from Mr M Jones
30. Letter to the Planning Inspectorate dated 27 March 2019 from WC
31. Letter to the Planning Inspectorate dated 26 April 2019 from Dr M Adams
32. Letter to the Planning Inspectorate dated 26 April 2019 from Mr M Jones
33. Email to the Planning Inspectorate dated 26 April 2019 from Mr D Adams
34. Closing statement of WC

Wiltshire

Where everybody matters

The Wiltshire Council (Parish of Idmiston) Path no.9 Definitive Map and Statement Modification Order 2016

418700

418800

The Wiltshire Council (Parish of Idmiston) Path no.9 Definitive Map and Statement Modification Order 2016

Key

Length of footpath to be added : A — — — B — — — C

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Tracy Carter – Associate Director Waste and Environment

Prepared by: JEG Date: 25th November 2016 Scale: 1:1,000 Grid Ref: SU 187-366

Wiltshire

Where everybody matters



136700

136700

Play Area

Path

Appledown

Sub Sta

MAP NOT TO ORIGINAL SCALE

C

2

1

Burnmoor

32

Linley

136600

136600

B

Rose Cottage

Clare

The New Ho

BOURNE CLOSE

4

HIGH STREET

1

2

Ti Trees

Martins House

A

Wistaria House

The Old Vicarage

The Rectory

Field Cottages

Rosemary

The Dairy House

Jayesmoor

Fieldings

1:1,000

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418700

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