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| **Interim Order Decision** |
| Inquiry opened on 7 December 2021 |
| **by Heidi Cruickshank BSc (Hons), MSc, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 January 2022** |

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| **Order Ref: ROW/3209564M1** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Swindon Borough Council Footpath 44 Wanborough Modification Order 2017. |
| * The Order is dated 22 November 2017 and proposes to record Footpath 44, as shown in the Order map and described in the Order Schedule. |
| * In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of the proposal to confirm the Order subject to modification. There were fourteen objections outstanding at the opening of the Inquiry. |
| **Summary of Decision: The Order is proposed for confirmation subject to**  **modifications set out in the Formal Decision.** |
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Preliminary Matters

*Seeking of agreement*

1. At the opening of the Inquiry the representative of those living in the Suters Lane, affected by the claimed route alignment A – B – C (letters A – G refer to letters as used in the Order map), indicated that he would like to find a solution to the issue rather than spend public time and money on the matter. I adjourned to allow for discussion with Swindon Borough Council, the Order-making authority (OMA).
2. From some discussion on resumption, I understood the desire was that the matter should be resolved amicably and appreciate that sentiment. However, having explained the limits of my powers in relation to an Order of this type, it was understood and agreed that the evidence and argument should be presented to allow my decision to be taken on the basis of the relevant evidential matters, as appropriate.

*Power to modify the Order*

1. It was suggested that the Order was incapable of confirmation. The Interim Order Decision (IOD), issued on 29 November 2019, sets out the reasons that that Inspector determined not to modify the Order in relation to the alignment to be recorded over the section A – B – C. It does not indicate that the Order was fatally flawed and, for the reasons set out below, I do not consider it to be so.
2. I agree with the OMA and the Ramblers that *Trevelyan v Secretary of State for Environment, Transport and the Regions [2001] EWCA Civ 266* provides relevant caselaw and that, being in possession of facts which have come to light in the course of the Inquiry I should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. I consider the OMA are correct to say that the proposed modification lies within my powers of modification arising from paragraph 7(3), read with paragraph 8, of Schedule 15 to the Wildlife and Countryside Act 1981 (the 1981 Act). I shall propose such a modification, with appropriate advertisement.

Procedural Matters

1. This Order was first dealt with in an Inquiry held in July and November 2019. The Inspector determined that modifications to the Order should be proposed, which would remove part of the claimed route, running A – B – C. If confirmed as proposed the Order would record a footpath only on the alignment G – D – E – F. The IOD proposing these modifications led to objections.
2. Although there were alternatives as to how the Order should, or should not, be confirmed, in essence there was a split between those supporting that the Order as a whole should be confirmed and those arguing, generally, that it should not be confirmed; this is the way in which I have recorded parties in the appearances list.
3. It is usually the case that the Inspector who proposes modifications would deal with the Order through to its conclusion. However, in this case the Inspector was due to retire before the matter could be completed and so I have taken over the determination of this Order. It is fair to say that, as a result, greater leniency has been given to unrepresented parties, including where they were in the main rehearsing arguments already made and disagreeing with the findings in the IOD, with very limited ‘new’ evidence in relation to the Order as a whole. I am satisfied this did not unduly extend the Inquiry and that it was fair to all in the circumstances.

***The Inquiry***

1. There was some difficulty arranging this Inquiry due to the Covid-19 pandemic. Some parties indicated problems in taking part in a wholly virtual format, which would have allowed earlier sitting dates. Taking account of the relevant Government restrictions and following a case management conference held on 28 October 2021, I opened the Inquiry on 7 December at STEAM, Swindon, as a blended event, with some parties attending in person and others virtually, for two days. One witness and closing submissions were heard virtually on 15 December 2021 at which time I closed the Inquiry.

***Site visit***

1. I made a site visit on 6 December 2021 and was able to walk the claimed route from each side, to the obstructions at points C and E and from points D – G along the track. I was also able to walk Footpath 25 (FP 25) from Burycroft, south-east of point A to a point north-west of point F. All were satisfied that there was no need for an accompanied site visit at the close of the Inquiry.

Main issues

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

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

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

*(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*

*(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes—*

*(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway,*

*…*

*the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway...*

1. It was found in the IOD that the use had been brought into question in 2017. However, it was argued that further information showed that an earlier date should be considered. There were questions as to the reliability of the user evidence and further witnesses were heard in relation to use.
2. In relation to the section F – E – D – G there was some new evidence. Bearing in mind that this was the section of the Order confirmed by the IOD it was dealt with by reopening the original Inquiry under paragraph 7 of Schedule 15 to the 1981 Act.
3. The OMA were of the view that the finding in the IOD of implied dedication at common law for section F – E – D – G applied equally to section A – B – C.
4. The test to be applied is whether or not the rights of way have been shown to subsist on the balance of probabilities, whether under the statute or at common law. This is the test I shall apply to all the evidence before me.

Reasons

*Section A – B - C*

*Section 31 of the Highways Act 1980*

*The date on which the use of the way was brought into question*

1. The IOD was clearly written with the possibility of different dates at which the use of the route was brought into question in mind, mentioning 2013, 2015 and 2017. There is evidence of limited use of the route made available on site up to the formal temporary closure order, made in February 2017, under the Traffic Regulation Act. However, taking account of photographs, with testimony as to the dates and locations at which they were taken, and an email dating from 2016, I am satisfied that the use of this section of the Order route was called into question in late 2015 due to fencing of the land now developed as Suters Lane. This followed on from the planning permission granted in March 2015.

*Evidence of use*

1. Looking to the user evidence in the relevant twenty-year period, late 1995 – late 2015, it is noted that the IOD refers to the Inspector being satisfied that a route across this piece of land had been used by local people. The original Inquiry heard evidence in support of the Order from ten individuals, five of whom also gave evidence to this Inquiry.
2. There was criticism of the user evidence, with the suggestion that the veracity of statements made were not given adequate scrutiny. The point of cross-examination is to explore and highlight differences in evidence. Whilst I agree that users were not always clear on dates of use and changes to availability of the routes, I did not find the evidence I heard to be so unreliable that it should be disregarded. This is particularly the case when taking account of the wider supporting evidence, such as that from a former employee of the former owner of the land affected by the Order, stating that part of his role was to ensure that the route was accessible. He was confused on some matters, such as the position of the aviaries, but I am satisfied that his overall evidence on this point remains undisturbed.
3. I am satisfied that the booklet ‘A Walk around Lower Wanborough’, 1994 and revised in 2012, describes a route passing aviaries, which were built over the legal alignment of FP25. I agree with the applicant that the description in both 1994, just prior to the start of the relevant twenty-year period, and 2012, within that period, describe a route which must relate to the alternative made available by the landowner on the Order route as a whole. The 1994 description notes the section D – G as a short-cut to Green Lane.
4. It was suggested that those who had claimed to use the Order route as a safe alternative, cutting off the corner of the road to the south, would not have done so. It was put to those living at Marsh, the properties to the south-west of the Order route, that they would instead have used Footpath 20, which can be seen on the Order map to the south of the Order route. However, users clearly responded in cross-examination that this route had historically been in poor condition, with fencing, mud and flooding, making the Order route the preferred alternative.
5. It was also suggested that some people had been mistaken in claiming the Order route, as they thought they were referring to the legal alignment of FP25, and that a campaign within the village had led to disinformation. None of the user evidence has been withdrawn on the basis that people were mistaken or misled. I approach the evidence as a whole on the basis that where people have given evidence which can be cross-examined I am able to place greater weight upon it.
6. I consider it inappropriate to suggest that the evidence of use of FP25, November 2018 – March 2019, necessarily reflects use made of the Order route in the relevant twenty-year period. The link to and from FP25 differs and the reasons for use, such as visiting family or friends, would also differ over time as people move in and out of the area. What can be said is that it shows continued use of a route in this general location, even during a winter period.
7. A statement was submitted regarding the situation as understood on the ground by a resident of Wanborough from 1997. The description of routes in the area that is now Suters Lane is at odds with the general evidence – from a variety of sources – that the legal alignment of FP25 had been altered in the 1980s by the former owner as he developed the property Ducksbridge, installed ponds and aviaries and generally encouraged users onto a different alignment. This individual chose to climb a locked gate, which appears to be that at point C, whilst others indicated that at times the gate was open and, when it was not they had used the stile and latterly gap to the northern side of the gate. I do not find this statement disturbs the general evidence of use of a route alternative to FP25 in this location over very many years.
8. I have looked carefully at the UEFs and agree with the Ramblers that the examples do not support the contention of multiple UEFs written in the same hand. Although I am not an expert in analysis of handwriting I am satisfied that there was sufficient variability in the style and wording to demonstrate that these were individual UEFs.
9. The structure of the UEFs is not the most helpful in terms of the questions asked and limitations of where mapping was and was not provided. However, I am satisfied, taking account of the evidence I heard through cross-examination, that they can be relied upon. The evidence given in them is supported by the independent evidence arising through the planning process, see paragraphs 31 and 32; the booklet ‘A Walk around Lower Wanborough’, see paragraph 19; and, emails from the Council Rights of Way Officer.
10. I do not agree with Wanborough Parish Council (the Parish Council) that the non-indication of the claimed route in a Parish map shows it did not exist; there is clear evidence that it did exist. The map referred to appears to be a hand-drawn copy of the DMS, with the numbered routes indicated. This Inquiry has only arisen because this route which is not recorded or numbered on the DMS.
11. I consider the cross-examined evidence that I heard was supportive of the overall use by the public and assisted in clarifying certain matters. Overall, I consider the use reported capable of supporting the claimed rights on foot, showing sufficient numbers and quality of use throughout the relevant twenty-year period, 1995 – 2015, to give rise to a presumption of dedication.

*Use as of right*

1. In order for use to give rise to a presumption of dedication it is necessary that the use be undertaken ‘as of right’, that is without force, secrecy or permission. Whilst there has latterly been some reference to the alternative to FP25 as a permissive route this was minimal, see discussion from paragraph 47. There was nothing to suggest that users had sought or been given permission to make use of the Order route. The former employee indicated that he understood that the owner intended people to use the route that was available following the blocking of FP25. There was nothing to suggest to me that use was secretive.
2. I consider that the matter of force is relevant to some extent as it would often be the case that a locked gate formed an obstruction to use, indicating that the landowner lacked any intention to dedicate a public right of way; use through an adjacent gap to circumvent this would not be use as of right. However, in this case, the evidence was clear that users were expected and allowed to use the gap alongside the gate, at which point the evidence as a whole indicates there had formerly been a stile. I am satisfied that the use of the gap was as of right. In relation to the use through the gate, which was sometimes unlocked, I am not satisfied that this is supportive of use as of right; the landowner was choosing to have the gate locked or unlocked to suit his use and not by reference to the users. I am satisfied that this does not disturb the overall evidence leading to a presumption of dedication but may be relevant with regard to the route to be recorded, which I shall deal with shortly.

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

1. In considering whether the landowner did not intend to dedicate a public right of way within the relevant twenty-year period, I bear in mind the evidence overall. As referred to in the IOD, there was indication that he specifically intended the alternative route he provided from around the mid-1980s to be a footpath, as he blocked the alignment of FP25. I do not find hearsay evidence of latter years provides sufficient evidence to suggest this situation altered up to the 2013 sale.
2. There was no evidence that the developer did not intend to dedicate the alternative route. The officer’s report refusing an initial application for planning permission for the Suters Lane development summarised the comments of an agent for the developer, saying that *“none of the proposed development obstructs the original route of footpath 25, although the route appears to be no longer in use, the applicant sees no need to alter it as the ‘unofficial’, new route now deemed to be highway and this is the route our development proposals have already incorporated*”.
3. It is noted that the Design and Access Statement, which some referred to as the brochure, indicates that “*Using the caravan sites existing entrance a gravel drive leads to the homes with the route of the public path preserved through the site from the south-east to the north-west*.” This again acknowledges and preserves an existing route, which despite the suggestion of objectors, simply does not reflect the alignment of FP25, which is not shown in the Site layout plan, page 4 of that document, dated November 2012. It must be remembered that this was a plan of what was intended, not what was onsite at that time, however, I am satisfied that it does not indicate any lack of intention on the part of the developers in relation to dedication of a right of way in a location closely aligned to the route provided by the previous landowner over a former gravel track.
4. I am satisfied that there is insufficient evidence of a lack of intention to dedicate the alternative route by either of the landowners in the relevant period. The proviso has not been met.

*Conclusions*

1. I am satisfied that the evidence shows use by the public over the relevant twenty-year period, as of right and without interruption, raising a presumption of dedication, which has not been displaced by any evidence sufficient to show a lack of intention to dedicate the rights. As a result I consider, on the balance of probabilities, that a public footpath has been shown to subsist over the route alternative to the alignment of FP25.

*Common Law*

1. In respect of inferred dedication under common law, I agree with the OMA that there is evidence which indicates that the former owner positively intended to provide an alternative route for the public to use from the time he enclosed FP25 into aviaries, ponds and/or the land of Ducksbridge. There is some evidence, including user and Ordnance Survey (OS) mapping, such as that attached to the 1984 conveyance, which suggests the use of an alternative route cutting the corner was already occurring prior to his purchase. On the balance of probabilities I am satisfied that the evidence shows that the landowner from the mid-1980s, and potentially previous landowners, dedicated this route to the public and the common law test is met. This would mean, as apparently accepted by the agent, that the alternative to FP25 was impliedly dedicated to the public prior to the 2013 ownership and later development of the land.

*The route to be recorded*

1. Being satisfied that a footpath should be recorded by the Order, in respect of either the statute or common law, the matter remaining to be determined is the route that should be recorded. There has been confusion arising from changes to the site, particularly in relation to the relatively recent development, which has provided a route on the approximate alignment of the original but not at the relevant width.
2. In relation to questions regarding the section of FP25 to the south-east of point A I am satisfied that the Public Path Diversion, Footpath WA25 Order 2017, made under the 1980 Act, sets out the location and width of that section of FP25. No evidence was submitted to the Inquiry to show that there had been any dedication of an alternative location or width of that section in the period since confirmation of the 2017 Order.
3. The objectors indicated that if I was satisfied that the Order should be confirmed then the original Order route would be the closest to that which most witnesses claimed to have walked. The OMA provided a Proposed Modification which they were satisfied reflected the route as used. There was discussion regarding the reliability of OS maps, site surveys undertaken in relation to the development of the site and aerial photographs. I have carefully looked at all these sources of evidence, although I agree with the parties that there are always limitations with any source.
4. I consider that the evidence shows that users were directed onto the gravel track which was at certain times also used as an access route, for example, with tractors and caravans. Although there was some evidence of use of the verge, I do not consider that use of this area was significant, seeming to relate to looking at the aviaries, which were situated to the north-east of point C. On the balance of probabilities, I consider that it was the gravel track that was made available to the public and used as a right of way.
5. In relation to the access to the track via point C I consider that the evidence as a whole indicates that the consistently available route was to the north of the gate, at some points a stile and latterly a gap. As the OMA note there is no evidence of any structure here prior to the former employee erecting a stile. On the balance of probabilities, I am satisfied that no structure should be recorded in relation to point C and that the width at this point should reflect the narrowing of the route to a pinch point of 1.2 metres. I do not consider that the Order should be modified to show Point C at a different location and this affects the distances suggested for recording by the OMA, which I am satisfied should not be modified.
6. In response to the IOD the OMA provided a detailed plan which they felt showed the width. Under section 56(1) of the 1981 Act, the Definitive Map provides conclusive evidence that there was at the relevant date a highway as shown on the map, in this case a footpath. Overlaying the Order map and the OS Master Map, February 2017, I consider that Point B as shown lies a little to the north of the centre of the track. However, in looking to modify the map in this respect I consider that the change is so small that it is not possible for me to indicate it; it is de minimis and so I do not propose to modify the map.
7. The Definitive Statement provides conclusive evidence with regard to the particulars as to position or width and I am satisfied that those details can be properly recorded there. In relation to the suggested modification from the OMA I am not satisfied that the suggested width of 10 metres takes account of the width of FP25. I consider the greatest width is 8.8 metres, near point B, with the majority of the route being no more than 4 - 5 metres. I agree with the objectors that the grid references appear sufficiently detailed, with no modifications required.

*Conclusions*

1. I am satisfied, on the balance of probabilities, from the evidence as a whole that the section A - B - C should be recorded as a public footpath, by reference to either the statute or under common law. A minor modification to the Order will be proposed to better reflect the width of the route used. To avoid confusion this modification will be made on the original Order, rather than that as modified by the IOD and it will refer to appropriate mapping as the source material.

*Section F – E – D - G*

1. The IOD confirmed this part of the Order in relation to the evidence available to the initial Inquiry. As noted above, I allowed some matters to be aired which did not strictly comprise new evidence and am satisfied that these did not disturb the findings in the IOD. Some matters raised related to a misunderstanding of the legislative process but I will deal briefly with the main issues which I consider potentially relevant to the decision at this time.

*The date on which the use of the way was brought into question*

1. Whilst I am satisfied that the date that use was brought into question in relation to section A – B – C was earlier than suggested by the IOD, I consider that the date of 2017 remains correct in relation to this section. This is by reference to the emails leading to the temporary footpath closure under section 14 of the Road Traffic Regulation Act 1984, made by the OMA and effective from 22 February 2017 for 6 months. In conjunction with this the race was closed and, subsequently, the application to record the Order routes was made. There is no new evidence to disturb this conclusion.

*Use as of right - Secrecy*

1. It was suggested that as the landowners did not live onsite initially, and subsequently that the property, Honeyfield Farm, was at a distance from the Order route, in particular the section G – D – E, the use was effectively secretive. I consider that a finding of secretive use relies upon there being a deliberate intention by users not to be found using the route in question; I do not consider any such evidence has been presented.

*Use as of right - Permission*

1. I appreciate that the landowners believe that the conversation with the former Rights of Way Officer for the OMA showed an understanding that the race was permissive. However, the emails from this Officer to the Parish Council, September 2011, copied to the landowner, referred to the Order route as “…*the unofficial alternative route…that has been in use for over 20 years and remains free from obstructions…The alternative route, if in use for a period in excess of 20 years, can also be deemed to be a public highway*.” It was not referred to as a permissive route.
2. The email noted that there was a property dispute, which presumably relates to matters discussed from paragraph 64, and that it had been suggested that the alternative route remain open until that was resolved. It was made clear that when the land for Honeyfield was purchased it was believed that “…*the previous owner…unofficially changed the alignment of footpath 25 to that currently in use. In due course both landowners will be required to address this issue by applying for a diversion order*.” It is clear that the Parish Council and the landowner were made aware of the use of this route and the process to be followed to alter the route.
3. The 2013 email from the same Officer in relation to planning on the section A – B - C again made clear the legal situation. She referred to the Order route as an unofficial diversion, not a permissive route. It was noted that the illegal rerouting of the path needed to be addressed.
4. 2017 correspondence from another OMA Officer referring to a “permissive” route (in those terms in the email to the landowner) dated from around the time that the claim was made. Had this Officer been in possession of positive evidence that demonstrated that the route was permissive I would expect advice to be given to this effect, as it would stop the claim from succeeding.
5. Only one person referred to a permissive route in the 2017 UEFs. She also referred to it in this way in a letter dating from around the time of UEFs and an email from 2018. There was no information as to why she thought the route to be permissive or what she understood that term to mean and no evidence was provided by the landowners to suggest they had given permission directly to her or anyone else. I do not find this shows that there was any general public understanding that this was a permissive route.

*The route used*

1. I understand from the IOD, and from discussion during this second Inquiry, that there was debate relating to the route used prior to the building of the race in 2009 and whether this varied. Some of this referred to aerial photographs, evidence regarding potential troughs on a fence line, the position of the fence line and related matters [IOD paragraphs 47 – 49].
2. It was argued that the evidence from the initial Inquiry could not be relied upon as a letter from Thames Water, dated 10 February 2021, showed that an active water meter had been fitted at the property from May 1985, supplying water to a trough. It was argued that this showed the reliance placed on evidence of one of the tenants was misplaced.
3. I did not have the assistance of this witness at the second Inquiry. However, I do not consider that the letter displaces the weight that was placed on her evidence, which I am aware would have been subject to cross-examination. The letter shows that there was water on the property and the IOD simply refers to having to provide water by hand. I also note that the letter refers to a trough, singular, not a supply to troughs, which I understand to have been argued to be shown in the aerial photograph. Taking all these matters into account it can fairly be read to infer that the tenant had to carry water from one location to another.
4. Furthermore, the IOD shows that the Inspector undertook to carefully compare the aerial photographs and, as result of that and the other evidence she heard, was satisfied as to the location of the Order route in this area. I have reviewed the mapping and aerial photographs and am similarly satisfied as to the location of the Order route over time. I do not consider that this matter relating to water supply unduly affects the evidence as a whole.

*Character of the way*

1. It was suggested that the character of the route, in terms particularly of the access route G – D which continues north to properties, was such that it could not be dedicated as a public right of way. There are numerous examples countrywide of public rights of way running concurrently with private access rights, whether over surfaced or unsurfaced tracks. There is nothing in the character of this route to prevent the acquisition of public rights thereover.

*Interruption*

1. In relation to the argument that the IOD failed to consider the effect of interruption to use of the route due to works on the land there appears to have been a misunderstanding of the implications of various actions. In relation to actions in 2017 the Inspector found that these were sufficient to bring use into question, as do I as set out in paragraph 45 above, because these were the actions which led directly to the application to record the route. However, as noted in paragraph 52 of the IOD, an alternative was provided for users when the works were taking place and no one felt that their use of the route was being challenged. I am entirely satisfied from the photographs supplied to the initial Inquiry that an alternative was provided in relation to the Order route. There is no new evidence before me to overturn the findings of the IOD on this matter.

*Width*

1. In relation to the width of the race, which existed in the period 2009 – 2017, the OMA were satisfied that the measurements taken fairly reflected the width then available. I note some mention in objections of a width of 2.3 metres. However, comparing the width of the track with the width of the race in aerial photographs and mapping suggests that the width of 3 metres is correct on the balance of probabilities.
2. I consider it likely that the used width was narrower in the early part of the twenty-year period. However, the throwing open of the width, and acceptance of the public of that area, means that 3 metres is reasonably the width that was dedicated in the period from 2009. On the balance of probabilities I consider that this is that width that should be recorded.

*Intention to dedicate a public right of way*

1. The question of whether “there is sufficient evidence that there was no intention during that period to dedicate [a right of way]” (section 31(1) 1980 Act) does not simply rely on a landowner’s subjective intention, which it was suggested was supported by the Court of Appeal’s decision in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2005] EWCA Civ 1597*. This was appealed (*[2007] UKHL 28*) and the House of Lords confirmed that there can only be “sufficient evidence” that a landowner had no intention to dedicate a path as a public way if there were overt acts such that the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention. Effectively this confirmed Lord Denning’s statement of the principle from the earlier case of *Fairey v Southampton CC [1956] 2 QB 439*:

*“In my opinion a landowner cannot escape the effect of 20 years prescription by saying that locked in his own mind, he had no intention to dedicate it…In order for there to be ‘sufficient evidence that there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as show the public at large – the public who use the path, in this case the villagers – that he had no intention to dedicate. He must, in Lord Blackburn’s words, take steps to disabuse those persons of any belief that there was a public rights: see Mann v Brodie…”*

1. It was argued that the closure of the route acknowledged trespass and this would have been made public through the formal issuing of the temporary closure and then the closing of the race. I am satisfied that these matters were the process which led to the bringing into question of the use. The emails between the OMA and the landowners were not available and known to the public who used the path and so do not provide sufficient evidence of a lack of intention to dedicate a right of way over the land. There may be a misunderstanding as to when the lack of intention needs to be demonstrated in relation to the date of making of the Order but I am satisfied with the findings in the IOD on this matter, with no new evidence to alter that conclusion.
2. Similarly, I do not consider that the demonstrated difference in width between the race and other recorded rights of way on the land assists. I understand that the intention in the minds of the owners was to provide a useful area for moving horses between fields and stables and for that purpose the race was made at a width to safely move and turn horses, with a hardened surface to prevent poaching of the land. However, there was nothing to show the public using the route that this was the intention. I do not consider that a reasonable user could be expected to equate a difference in width or surfacing between certain routes to have indicated a difference in intention on the part of the landowner.
3. I also do not consider that a difference between having a gate on FP25 and a stile on the race capable of demonstrating a lack of intention to dedicate to the public.
4. In relation to the Lands Tribunal decision from October 2012, which related to a boundary dispute, reliance was placed on the finding that: “*I accept the Respondents’ evidence that they gave express permission to the Applicants to place ploughs and other machines on the Track in order to prevent members of the public from obtaining access as an alternative to using the public footpath*”. I am quite clear from the decision that the Track as referred to was a section some distance north-west of the Order route, part of the disputed land lying between Wansdyke and Foxbridge Farm. I am also satisfied that the public footpath there referred to was Footpath 23, which forms a ‘crossroads’ with FP25 and the Order route to the south-west of Honeyfield Farm.
5. I do not consider the Tribunal decision demonstrates a lack of intention to dedicate the Order route. The placement of machinery to prevent public access, if that actually occurred, would not have impacted on use of the Order route. There would be no reason for users of the Order route to be aware of machinery some distance from the route they were using nor to draw any inference as to intention from that matter.
6. Although it was said that there were signs at or near point G, on questioning these were the signs on the race. I agree with paragraph 60 of the IOD that these notices were not incompatible with the use of a highway. I also do not accept that it would have been difficult to word any signs at point G to allow use of the driveway for legitimate access to the properties, whilst preventing general public access. The failure to erect such signs mitigates against there being sufficient evidence of a lack of intention to dedicate a public right of way.

*Conclusions*

1. Whilst there is clearly unhappiness as to the findings of the IOD I do not consider the matters raised by the objectors have demonstrated that the confirmation of the section G – D – E – F should be rescinded. I am satisfied, on the balance of probabilities, that this part of the Order should be confirmed.

Other matters

1. It was suggested that objectors were at a disadvantage in not instructing legal representation. It is for the parties to choose the way in which they take part in such events. I did my best during the Inquiry to assist on points that appeared to be misunderstood, as well as providing some leeway to matters which probably had already been aired at the original Inquiry. However, I am also aware that the OMA were taking part as representatives of the public; public money should not need to be spent unnecessarily because other parties choose not to obtain appropriate advice on what can become complicated legal matters. I am satisfied overall that all parties had a fair opportunity to participate in this public Inquiry.
2. There were concerns that the DMS already contained a footpath numbered 44. The OMA confirmed that this was not the case and no modification was required.
3. There was misunderstanding as to the relevance of Orders made under the Town and Country Planning Act 1990. This Order is made under the section 53 of the 1981 Act, which places a statutory duty on the OMA to keep the DMS under continuous review.
4. Concerns were raised regarding trespass; privacy; anti-social behaviour; health and safety; effect on farming activities; and related matters such as public benefit and the cost of the Inquiry itself. An alternative solution was proposed, on which discussions continued at the Inquiry as referred to under ‘Preliminary matters’ above. Whilst I understand the importance of these matters to those living and working in this area these are not issues I am able to consider in relation to this decision.
5. At the end of this process it is open to the OMA and the interested parties to look again at solutions which may suit them and could potentially be achieved under the appropriate legislation in relation to matters such as alignment and width. There is nothing to prevent development of land adjacent to a recorded public footpath and so I give no weight to the suggestion that the claim for the route was being followed only in order to extinguish FP25 for this purpose.

Conclusions

1. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be proposed for confirmation subject to modifications as to location and width, as discussed.

Formal Decision

1. The Order is proposed for confirmation subject to the following modifications:
   * Within Part I of the Schedule:
     + replace text “…*for 30 metres to Point B at OS grid reference SU20338373, continuing west north west for 40 metres…”* with text “…*and west north west for 70 metres*…*”*;
     + after text “…*having a width…”* add text “…*varying from 4 to 8.8 metres between Points A - B - C by reference to the Ordnance Survey Master Map, February 2017, excluding the verge north-east of Point C, and a width* …*”*;
     + remove text “…*Points A and B and…”*;
     + replace text “…*between Points B and…”* with text “…*at Point*…*”*;
   * Within Part II of the Schedule:
     + replace text “…*for 30m…”* with text “…*and west north west for 70m”;*
     + replace text “…*of 3m and continuing west north west for 40m, with a width of 1.2m to…”* with text “…*varying from 4 to 8.8m by reference to the OS Master Map, February 2017, to a gap of 1.2m and*…*”*;
     + remove text “…*Points A and B and…”*;
     + replace text “…*between Points B and C…”* with text “…*at Point C*…*”;*
     + replace text “*3m”* with text “*8.8m”.*
2. Since the confirmed Order would affect land not affected by the Order as submitted I am required, by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act, to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

**Inspector**

**APPEARANCES**

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| **For the Order Making Authority:** | |
| Ms K Barnes | of Counsel *instructed by* Swindon Borough Council | |
| *who called:* |  | |
|  |  | |
| Mr M Fry | Rights of Way and Highways Information Manager | |

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| **In Support of the Order:** | |
| Mr J Warr | Applicant | |
| *who called:* |  | |
|  |  | |
| Mr D Birley |  | |
|  |  | |
| Mr R Inskip |  | |
|  |  | |
| Mr P Hunt |  | |
|  |  | |
| Mr C Offer |  | |
|  |  | |
| Mr M Savage |  | |
| Mr S Savage |  | |
|  |  | |
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| Mr P Gallagher | Footpaths and Walking Environment Officer for Ramblers Swindon and North East Wiltshire Group | |
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| **In Objection to the Order:** | |
| Mr M Hanson | *on behalf of* the residents of Suters Lane | |
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| Mr N Stalker |  | |
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|  |  | |
| Mr D Hayward | |  | | --- | | *on behalf of* himself and Wanborough Parish Council | | |
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**INQUIRY DOCUMENTS**

|  |  |
| --- | --- |
| 1 | The Order |
|  |  |
| 2 | Opening statement on behalf of the OMA |
|  |  |
| 3 | Road Traffic Regulation Order 2017 |
|  |  |
| 4 | Diversion Order 2017 |
|  |  |
| 5 | Closing submission and legal cases bundle on behalf of the OMA |
| 6 | Summing up Statement from the Applicant |
| 7 | Statement Mr C Offer |
| 8 | Extract from Planning Report |
| 9 | Bower Mapson, Design and Access Statement |
| 10 | Statement of further evidence from Peter Gallagher |
| 11 | Suters Lane Presentation |
| 12 | Suters Lane Plans and overlays |
|  |  |
| 13 | Suters Lane Closing Statement |
| 14 | Photographs and overlays from Messrs Stalker |
|  |  |
| 15 | Judgment REF/2011/1055 |
|  |  |
| 16 | Closing Statement for Messrs Stalker |

