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| **Order Decision** |
| Site visit made on 15 March 2022 |
| **by Alan Beckett BA MSc MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 22 April 2022** |

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| **Order Ref: ROW/3241912** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the East Sussex (Public Footpath Chiddingly 67) Definitive Map Modification Order 2019.
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| * The Order is dated 18 April 2019 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.
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| * There were 3 objections outstanding when East Sussex County Council (‘the Council’) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an inspection of the path at issue on Tuesday 15 March 2022 in the company of a representative of the Council; representatives of Chiddingly Footpath Group (‘CFG’), the applicant for the Order; the owners of the land crossed by the claimed footpath, and their land surveyor.

The Main Issues

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c)(i).
2. Therefore, the main issue is whether the Council has discovered evidence which, when considered with all other evidence available, is sufficient to show that a right of way which is not shown in the definitive map and statement subsists over land in the area to which the map relates such that the definitive map and statement require modification.

 **Legal Framework**

1. The application to add the claimed footpath to the definitive map and statement was made in 2015. Following its investigation of the application under the provisions of Schedule 14 of the 1981 Act, the Council applied the tests outlined in *R v Secretary of State for the Environment ex parte Norton and Bagshaw [1994] 68 P&CR 402* and concluded that as there was conflicting evidence in the case, a reasonable allegation could be made as to the existence of the claimed right of way and that an Order should be made.
2. The findings of the court in the case of *Todd and another v Secretary of State for the Environment, Food and Rural Affairs [2004]* EWHC 1450 (Admin) are relevant to my consideration of the Order. In that case, the court held that at the Schedule 15 confirmation stage (i.e. when the decision maker is considering the evidence before determining whether to confirm an Order or not), the standard of proof that the evidence must satisfy is the civil standard, namely the balance of probabilities, and an Order should not be confirmed on the basis of the less onerous “gatekeeper” test of it being possible to reasonably allege that a right of way subsists.
3. Dedication of a public right of way through a long period of use can be deemed to have occurred under section 31 of the Highways Act 1980 (‘the 1980 Act’). Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that during that period the landowner had no intention to dedicate it. Use ‘as of right’ is use which has been without force, secrecy, or permission.
4. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
5. Should the tests for deemed dedication under section 31 not be met, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few months to several decades. There is no particular date from which use must be calculated.

Reasons

*The site and surroundings*

1. Footpath 18a commences at its junction with bridleway 7b a little to the east of the bridge over the weir associated with the mill pool of the former Stream Mill. Bridleway 7 runs on a generally east-west alignment, whereas footpath 18a runs in a generally southerly direction to a footbridge over the stream before turning south-west.
2. To the east of the junction of footpath 18a and bridleway 7b are two properties known as Stream Mill and The Mill. The properties occupy the site of a corn mill which was powered by the water held in the mill pond to the north of the bridleway. It is known that cannon were cast and bored on the mill site during the 1660s and that a mill was recorded at the site in the Domesday Book; the weir under the bridleway bridge was part and parcel of this long-established industrial site. I understand that the mill ceased to function in or around the 1930s.
3. The land crossed by the claimed footpath is currently part of the property known as The Mill. Prior to 2000, Stream Mill and The Mill had been a single property which was sub-divided in that year. The current owners of The Mill bought their property in 2012 and object to the Order. The claimed footpath would provide a deviation from the line of footpath 18a with the loop created providing access to the pool of water at the base of the weir.

###### *The date on which the right of the public to use the claimed footpath was brought into question*

1. It is common ground between the parties that the event which brought public use of the claimed footpath into question was the erection in 2012 of fencing along both sides of the walked line of footpath 18a. The fence on the western side of the walked line of the footpath blocked access to the stream and mill pool.
2. The owner of Stream Mill between 1979 and 2000 submitted evidence that up to 1981 the field through which footpath 18a ran had been rented by a livestock farmer, and that a fence had run alongside the stream and the pool to prevent livestock from entering the water. On the termination of the tenancy agreement in 1981, the fence had been removed to create a large open space east of Stream Mill. A path which crossed the line of footpath 18a was mown through the field from the house to the mill pool which family, friends and those with permission used to access the stream.
3. The owner of The Mill between 2000 and 2011 submitted that he “*had not prevented anybody from enjoying this piece of land (*that is,the land between footpath 18a and the stream*) which was used regularly by numerous dog-walkers, ramblers, and horse riders*”. On the evidence of current and previous owners of the land, there does not appear to have been any other physical obstruction or barrier between footpath 18a and the stream and mill pool until the current owner’s fence was erected in 2012.
4. Consequently, I conclude that the relevant 20-year period for the purposes of section 31 (2) of the 1980 Act is 1992 to 2012.

***Whether a way has been actually enjoyed by the public as of right and without interruption for a period of not less than 20 years ending on the date the public right was brought into question***

1. The application was supported by 21 user evidence forms (‘UEFs’), 3 of which each provided the evidence of 2 persons. In addition to the UEFs, there were also three letters of support submitted. Of those who completed a UEF, 16 respondents claimed to have used a route between bridleway 7a and footpath 18a which gave access to the stream and mill weir throughout the 20-year period under consideration.
2. The period of use claimed by the remainder of the respondents varied between 3 and 15 years. One other respondent’s period of use commenced in 1962 but had ended in 1979. Use is said to have occurred on a daily or weekly basis by twelve respondents, with others using the route once per month or less. The purpose of using the path had been to access the pool to paddle, to fish, to let the dog swim in the water, and to observe the wildlife present in the vicinity of the weir. None of the respondents stated that use had been with permission nor that use had ever been interrupted or challenged.
3. The Council submits that the evidence demonstrates that use has been made of a route to the mill pool and stream throughout the relevant 20-year period.
4. On a picture postcard of “The Mill Dam, Chiddingly” (posted on 28 August 1906) the correspondent wrote ‘*This is where we went fishing last week, am having a ripping time’*. A poem entitled “*The Floodgates at the Stream Mill Pond*” (1900) by William Chives describes the weir and that visitors to it would sit on the grass nearby to view it. In an undated self-guided walk from The Gun public house (‘*Walks of the Gun’*) the suggested route follows bridleway 7b and notes “*There is a nice waterfall just underneath the bridge. If you want to see it walk over the bridge, turn right and go down close to the stream*”.
5. These items of documentary evidence suggest that access to the stream and mill pool was possible from at least the beginning of the twentieth century; I consider that the evidence of use found in the UEFs is a continuation of that earlier use. However, what the picture postcard, the poem and the self-guided walk leaflet do not demonstrate is the route used by the public to access the stream.
6. It is the objector’s case that in relation to the statutory test under section 31 of the 1980 Act, the user evidence does not demonstrate use of ‘a way’; that is, a single defined route by which the public accessed the stream and weir. In the objector’s view, the user evidence is of the public wandering at will over the open area of land between the definitive line of footpath 18a and the stream. Furthermore, and in the alternative, the objectors contend that the claimed use of a way which is ancillary to recreational activities such as swimming, paddling, and fishing cannot give rise to a public right of way and cite in support the findings of the Court of Appeal in *Dyfed CC v Secretary of State for Wales* (1990) 59 P. & C.R. 275.
7. The question which arises therefore, is whether the user evidence demonstrates that ‘a way’ has been actually enjoyed by the public. If it cannot be demonstrated that ‘a way’ has actually been enjoyed by the public, then the section 31 test under the 1980 Act will not be engaged.
8. Of the copies of the UEFs which have been forwarded to me, only 9 have a plan attached, despite a number of those which do not have a plan of the route used stating “*see map*”; “*see plan marked in yellow*” “*as shown on plan*”; or “*see attached map marked in yellow*”.
9. Of those UEFs which were accompanied by a plan, the route claimed is shown in yellow but does not represent the route shown A – B – C in the Order plan. The route shown in yellow is identical on all 9 plans which were submitted. However, 5 of these 9 plans have been annotated to show an alternative route by means of a blue line with cross hatching; this second route is also identical across all 5 of these plans. None of the plans are signed by those who completed the UEF to which the plan is attached.
10. That the yellow route is shown identically across the 9 submitted plans and the alternative route is identical on 5 of them suggests the plans had been created by a third party and issued to at least some of those who submitted user evidence. That a number of the UEFs which did not include a plan refer to a “*plan marked in yellow*” also suggests that the plan was created for general circulation.
11. Whilst the preparation of a plan to assist respondents in focusing their evidence is not unusual, the absence of plans from the majority of the UEFs limits the weight that can be attached to the evidence as relating to the use of a specific route.
12. Furthermore, the route shown in the plans attached to the UEFs and shown in the Order plan does not appear to have been that which the respondents claim to have used. In its submissions, CFG stated that the route being claimed ‘*leaves footpath 18a at the bottom of the slope at a point about 15 metres south of the junction of footpath 18a and bridleway 7b. It then proceeds to the edge of the mill pond and returns to footpath 18a at a point approximately 45 metres south of the junction of footpath 18a and bridleway 7b*”. At the site inspection it was this route which the supporters of the Order indicated to me as being the one they had used.
13. That part of the Order route A – B would run over ground which is steep and was thickly vegetated at the time of my site inspection. Whilst it may be that erosion of the stream bank has occurred post-2012 which would now make access more problematic on this alignment, the evidence offered by CFG does not support A – B as having been part of the route which is claimed to have been used.
14. If the route described in the Order is not one which the supporters of the Order claim to have used, the evidence contained within the UEFs must relate to some other route. However, the routes shown in yellow and blue with cross hatching on the plans attached to 9 of the UEFs do not correspond with the description of the claimed route given by the CFG; there is some uncertainty therefore as to which route the user evidence is referring to.
15. The various routes at issue in this case are shown on a plan devised by the objector’s appointed surveyors (‘the Aworth plan’) which demonstrates in graphic form the position of the current walked line of footpath 18a; the definitive line of footpath 18a; the route described in the Order; the yellow route from the UEF plans; and the route claimed to have been used by the CFG. Also shown on that plan is the position of the permissive path mown by the former owners of the land mentioned in paragraph 13 above. The Aworth plan demonstrates the limited coincidence between these routes.
16. It is not disputed that prior to 2012 the land east of the stream formed part of the extended garden or amenity land belonging to Stream Mill (until 2000) and then The Mill (2000-2012) and that this land was unfenced. Photographs taken in 2012 of the area demonstrate that this was the case at the end of the 20-year period under consideration; aerial images obtained from Google Earth taken between 2004 and 2009 show the open nature of the land to the east of the stream.
17. Footpath 18a appears to have been undefined within this area. During the relevant 20-year period there was no physical barrier which would have prevented users of footpath 18a from accessing the stream or walking alongside it. The 2012 photographs do not show an evident wear line in the ground on the line of footpath 18a or alongside the stream or leading to it; such a wear line might have been expected if a defined route was being walked on a daily or weekly basis as claimed by the users. The available photographic evidence does not demonstrate that ‘a way’ was evident on the ground or in use.
18. One of the letters submitted in support stated: “*The public have only the right to cross the land by the designated route…..and generally the way is quite narrow. However exceptions exist and this is one of them. All of the previous owners I have met have been aware that the public make use of all the area from the “official” footpath and the stream….”*. This statement is consistent with the objectors’ submission that the user evidence is of wandering at will over the area between footpath 18a and the stream.
19. The UEFs also provide evidence of the width of the route which the respondents considered to have been available to them. Whilst some describe a fairly narrow path (‘a walkway’; ‘approx 2 feet’; ‘3-4 feet’) others contend that the width in use was substantial (‘approx 40 yards’; ‘approx 20m’; ‘previously 20m in places’). The former statements are consistent with an identifiable route being used (although the exact location of that route is unclear), whereas the latter statements suggest that what had been available and what had been used was a much wider area and through which there would be no defined ‘way’.
20. In response to question 16 on the UEF (‘has the claimed path been maintained?’) some respondents state that the path had been kept clear by previous owners or had been maintained by them by cutting the grass. These references suggest that the respondents had used the mown path which crossed footpath 18a and led from Stream Mill to the stream bank at or around point B. Whilst this route might have provided users with a means of access to the stream during the summer months when the grass was long, the Aworth plan shows that this route does not equate with either the route described in the Order or the route claimed to have been used by the CFG.

**Conclusions**

1. Drawing these strands of evidence together, it is evident that there has been access to the weir and mill pool for some considerable time; the poems of William Chives and the correspondence on the picture postcard from 1906 demonstrates that it was possible to access the mill pool in the early part of the twentieth century; such access appears to have remained available until 2012.
2. However, the evidence of use in support of the claim for a public right of way having come into existence through long use does not demonstrate, to my mind, that access to the weir and mill pool has been over any single defined route. The route claimed by the CFG is not the route shown on the plans attached to the UEFs and is not the route described in the Order.
3. The UEFs suggest that the route used varied between 2 feet and 40 yards in width; within that width there may have been any number of possible routes which users of footpath 18a could have taken to access the stream and mill pool. I consider that the user evidence demonstrates that individuals were in the habit of roaming over the open area of land between footpath 18a and the stream and did not follow a single defined route to reach the stream and mill pool.
4. In short, I am not persuaded that the evidence of use adduced in this case demonstrates that the public have enjoyed the use of ‘a way’ such that the statutory test set out in section 31 of the 1980 Act is engaged. As use of a defined ‘way’ has not been demonstrated, it also follows that it would not be possible for an inference of dedication at common law to be drawn from the available evidence.
5. As the evidence does not support the use of a defined ‘way’, it is not necessary for me to consider whether use was ancillary to recreational activities undertaken in the mill pool or stream.
6. It follows that I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Alan Beckett

Inspector

