

|  |
| --- |
| **Order Decision** |
| Site visit made on 2 August 2022 |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 25 August 2022** |

|  |
| --- |
| **Order Ref: ROW/3248630** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Cheshire East Borough Council Definitive Map and Statement (Addition of Public Footpath No. 21, Parish of Cranage) Modification Order 2019.
 |
| * The Order is dated 31 October 2019 and proposes to modify the Definitive Map and Statement for the area by adding a footpath between Carver Avenue and Byley Lane as shown in the Order plan and described in the Order Schedule.
 |
| * There were two objections outstanding when Cheshire East Borough Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
 |
| **Summary of Decision: The Order is not confirmed.** |
|  |

Preliminary Matters

1. I undertook an accompanied site visit on 2 August 2022 with a representative of Cheshire East Borough Council (The Council), two representatives of Cranage Parish Council (CPC) and one of the objectors.

The Main Issues

1. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires me to consider if, on the balance of probabilities, the evidence shows that a public footpath subsists along the Order route. This is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
2. The case for the footpath is based on principles of common law. Where there is evidence of use of a way Section 31 of the Highways Act 1980 (the 1980 Act) is normally relied on. Subject to certain criteria, it provides a statutory presumption of dedication as a highway where it has been actually enjoyed by the public as a right of way and without interruption for a full period of twenty years.
3. However, the Order route crosses land which was owned by hospital and regional health authorities between 1934 and 2001 when it was sold by the Secretary of State for Health. Land held by a government department is classed as Crown land. Section 327 of the 1980 Act sets out that Section 31 does not apply to Crown land unless the appropriate authority has agreed with the highway authority that the provisions of the 1980 Act apply in relation to the land. There is no evidence before me that such an agreement has been made.
4. Under common law, an inference that a way has been dedicated for public use may be drawn when the actions of the landowners (or lack of action), indicate that they intended a way to be dedicated as a highway and where the public have accepted that dedication.
5. Use by the public can be evidence of the intention to dedicate. For an inference of dedication, this use should be as of right without force, secrecy, or permission. There is no fixed period of use at common law and use may range from a few years to several decades, based on the facts of the case. The more intensive and open the use, the shorter the period required to raise the inference of dedication. The burden of proof lies with the claimant to demonstrate that the evidence is sufficient to indicate an intention of dedication.
6. The Order was made following a successful appeal to the Secretary of State under Schedule 14 of the 1981 Act. Notwithstanding that decision, I shall consider the matter afresh based on all the evidence before me, including the submissions made following the making of the order. Furthermore, the tests for confirming the order differ to those for making an order, as outlined in paragraph 2 above.

Reasons

***Analysis of use***

*Period of use*

1. On 14 June 1934 Cheshire Joint Board for the Mentally Defective deposited a 6” scale map and statement with the highway authority under The Rights of Way Act 1932. No public rights of way were shown on the map or admitted in the statement. This deposit is sufficient to show that the landowner had no intention to dedicate any public rights of way over the land at this time.
2. To continue this protection, the owners or successors in title would need to make a statutory declaration within six years to the effect that no additional ways had been dedicated over the land. There is no evidence that additional deposits were made.
3. Between 2005 and 2007 the new landowners fenced off their land, an overt act that made it clear to the public that their right to use this land was being challenged. The landowners and claimants claim that the Order route was fenced in 2006 or 2007. This leaves a period between 1940 and 2006/7 when public rights could be acquired.

*Was use by the public?*

1. Use must be by those who can be regarded as the public. Those providing user evidence are residents of Cranage, who I consider to be members of the public.
2. The objectors state that the evidence from claimants who are members of CPC, or related to them, is inadmissible and should be excluded because they would gain material benefit from the recording of the Order route. They refer to the Code of Conduct for District and Parish Councillors which states that ‘holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends’.
3. I am unable to comment on any alleged breach of the Code of Conduct by members of the CPC. However, as local residents they are members of the public who claim to have used the Order route. Therefore, I consider that their evidence should be taken into consideration when determining the Order.

*Was use as of right?*

1. For use to be as of right it must be without force, secrecy, or permission. Use was predominantly for dog walking, visiting friends, reaching local facilities, bus stops, post boxes and for pleasure. There is no suggestion that the claimed use took place with secrecy or force. The current landowners acknowledge that there was some use by the public.
2. The landowners refer to permission to use the Order route being agreed following a meeting with CPC on 3 May 2007, with notes from the meeting and a follow up letter from one of the landowners being provided. No formal agreement was ever signed between the landowners and CPC. However, this permission was only agreed after the definitive map modification order application (DMMOA) was made, and after use challenged. There is no evidence before me of permission being given prior to 2007.
3. The landowners also advise that when the land was purchased from the Merseyside Health Authority in 2000, there was a covenant that the land was to be held for recreational and leisure purposes for at least 30 years, and if any building was agreed, they would be entitled to 50% of the development payment. If this were the case, the public may have a right to use the land until at least 2030. Therefore, the use of the land would have been ‘by right’ rather than ‘as of right’. I have not seen any documentation to support this and there is no mention of this in the Land Registry titles provided, therefore I can only place limited weight on this claim.
4. On the balance of probabilities, I consider that use of the Order route by the public, was as of right.

*Was there sufficient use of the Order route?*

1. Twenty people provided user evidence of a route between Carver Avenue and Byley Lane prior to 2007. Use dates back to 1934, with two people commencing use in the 1930s, three in the 1950s, one in 1960, two in the late 1970s, three in the 1980s, seven in the 1990s and one in 2001. One person did not provide dates of use. All the claimants used the route on foot, with seven also using it with a bicycle and two on a horse.
2. The Order is for a footpath rather than a bridleway. One of the horse riders indicated that they had not always used the same route. The amount of cycle use is not particularly clear and appears to have been secondary to the use on foot. I am not convinced that there is sufficient evidence of horse or bicycle use to indicate that any bridleway rights would exist.
3. Half of the claimants do not provide details of their frequency of use. Four stated that they used it daily, five several times a week, one person occasionally and one when needed. A member of CPC and an adjoining resident responded to a consultation saying that the route was in regular use. The current landowners accept that the Order route was used by the public, although they do dispute the frequency of use. One made comments regarding each claimant based on their observations and video footage. The landowner accepts some of the use was as frequently as stated, but not others. Nevertheless, I accept on face value frequency of use stated in the user evidence.
4. The user evidence provided was in a mixture of formats including the Council’s user evidence forms, Evidence of Walking forms, and letters. Ten of those providing evidence did not indicate the route they have used on a plan, five of whom also did not provide a description of the route used. The descriptions provided from another two claimants, who did not provide maps, was ‘over the field’. I consider that this is too vague to identify a clear route used. When a map is not included with user evidence, the weight that can be placed on it is significantly reduced, as it is not possible to identify the exact route that is being used by the claimant. The weight that I can place on the evidence of the seven claimants who have not provided a map or description of the route used, or only a vague description, is therefore very limited.
5. Six of those providing plans used the same sketch map with five different routes already marked on it. Using a map which has already been marked up with the claimed route can also reduce the weight that can be placed on it, as it may not accurately reflect the route that the claimant has used. This can be mitigated if the claimant signs the map or adds their additional information. However, only one person signed the map and only two others made additions to the map. Three people did not sign the map or make any additions to it, reducing the value of their evidence.
6. In addition to these six claimants, another claimant also marked on multiple routes on their own sketch map. Showing multiple routes reduces the value of the user evidence as it may not be clear how frequently a route has been used, when, for what purpose or how it was used. This is particularly the case for the two claimants who did not describe the route used in their evidence.
7. Two of those using the same sketch map provided additional maps showing that they have used different routes, one showing a route joining Byley Lane further to the west and the other showing a route directly behind the rear boundary of Deans Row rather than across the field.
8. Another two claimants provide two of their own sketch maps, one showing the route they used prior to 2005, when the fields at the end of the Crescent were fenced off, and the other after. Both indicate that they joined Byley Lane further to the west before 2005, and only started using the Order route along the track to the garages and rear of Deans Row after the field to the west was fenced.
9. Another claimant’s sketch map only showed the northern end of the Order route from Carver Avenue to the rear of the Carver Avenue garages and a short section south of B. He labelled the short section south of B as being used by school children to get to the bus. He added an additional route to The Crescent which he believes most of the residents used. I consider that this suggests that he personally did not use most of the Order route to reach Byley Lane, and only used the northern end continuing west from B on a different route.
10. I consider that the five claimants who indicated alternative routes only provide evidence of use of the Order route from A to B. Therefore, I can only give very limited weight to the evidence that they provide.
11. Overall, I consider that I can give very limited weight to the evidence of twelve of the claimants due to the lack of a map showing the Order route, lack of a clear route description or maps that indicated different routes were used.
12. This leaves evidence from eight claimants. Three of these did not provide a map of the Order route with their evidence, although did provide a description that corresponds with the Order route. Five of these used a sketch map showing multiple routes, which reduces the weight I can give to them, as the frequency of use or period used, may not be as great as indicated. There were also gaps in the evidence available as some of the claimants did not indicate which years they had used the Order route, the frequency of use, purpose, or description of the route used.
13. I am satisfied that the public have used a route between Carver Avenue and Byley Lane for many years. However, based on the quality of the evidence before me and gaps in evidence, I cannot be satisfied that, on the balance of probabilities, there has been sufficient use of the Order route to demonstrate an inference of dedication for public use under common law.

*Alignment of the path used*

1. Notwithstanding my conclusion in paragraph 30 above, I shall consider if people walked along a clear alignment and that this remained the same during the period of use. This alignment does not need to be obvious on the ground.
2. I have already noted above that some of the claimants were using different alignments or only part of the Order route. However, the objectors claim that the alignment of A to B is shown on the wrong line, and that the alignment used between B and C has not always been the same.
3. The Order map shows the section between A and B as running along the driveway to the garages of 24 Carver Avenue before crossing the turning head and going around the side of the garages. The owner of the property states that the footpath does not run within his property, but instead runs outside of it, alongside his boundary wall and fence. During my site visit I observed that there was a clear walk line on a stone surface outside of his boundary, and that the line shown on the Order map between A and B was obstructed by the boundary wall.
4. However, as advised by the owner, he purchased the original garages and access to them in 2011 and rebuilt the garages and erected the boundary wall and fencing in 2013 with the relevant planning permission. It would appear that when the DMMOA was made the wall did not exist, so would not have obstructed the Order route. I must therefore examine the user and other evidence to determine which line was used between A and B.
5. The map with the DMMOA shows the claimed path running along the access track to the garages, before cutting across the turning area and alongside the side and rear of the garages, as shown on the Order. However, a letter dated 17 of April 2007 from CPC to one of the landowners includes the notice and amended application plan for the DMMOA. This plan shows section from A to B to the eastern side of the access track and turning head and not along it. This casts doubt on the alignment being claimed and used.
6. The sketch plan used by six of the claimants appears to show the section to Carver Avenue as running between boundaries. However, the map is labelled Carver Avenue directly behind Deans Row (labelled Lees Cottages), with an arrow alongside it. The garage block is not shown. The Order map indicates that Carver Avenue ends approximately 60 metres north of Deans Row. Therefore, it is not clear if the sketch map shows the route used along the garage access, or if section A to B is omitted from the map altogether, with the arrow meaning that Carver Avenue can be joined by continuing to the north. Looking at the other maps provided one appears to show it as running along the access track, three alongside it and two do not indicate the route between A and B at all. I am therefore unable to determine, from the evidence available, which route was actually used by the public between A and B.
7. The owner of the field south of Carver Avenue states that the route used across it has changed several times. When he moved to Cranage in 1993, he claims that there was a well-worn path running alongside the garden fences behind Deans Row. However, in 1994 the boundaries for 4 Deans Row were extended and soil and rubble were deposited in the field. This caused walkers to use an alternative line through the middle of the field, as shown on the Order map.
8. He claims that when he purchased the land in 2006, he removed the rubble and people walking between Carver Avenue and Byley Lane started walking a shorter route, similar to the 1993 route. As he cleared more of the land the route varied again.
9. He also says he had issues with an adjoining resident who was driving over, and parking on his land in 2006. To prevent this, he erected a fence which amended the line used and now forms part of the enclosed path to Byley Lane.
10. Once he cleared the land, he sowed grass seed, but after someone rode a horse over it, he diverted the path around the edge of his property and bounded it with a fence. This is the route available today and offered up as a permissive path. The enclosed path would have been more or less straight if it hadn’t been for the boundary of 4 Deans Row, which includes some of his land.
11. One of the claimants did refer to part of the route being used to dump garden soil and states that, ‘as the area was open field, a path was established; this route moved as garden waste was dumped on the path’. She also answered ‘no’ to the questions ‘has the route always followed the same alignment?’ and ‘did you always follow the same route’. This supports the landowners claim that the alignment changed because of this. Two other claimants also answered ‘no’ to the question ‘has the route always followed the same alignment?’ but answered ‘yes’ to ‘did you always follow the same route?’ Seven claimants answered ‘yes’ to these questions. There is clear indication from one of the claimants, and some indication from two others, that there were variations to the route used.
12. As detailed in paragraphs 24 to 27 above, five of the maps show different routes used south of B, which indicate that the public did not always use the same route, were using multiple routes across the field, or did not use the claimed route south of B. In addition to this, the sketch map used by seven of the claimants, indicates a route with more of a curve across the field than shown on the Order map, which is almost straight.
13. For those who only described the route, one referred to it as being diagonally across the field, and one described it as being ‘at the back of Dean Row Cottages’. The descriptions provided by the others were not sufficient to identify the route they had used over the field.
14. Additionally, CPC requested additional user evidence in a parish newsletter. The copy provided was not dated, but it referred to various events and consultations in September and October 2017. The map to indicate the route shows a line to the east of the Order route, to the rear of Deans Row boundaries. This casts further doubt on the line being claimed and used by the public.
15. A copy of an aerial photo dated 1971 was provided by the Council as part of the report for the Rights of way Committee on 3 December 2018. Although none of the parties have indicated that it provides any evidence for or against the Order route, I note that it does show several wear lines across the field. One of these shows a route across the field which corresponds with the Order route, but it starts from the eastern side of the garages, rather than point B. Two other wear lines start from this point. These wear lines could indicate a route that was being used by the public at this point in time, although equally they could indicate routes used by the landowner or livestock. It also only shows what was visible at the time the photo was taken. Without comments from the parties involved I can only give this limited weight.
16. Although the user evidence indicates a route through the field south of Carver Avenue, the user evidence and maps relating to its alignment are inconsistent or lacking. I am not satisfied that there is sufficient evidence to indicate, on the balance of probabilities, the line used by the public across the field south of B behind Deans Row.
17. From the southern end of this field to Byley Lane, the Order route runs along an enclosed track, and I am satisfied that the alignment shown on the Order here is the route claimed.

***Conclusions under common law***

1. In my opinion it is reasonable to allege that a footpath exists between Carver Avenue and Byley Lane. However, the test which I must apply is whether, on the balance of probabilities, a footpath subsists. Under common law, an inference that a way has been dedicated for public use may be drawn when the actions of the landowners (or lack of action), indicate that they intended a way to be dedicated as a highway and where the public have accepted that dedication. Use by the public can be evidence of the intention to dedicate. The burden of proof lies with the claimant to demonstrate that the evidence is sufficient to indicate an intention of dedication under common law.
2. The user evidence provided contains inconsistencies and omissions regarding frequency of use, periods of use and route used. Many claimants do not provide maps or descriptions of the route they used. Those that do, indicate a variety of routes, different routes to that shown in the Order or omit sections of the claimed route. I am not satisfied that, on the balance of probabilities, the claimants have shown sufficient use of the Order route to demonstrate an intention of dedication by the landowner under common law. I am also not satisfied that there is sufficient evidence to determine the alignment of the claimed route between A and B and across the field behind Deans Row south of B.
3. There is no evidence to indicate that the landowner took any action to dedicate a right of way or to prevent the dedication of one prior to 2006 or 2007. However, I am not satisfied that the level of use would have been sufficient for a landowner to realise that they needed to take action to prevent a public right of way being established over their land.

**Other Matters**

1. The objectors also refer to issues of security, vandalism, anti-social behaviour, litter, animal welfare, disturbance, noise pollution and the existence of other routes. These matters relate to the suitability and desirability of the Order route which I am unable to take into consideration when determining the Order.
2. Some of the objectors question the validity of four of the letters as they were from children, so may have been dictated or prompted by adults. These letters did indicate some use by the children as a walking route, as well as playing. However, all four were given very limited weight as they did not provide a map showing the route used, or an adequate description of it.

Conclusions

1. Having regard to these, and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

1. I do not confirm the Order.

Claire Tregembo

INSPECTOR

