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| **Order Decision** |
| Inquiry held on 6 September 2022 |
| **by Barney Grimshaw BA DPA MRTPI(Rtd)** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 26 September 2022** |

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| **Order Ref: ROW/3268331** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as Herefordshire Council (Addition of Footpath BM29 Bodenham) Modification Order 2018. |
| * The Order is dated 9 January 2018 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath running between the C1121 road and bridleway Bodenham BM1, as shown on the Order Map and described in the Order Schedule. |
| * There were 10 objections outstanding at the commencement of the inquiry. |
| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. I held a public inquiry into this Order on 6 September 2022 at Hereford Town Hall. I made an unaccompanied site inspection on 5 September 2022 when I was able to walk most of the Order route. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

1. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
2. Some of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. 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.
3. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

1. Both documentary and user evidence has been submitted in this case. I consider the different types of evidence separately.

***Documentary Evidence***

*Inclosure Award*

1. The map prepared in connection with the Bodenham Inclosure Award 1813 shows the Order route. The route was not set out in the award suggesting that it might have been a pre-existing road that was to be retained. The description of a plot which adjoins section C-D of the Order route states that it was *‘bounded by the private road leading from Bodenham to Hampton Court’.* A copy of the Act which authorised this award was not made available and accordingly I do not know whether it provided for pre-existing routes not awarded to be extinguished as was sometimes the case in such Acts.
2. A road which crossed the Order route at Point C was set out in the award (the enclosure road), but Ladywell Lane was not mentioned in the description of that road. This road was subsequently diverted by a Quarter Sessions order in 1845 Although Ladywell Lane was not mentioned in the description of the road to be diverted, it was named on the plan accompanying the diversion.
3. These documents show that the Order route existed from some time before 1813 but they do not indicate the presence of any public rights over it.

*Early maps*

1. Two commercial maps prepared in 1817 and 1835 show only parts of the Order route.
2. Ordnance Survey (OS) maps prepared from 1815 until 1928 show the whole route. On the 1928 map, the route is annotated *F.P.* (footpath) immediately to the north of Point C. These maps show the continued existence of the Order route but do not indicate the presence of any public rights over it.

*The 1910 Finance Act*

1. Under this Act a survey of all land was undertaken in order to assess the value of land so that a tax could be imposed on any increase in value when the land was subsequently sold. Landowners with public rights of way on their land could claim a reduction in the taxable value of the land and accordingly survey records can be helpful in identifying the existence of public rights.
2. In this case, section A to B of the Order route is excluded from adjoining hereditaments and accordingly not liable for tax. This is the way in which public roads would have been dealt with, but some private roads used by a number of different people could also have been excluded in the same way.
3. Sections B to C to D of the Order route were included within the adjoining hereditament for which no deduction in respect of public rights of way appears to have been claimed.
4. In these circumstances, the Finance Act records provide no support for the claimed existence of public rights over the Order route.

*Estate Plans*

1. A plan of Hampton Court Estate, dated 1831, shows most of the Order route as an enclosed lane but part of section B to C is not shown at all. A plan, dated 1859, shows the whole route. A plan prepared for the sale of the estate in 1923 shows only the same information regarding the route as the OS base map used.
2. A map prepared in connection with an exchange of land in 1846 does not show the Order route.
3. These plans provide no evidence of public rights over the Order route.

*Other documents*

1. In a book published in 2004, ‘*A Brief History of the Houses in the Parish of Bodenham’,* by Anthea Brian, the author stated *“The building of the enclosure road (1813) had a devastating effect on Ladywell Lane which, because it lay in a deep depression was in the way. As a result it was officially closed and the depression was filled in to carry the new road level across the top. This left a very steep bank on the south side completely blocking the lane. The steep bank is still there today and has recently had steps made up the face”.*
2. No evidence has been discovered of any ‘official’ closing of the lane, however, the steep bank and steps were evident on my visit.

*Conclusions regarding documentary evidence*

1. The documentary evidence that is available indicates the existence of the Order route for over 200 years but, generally, does not show whether there were any public rights over it. The evidence does not preclude the possibility that it was a public route of some sort, but it is insufficient to justify a conclusion that this was the case.

***User Evidence***

1. In 2011, the land crossed by section B to C of the Order route changed hands and the new owner erected gates at Point B, which were later locked, and placed signs stating ‘No public right of way’ at Points B and C. These actions brought public use of the route into question in 2011/12.
2. Prior to this, between 1998 and 2008, the land crossed by sections B to C to D was subject to a Countryside Stewardship Agreement which included, from 2001 to 2008, an open access agreement for land between Points B and C and a permissive path agreement for section C to D of the route. The designation of section C to D as a permissive path in 2001 could have brought any public use taking place ‘as of right’ into question at that time. However, available evidence suggests that no signs were erected to inform users of the permissive nature of the path and in fact public use may not have been brought into question.
3. Accordingly, the relevant 20 year period of public use during which a presumption that the route has been dedicated as a public right of way might have been raised in accordance with the provisions of the 1980 Act runs from 1991/92 to 2011/12 in this case. However, to avoid doubt, I have also considered use during the period from 1981 to 2001.
4. Twenty User Evidence Forms (UEFs) were submitted describing use of the Order route from the 1940s to 2012. Two UEFs were discounted by Herefordshire Council, the Order Making Authority (OMA), one which did not state a period of use and one completed on behalf of a deceased person. Thirteen users were also interviewed by officers of the OMA.
5. Eight people claimed to have used the route throughout the period 1991/92 to 2011/12 and another 10 for some of that period. The same 8 people also said they used the route throughout the period 1981 to 2001 and 5 people for some of that period. The frequency of use claimed varied but around half the people who completed UEFs only used the route occasionally, between 1 and 8 times per year.
6. Users claimed that the route had not been obstructed before 2011/12 and that they had not been challenged. Several referred to there having been a wooden stile at Point C which was replaced by the present stone stile in around 2000. Some people also stated that there had been a footpath sign at Point A pointing northwards along the Order route.
7. It is not known when or by whom the footpath sign was erected or indeed whether the route it indicated was in fact the Order route. The sign was said to have been removed by persons unknown in around 2012.
8. On the other hand, Mr and Mrs Marko stated in written submission and at the inquiry that they had known the route since 1992, when Mr Marko’s parents moved into Bodenham Court. They gave evidence that from 1992 until some time after 1998, when clearance work was undertaken in connection with the Countryside Stewardship Agreement, the orchard area section from Point B to Point C was impassable due to overgrown brambles and other vegetation.
9. Until 2011, the land between Points B and C was owned by Hampton Court Estate. An employee of the Estate responsible for overseeing work in accordance with the Stewardship Agreement confirmed in writing that *“At commencement of the various works the orchard was totally overgrown and what had been a track, the old sunken lane, was impassable until we cut through thick overgrown brambles etc to clear the way.”* A work guide for the work in the orchard area includes an intention to *“remove scrub to permit access along the old track…”* and an attached scrub management plan shows the Order route annotated *‘Create a pathway along the old track by removing scrub from the flat bottom and 1-2 metres up the bank on each side.’* The guide also referred to putting a stile in the northern boundary (of the orchard area) to enable people to link up with the east-west bridle path.
10. The Estate Manager at the time also confirmed in writing that the route was very overgrown and stated *‘We did make it accessible as part of a stewardship scheme at the time but I don’t think it can have been used much for many years up until then.’*
11. Other local residents have also stated that section B to C of the route was not passable before the works under the Stewardship Agreement were carried out.

*Conclusions regarding user evidence*

1. The amount of user evidence available is somewhat limited but this is perhaps unsurprising in a small settlement such as Bodenham.
2. There is a conflict of evidence regarding whether the route was available for a period before works were carried out under the Stewardship Agreement with users claiming to have used the route without obstruction whereas others say it was impassable. Unfortunately, no users appeared at the inquiry, so none of the user evidence could be tested in cross examination. It is thus difficult to reconcile the conflicts within the evidence.
3. On balance, it is my view that the evidence of the Hampton Court Estate employees responsible for the work under the Stewardship Agreement together with the work guide detailing this work and the statements of local residents indicates that for some time prior to 1998 section B to C of the Order route was not usable by members of the public as part of a through route.
4. Accordingly, I conclude that the route was not used throughout either the period 1991/92 to 2011/12 or that from 1981 to 2001 in such a way as to raise the presumption that it had been dedicated as a public footpath in accordance with the provisions of the 1980 Act.

***Common Law***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
2. In this case, there is a limited amount of evidence of public use of the Order route over a lengthy period but little evidence of action by landowners which might indicate an intention to dedicate it as a public right of way. It is not known by whom the sign at Point A was erected or indeed whether it related to the Order route, particularly the section to the north of Point B. There were some references to a wooden stile having been in place at Point C prior to the current stone stile but, again, this does not necessarily indicate an intention to dedicate a public right of way. The inclusion of a permissive path in the Stewardship Agreement indicates a lack of intention to dedicate a public right of way in 1998, even though this may not have been communicated to the public, and the work guide suggests that there may not have been a stile at Point C.
3. On balance therefore it would not be reasonable to infer that the Order route has been dedicated as a public right of way at common law.

**Other Matters**

1. Some people, who use the section of Ladywell Lane between Points A and B to gain access to their properties, objected to the Order as they are concerned that the recording of public footpath rights over the route would restrict their private right to use the route with vehicles. This would not be the case, confirmation of the current Order would have no effect whatsoever on any private rights over the Order route.
2. The owners of some of the land crossed by the Order route expressed concern that the recording of it as a public footpath might have a damaging effect on the flora and fauna of the area. I understand this concern but, as it lies outside the criteria set out in the relevant legislation, I have given it no weight in reaching my decision.

Conclusions

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

Formal Decision

1. I do not confirm the Order.

Barney Grimshaw

Inspector

appearances

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| **For the OMA** |  |
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| Simon Aley | Solicitor, Herefordshire Council (HC) |
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| Who called: |  |
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| Robin Carr | Independent consultant, representing HC |
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| **Objectors** |  |
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| Wendy Huxley Marko | Landowner |
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| Karl Marko | Landowner |
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| **Interested Parties** |  |
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| Chris Marsden | Local resident/path user |
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documents

1. Statement of Case of HC with bundle of 34 supporting documents.
2. Proof of Evidence and summary proof of Robin Carr.
3. Statement of Wendy and Karl Marko.
4. Copy of Email, dated 16/8/22 from Ed Waghorn to Wendy Marko.
5. Closing submission on behalf of HC.

