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| **Final Order Decision** |
| Inquiry held on 7 June 2022Site visit made on 25 April 2019 |
| **by Susan Doran BA Hons MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date:14 September 2022** |

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| **Order Ref: ROW/3206702M** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Borough Council of Calderdale (Woodroyd Gardens to Rose Grove Lane) Order No.1, 2017.
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| * Calderdale Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
* The Order is dated 13 January 2017.
* The Order 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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| * In accordance with paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of a proposal to confirm the Order with modifications.
* Two objections were received in response to the notice.
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| **Summary of Decision: The Order is confirmed subject to the modifications previously proposed, as set out below in the Formal Decision** |
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Preliminary Matters

1. I held an Inquiry into the Order on 24-25 April 2019, following which I proposed to confirm it with modifications to correct the length of the path recorded in the Schedules to the Order. Since these modifications could have affected land not affected by the Order as made, notice was given affording an opportunity for any objections or representations to be submitted.
2. Of the two objections received in response to the notice, one was subsequently withdrawn. The other objection, made on behalf of landowners (the objectors), concerned my findings regarding the Order itself and the evidence following the arguments and submissions put to me at the first Inquiry. A second Inquiry was held into both the modified and unmodified parts of the Order. However, this was delayed due to the Covid-19 pandemic and took place as a Blended Event (a mix of virtual and face-to face participation), with some people again attending at Halifax Town Hall. I am grateful to everyone involved in enabling the case to be conducted in this manner. Due to unexpected circumstances, the issuing of this decision has been slightly delayed.

*Notices*

1. I have carefully considered arguments that the notices (in respect of the Inquiry) were incorrectly placed. The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 at Rule 16(3)(a), by reference to modification inquiries under Rule 27(5), requires the authority to *“…cause a notice of the inquiry to be displayed in a prominent position at each end of so much of any way or proposed way as is affected by the order and in such other places in the locality as the authority may consider appropriate.”*
2. Photographs provided show the locations of the notices. The Council chose items of street furniture near the ends of the Order route on which to display them – one set on a metal streetlamp on Woodroyd Gardens a few metres west of point A on the Order plan, the other on a metal signpost on Rose Grove Lane, opposite and a few metres from point E. Both were in a prominent position at either end of the way affected by the Order, albeit not the precise positions of A and E, but close enough to be clearly seen from them.
3. These are similar locations to where notices were posted previously. A Council email dated February 2017 indicates that notices (in this instance concerning the making of the Order) were put up by the Council on “the lamp column nearest point A at Woodroyd Gardens and on gabion baskets near Woodland Manor’s driveway close to point E” and, in addition, near the bus stop on Burnley Road as those at A were unlikely to be seen other than by residents of Woodroyd Gardens. The same was the case for the first Inquiry.
4. The objectors were not able to say if anyone had been prejudiced by the positioning of the latest Inquiry notices. Whilst only one person (apparently unconnected with the case) attended the second Inquiry, there was awareness of the process and that it was taking place. One person (who attended the first Inquiry) had sent their apologies that they were unable to attend on 7 June. In addition, the objectors had made their submissions and attended or were represented at the Inquiry.
5. I am satisfied no one has been prejudiced or disadvantaged by the placing of the notices at the locations identified, and that it was appropriate to continue with the Inquiry as scheduled.

*Validity of the Order*

1. The objectors maintained that the Order had been created illegally for the following reasons. Whilst the Constitution of the Borough Council of Calderdale (the Council) delegates authority in such matters, it was illegally formed as it usurps Parliament’s instructions, as set out in the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (the 2000 Regulations). The Council’s interpretation of their Constitution was of no bearing as their action was incompatible and contrary to the will of Parliament and statute law. Therefore, as the creation of the Order and subsequent process was unlawful the Order is void and has no power. Furthermore, it remains void and cannot achieve legal status by the passage of time and is not bound by the artificial time limits of judicial review.
2. The issue of whether the order was made unlawfully was raised at the first Inquiry. As regards the 2000 Regulations*,* Regulation 2(1) provides that the functions of a local authority specified in Schedule 1 are not to be the responsibility of an authority’s executive. One such function, at paragraph 24 of section 1 of Schedule 1, is the duty under section 53 of the Wildlife and Countryside Act 1981 (the 1981 Act), to keep the Definitive Map and Statement (DMS) under review. This, the Council stated, is that it is not the function of the Council’s executive to act under section 53 of the 1981 Act, but the function of the Council itself. Under section 101 of the Local Government Act 1972 (the 1972 Act), the Council can delegate its functions to its officers, as it did in this case.
3. Regulation 2(7) of the 2000 Regulations sets out the functions in respect of which the power of delegation under section 101 of the 1972 Act does not apply. The limited number of functions excluded from the delegation power in section 101 of the 1972 Act does not include any function under section 53 of the 1981 Act.
4. Having considered the submissions, I prefer the Council’s interpretation such that the Order is not void, or invalid, and it remains open to me to determine it.

*Order seal*

1. The Council accepted that in this regard the Order had been drafted incorrectly. Schedule 4(1) to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 states the surveying authority’s seal is to be *“…inserted after the order before its Schedule”.*
2. The powers of modification available to me do not extend to correcting the position of the seal within an order. However, this error would not give rise to a conflict between the order map and schedule, and this is the issue to be avoided. Neither does there appear to be any prejudice arising to the parties to the Order by the incorrect positioning of the seal. It provides confirmation that the Order was made by the order making authority (the Council) as a legal document. Although in the wrong place, the error is a minor one. The Order has been sealed, as required by the Regulations.
3. If it rendered the Order invalid, the Council would be required to re-make and re-advertise it. In all likelihood this would result in a further Inquiry process together with the associated costs for the main parties to present their cases, as well as to members of the public wishing to attend and give evidence. In the meantime, there would be continued uncertainty as regards the status of the route both for the landowners and for the public.
4. On balance I conclude that no prejudice arises despite the seal being wrongly placed after and not before the Schedule. Further, and for the reasons given, this does not render the Order invalidand incapable of confirmation.

*Evidence*

1. It was alleged that evidence had been withheld by the Council and/or removed from its files. For example, the 2003 user evidence forms (the forms), considered during the first Inquiry, referred to enclosures comprising maps. However, none had been found by the Council.
2. Whilst some papers may be missing, or are no longer available, this is not evidence that documents have been either deliberately withheld or destroyed. There is no evidence before me to substantiate the allegations, which are unfounded.

**The Main Issues**

1. In relation to the modified part of the Order, the main issue is whether there is any evidence or argument which has a bearing on the modifications proposed in paragraph 37 of my interim decision (dated 23 July 2019) and which might indicate that those modifications should be amended or not pursued.
2. As regards the unmodified part of the Order, the main issue is whether there is any new evidence or argument to cause me to reconsider the conclusions I previously reached.

Reasons

***Proposed modifications to the length of the Order route***

1. In my interim decision, I proposed to modify the Order by correcting the recorded length of the Order route in Parts I and II of the Schedule. This meant in Part I of the Schedule to replace the recorded length of 81 metres, from points A to E on the Order plan, with 134 metres; and in Part II, to amend the lengths of the surfaced and unsurfaced sections of the Order route from 20 to 21 metres, and 112 to 113 metres respectively.
2. No objections or representations were made in respect of the modifications proposed, which seek to ensure that the correct details are recorded in the DMS. Having had the opportunity to revisit my conclusions on this matter I am satisfied that there is nothing to cause me to amend or not pursue the modifications proposed, and they should stand in the event that I decide to confirm the Order.

***The unmodified part of the Order***

*Alignment*

User evidence

1. It was alleged that witnesses giving evidence at the first Inquiry subsequently indicated they had not used the Order route and their forms concerned another route on a different alignment, with a different length. Further, that they had adapted their evidence at the first Inquiry to suit the Order as made. However, no evidence to substantiate these allegations has been submitted by the objectors, and none reported or found by the Council. No witnesses were called, nor re-called to give evidence to this effect at the second Inquiry.
2. It was further suggested that the 2003 forms (absent any maps) concerned a path on land to the north of the Order route, which now lies beneath The Meadows. As a consequence, the public began using a path south of the boundary of the new housing, but not the Order route.
3. An order dated 2003, the same year the forms were submitted and planning permission granted for the development of The Meadows, made under the Town and Country Planning Act, concerned the diversion of Sowerby Bridge No.48. However, this was anexisting public footpath running from Burnley Road to Timmey Lane lying well to the north of the Order route. Furthermore, the 2003 forms, referring to a claim for a new path based on user evidence, described a route between Woodroyd Gardens and Timmey Lane.
4. I considered the user evidence at length in my interim decision. There is nothing in the arguments produced by the objectors to lead me to conclude that the 2003 forms concerned a route crossing land now forming part of The Meadows development. It follows there is nothing that leads me to alter the conclusions I previously reached.

2016 plan

1. A plan produced in 2016 by the Council shows a path marked on the base mapping along the southern boundary of The Meadows, but none marked where the claimed route is represented by a pink dotted line passing through the property Woodlands Manor. Accordingly, the objectors maintained the marked path, as evidenced by a feature that existed on the ground, was more likely to represent the Order route than the dotted line marked by the Council.
2. The 2016 plan shows a mapped feature lying to the north of Woodlands Manor (and south of The Meadows boundary). However, on a map produced by the Council from data available in 2010 (showing the former garages prior to the construction of Woodlands Manor) a path is marked which is more consistent with the Order route. Similarly, a 1961 Ordnance Survey (OS) map shows a route marked ‘footpath’ on an alignment consistent with the Order route (paragraph 26 of my interim decision), likewise on an existing site layout plan dated December 2009 produced for the first planning application for the site of Woodlands Manor. Aerial photographs dating between 2002 and 2009 do not show a worn route corresponding with the one on the 2016 plan but do show one consistent with the Order route (paragraph 27 of my interim decision).
3. Moreover, I determined that the right of the public to use the Order route had been brought into question in 2010 when it was obstructed by fencing at Woodlands Manor (paragraph 11 of my interim decision). It was this action that led to the submission of the application to add the path. It is entirely possible that the path marked on the base mapping in 2016, which indicates what physically existed at the time of the survey, reflected an alignment that had come into existence after the development of Woodlands Manor. In any event, the 2016 base mapping post-dates the relevant period of use and there is nothing to suggest the plan misled witnesses or caused them to misrepresent their use, neither does it cause me to overturn my previous findings.

Order plan and 2006 aerial photograph

1. The objectors argued that by overlaying a copy of the Order plan onto an aerial photograph (dated 2006) reveals two areas of divergence, one at the steps below the garages (on Woodroyd Gardens), and another where the Order route passes through the corner of what is now the new build (so should be shown to the north as per the application route). Accordingly, the Order route is not that used during the claim period, nor the route in use in 2011 when the definitive map modification order was made. They reasserted that reliance cannot be placed on an Ordnance Survey (OS) map as proof of a right of way and that the Council has created a route based on the map.
2. Both of these documents were available to, and considered at, the first Inquiry, albeit individually, so in that regard do not constitute new evidence. I considered the aerial photographs dating between 2002 and 2009 at paragraph 27 of my interim decision, concluding they consistently showed a well-defined path on an alignment equivalent to the Order route. Paragraph 28 of my interim decision, commenting on the 2006 aerial photograph, noted the well-defined wear line consistent with the Order route as being clearly visible.
3. The Council explained it had identified a discrepancy between the alignment in the application and the route available on the ground and identified from other evidence. That is why the Order did not record the exact alignment of the application route.
4. I reviewed the evidence as a whole in my interim decision, whether user, photographic, or mapping and so forth, and reached an overall conclusion that it supported the alignment shown in the Order. The 2006 aerial photograph relied on represents a moment in time, as indeed do the other photographs considered. The overlaying of the Order plan onto this aerial photograph indicates some variations between the two. However, on balance and having regard to the evidence as a whole, I remain satisfied that the Order route’s alignment is representative of the path in use by the public. In addition, I find no support for the objectors’ suggestion the Council placed undue reliance on OS mapping.

Conclusion

1. In reaching my decision I have had the opportunity to revisit findings made in my interim decision. In so doing I have given careful consideration to the arguments and submissions made on behalf of the objectors. However, I am not persuaded that I should depart from my original conclusions. I recognise that the outcome of my decision will be a disappointment to the objectors.
2. Having regard to these and all other matters raised in the written representations and at the Inquiry, I conclude the Order should be confirmed with the modifications proposed in my interim decision of 23 July 2019.

**Formal Decision**

1. The Order is confirmed subject to the following modifications:
* In Part I of the Schedule to the Order, under the description of the path or way to be added, in the last line recording the approximate length of the path, delete “81” and replace with “134”
* In Part II of the Schedule to the Order, under the heading “Approx. length Metres” delete “20” and “112” and replace with “21” and “113”

S Doran

**Inspector**

**APPEARANCES**

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| **For the Order Making Authority:**Alan Evans *of Counsel instructed by* Marcus Woody, Solicitor, Highways and Planning, Calderdale Council |
| who calledPhil Champion former Rights of Way Officer, Calderdale Council Marcus Woody Solicitor, Highways and Planning, Calderdale Council**For the Objectors:** |
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| Andrew Dunlop  |  *representing* Richard and Ashley Haigh |
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**INQUIRY DOCUMENTS**

1. Closing submissions on behalf of the objectors Mr and Mrs Haigh, together with copies of *R oao Miller v The Prime Minister, Cherry v Advocate General for Scotland* [2019] *UKSC 41,* and *Entick v Carrington* [1765] *EWHC KB J98*
2. Closing submissions on behalf of Calderdale Council

