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| **Order Decision** |
| Site visit made on 13 September 2022 |
| **by A Spencer-Peet BSc(Hons) PGDip.LP Solicitor (Non Practicing)** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 23 November 2022** |

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| **Order Ref: ROW/3278102** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The South Gloucestershire Council (Footpath Between Broad Lane and Frog Lane, Coalpit Heath) Definitive Map and Statement Modification Order 2019. |
| * The Order is dated 22 March 2019 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule. |
| * There was one objection outstanding when South Gloucestershire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision** |
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Preliminary Matters

1. At the date when South Gloucestershire Council (the OMA) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation, only a single objection from the British Horse Society (the BHS) was outstanding. However, since that date a further objection has been received from a landowner. The OMA has been provided with the opportunity to comment on that further objection. Accordingly, I shall take into account all the evidence, submissions and comments before me.
2. I have, therefore, considered this case on the basis of the written representations provided. I made an unaccompanied inspection of the route on Tuesday   
   13th September 2022.
3. The abovementioned landowner’s objection raised concerns regarding the availability of some of the documents provided by the OMA in support of their statement of case. In that regard, the Planning Inspectorate has provided that objector with copies of the relevant documents and has provided the landowner, the OMA and the BHS with the opportunity to provide statements in response.

**The Main Issue**

1. The Order has been made under Section 53(3)(c)(i) of the 1981 Act, and based on evidence which the OMA has put it to me confirms that a public footpath subsists over the Order route. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a footpath which is not shown in the definitive map and statement (the DMS) subsists. The burden of proof to be applied is the balance of probabilities.
2. An application to add a bridleway to the DMS was made by the BHS in January 2017. In support of that application for a bridleway, the BHS submitted both documentary evidence and evidence of use of the Order route on horseback.
3. In respect of the documentary evidence, Section 32 of the Highways Act 1980 (the 1980 Act) requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
4. Dedication through public use arises either by presumed dedication as set out in Section 31 of the 1980 Act, or by implied dedication under common law. The 1980 Act requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of not less than twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention, during that period, to dedicate a public right of way.
5. At common law a right of way may be created through express or implied dedication and acceptance. Dedication may be presumed if there is sufficient evidence, from which it could reasonably be inferred, that the landowner has dedicated a right of way and the public has accepted that dedication. No minimum or fixed user period is required for the dedication of a public right of way at common law. The OMA does not consider that a case can be made for the dedication of a bridleway at common law.

**Reasons**

***Background***

1. The Order route commences from the junction with restricted byway LWE 37 and Broad Lane (point A). The Order route runs in a north easterly direction along the bed of a former mineral railway track, where it joins with footpath LWE 18 and Frog Lane (point B).

***Documentary Evidence***

1. A number of Ordnance Survey (the OS) maps have been submitted in support of the application and by the OMA. The first edition OS map shows the Order route being annotated as Frog Lane. The later 1882 edition shows the Order route annotated as Mineral Railway. No significant changes to the claimed Order route appear in the OS maps until 1965 where the OS map shows the Order route annotated as a path, with a section of the route between Broad Lane and where it passes under the South Wales and Bristol railway line being annotated as track. Later OS maps continue to annotate the claimed Order route as path and track. On the 1817-1830 First Edition Ordnance Survey map, the claimed Order route appears as a continuation of Frog Lane. However later OS maps do not show the claimed Order route as a continuation of Frog Lane, with OS maps dated between 1882 and 1935 showing the continuation of the mineral railway was separate from Frog Lane.
2. Cassini Map for 1817 – 1830 shows the claimed Order route as solid lines, with the later 1919 Cassini Map appearing to show a railway track running over the claimed Order route.
3. An undated photograph was provided in support of the application which shows a gate, which appears from observations made on my visit, to have been located at point B of the Order route, with a sign upon which the words “No Bikes” can just be discerned.
4. The evidence before me indicates that, following further investigations by the OMA, letters from 1984-1985 were found and which concern correspondence between the then BHS representative and the Divisional Planning Officer. The OMA have stated that those letters talk of the lack of provision for horse riders and that the route would need to be acquired. The OMA maintains that the correspondence suggests that the BHS were aware that the Order route was not a bridleway and that it would need to be acquired from the landowner for use as a bridleway. The OMA states that no application was made at that time by the BHS for a bridleway over the Order route. The Applicant has advised that she was not the BHS representative at that time and suggests that an application for a bridleway was not made at that time by reason of the then BHS representative having numerous other routes to consider.

***Evidence of use by the public***

1. Evidence of use has been gathered and provided from user evidence forms and letters obtained from local residents. In the first instance, it is necessary to determine when the alleged right of way was brought into question, and so that the statutory period of twenty years can be calculated up to that date in accordance with section 31(2) of the 1980 Act.
2. The present landowner has provided submissions in which it is maintained that locked gates have been placed at both ends of the Order route since they obtained ownership of the land in 1995. Evidence provided by users of the route suggest that locked gates appeared on the Order route in the late 1980s or early 1990s. Only a single individual claims use of the Order route on horseback after 1989. Given the evidence before me, it is reasonable to consider that the use of the route was brought into question in 1989.
3. The user evidence forms provided in support of the application describe the route and its use for varying periods of time. There is a full twenty year period of use during the relevant period between 1969 and 1989.
4. One of the seventeen user evidence forms describes use outside of the relevant period. Frequency and duration of use on horseback varies between users, with eight users reporting use approximately once, or more than once, per week. Three users describe use of the Order route on horseback during the full period between 1969 and 1989. However, one of those users confirms that they used the route as a member of a riding school, and who also confirms that permission to use the route was provided by the previous landowner, with another one of those users appearing to be aged under eighteen for a significant proportion of that relevant period.
5. In addition to the above, three further users indicate that the route was used in conjunction with the riding school. Excluding those who appear to have had permission in relation to the riding school or who were under eighteen years of age for a significant portion of the relevant period, nine of the users state they were using the route on horseback between 1969 and 1989, with duration of use predominately comprising less than ten years but varying from three years up to the abovementioned twenty year use by a single user.
6. In addition to the above user evidence forms, a number of letters from interested parties have been submitted. The letter submitted in support of the BHS application states that a local resident, who lived at a house in Frog Lane between 1960 and 1965, frequently walked along the former railway line and, during that period, it is maintained by that resident that there were no barriers on that path obstructing use by horses or bicycles.
7. The OMA has also provided extracts of responses from interested parties following consultation. Those responses are consistent in terms of confirming that former and current residents at Frog Lane Farm and Fairview House, since 1973, state that they have never seen the route being used by horse riders, or indeed did any of those residents recalls seeing any evidence of such use, up to the present day.
8. The OMA submissions include details from one of the abovementioned responses, and which references a newspaper article from 1998 entitled “Landowner says no to new bridleway”. The extract provided from that article states that the BHS representative “wanted to see a bridleway” stretching over the Order route with eight letters supporting the call for more bridleways. That extract article further provides that discussions had been held between a local Councillor and the current landowner, with the Councillor saying that the landowner reported to them that he would be reluctant to turn the route into a bridleway. That Councillor further reported that the current landowner “never stopped anyone walking along there in the past and he could do as it’s not a footpath”.
9. A further letter from a local resident has been provided and which states that that resident was a police officer based at a station responsible for policing Coalpit Heath, and that during the period 1970 to 1974 they recall driving a police vehicle along the Order route on more than one occasion without the need to open any gates or negotiate any fencing.
10. Since the date the application was determined by the OMA, the BHS Applicant submitted an additional five user evidence forms, as well as a further two letters. The additional user evidence forms describe the route, maintaining use on horseback. Duration of use varies between one year and eighteen years for these users during the relevant period. However, two of those users, including that user who reports use over eighteen years, were under eighteen years old for significant portion of the relevant period. One of the letters describes riding a horse along the Order route from 1975 up to a point where the land was sold to the current owners. I understand from the submissions before me that the second letter included in evidence at this time, was later retracted.
11. Following the issue of notice making the order, two letters of support were provided to the OMA. The first letter of support is from a local resident who claims to be a regular user of the footpath, at least once a week, but does not specify the duration of that claimed use. The second letter is from the Southwold Ramblers which simply states that they support the modification. However, a further letter from a member of the Southwold Ramblers was submitted which states that that member of the group has walked the Order route on many occasions with others of the group and since 1987.

*Other Evidence*

1. As noted above, since the date that the OMA submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation, a further objection has been received by the current landowner. That objection claims that whilst the OMA were correct in finding that the claimed bridleway could not be reasonably alleged to subsist over the Order route, the OMA was incorrect in finding that it could be reasonably alleged that a footpath subsists. The objection includes a statement which maintains that the landowner had taken steps to exclude certain classes of use by erecting locked gates at both ends of the Order route, an earth bund and fencing that prevents access by motor vehicle and horses.
2. The landowner further states that he has made specific provision for members of the public to walk along the route by providing a gap between the gate, earth bund and the fencing erected at point A on the Order route. The landowner maintains that signage has previously been erected and has been torn down or removed, and that when encountering members of the public, the landowner confirms that he communicated to those he encountered on the route and within the adjacent fields that they are permitted to walk along the route. The landowner has put it to me that his actions, as described above, amounts to more than simply tolerating use of the way on foot and would rather constitute express permission for use of the way on foot.

*Conclusions on the Evidence*

1. The OS maps and Cassini Maps provide good evidence of the existence of the route and physical features at the relevant survey dates. Nonetheless, those maps do not confirm the status of the route. The undated photograph shows a gate at point B on the Order route but does not indicate or confirm the status of the route.
2. However, details provided in respect of correspondence from 1984-1985 between the BHS and the Council suggests that the BHS knew at that time that the route was not a bridleway. That suggestion would appear to be consistent with the quoted newspaper article from 1998 which describes a campaign for more bridleways in the area and which did not seek or mention recognition of the Order route as a bridleway.
3. From the user evidence forms, it is apparent that a number of those users on horseback were related to a riding school for which permission to use the route for such purposes was provided by the landowner at that time. As such, use of the route by those users would not have been ‘as of right’.
4. For the relevant period between 1969 and 1989, user evidence forms submitted in support of the application and those additional forms submitted after the date the OMA determined the application combined, is covered by twenty one users on horseback. Three of the users claim to have used the route on horseback for the full twenty year period between 1969 and 1989. However, one of those users appears to have used the route in conjunction with the riding school with a second user appearing to be aged under eighteen for a significant proportion of that relevant period.
5. A further user claims eighteen years of use on horseback during the relevant period. However, again it appears that user was aged under eighteen for a significant proportion of that relevant period. Others report use ranging from three years to twelve years during the relevant period. Furthermore, it appears that a significant portion of users claim use of the route on horseback between 1972 and 1983 which, as noted above, appears to include a period in which the riding school had permission to use the route.
6. The OMA identifies that a number of the users provide evidence which relates to their childhood years and that it is likely that use was in association with the riding school and that given the age of the users at the time, that would bring into question whether the use was by the public at large. In that regard, the Applicant has put it to me that those users who were of childhood age during the relevant period are now mature adults and have completed the user evidence forms in good faith.
7. Whilst I acknowledge the comments from the Applicant, it appears that a significant number of users during the relevant period were below the age of eighteen and the evidence before me indicates that there were people using the route on horseback in association with the riding school for which the landowner had provided permission.
8. In my view and on the balance of probabilities, the user evidence in combination with the evidence submitted in respect of the correspondence between the BHS and the Council in 1984/1985 which, as described above, strongly suggests that the BHS were aware that the Order route was not a bridleway at that time, as a whole I find the evidence is insufficient to reach the conclusion that the Order route subsists as a bridleway. Furthermore, the evidence suggests that the use by the public at large has not been intensive enough for the claim to add a bridleway over the Order route to succeed at common law. I acknowledge the submissions from the Police Officer who states that they used the route whilst traveling by vehicle. However, those submissions do not indicate in what circumstances that route was used, nor confirms adequately the duration or frequency of such use. A such, that evidence does not alter my conclusion that the evidence is insufficient to reach the conclusion that the Order route subsists as a bridleway or as a route with a higher, vehicular status.
9. Whilst I have found, for the reasons above, that the evidence is insufficient to reach the conclusion that the Order route subsists as a bridleway, given the abovementioned objection from the current landowner, it is necessary to consider whether, on the balance of probabilities, that a footpath subsists over the Order route.
10. As noted above, whilst the OS maps since 1965 have shown the route as a ‘path’ or ‘track’, the OS and Cassini maps only demonstrate the existence of the route at the relevant time and do not confirm its status.
11. In terms of the user evidence and responses from residents that have occupied dwellings nearest to the Order route, excluding those who appear to have been aged under eighteen for a significant proportion of the relevant period, there are two who report use on foot for the entire twenty year period between 1969 and 1989. One other user evidence form describes using the route on foot for eight years with the letters from nearby residents describing use for three years and fifteen years. Frequency of use on foot is reported as being twenty times a year or less.
12. In light of the above regarding number of reported users on foot, the duration of use and the low frequency of such use during the relevant period between 1969 and 1989, in my view and on the balance of probabilities, as a whole I find the evidence is insufficient to reach the conclusion that the Order route subsists as a footpath under section 31 of the 1980 Act.
13. However, the question arises under common law as to whether, through their actions, there has been an express or implied dedication of a footpath over the Order route by the current landowner which has been accepted by the public.
14. In that respect, as noted above, the current landowner maintains that gates at either end of the Order route were erected in 1995. The landowner confirms that the gate at point B on the Order route has been locked since 1995, with a fence and earth bund having been erected at point A but which provides a gap of sufficient space to allow for those on foot to enter onto the Order route. The landowner has further put it to me that he has communicated to those he has encountered on the Order route that they have permission to use the route.
15. Whilst it is acknowledged that the landowner maintains that he erected signage along the route which has been torn down, the evidence suggests that those signs did not expressly indicate that the use of the route on foot was permissive, but rather than the signage simply advised ‘bikes keep out ‘ or ‘no bikes’. The landowner has left a gap at point A for those on foot to enter onto the Order route. The locked gate at point B would have prevented access on foot to the Order route from 1995. However, a gap has been left on the route to the south of point B which provides the only access onto the LWE18 footpath from the Order route and, from the evidence before me, that appears to be the route that users are taking in order to access footpath LWE18. The landowner has confirmed that this changed alignment is the route taken by users.
16. There does not appear to be any evidence before me that confirms notices, or communication to the public at large, has been provided which either deters use of the route with the changed alignment near to point B, on foot or that that route was permissive. As such and given the evidence of historic and continuing use in combination with the provision of a gap at point A, there is sufficient evidence that dedication by the landowner and acceptance by the public of a footpath can be presumed at common law.
17. In light of the above, I conclude that the Order should be proposed for confirmation, albeit with a modification that the alignment of the route be changed on the Order map.

**Overall Conclusion**

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation with modifications.

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:

* Delete the text after “under a *railway bridge*” in Part I of the Order Schedule and insert:

“*and then continues for a distance of 520 metres to Point Y and then in a north east direction for a distance of 25 metres and then in a north west direction for a distance of 25 metres to Point Z where it joins with public footpath LWE 18 and shown as a bold broken line marked A-Y- Z on the map contained in this order.*

*The width of the path varies:- between Point A and the railway bridge a width of 1.4 metres with pinch points for the first 1.5 metres; 50cm between gate post and fence and 35cm between gate post and tree roots. Widens to 4.4 metres at the railway bridge with a pinch point under the centre of the bridge of 50cm between the wall of the bridge and a concrete pipe/pile of rock. From the northern side of the bridge, path remains 4.4 metres wide for a distance of 68 metres where it then narrows and the remainder of the path, to Point Z, varies between 2.2 metres and 2.5 metres in width.*

*The total length is 650 metres.*

*The number of the footpath to be added is LWE 84*.”

* Delete the words “*135 metres*” in the To Location contained within Part II of the Order Schedule and insert “*145 metres*”.
* Delete “*6847 8078*” from the To Grid Ref (ST) in Part II of the Order Schedule.
* Delete the words “*Length: 640 metres*” in the Particulars shown in Part II of the Order Schedule and insert “*Length: 650 metres*”.
* Delete the words “*Field gates at Point A and Point B*” in the Particulars shown in Part II of the Order Schedule and insert “*Field gate at Point A and field gate and stile at Point Z”.*

1. Since the confirmed Order would affect land not affected by the Order as submitted, I am required, by reason of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mr A Spencer-Peet

INSPECTOR

