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| **Order Decision** |
| Papers on file |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 6 February 2023** |

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| **Order Ref: ROW/3281961** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Hertfordshire County Council (Berkhamsted 61) Modification Order 2020. |
| * The Order is dated 4 August 2020 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath between Upper Ashlyns Road and Chesham Road as shown in the Order plan and described in the Order Schedule. |
| * There were two objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs. |
| **Summary of Decision: The Order is confirmed.** |
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Preliminary Matters

1. The Order route starts from Upper Ashlyns Road at point A and runs along the northern boundary of the School’s playing fields to point B, where it crosses the existing Berkhamsted Footpath No. 13 (FP13) which runs north to south through the playing fields. It then follows the entrance track to the sports pavilion, passing through a set of gates at point C, before joining Chesham Road at point D opposite Ashlyns School. The Order map is appended to the end of my decision.
2. After the Order was submitted to the Secretary of State for Environment, Food and Rural Affairs, Hertfordshire County Council (the Council) and the landowner, Berkhamsted Schools Group (the School), agreed an alternative route between B and D. This would divert the Order route around the outside of a maintenance compound resolving the School’s health and safety concerns. Subsequently, a diversion order was made which received no objections. On the agreement that the Council would confirm the diversion order if the modification order was confirmed, the objections were withdrawn. Nevertheless, I must consider the merits of the Order, and make a decision based on the written documents before me.

The Main Issues

1. The Order has been made under Section 53(3)(c)(i) and (iii) of the Wildlife and Countryside Act 1981 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 evidence submitted in support of the Order relies on the presumption of dedication arising from tests laid out in Section 31 of the Highways Act 1980 (the 1980 Act). This requires me to consider if the public have used the route as of right and without interruption, for a period of twenty years immediately prior to its status being brought into question. I must establish the date when the public’s right to use the Order route was brought into question and determine if use by the public occurred for a twenty year period prior to this that is sufficient to raise a presumption of dedication. If this is the case, I must then consider if there is sufficient evidence that there was no intention on the part of the landowner to dedicate a public footpath during this period.
3. The School has been a registered charity since 1962 and their predecessors were also charities. Under Section 117 of the Charities Act 2011, no land held by or in trust for a charity is to be conveyed, transferred, leased or otherwise disposed of without an order of the court or the Charity Commission, and this would include the granting of rights over the land. Similar provisions are contained within the Charities Acts of 1960 and 1993. Therefore, there is no landowner with the capacity to dedicate at common law. Statute removed this barrier to dedication, originally under the Rights of Way Act 1932 and now under the 1980 Act, by providing that if a way had been actually enjoyed by the public it was deemed to have been dedicated as a highway even if there was not a landowner with the capacity to dedicate at common law.
4. However, nothing in Section 31 of the 1980 Act affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.

Reasons

*Documentary Evidence*

1. Plans attached to indentures and conveyances between 1914 and 1922 show a track from Chesham Road along the northern boundary of two fields and then turning south to Kingshill Way. It is shown with a solid and a dashed line and provides access to a property. This track is on the line of the Order route between A and B but the section between B and D is on a different line to the north. FP13 is shown with double dashed lines. The 1914 indenture refers to rent payable on this track which is *‘hereby assured’*. There is nothing to indicate the status of the track, but the documents are suggestive of private access rights.
2. Various aerial photographs between 1970 and 2015 appear to show a wear line along the Order route. On the earlier photographs, this is faint or partially covered by trees between A and B but is clearer between B and D. All of the Order route is very clear on the 2000 and 2010 photographs but less so on the one from 2015. The worn lines indicate the existence and use of the Order route, but they cannot indicate if this use was public or private.
3. The Berkhamsted Citizens Association (BCA) Footpath Maps from 2007 and 2014 and the Official Guide of Berkhamsted 2010-11, all show the Order route and FP13 with a solid red line, which the key indicates are footpaths and bridleways. The 2014 map states that the footpaths shown are those indicated by signposts on the ground and shown on the definitive maps. It also states that there may be errors, that there may not be a right of way along tracks shown, and that they would be grateful to receive any corrections. BCA believe their maps reflect the patterns of walking through the decades and constant use of the routes shown, including the Order route. As these maps were produced locally, they indicate that the Order route was reputed to be a public right of way.

*Bringing into question*

1. For the public’s right to use the Order route to have been brought into question, some actions or events must have occurred that brought home to at least some of those using it, that their right to do so was being challenged. These must have been sufficiently overt to bring the challenge to the attention of the public using the route.
2. The Order route was obstructed by the removal of stiles and the erection of fencing in 2017 at point A which led to an application for a definitive map modification order (DMMO). However, the School put forward various other actions which they consider brought its use into question before 2017.
3. Notices erected in 2010 clearly stated that there were no public rights and no intention to dedicate any. Letters with similar wording were also sent to neighbouring properties by the School. It is claimed earlier letters were sent but copies are not available, and residents do not recall receiving any.
4. Earlier notices erected between the 1980s and 2010 are said to have included ‘*no public right of way’*. However, photographs are not available and this is disputed by path users who refer to notices saying, ‘*no dogs’* and *‘private**’*. Photographs are provided of older notices at two other playing field entrances which state *‘Berkhamsted School Private Grounds No Dogs Allowed’* and ‘*In the children’s interest please refrain from walking dogs on this site**’*. In my view, it is likely that these notices were also erected on the Order route prior to 2010 as the wording is similar to that recalled by path users.
5. Reference to private does not preclude the existence of public rights of way and many cross private land, including FP13. Although dogs are a usual accompaniment for walkers, I do not consider that *‘no dogs’* is sufficient to challenge people using a way. Furthermore, the request to not walk dogs on the site acknowledges that people are walking there.
6. A notice erected near point B on FP13 states *‘Berkhamsted School Private Fields. Keep to the Public Footpath along line of trees. Please keep dogs on a lead**’.* There is asecond noticesaying the same but with the addition of *‘centre’* before *‘line of trees.’* The wording of these notices does not, in my view, challenge the use of other routes and it has been suggested that these signs could not be seen from the Order route. Furthermore, the aerial photographs show several trees along the Order route which could lead members of the public to believe it is a public footpath based on the description in one of the notices.
7. The stile at point A was blocked off over the 2007 Christmas holidays with notices posted in advance to advise that it would be closed. Several people believe it was closed due to a tool shed burglary, although the School claims it was to prevent use by the public. This closure brought use of the Order route into question, although it would still have been possible to use it between B and D.
8. During the evenings and school holidays the gates at point C have also been locked. Groundsmen state that they were locked during the school holidays from the late 1990s and in the evenings from around 2012. However, most path users do not recall the gates being locked and those that do say this was not until 2011/12. One person’s son thinks they were closed on occasion around 2006 although she refers to them being locked around 2012. Reference is also made to another gate into the school playing fields from Upper Ashlyns Road, but not on the Order route, being permanently locked in 2011/12. Therefore, I consider that the most likely date for the locking of the gate at point C is around 2011/12. This brought use of the Order route into question, although it would still have been possible to use it between A and B. However, there is nothing in the user evidence before me to corroborate that this gate was locked in the late 1990s.
9. In my opinion, use of the Order route was first brought into question by the blocking of the stile at point A at Christmas 2007. Therefore, the relevant twenty year period for the purposes of statutory dedication is December 1987 to December 2007.

*Analysis of use*

1. To satisfy the requirements of Section 31, use must be by those who can be regarded as the public. For use to be as of right, it must be without force, secrecy, or permission. Use should be without interruption and to be effective, any interruption must be by the landowner, or someone acting on their behalf. The interruption should be with the intention of preventing use of the way by the public and not for other purposes such as car parking or building works. I must also be satisfied that there is sufficient use by the public to raise a presumption of dedication.
2. There is evidence of use from seventy one people between 1945 and 2017. Fifty six people used it during the relevant period, thirty six for twenty years or more. Use was primarily to reach Ashlyns School opposite the eastern end of the Order route, either as a pupil, adults with pupils or for activities at the school. It was also used for pleasure, to reach work, other schools, the town, or other local facilities and to visit family and friends. Use appears to have been open with many people saying they often saw or spoke to the groundsmen. Some people only used section A to B to reach FP13 and a smaller number only used section B to D from FP13, but most used the full length of the Order route.
3. A small number of people marked a line to the south of the pavilion just before reaching Chesham Road. Some stopped using the Order route before the pavilion was constructed which could have caused confusion, and the written description given by some indicates that they were using the Order route. In my experience discrepancies do sometimes occur between the route that people use and what they mark on a map. I do not consider this reduces the overall value of the user evidence.
4. The School does not dispute use of the Order route but claims it was only with permission. From 1963 until the mid-1980s passes were issued to pupils of Ashlyns School who lived to the west of the Order route with approximately twenty issued each year. When they were first in operation, a member of staff would check them at point C and after this anyone not believed to have permission was challenged. After the passes were discontinued, permission was more general by word of mouth to those living in the area.
5. Most path users do not recall being challenged or granted permission to use the Order route, despite many referring to conversations with groundsmen or other staff. Of those referring to challenges, none were told that the Order route was not a right of way. Challenges related to the use of a bicycle, keeping to the line of the footpath, or dogs. Only four people say that they or their children had permission to use the Order route when they were at Ashlyns School, but they also used it when they were not a student. Furthermore, thirty other path users or their children attended Ashlyns School and do not recall any permission to use it. I do not consider that such a limited number of challenges and permissions are sufficient to interrupt use or bring to the attention of path users that their use was being challenged.
6. Overall, I consider that there is sufficient evidence of use during the relevant period without permission, force, or stealth to demonstrate a presumption of dedication.

*Capacity to Dedicate*

1. The School’s charitable objective is *‘to promote the education (including social and physical training) of boys and girls.’* They claim the sports pitches are essential to meet their sporting objectives and the Order route interferes with their use and substantially affects their ability to continue to provide such a high level of sports. Potentially it could lead to the loss of at least one sports pitch, reduction of pitch size and fewer matches to avoid the loss of a cricket pitch in summer. It would impose a burden on the School with no commensurate benefit and therefore be incompatible with their obligation to protect their charitable assets. On a practical level if they could not impose restrictions it would be difficult to manage security, health and safety.
2. The sports pitches are visible on the aerial photographs, particularly those from 2010 and 2015. They show that there is at least five metres between them and the Order route, which is sufficient runoff for rugby pitches. Some of the pitches to the east of FP13 have the same or shorter runoffs which does not appear to be an issue. The aerial photographs show cricket squares at the southern end of pitches 6 and 7 and just northwest of the centre line of pitch 6. If it were necessary to shorten pitches and move the northern goals away from the Order route, it would not move the goal line onto either cricket square. There are no references to any issues or incidents between walkers and those participating in sports. Path users indicate that matches did not interfere with their use. Therefore, I do not consider that the Order route would impact on the use of the sports pitches.
3. Currently FP13 runs across the centre of the playing fields alongside a line of trees and is not fenced. Therefore, I do not consider that the Order route would impose any additional safeguarding, security or health and safety impacts on the School. I note the School’s concerns about health and safety through the maintenance compound where vehicles and machinery are manoeuvring and operating. Based on aerial photographs, use of the maintenance compound by vehicles and machinery appears to have intensified after 2010. As this intensification occurred after the relevant period ended it would not affect the capacity to dedicate during this time.
4. Based on the evidence before me, I do not consider the dedication of a footpath to be incompatible with the School’s charitable education objectives during the relevant period.

*Lack of intention to dedicate*

1. To demonstrate a lack of intention to dedicate, a landowner must take action to make the public aware that they have no intention of dedicating a public right of way. There are various ways of demonstrating this, but the most common ways are erecting notices denying public rights or granting permission, physical obstructions, or verbal challenges.
2. I have already concluded in paragraphs 13 to 15 that the notices erected prior to 2010 did not challenge use by the public. For the same reasons, I do not consider that they demonstrated a lack of intention to dedicate the Order route.
3. The passes issued to Ashlyns School students were not in use during the relevant period, therefore they do not indicate a lack of intention to dedicate. Most path users are not aware of a general permission to use the Order route or the earlier pass system, which only amounted to a limited number of passes each year. Furthermore, the School relied on word of mouth to indicate permission rather than taking their own actions to communicate it to the public.
4. There are references to challenges, but these appear to have been limited and ineffective. The Groundsman estimates that he challenged people on eight separate occasions over a thirty year period. The Head Groundsman says he challenged people on the rare occasions that he saw them if he was able to do so. The few people who were challenged were told to keep to the line of the footpath or informed that they could not use bicycles or have dogs on the site. None were told that the Order route was not a public footpath. I do not consider that such a limited number of challenges are sufficient to demonstrate a lack of intention to dedicate.
5. I have already concluded in paragraph 17 above that the user evidence supports the locking of the gates at point C from around 2011. There is nothing in the user evidence to corroborate the School’s claim that they were locked during the relevant period other than hearsay evidence to which I attach little weight.
6. I do not find sufficient evidence to demonstrate a lack of intention to dedicate a public footpath along the Order route during the relevant twenty year period.

*Conclusions on Section 31*

1. I conclude that there is sufficient evidence of use on foot by the public as of right and without interruption between December 1987 and December 2007. I also do not consider that there is sufficient evidence of challenge, permission, or other actions to demonstrate that the landowner had no intention of dedicating a public right of way.
2. I am satisfied that the evidence before me is sufficient to show that, on the balance of probabilities, a public footpath subsists over the Order route.

Conclusions

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

1. I confirm the Order.

Claire Tregembo

INSPECTOR

