

|  |
| --- |
| **Order Decision** |
| Inquiry held on 20 September 2022  Site visit held on 22 September 2022 |
| **by Paul Freer BA (Hons) LLM PhD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 9 February 2023** |

|  |
| --- |
| **Order Ref: ROW/3274679** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (1981 Act). It is known as the Dorset Council (Footpath from Footpath 17 at Higher Holt Farm to Bridleway 15 at Fuzzy Grounds, Melbury Osmond) Definitive Map & Statement Modification Order 2020. |
| * The Order is dated 7 August 2020. It proposes to modify the definitive map and statement for the area by adding a footpath from its junction with Footpath 17, south west of Higher Holt Farm, to the north east corner of Fuzzy Grounds at its junction with Bridleway 15, as shown on the Order map and described in the Order Schedule. |
| * There was one objection outstanding when Dorset Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| **Summary of Decision: The Order is not confirmed.** |

**Background and procedural matters**

1. The making of the Order follows a successful appeal under section 53(5) and paragraph 4(1) of Schedule 14 of the 1981 Act against the decision of Dorset Council not to make an order under section 53(2) of that Act (FPS/C1245/14A/12). Accordingly, the Order Making Authority adopted a neutral stance at the Inquiry.
2. The Order as drafted does contain errors, principally in relation to the omission of long-standing gates and the alignment of the route in relation to adjoining hedgerows. I was able to verify this at the site visit. However, I am satisfied that none of those minor errors affect the substance of the Order or my considerations of the main issues. Had I been minded to confirm the Order, it could have been modified to correct those errors without causing any injustice.

**Main Issue**

1. The main issue here is whether the evidence is sufficient to show that in the past the Order route has been used in such a way that a footpath can be presumed to have been established.
2. The Order was made under the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows a public right of way on foot subsists along the route described in the Order.
3. The case in support is based primarily on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route by the public as of right and without interruption, over the period of 20 years immediately prior to the right to use the route being brought into question, thereby raising a presumption that the route had been dedicated as a footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a footpath will be deemed to subsist.

Reasons

*Bringing into question*

1. In November 1978, a Public Inquiry was held as part of the Special Review process. One of the routes claimed was between Footpath 16 and Footpath 17 on a line that coincided with part of the claimed route (from Point C to Point C1). The claim did not succeed, partly because of the difficulty in ascertaining the route of the path due to it being overgrown and the presence of newly erected wire fencing. I am satisfied on the evidence before me that the Inquiry held in 1978 was a public process. It is also clear that the landowner, Ilchester Estates (the Estate) or its predecessor, objected to the inclusion of the route considered at that Inquiry.
2. The relevance of the 1978 Inquiry was considered at some length by the Inspector in the Schedule 14 appeal (FPS/C1245/14A/12). He concluded that the representation made on behalf of landowner constituted a declaration of there being no acknowledged public rights over a proportion of the current claimed route and could bring into question the status of the route. Nevertheless, referencing the judgments in *James Wild v Secretary of State for the Environment, Food and Rural Affairs and another* [2009] EWCA Civ 1406 and *Brian Paterson v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 394, he concluded that in relation to statutory declaration it does not matter if action was taken to challenge public used at some point in time earlier or later than the relevant period. I see no reason to take a different view.
3. At some point after that, in or around 1984, a hard surfaced track was laid between Points D and E of the Order route (and subsequently extended along it in stages). I heard detailed evidence at the Inquiry from the Objector’s witnesses about the erection of ‘Dorset’ gates and electric wire fencing across the Order route. It was explained that the gates/ fencing would have been in place for weeks at a time, in successive fields, and that the route would have been blocked in three or four places when livestock were in the adjoining fields.
4. I accept that, viewed objectively, the erection of the gates and fencing would have been a clear indication to a reasonable user of the landowner’s intention not to dedicate and would have brought the use of the way into question, had that occurred in the manner described by the Objector’s witnesses. However, I am not persuaded that was the case.
5. None of the UEFs submitted in 2011 refer to ‘Dorset’ type gates or electric fencing across the route. The UEFs either state there were no gates, or that gates were left open or unlocked. The UEFs were a genuine and contemporaneous response to questions asked on the form: they were not made in the knowledge of, or in any way influenced by, the Objector’s later evidence on the erection of gates or electric fencing leading up this Inquiry. Had ‘Dorset’ gates and/or electric fencing been in place to the extent indicated by the Objector’s witnesses then, even on the level of usage indicated in the UEFs, it seems more likely than not that those completing the UEFs would have encountered them and recorded that on their UEF.
6. There is also no reference to ‘Dorset’ type gates or electric fencing inn the Inspector’s decision on the Schedule 14 appeal (FPS/C1245/14A/12). Had the erection of ‘Dorset’ type gates or electric fencing been considered by the Objector to have brought the use of the way into question, or indicated no intention to dedicate, it is reasonable to have expected that point to have featured prominently in the case put to the Inspector at that time. But there is no indication in the Inspector’s reasoning that it was.
7. Furthermore, I have difficulty in reconciling the trouble, need for and cost of constructing the hard surface track with the subsequent blocking of that track by gates and electric fencing. Indeed, I take the applicant’s point that placing gates or fencing across the route would have entirely defeated the purpose of constructing the track in the first place. The fact that none of the applicant’s witnesses at the Inquiry have any recollection of the presence of ‘Dorset’ gates or fencing across the route is consistent with the UEFs and with there being no such gates or fencing in place during the relevant period, at least not in the manner and extent described by the Objector’s witnesses.
8. There is some evidence that gates and fencing were erected across the route before the construction of the hard surfaced track in 1984: the evidence to the Inquiry in 1978 does point to that. But the evidence before me relating to that Inquiry is scant and not detailed in terms of how and where the route may have been blocked. For these reasons, there is not sufficient evidence to show that the erection of gates or fencing across the route was sufficient to disabuse the public of their right to the use the route at any time and therefore bring the use of the Order route into question.
9. In 1995 and again in 1998, the landowner made deposits pursuant to section 31(6) of the 1980 Act. In neither case was the deposit followed by the lodging of a statutory declaration. The objector points out that the documents for the deposits were held on record at the County Archives and the Council Offices, and as such were made available to the public. The 1995 and 1998 deposits each state what public rights of way exist. They do not include the Order route. The Objector maintains that, when viewed objectively, the 1995 and 1998 deposits challenged the right of the public to use other routes (including the Order route) in terms of the requirements outlined by Lord Denning in *Fairey v Soton CC* [1956] 2 QB 439.
10. In that context, the Objector cites the comments of Lord Neuberger *in R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, where at paragraph 79 he says this:

*“….the whole tenor of section 31 , whether it is dealing with establishing presumed dedication (enjoyment “as of right”), or rebutting presumed dedication (“without interruption” and the provisions of subsections (3) to (6) ) is directed towards observable actions from which presumptions may be made or rebutted. It is true that communications with the local authority under sections 31(5) and (6) are not with members of the public, but a local authority would be obliged to retain the documents there referred to, and to permit members of the public to inspect them.”*

1. The Objector relies on that paragraph to claim that the documents that were made available at the County Archives and Council Offices fulfilled the requirements of Lord Neuberger as an effective communication of the landowner’s intention and thereby brought the use of the way into question.
2. However, the comments of Lord Neuberger must be viewed in the context of *Godmanchester* when read as a whole. At paragraph 37, Lord Hoffman made the following obiter comment:
3. “….. *I do not say that all acts which count as negativing an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts.”*
4. And at paragraph 53, Lord Hope of Graighead said this:

*“So too will the deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as this is backed up every ten years by a declaration that no additional way has been dedicated in the meantime: section 31(6).”*

1. I note that Lord Hoffman specifically refers to declarations: there is no mention of the possibility of a deposit under section 31(6) having the same effect. The opinion of Lord Hope of Graighead is more explicitly stated. The inference I draw is that a deposit on its own, without being backed up by a declaration, is not sufficient to demonstrate a lack of intention to dedicate. There is no judicial authority on this particular point. However, I see no reason why a different approach should apply in relation to bringing into question the right to use a way.
2. I therefore conclude that unlikely that a deposit by itself will be sufficient to bring the status of the route into question.
3. A further deposit was made by the landowner in 2007, but this time backed up a statutory declaration. It follows from the above that this constituted an event that did bring the status of the claimed route into question. The relevant period for the purposes of statutory declaration is therefore 1987 to 2007.

*Assessment of the evidence*

1. There is no statutory minimum level of user required to show use sufficient to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by ‘the public’. It was held in *Mann v. Brodie* [1885] 10 App.Cas. 378 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. It was also held in *Merstham Manor v Coulsdon and Purley District Council* [1937] 2 KB 77 that public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the public make use of the way.
2. In *R (Lewis) v Redcar and Cleveland Borough Council and anothe*r [2010] UKSC 11, Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepted the view of Lord Hoffman in *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 AC 335 that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land. The presumption of dedication then arises from acquiescence of the use.
3. The case in *Lewis* related to a village green. The applicant challenges the applicability of what he terms the “appearance” principle citing, amongst others, the views of Lord Scott of Foscote in *R(Beresford) v City of Sunderland* [2003] UKHL 60 in which he said this:

*It is a natural inclination to assume that these expressions, “claiming right thereto” (the 1832 Act), “as of right” (the 1932 Act and the 1980 Act) and “as of right” in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.*

1. It is, however, important to read that quote in context. In the preceding paragraph in *Beresford*, Lord Scott of Foscote had set the scene thus:

*As Lord Hoffmann noted in the Sunningwell case [2001] 1 AC 335 the concept of use as of right— nec vi, nec clam, nec precario— is derived from the law relating to the acquisition by prescription of private easements. Section 2 of the Prescription Act 1832 refers to rights of way or other easements “actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years …” The concept was imported into the law relating to the dedication of land as a public highway. Section 1(1) of the Highways Act 1932 provided that “where a way … upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way …” (see now section 31(1) of the Highways Act 1980 , which is in the same terms).*

1. On my reading, all Lord Scott of Foscote is doing in *Beresford* is highlighting the differences between the three Acts and cautioning against taking the similarities too far. He does not say that the principle to prescription has no relevance to rights of way cases: indeed, he says in terms that the concept of prescription was imported into the law relating to the dedication of land as a public highway and found its way into what is now Section 30(1) of the 1980 Act.
2. In summary, Section 31(1) of the 1980 Act says that where a way over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. To my mind, in order for a landowner to produce sufficient evidence that (s)he had no intention to dedicate the way, (s)he must first be aware that the public was asserting a right to use the way. That is directly the point being made in *Lewis* and which, given that the principle of prescription was embodied in the 1980 Act, must apply equally to rights of way cases. My conclusion in that respect is reinforced by the reference to the *Lewis* case at paragraph 5.20 of the PINS Consistency Guidelines*.*
3. The Order route is a remote rural area. The closet village, that of Melbury Osmond, has a population of some 200, is not on a main road and is not a tourist destination. The case law outlined above must be read together. Consequently, whilst I acknowledge the principles established in *Mann v. Brodie* that the number of users must be such as might reasonably be expected in a remote rural area and in *Merstham Manor* that the use may be intermittent, the use of the way must nonetheless have been sufficient to bring home to the landowner that the right is being asserted in terms set out in *Lewis*. I have approached my assessment of the evidence on that basis.
4. A total of 10 User Evidence Forms (UEF) were submitted with application, and nine witnesses gave evidence is support of the application at the Inquiry. There is also written evidence in the form of Proofs of Evidence and statements. The UEFs cover the entirety of the relevant period, and three (including the applicant) claim to have used the route throughout the relevant period. It is convenient to consider first the evidence of those who appeared at the Inquiry, set out below in the order in which they appeared.

*Witnesses who gave evidence at the Inquiry*

1. A total of ten witnesses at gave evidence on behalf of the applicant, including Mrs Janice Wardell of the Ramblers. She has no personal knowledge of the use of the Order route, and did not speak directly to that.
2. Turning first to the evidence of Mr Caesley (the applicant), he largely worked away from home between 1988 to 1998. Only in 1998 was he able to work from home, and then only more permanently from 2003. He confirmed the position set out in his UEF that he walked the route, on average, 30 times a year. Mr Caesley confirmed that he was never challenged during that period.
3. In his UEF, Mr John Forrest indicated that between 1996 and 2009 he used the route frequently, either walking for recreational purposes or as a regular running circuit. Initially this was on some 150 occasions per year, reducing to some 50 occasions per year later on. At the Inquiry, Mr Forrest acknowledged that he was acquainted with Mr Edward Green who, at that time, was employed by the landowner to manage work on the Estate. In that regard, Mr Forrest conceded that he knew Mr Green socially, and explained that he and his wife would sometimes walk the route with Mr Green.
4. I therefore cannot escape the conclusion that Mr Forrest’s use of the route was with the knowledge and permission of Mr Green, and therefore by extension the landowner. The use of the route by Mr Forrest must therefore be regarded as by right as opposed to as of right, and as such cannot be taken into account. This applies equally to those occasions when Mr Forrest was walking with the route with Mr Green, as well as those occasions when he was walking or running the route on his own.
5. The evidence of Mrs Geraldine Peach is that she walked the Order route from 1967 until 2008. At the Inquiry, she re-affirmed the statement in her UEF that she walked the route between 30 and 40 times per year (other than during the Foot and Mouth outbreak). However, during cross-examination, Mrs Peach could not recall whether the route had always been a hard surfaced track. She did recall that it was a hard surfaced track in 2008, but had no clear recollection of before that (including in 2004 when it was constructed). I found that answer surprising, especially for someone who claimed to have walked the route for up to 40 times per year (or nearly once a week) for many years prior to the hard surface being constructed. That casts doubt as to the accuracy of Mrs Peach’s recollection and, for that reason, I can only attach limited weight to that evidence.
6. In giving her evidence, Mrs Williams clarified that given in her UEF, in which she had stated that she walked the route for recreational purposes between 1980 and 2000. At the Inquiry, Mrs Williams was certain that she walked the route when looking after her daughter’s German Shepherd dog which, she recalled, likely commenced in or around 1995 and which ceased in 2002. Given that Mrs Williams clearly associates her use of the route with a specific event (walking the German Shepherd dog), I am inclined to give weight to her amended evidence. That does, however, mean that the evidence that she used the route before 1995, as stated in her UEF, cannot now be relied upon.
7. Mr Charles Swallow had not previously submitted a UEF. It is Mr Swallow’s evidence that he walked the route from the summer of 2005 until 2013, always in a clockwise direction and as part of one of four walks that undertook regularly. He claimed to have walked the route on some 30 or so occasions each year, sometimes in the evenings. I found Mr Swallow to be credible witness but I note that he did not walk the route at all prior to 2005, towards the very end of the relevant period, and therefore not during the early part of that period
8. The evidence given by Mrs Helen McNab at the Inquiry, and in her written Proof of Evidence, was not entirely consistent with that provided in her UEF. In the latter, Mrs McNab indicated that she walked the route for recreational purposes between 20 and 30 times a year between January 1998 and 2012. In her written evidence, this was considerably reduced to between 1998 and the summer of 2000. Furthermore, in giving evidence to the Inquiry, Mrs McNab explained that she never walked the entire Order route, only sections of it as part of three different walks that she would undertake. Irrespective of the inconsistencies in her evidence, which tends to reduce the weight that I can attach to it, the main fact that I take from Mrs McNab’s evidence is that she did not walk the route at all until January 1998, and therefore not during the early part of the relevant period.
9. In her evidence, Mrs Jane Dixon indicated that she walked the route with her husband every couple of weeks from 1978 until 2003, when she moved away from Melbury Osmond. I note that the use of the route by Mrs Dixon, which equated to roughly 20 times per year, occurred throughout a significant proportion of the relevant period, including the early part of that period. However, that level of use equates to only once every other week on average.
10. In giving evidence in her own right, Mrs Elizabeth Forrest indicated that from 1996 she walked the route twice a month on average. However, for the same reasons that apply to her husband, Mrs Forrest’s use of the route must be regarded as by right as opposed to as of right, and therefore cannot be taken into account.
11. Mr Peter Preston does not claim to have walked the Order route during the early part of the relevant period. In his UEF, Mr Preston states that he did not begin the use the route until 1994, and then on an average of 12 to 18 occasions per year. However, in giving his evidence to the Inquiry, it emerged that Mr Preston was away from home for five or six months of the year throughout the relevant period, and that he only used the route once a month when he was at home. That equates to six or seven occasions per year or, put another way, approximately one third of the number of occasions claimed in his UEF at its highest.

*The written evidence*

1. In her Proof of Evidence, Mrs Margery Marshall describes using the route as part of a circular walk from 1978 until 2009, when notices were put up. She records her surprise at that, having previously believed that the route was a public footpath. However, Mrs Marshall had not previously submitted a UEF and there is no indication in Mrs Marshall’s evidence as to how frequently she walked the route. Consequently, whilst her stated use of the route covers the entirety of the relevant period, I attach limited weight to that untested evidence.
2. The evidence of Mrs Suzanne Roriston is that she began walking the route in 1983 and only ceased doing so in 2009 when the path was “closed”. Her written evidence is consistent with her previously submitted UEF in that she only walked the route on one or two occasions each year.
3. The evidence of Mrs Jacky Fisher was submitted on behalf of her late husband: Mrs Fisher herself did not walk the route. She indicates that her husband walked the route “many times” between December 1993 and July 1994 when, having found permanent accommodation elsewhere, they move out of Melbury Osmond. Neither Mr Fisher nor Mrs Fisher had previously submitted a UEF. The actual use of the route by her husband was not quantified, and I take the Objector’s point that Mrs Fisher is unlikely to have been a position to know just how frequently (or infrequently) her husband did walk the route in practice. In any event, I am mindful that Mrs Fisher’s evidence only relates to a relatively short period of time in the middle of the relevant period.
4. Mr Alan Dodge describes using the route between 1992 and 1995, both for recreational walking and for physical fitness training away from the main roads. However, Mr Dodge provides no indication as to how often he used the route and his evidence only relates to a relatively short period of time in the middle of the relevant period. There are also some unanswered questions relating the evidence given by Mr Dodge. Firstly, Mr Dodge refers to the Order route as a “bridal (sic) path”. Secondly, the Objector disputes, with evidence, the distance of 4 miles stated by Mr Dodge for the circular route for his physical fitness training. Without being able to test his evidence, I cannot be certain that when he refers to the Order route Mr Dodge is not actually referring to a different circular route that includes Bridleway 15. For these, reasons I attach limited weight to this evidence.
5. The evidence of Ms Andrea Podmore-Hutton is short on detail. She states that she lived in Melbury Osmond between 1995 and 2009, and that she mostly walked the route in the evenings prior to starting work. But she does not say how frequently that was or if was throughout the period that she lived in the village. Accordingly, I attach limited weight to that evidence whilst also noting that it relates only to the latter half of the relevant period.
6. Of those who only submitted UEFs, there is evidence from several sources that Mrs Heather Saunders had permission from the Estate to use the route. In her UEF, Mrs Lilian Smith indicates that her husband worked for the Estate as veterinary surgeon. This is confirmed by the Objector, who goes on the indicate that Mr Smith had extensive permission to access the Estate in connection with a study of nesting birds. By association, this would equally apply to Mrs Smith. The use of the route by both Mrs Saunders and Mrs Smith must therefore be regarded as being by right rather than as of right, and therefore must be disregarded.
7. The UEF submitted by Mr David Dixon is entirely consistent with the oral evidence given to the Inquiry by his wife.

*Witnesses on behalf of the Objector*

1. A total of eight witnesses appeared on behalf of the Objector, included Mr Oliver Adderley, the current Rural Estate Manager for the Estate. He has no personal knowledge of the use of the Order route during the relevant period, and did not speak to that. Their evidence is set out below in the order in which they appeared at the Inquiry. In addition, two Statutory Declarations have been submitted, by Mr Edward Green and Mrs Sally Green respectively.
2. The Deer Keeper for the Estate, Mr Richard Squires, has been employed there since 1982. In giving his evidence, he confirmed that he would be out on the Estate most days from early morning until late evening, and on or near the Order route on a regular basis. He typically walks the Order route three or four times each week. Furthermore, it was part of his briefed role to look out for trespassers and people not on the public footpaths on the Estate. Only very occasionally would Mr Squires see people on sections A-D of the Order route and those people he did encounter were mostly between points D and E. It is apparent from Mr Squires’ evidence that there was some use of the Order route but, at least until 2009, Mr Squires himself categorized that level of use as being not appreciable.
3. Mr Neil Spearing worked for the Estate as a stockman between 1986 and 2004, again during the early part of the relevant period. As part of his duties, Mr Spearing would be in and around the fields adjoining the Order route most days during the spring, summer and autumn months, albeit less frequently during the winter months. His evidence is that he never saw a single person using the Order throughout the time that he was employed there but that he often did see people walking other paths on the Estate.
4. Mr Gerald Curtis worked as a dairyman for the Estate between 1971 and 2004, and therefore during the early part of the relevant period. He explained that he would be in and around the fields adjoining the Order route every day during the spring, summer and autumn months when the stock were out. He saw “plenty of people” walking elsewhere on the Estate, but never saw a single walker on the Order route throughout the whole time that he worked there.
5. Mr Stephen Mintern started working for the Estate in 1969, and became Farm Manager in the 1980s. Between 1984 and 2005, when there were cattle grazing in the fields adjoining the Order route, he or a member of his team would check on those cattle every day, including at weekends. He saw people on the Order route only very infrequently, and estimated by him at no more than four in total.
6. Mr Benjamin Jones was the Agent for Estate between 2004 and 2019. Throughout those fifteen years, Mr Jones lived at Higher Holt Farm, near the northern end of the Order route. He would walk parts of the Order route in the morning and evenings, and the whole of the route on a regular basis. He only very occasionally saw anyone on the Order route, and then mainly between points D and E. Those people were either those he knew had permission to use the route, or otherwise were challenged (including Mr Swallow).
7. Mr Christopher Martin is the occupier of a property that adjoins the Estate. In 1994, he was given permission by the landowner to use their land for walking and riding, which he did most days. Mr Martin admits that he did not walk the Order route when the adjoining fields were being used by livestock but it his evidence that he never witnessed the Order route being used by members of the public.
8. Mr Allaster Dallas, the current Farm Manager and who has been employed by the Estate since 2003, has often spotted local people and holidaymakers on the existing public footpaths on the Estate, but has never seen anybody walking the Order route.

*The Statutory Declarations*

1. In his Statutory Declaration, Mr Edward Green confirms that he was Agent for the Estate between 1977 and 2004. In 1996, Mr Green and his wife moved into Higher Holt Farmhouse. Footpath 17 runs past that property and Mr Green points out anyone using the route would have had to had to walk past his house. In addition, Mr Green frequently used the Order route himself to exercise horses and dogs. It is Mr Green’s evidence that the Order route was occasionally used by walkers who had strayed off the existing public footpaths that crossed the Estate but that, with exception of Mr Forrest, he does not recall seeing any of the residents of Melbury Osmond using it. The Statutory Declaration of Mrs Sally Green repeats and corroborates that of her husband.
2. The Statutory Declarations of Mr and Mrs Green are both properly made, being witnessed by a solicitor and including the form of words set out in the Schedule to the Statutory Declarations Act 1835. Accordingly, I afford these Statutory Declarations their full weight.

*Summary of evidence*

1. Viewed collectively, it is apparent from the evidence that the Order route was not well used during the first half of the relevant period. Although he first walked the Order route in 1984, Mr Caesley worked away from home until 1998. At most, he walked the route 30 times a year during this period, which is slightly more than once every other week. Mrs Peach claims to have walked the route 40 times per year, or nearly once a week, but because of her poor recollection of a significant matter of fact (when the hard surface track was constructed) I place little reliance on her evidence. Mr & Mrs Dixon walked the route regularly but relatively infrequently, amounting to less than every other week. Mrs Marshall did not give any indication as to how frequently she walked the Order route during this period, and Mrs Roriston walked it only once or twice per year. That level of use is not, in my opinion, sufficient to bring the use of the Order route to an alert landowner.
2. The evidence does show that the Order route was used more extensively during the second half of the relevant period, particularly so from about 1992 onwards. Mr Dodge did not begin the use the route until 1992, and Mr Preston not until 1994. Mr Swallow walked the route from the summer of 2005, and Mr Fisher walked the route on an unspecified number of occasions in the space of just over a year in 1993/4. It emerged under cross-examination that Mrs Williams did not commence until using the route to 1995, and then only for a very short period. Mrs McNab walked the route between 20 and 30 times from January 1998. Mr Caesley worked from home on occasion from 1998 and was able to work from home more permanently from 2003.
3. The level of use during the second half of the relevant is cleary more extensive, particularly towards the end of that period. However, on the evidence before me, I am not persuaded that even this level of use was in practice sufficient to alert the landowner to the use of the Order route. The consistent evidence of the Objector’s witnesses is that they rarely, if ever, saw people using the Order route. That evidence was not seriously challenged by the applicant. It is apparent that the Objector’s witnesses either spent a considerable proportion of their working days in the fields that adjoined the Order route or, in the case of Mr Martin, were themselves frequent users of it. They were therefore in a good position to observe any use of the order route. The employees of the Estate were instructed to look out for trespassers and to challenge any that they saw. In that respect, the Estate must be considered to be a reasonably alert landowner.
4. It is significant, in my view, that none of the Objector’s witnesses saw any of those claiming to have walked the route actually on it (again with the exception of Mr Forrest, who used the route by right). These include Mr Squires, Mr Mintern, Mr Jones and Mr & Mrs Green, all of whom freely admit to occasionally seeing some other walkers on the Order route. It is also significant that those same witnesses saw people using the existing the public footpaths, including some of those of who gave evidence to the Inquiry claiming to have used the Order route. If those witnesses were aware of people walking the public footpaths, and even recognised some of them, it is reasonable to conclude that they would have been equally aware (if not more so, given its proximity to where they were working) of people using the Order route. But they were not.
5. I do not suggest that the applicant and other witnesses never used the Order route. Clearly they did. However, the evidence indicates that the level of use was not sufficient that bring that use to the attention of a reasonable landowner, even taking into account the remote rural location and that the use may to some extent have been intermittent. This was particularly the case during the first half of the relevant period. Consequently, on the balance of probability, I conclude that the level of use was not sufficient to bring to the attention of the landowner that the way was being used as if it were a public right of way.

*Intentions of the landowner*

1. The Objector accepts that, in order to manifest no intention to dedicate, there must be communication of that fact. I have already found that, in the absence of a statutory declaration, the deposits in 1995 and 1998 were insufficient to bring the use of the way into question. Similarly, in the absence of a statutory declaration, those deposits would not constitute a lack of intention to dedicate any additional public rights of way.
2. The erection of ‘Dorset’ gates or electric fencing across the Order route would have been a clear communication that the landowner did not intend to dedicate the way, had it occurred in the manner described by the Objector’s witnesses. However, on the balance of probability, I am not persuaded that the erection of ‘Dorset’ gates and/or electric fencing across the Order route did take place in the manner or to the extent described. In any event, it is clear from the evidence of the applicant’s witnesses that they did not perceive the erection of the gates/electric fencing, in whatever form that took, to communicate any lack of intention on the part of the landowner.
3. There was much discussion at the Inquiry regarding the laminated cards issued to all Estate staff explaining what to do in the event they encountered trespassers. This practice was apparently initiated by Mr Green, and in turn continued and updated by Mr Jones. The salient point, however, is that none of the applicant’s witnesses were previously aware of this laminated card and there is no reference to it in the written evidence submitted on behalf of the applicant or in the UEFs. It follows that, as a means of communicating no intention to dedicate the way to the public, the laminated card was singularly ineffective.
4. At some point prior to May 2009, signs were erected at points D and E (and possibly also point C) of the Order route indicating that the land was private property. By this time, it had become apparent to the Estate that people taking a short cut between those two points. The location of the signs was in direct response to that and a clear attempt to prevent walkers from straying off Footpath 15 and Bridleway 16 respectively. The erection of these signs was also a clear communication of the fact that the landowner had no intention to dedicate the way but, by that time, the use of the Order route had already been called into question by the statutory deposit in 2007.
5. The assertion that the Order route was a ‘traditional’ route used by the village made to the Parish Council in May 2009 was immediately countered by the Estate. That served as a further communication to the public that the landowner had no intention to dedicate the way but, again, post-dates the statutory declaration in 2007.
6. I therefore conclude that there was not sufficient evidence that there was no intention on the part of the relevant landowner(s) during the relevant period to dedicate the way for use by the public.

*Interruptions*

1. The Courts have held that ‘interruption’ means of ‘interruption of fact’. I accept that the erection of ‘Dorset’ gates or electric fencing across the Order route would have constituted an interruption in the use of the route, even though the stated intention was to control livestock rather than to deliberately disabuse the pubic of their right to the use the route. However, as previously indicated, I am not persuaded on the evidence before me that the erection of Dorset’ gates and/or electric fencing across the Order took place in the manner described by the Objector’s witnesses. The corollary is that I am not convinced that, in practice, the erection of ‘Dorset’ gates or electric fencing did constitute an interruption of the route as a matter of fact.
2. The Objector also considers that the closure of footpaths due to the outbreak of Foot and Mouth Disease in 2001 amounted to a non de-minimis interruption in the use of the Order route. In that context, the Objector cites the case *of R (on the application of Roxlena Ltd) v Cumbria* CC [2017] EWHC 2651 (Admin) in which the court found that a non de-minimis interruption caused by measures taken against Foot and Mouth Disease could amount to an interruption. The Court also indicated that whether or not people had been deterred from using the Order route because of Foot and Mouth Disease was a matter to be determined at Inquiry. That judgment was subsequently considered in the Court of Appeal ([2019] EWCA Civ 1639), although the higher court did not interfere with the finding of the lower court in relation to this particular point.
3. In this case, those witnesses who had used the route immediately before the closure of all footpaths pursuant to the Foot and Mouth Disease Order 1983 were universally candid in stating that they had respected the regulations and had not used the Order route during that period. In that respect, their decision to cease using the Order purely because of the restrictions imposed by the outbreak of Foot and Mouth Disease could be perceived as an interruption in the terms set out in *Roxlena*.
4. However, Rights of Way Section Advice Note 15: Breaks in User Caused by Foot and Mouth Disease, states that there is no direct analogy between the requisition of land during the war and temporary closures during the foot and mouth epidemic. Against that background, Advice Note 15 does not consider that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an “interruption” under section 31(1) of the 1980 Act. Advice Note 15 remains extant guidance and, whilst it has not been updated in the light of the judgment in *Roxlena*, the comments made by Kerr J in the High Court were obiter. Consequently, I see reason to depart from the guidance in Advice Note 15 this case.

*Documentary evidence*

1. The applicant does not rely on any documentary evidence in support of his case. The Order Making Authority researched the documentary evidence as part of its investigation of the original application, and concluded that it was insufficient to raise a reasonable allegation that the claimed footpath subsists. I have been provided with copies of that documentary evidence and see no reason to take a different view.

*Common law*

1. For the reasons set out above, the level of use of the path is not sufficient to show that a deemed dedication at common law can be inferred.

**Conclusion**

1. In allowing the Schedule 14 appeal (FPS/C1245/14A/12), the Inspector was satisfied that the evidence before him was sufficient to meet the lower test that a right of way could be reasonably alleged. In determining this appeal, I am required to apply the higher test of balance of probability. In applying that test to the evidence before me, I conclude that a footpath has not been established along this route. Accordingly, I conclude that the Order should not be confirmed.

Formal Decision

1. I do not confirm the Order.

Paul Freer

INSPECTOR

**APPEARANCES**

**For the Order Making Authority**

Mr Philip Crowther Senior Solicitor

**In Support of The Order**

Mr Roger Caesley Applicant

Mrs Janice Wardell The Ramblers’

Mr John Forrest Local resident

Mrs Geraldine Peach Local resident

Mrs Muriel Williams Local resident

Mr Charles Swallow Local resident

Mrs Helen McNab Local resident

Mrs Jane Dixon Local resident

Mrs Elizabeth Forrest Local resident

Mr Peter Preston Local resident

**Opposing the Order**

Mrs Karen Jones Of Counsel

She called:

Mr Richard Squires Ilchester Estates

Mr Neil Spearing Ilchester Estates

Mr Gerald Curtis Ilchester Estates

Mr Stephen Mintern Ilchester Estates

Mr Benjamin Jones Ilchester Estates

Mr Christopher Martin Local resident

Mr Allaster Dallas Ilchester Estates

Mr Oliver Adderley Ilchester Estates

**Documents submitted at the Inquiry**

1. Opening Statement of Applicant

2. Copies of Witness Statements

3. Copy of Statutory Declaration of Mrs Sally Green

4. Melbury Osmond Parish Council - Chairman’s Report 2020

5. Copy of User Evidence Form submitted by Mr David Dixon

6. Photocopies of laminated cards issued to employees of Ilchester Estates

7. Copies of additional authorities referred to in applicant’s closing submission

8. Note concerning authorities to be cited by applicant in closing submissions

9. Minutes from the meetings of Melbury Osmond Parish Council on 11 March 2019 and 14 September 2020

10. Correspondence between Mr Forrest, Footpath Liaison Oficer, and Mr Jones, Country Agent for Ilchester Estates.

11. Correspondence between Mr Forrest, Footpath Liaison Officer, and Councillor Frost.

12. Appeal Decision dated 25 July 2018 in relation to the Wiltshire Council Codford Path No.15 Rights of Way Modification Order 2016 (ROW/3191249)

13. Extract from Rights of Way: Guide to Law and Practice, 4th Edition, Riddall and Trevelyan, relating to Reviews under the Countryside Act 1968.

**Documents submitted electronically after the Inquiry**

1. Closing submissions on behalf of the Objector.
2. Closing submissions by the Applicant.

