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| **Order Decision** |
| Inquiry held on 31 January 2023  Site visit undertaken on 30 January 2023 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 02 May 2023** |

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| **Order Ref:** **ROW/3276000** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’) and is known as the Derbyshire County Council (Footpath from Heanor Road to Denby Public Footpath No. 60 – Parish of Smalley) Modification Order 2011. |
| * The Order was made by Derbyshire County Council (‘the Council’) on 21 April 2011 and proposes to add a footpath (‘the claimed route’) to the definitive map and statement. |
| * There were nine objections outstanding at the commencement of the inquiry. |
| **Summary of Decision:** **The Order is confirmed subject to modifications set out below in the Formal Decision.** |
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Procedural Matters

1. All of the points referred to below correspond to those delineated on the Order Map. The claimed route corresponds with an access road serving Kidsley Park Farm (‘KPF’) and Robey Fields Farm (‘RFF’).
2. The decision to hold a public inquiry was taken in light of the conflicting written evidence submitted by users of the route and some of the objectors. However, none of those present at the inquiry had personal knowledge of the claimed route during the relevant period outlined below. Whilst this may be due to the lengthy period between the initial application and the inquiry, it leads to the unsatisfactory situation of the conflicting evidence being determined mainly from the written submissions.
3. An application for an award of costs was made at the inquiry and this will be the subject of a separate decision.

**Main Issues**

1. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, for me to confirm the Order, I must be satisfied that the evidence shows on the balance of probabilities that a public right of way subsists.
2. Given that the land crossed by the claimed route is stated to have been settled land during the period covered by the user evidence, it is likely that there was no person with the capacity to dedicate a public footpath under common law.
3. Dedication can nonetheless arise in these circumstances under Section 31 of the Highways Act 1980 (‘the 1980 Act’). This requires consideration of whether there has been use of a way by the public, as of right (without force, secrecy or permission) and without interruption, for a period of 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 this period to dedicate a public right of way.

**Reasons**

***When the status of the claimed route was brought into question***

1. In considering this issue I have had regard to the House of Lords judgment in the case of *Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs [2007] UKHL 28*. The comments of Lord Hoffman at paragraph 37 of the judgment are supportive of there being symmetry between acts that are sufficient to bring the status of the way into question and those that will demonstrate a lack of intention to dedicate a public right of way.
2. Reliance is placed by the Council on the submission of documents in April 2000, in accordance with Section 31(6) of the 1980 Act, in relation to land crossed by the claimed route. This was accepted to be the case by the representative of the landowner at the inquiry (Mr McKenzie).
3. Section 31(6) sets out the procedure a landowner can undertake to demonstrate that they have no intention of dedicating any additional ways across their land. This involves depositing with the appropriate local authority a statement and plan showing any public rights of way acknowledged to exist followed by a statutory declaration within the required timeframe to declare that no additional ways have been dedicated over the land in question.
4. I accept from the details provided that this action served to bring the status of the claimed route into question. It is also apparent that following the submission of the documents in 2000 other measures were taken to challenge use of the route. The relevant twenty-year period to be considered (‘the relevant period’) will therefore be 1980-2000.

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

1. Thirteen people submitted a user-evidence form (‘UEF’) in support of use of the claimed route. These forms provide evidence of use by at least nine people during each year of the relevant period. A statement has also been submitted by the applicant for the Order which provides further information in relation to his use of the route. The UEFs comprise of only one page of questions and do not generally contain a map showing the route used. There is also no clarification regarding the frequency of the use during the relevant period. Nonetheless, other information contained in the formspoints to use of the claimed route which is a well-defined lane.
2. There are some limitations with the UEFs, but it is generally not disputed that people used the claimed route albeit that there was a problem with dog fouling. A couple of the objectors who lived in close proximity to the route have acknowledged that it was well used. It is stated that the applicant and his wife were seen using the route at least twice a day. Additionally, a consultation response from Smalley Parish Council states that members familiar with the area reported that the route had been used for a long time.
3. Members of the Dakin family have occupied KPF since well before the start of the relevant period. Reference is made to the re-alignment of the lane in 1973 and Mrs Dakin says this was done by the owner of RFF to provide a more convenient access to the farm. The former alignment of this section of the route is evident on the 1972 aerial photograph. Whilst this change occurred prior to the start of the relevant period, it is asserted that it casts doubt on the evidence of the few people who claim that they used the route prior to 1973. However, it is evident that there was previously a parallel route through the farmyard, and I consider it likely that any person walking between points A-B-C would have previously followed the original route through the farmyard.
4. The evidence points to people using the claimed route throughout the relevant period and this use was sufficient to alert some local people that the route was being used by the public. The issues to be resolved from the conflicting evidence is the extent to which permission was given to people to use the claimed route and whether measures were implemented that served to challenge use of the route.
5. A number of forms have been submitted in support of the objection by the landowner. One of the questions in the forms asks whether permission was granted to them to use the claimed route. It is generally not possible to clarify particular details from these forms. However, it can be gleaned that the vast majority of these people used the route because they lived at one of the two farms, were visiting the farms or for work purposes. It appears that only a relatively small number of people had obtained permission to use the route for other reasons during the relevant period.
6. There are two questions within the UEFs which may indicate that permission was granted, namely Questions 5 and 6. These ask whether the person worked for an owner or occupier and whether they had received any instructions from the owner in relation to the route. Only one of the responses points to permission being granted by Mr Dakin. Whilst it cannot be determined from the form when this occurred, there is clearly the potential for it to have arisen during the relevant period.
7. I accept that there is some evidence of permission being granted for people to use the claimed route. However, I distinguish these people from those who were using the route for access or work purposes. There is nonetheless evidence of people using the claimed route without seeking or being granted permission to use it. Given the absence of anything to show that this use was undertaken in secret or by force, there is evidence of use by the public during the relevant period that was as of right. I find on balance that this evidence is sufficient to raise a presumption of the dedication of a public footpath.

***Whether any landowner demonstrated a lack of intention to dedicate a public footpath***

1. The issue to be determined is whether any action was taken during the relevant period that served to demonstrate a lack of intention to dedicate a public footpath. It is therefore appropriate to discount evidence in relation to challenges being issued and signage erected that occurred after the status of the route was brought into question. Further, any action needs to be communicated to users of the route. A clause in a tenancy agreement to not allow the creation of new rights of way would not be sufficient to inform the public that there was a lack of intention to dedicate a public right of way. This is distinct froma tenant taking action in line with such a clause.
2. Members of the Dakin family have referred to the wording of signs that have been erected since at least the early 1970s. The common theme is that they refer to the claimed route as a private road. In particular, a photograph has been provided of a sign containing the wording ‘*Private Road Authorised Access Only’* whichis stated to have been in place during the relevant period.
3. In terms of the wording of the first part of the sign, it is often the case that a private road and public right of way co-exist over the same route. The second part of the sign is indicative of access being for authorised persons only, but this could have been in relation to the use of a private road. For instance, it is not made clear that access on foot was prohibited. This is in contrast to a later sign erected after the end of the relevant period, which stated that the route was not a public footpath.
4. Whilst some of the users mention the existence of gates across or adjacent to the claimed route, there is no indication that these prevented them from using the route. Members of the Dakin family refer to the presence of a gate at point A, and reference is made to it being shut or locked (there were a pair of field gates set back from this point when I visited the site). The evidence of Mrs Dakin points more towards the gate mainly being unlocked given that the route provided access to the two farms. Statements from two other parties connected to the landowner refer to finding the gate closed when visiting the site.
5. It is evident that gates in the boundaries of the lane near to KPF were opened across the lane at times mainly to move livestock between the fields and the farmyard. Again, there is conflicting evidence regarding whether these gates were on occasions locked when cattle were being moved. It cannot be clarified when a photograph showing these gates locked and across the route was taken. However, Mr McKenzie assumed that it post-dated the application of 2001 to add the route to the definitive map.
6. It is apparent that the gates near to the farm were closed across the lane for agricultural purposes. In contrast, I consider it probable that the gate towards point A was closed for security purposes. I do not rule out that the gate near point A has been locked on occasions. There may have been less reason to lock the other gates to facilitate the movement of cattle. However, given that the lane serves as the means of access to both farms, it is less likely that the locking of gates would have been a frequent occurrence, particularlyduring the daytime. This may explain why none of the users’ state that they encountered locked gates and other visitors only acknowledge the presence of closed gates.
7. The issue to be resolved is whether the wording of the sign and/or locked gates served to demonstrate a lack of intention to dedicate a public footpath during the relevant period. I accept that the relevant sign is likely to have been in place during this period. However, I have outlined my reservations regarding the wording of the sign and on balance I do find it was sufficient to communicate to the public that there was no intention to dedicate a footpath. The issue of the gates is more difficult to resolve from the written submissions. Nonetheless, from looking at the evidence as a whole, I am not satisfied on balance it can be determined that gates were locked to such an extent to bring it home to the public that there was no intention to dedicate a footpath.
8. It follows from the above that I do not find on balance that action was taken during the relevant period that was sufficient to demonstrate a lack of intention to dedicate a public footpath.

***Limitations***

1. I explored with the parties whether, if confirmed, a limitation should be included in the Order in relation to the gates that have been opened across the route for the movement of livestock. Consideration should also be given to the recording of any structures near to point A.
2. Although I cannot be certain whether the gates were originally in place when the footpath was dedicated, there appears to have been longstanding structures in place towards point A and near to KPF. On balance, I consider it appropriate to record these limitations in relation to the claimed route. This would permit the gates to be closed but not locked across the route. Given the width of the lane, I am uncertain whether there was previously one or two gates near to point A, and this is reflected in the wording of the limitation.

**Other Matters**

1. Whilst reference has been made to issues such as the availability of public rights of way nearby, potential disturbance to wildlife, the impact on local residents and problems with dog fouling, these matters are not relevant to my decision which is concerned with determining whether a public footpath has been shown to subsist.
2. Some of the objectors have also referred to matters which relate to Article 8 of the European Convention of Human Rights (the right to respect for private and family life). However, the confirmation of the Order would be lawful as it is not possible to interpret the 1981 Act in such a way that it is compatible with the Convention rights.

**Conclusion**

1. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude on the balance of probabilities that a public footpath subsists, and the Order should be confirmed with modifications.

**Formal Decision**

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

* Insert within the column headed ‘*Limitations and Conditio*ns’ in Part II of the Order Schedule the following text: ‘*A gate or pair of gates at or near to point X on the Order Map*’.
* Insert ‘*X*’ on the Order Map at around the point where there are presently a pair of gates on the route.
* Insert within the column headed ‘*Limitations and Conditio*ns’ in Part II of the Order Schedule the following text: ‘*The right to temporarily close gates across the footpath in the locality of Kidsley Park Farm in order to facilitate with the movement of livestock to or from the farm’*.

Mark Yates

**Inspector**

**APPEARANCES**

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| ORDER MAP SHOWING POINT X |  |