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| **Order Decision** |
| Inquiry Held on 17 & 18 May 2023Site visit made on 18 May 2023 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 July 2023** |

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| **Order Ref: ROW/3286046** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cambridgeshire County Council (Public Footpath No.8, Harlton) Definitive Map Modification Order 2021.
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| * The Order is dated 14 July 2021 and proposes to modify the Definitive Map and Statement for the area by the addition of a footpath between Public Footpath No.1, Harlton, and St Mary’s Church as shown in the Order plan and described in the Order Schedule.
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| * There was one objection outstanding at the commencement of the inquiry.
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| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. I carried out an unaccompanied site visit prior to the public inquiry and a further visit following it, when I was accompanied by parties supporting and opposing the Order.
2. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.

**The Main Issues**

1. Cambridgeshire County Council made the Order under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates.
2. The majority of the evidence in support of this case comprises User Evidence Forms (UEFs). As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty 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. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. If statutory dedication is not applicable I shall consider whether dedication has been shown at common law. Such a dedication requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

Reasons

***Background***

1. The Order route leaves Public Footpath No.1, Harlton before crossing a field (“the field”) and meeting a fence at the edge of the graveyard, which formerly contained a stile. User, documentary and landowner evidence has been submitted in respect of the Order.

***Documentary evidence***

1. Inclosure and Finance Act records do not provide any evidence of the existence of public rights over the Order route.
2. Ordnance Survey mapping over the period 1885-1958 shows the physical existence of a path on the ground on the approximate alignment of the Order route. Ordnance Survey maps carried a disclaimer from 1888 to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. They generally provide a reliable indication of particular physical features when the land was surveyed. They do not set out to record the status of any paths or tracks shown. Thus, the maps do not shed light on whether the path shown was considered to be available for public or private use.
3. Aerial photography from 1997 to 2007 does not show a worn path to exist along the Order route.
4. The Council and the objector agree that the documentary evidence does not demonstrate the existence of a public right of way along the Order route, and I see no reason to take an alternative view.

***User evidence***

*Statutory Dedication: Bringing into question*

1. A Higher Level Stewardship (“HLS”) permissive access agreement commenced in respect of the Order route on 1 August 2007. Landowners received a consideration for providing environmental improvements and increased public access under the scheme, which was administered by Natural England. The agreement prescriptions for permissive access set out that all site maps and waymarks should be installed within two weeks of receipt, in accordance with Natural England guidelines and in agreed locations. The site map was also to be sent to the parish council by the landowner.
2. Information from Natural England in respect of the agreement states that consultation on it was carried out with a limited number of bodies, and that it is not known whether the landowner was provided with the requisite signs. An inspection in 2009 found the permissive access to be in place, but that the signs were not present. A request was made for these to be provided, however whether they were is not known. The agreement then closed on 31 July 2012, following which it was inspected and the permissive access marked as compliant.
3. Nine people provided evidence of use of the Order route. None of those people who used the route over the period 2007-2012 recalled the presence of the HLS notice at the site, whether in written or oral evidence.
4. The making of a permissive path agreement in respect of a way may potentially form a bringing into question of the public’s right to use it because it is intended to allow for permissive use, which would usually be inconsistent with use by the public as of right. Nevertheless, whether or not a bringing into question has actually occurred is to be determined on the facts of any particular case. An action must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway if it is to form a bringing into question.
5. In this case there is no recollection of the presence of a permissive path notice on the Order route amongst the user evidence, and no other evidence that such a notice was ever erected. Furthermore, consultations on the agreement were too limited to have brought it to the users’ attention, and the evidence does not indicate that notification of the agreement to the Council in 2010 was publicised to users, or that the access agreement was seen by users on the countryside walks website. There is consequently no evidential basis to determine that users considered that the HLS agreement challenged their right to use the way. Thus, the agreement did not form a bringing into question of that right.
6. Turning to other matters which may have brought the right into question, the user and landowner evidence indicates that a stile at point C was removed by one of the landowners in January 2012, leaving a barbed wire fence present there. This act made one of the witnesses aware that the owner had challenged their right, as they stopped using it at that point. Another witness commented that they found the stile’s removal a “hostile act”. Thus, the removal of the stile was sufficient to make it likely that some of the users were made aware that the owner had challenged their right to use the way as a highway. It consequently formed a date when that right was brought into question. Accordingly, the statutory period to be considered is 1992-2012 (“the relevant period”).

*Evidence of use*

1. The user evidence shows use of the Order route by five people on foot over the whole of the relevant period. One of these people carried out unpaid work for Peter Banks, one of the owners of the field from the late 1970s until 2003, and was good friends with him from the late 1970s. Their evidence consequently attracts only minimal weight because their use is unlikely to have been made as the public due to their long-standing association with the landowner and his family. The frequency of use of the remaining four people ranged from occasionally to monthly.
2. Four people additionally used the Order route for part of the relevant period. This use comprised between nineteen and nine years of the period. Their frequency of use ranged from bi-monthly to monthly. None of the shorter periods of use may be taken together to form a single continuous statutory period of use, as their use spanned the latter part of the relevant period in each case.
3. Reasons for use included dog walking and leisure.
4. The user evidence consequently shows a moderate intensity of use over the relevant period. In view of the route’s location within a small village, where such an intensity might be expected, this use demonstrates actual enjoyment by the public.
5. Further witnesses provided evidence but did not complete a UEF. This includes four letters which record memories or use of the churchyard stile and a route across the field from the 1940s or from childhood. However, relevant matters such as the route taken, frequency of use and whether that use was public are unclear due to the limited information provided in the letters. They consequently attract only minimal weight in this determination, when considering either statutory or common law dedication.

*Whether use was without force, secrecy or permission*

1. Three photographs were submitted shortly before the inquiry and show the presence of a post and wire fence across the centre of the field. The objector submits that two of these were taken at some point over the period 1992-1999, and that the other one was taken over the period 2000-2002.
2. An aerial photograph of 1997 shows the field to be separated into two distinct areas. Poached ground is visible at one end of the field which, it is credibly submitted, resulted from the passage of stock through a narrow area next to the fence as they were herded between a barn and land to the north of the field. An aerial photograph of 2000 shows vegetation in a line corresponding to the fence’s location, and a worn path of poached ground alongside the fence. The separate areas of the field are no longer discernible in aerial photographs of 2003 and 2005, although some poaching is still visible, so that it is not possible to ascertain whether the fence was present at these points. By the 2007 aerial photograph the farmyard boundary had apparently been extended to the east over the area which was fenced, and the fence and the pattern of poaching adjacent to it are not visible.
3. The fence would have bisected the Order route. It was erected in order to provide a place for horseriding away from cattle in the field. Whilst witnesses do not generally recall the fence, this may be attributable to the relatively intermittent frequency of use of some people and the passage of time between the date of the fence’s removal and the collection of user evidence. The lack of recollection of the fence may additionally suggest that the fence was present for a shorter period than the full suggested period 1991-2004.
4. Former co-owner of the field Alan Banks stated that Thomas Banks (who rented the field at that point) divided the field using fencing in approximately 2001, leaving a staggered gap between fences to allow the public to walk through. Alan Banks’ later evidence states, however, that he cannot specifically remember the fence and suggests that “a stile would have been put in place in any fence”. The evidence of the current owner is that the fence contained no stiles. In view of the contradictory evidence on the matter it is therefore necessary to establish whether any means of passage was present across or through the fence.
5. One witness recalled, in their written evidence, having found the stile into the churchyard “blocked up and with no obvious access”, but that they found a way through, whilst using the Order route with their children on a single occasion over the period 1999-2005. The date is clearly recalled because they were taking their children to play at nearby swings, allowing for a reasonably accurate estimate of the period over which the swings would have been a destination. It consequently appears most likely that the obstacle encountered was contemporaneous with the period over which the fence was present.
6. The same witness stated in oral evidence, having only recently seen the photographs of the fence, that they recalled that the blockage was at the churchyard and they did not recall the fence. However, they considered that it was possible that the blockage was the fence, but they could not be certain. If that had been the case, they stated that they would probably have climbed over the fence and lifted their children over it. As no other evidence supports the blocking or removal of the churchyard fence stile as early as 1999-2005, it is most likely that the blockage that the witness recalls was the fence across the field.
7. The suggested staggered gap or stile within the fence is not visible on any of the photographs, or recalled within the user evidence. Furthermore, the evidence of Alan Banks was not tested and therefore the identified inconsistency, as set out above, could not be resolved. The current landowner generally lived in the village and sometimes worked on the family farm over the period 1991-2004, so that they would reasonably have some recollection of the land use at the time, and their evidence in respect of the fence was tested at the inquiry. In view of these considerations and its consistency with other evidence, it attracts greater weight.
8. The Council accepts the current owner’s evidence that the fence was present between approximately 1991 and 2004 and, in light of the cogency of most of the evidence on the fence, I consider that it was present across the Order route, without any means of crossing it. The photographic evidence supports its presence over at least the period 1997-2000.
9. Whilst one of the witnesses over the full relevant period often walked the route before 7.30am, when it is submitted that the landowner would have been less likely to see them, that person’s use also occurred at other times of the day. Moreover, their evidence sets out that, prior to the date of bringing into question, they “always had a very good relationship with the landowners of the field…occasionally I would see the landowners when I was using the route and we would chat”. This indicates that landowners were aware of that person’s use, which was consequently not made in secrecy. The evidence indicates that other public use of the Order route was made without secrecy.
10. All witnesses state that they were not given permission to use the route. One witness states that they were told in approximately 2003 that “it was ok to use the route” by “village elders”, whose names are provided. One of these was Alan Banks, who appears to have co-owned the field as part of a settlement trust with a number of others at some point. The witness is uncertain who made the statement and hence it may not have been Mr Banks. An inference may, however, be drawn from the 2007 HLS agreement that subsequent use of the route was made with permission and consequently failed to be as of right.
11. In any event, the weight of evidence supports the existence of the fence across the route for a number of years during the relevant period. It has not been demonstrated that any means of passage across or through the fence was available. Users of the Order route would consequently have had to climb over the fence whilst it was present, so that such use would not have been without force. Use consequently failed to be as of right for a significant proportion of the relevant period.
12. The Modification Order application was made in April 2012, only three months after the churchyard stile was blocked, and a deposit and declaration under section 31(6) of the 1980 Act indicating ways admitted to be highways over land including the field were submitted at a similar time. Whilst these matters may have formed a further date when the public right was brought into question, they are so close to the initial date identified above that use during the resulting statutory periods would also have failed to be as of right due to the need to climb the fence. It is not possible to identify a clear date when the fence was erected, so that this does not form a potential additional date of bringing into question. As a result, no further potential periods of statutory dedication arise for consideration.
13. In light of the above considerations, the evidence does not support a statutory inference of dedication and there is no need for me to consider this matter further.

*Common Law dedication*

1. It is therefore necessary to consider whether use has given rise to an inference of dedication at common law. An inference that a way has been dedicated for public use may be drawn at common law where the actions (or lack of actions) of landowners indicate that they intended a way to be dedicated as a highway and where the public have accepted it. Landowners must have the capacity to dedicate the route in question as public.
2. The fence across the field was present for some years over part or all of the period 1991-2004. Use was consequently prevented from having been as of right whilst the fence was there, as force would have been required if the fence were to be climbed. When that period is excluded from potential periods of common law use, the most intensive period of use recorded in the user evidence is the nine-year period 1982-1991. Over that time three people used the route on a monthly basis, one person several times a year and two people occasionally. The same people used the route for those frequencies over the fifteen-year period 1982-1997, if the minimum identified period (1997-2000) over which the fence across the field was present is instead excluded.
3. The field was part of an area of land held on trust for sale from 1974 to 2009, according to a conveyance of December 1974 and the evidence of Alan and Edward Banks. One of the trustees was Peter Banks. The witness who carried out casual work as a friend of Peter Banks states that Mr Banks showed them a map showing the Order route to be a track in the 1960s or 1970s, and informed them that the Order route was a public right of way at that point. Nevertheless, this statement was made several years before the commencement of the potential period of common law dedication from 1982 onward, so that it cannot be taken to reflect the owner’s intentions from 1982. Furthermore, the remark may have been made as a friend or associate due to their working relationship. As a result, the remark did not show an intention to dedicate the Order route as a highway.
4. The evidence of objector Edward Banks was that his grandfather Peter Banks built the stile at point C in the churchyard fence to facilitate his daily checks of the farmland and stock on foot. A map showing a number of stiles marked on land owned by Peter Banks shows some stiles on recorded public rights of way and some at locations without any recorded public rights. It appears likely that these would have provided access between fields, as suggested, and their presence and purpose is uncontested in support.
5. A letter of 2012 from Edward Banks’ uncle, Alan Banks, states that he had maintained the churchyard fence stile for at least 40 years. A separate statement from Alan Banks suggests that his maintenance of the stile occurred over the period when he managed the farm, which was until the end of the 1990s or the early 2000s, coinciding with part of the two periods of potential common law use identified above. Had such maintenance occurred by the landowner at the time it would arise for consideration of a potential intention to dedicate on their part.
6. A hand-written memorandum of 1991 on the 1974 conveyance appears to refer to Alan Banks as a trustee at that time. However, the evidence of Alan Banks indicates that he did not co-own Manor Farm, including the field in question, as a trustee until 2003. The dates of Alan Banks’ ownership are consequently uncertain, so that the stated maintenance of the stiles does not comprise a clear action showing an intention to dedicate the way as public on the part of the landowner. Furthermore, even if Alan Banks had co-owned the land over part or all of either of the potential periods of common law use, the evidence does not show any potential indications of an intention to dedicate from the other trustees. Thus, his actions in maintaining the stile are not compelling evidence of knowledge of, and acquiescence in, the public use of the route by the landowners.
7. The evidence consequently does not show an intention to dedicate the Order route as public by the landowners over either potential common law period. The intensity of use of three of the witnesses is unclear but appears to have been sporadic, and the overall use in the case of either the nine or the fifteen-year common law period was not so intensive as to support the inference of dedication. Overall, the available evidence does not show that the landowner intended to dedicate the Order route as a public footpath, and that this was accepted by the public. Accordingly, it cannot be inferred that the route has in fact been so dedicated at common law.

**Conclusion**

1. The discovery of evidence (when considered with all other evidence available) is insufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates. Thus, having regard to all the evidence before me, I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

*C Beeby*

INSPECTOR

**APPEARANCES**

**In support of the Order**

For the Order Making Authority:

Sue Rumfitt Advocate

Who called:

Stephen Anderson

Fiona Davies

John McNeill

Roger Mortimer

Tom Ruszala

**Objecting to the Order**

Ruth Stockley Counsel for Edward Banks

Who called:

Edward Banks Objector

Robin Carr Independent Consultant, Robin Carr Associates

**DOCUMENTS**

Statutory Declaration of Alan Banks dated 24 April 2023

Two annotated photographs and one annotated aerial photograph of the land

Conveyance made 6 December 1974 in respect of Title Number CB338083

Revised Proof of Evidence of Tom Ruszala

Closing Statement on behalf of the Council

Closing Statement of the Objector

 