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| **Order Decision** |
| Inquiry opened on 27 June 2023 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 04 August 2023** |

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| **Order Ref: ROW/3302072** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hampshire (City of Winchester No. 50) (Parish of Corhampton and Meonstoke and Parish of Droxford) Definitive Map Modification Order 2020.
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| * The Order is dated 9 December 2020 and proposes to modify the Definitive Map and Statement for the area by adding a bridleway and upgrading a footpath to bridleway as shown in the Order plan and described in the Order Schedule.
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| * There were 2 objections outstanding at the commencement of the inquiry.
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| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. I held an inquiry at Soberton Village Hall on 27 and 28 June 2023. I made an unaccompanied site visit on the afternoon of 26 June and an accompanied visit at the conclusion of the inquiry on 28 June.
2. This Order concerns the addition to the Definitive Map and Statement of a public bridleway from the B3035 Corhampton Road (point A on the plan attached to the Order (‘the Order plan’)), to a junction with Droxford Footpath 1 (point D), and the upgrading to bridleway of that part of Droxford Footpath 1 between point D and the junction with the U201 Dundridge Lane at point E.
3. Hampshire County Council (‘the Order making authority (OMA)), having initially supported the Order, changed their stance and took a neutral position at the inquiry. The Applicant did not appear at the inquiry and the Order was promoted for confirmation by Dr Brenda King.
4. Two objections to confirmation of the Order were recorded and not withdrawn. Both Objectors appeared at the Inquiry, one represented by Mr Stephen Whale of Counsel, and the other by Mr Giles Wheeler-Bennett.
5. In this decision I have found it convenient to refer to the Order plan and for ease of reference a copy is attached.

**The Main Issues**

1. The Order has been made under section 53(3)(c)(i) of the 1981 Act which requires me to consider whether, on a balance of probabilities, the evidence shows that a public bridleway subsists along the Order route.
2. The evidence adduced is of claimed use by the public. In making the Order the OMA relied upon a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
3. Accordingly, I must establish the date when the public’s right to use the Order route was brought into question. The evidence can then be examined to determine whether there is a way over land which has been used by the public as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was no intention on the part of the landowners to dedicate public bridleway rights during this 20-year period.
4. The main issues in this case are whether there is a way over land, whether it has been used by the public, whether such use was as of right, whether it was interrupted and whether the landowners have sufficiently demonstrated a lack of intention to dedicate a public right of way.

Reasons

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

1. It is not disputed that use of the Order route by the public was challenged in November 2008 when the landowner erected a fence alongside the Corhampton Road approximately at point A, the effect of which was to prevent use of the Order route between points A and B. All parties agree that the erection of the fence brought into question the right of the public to use the Order route.
2. Taking 2008 as the appropriate date provides a 20-year period of 1988 to 2008.

***Whether the claimed route was a way over land used by the public as of right and without interruption***

*Whether the use was of ‘a way over land’*

1. It is a requirement of Section 31 of the 1980 Act that the statutory presumption of dedication must relate to “a way over land”. A right of way is frequently described as a right to pass from A to B by a defined route. This is to be contrasted with wandering at will for recreational purposes, something which is not a right recognised at common law.
2. The Objectors argue that the evidence of the route used between points A and B is not sufficiently consistent to represent the use of a defined way. The physical characteristics of this section of the Order route are different to the remainder of the route. Between points B and E the Order route follows clearly defined tracks used by motor vehicles and, for significant sections, having an improved stone or hard surface. In contrast the section A to B passes through woodland with no clearly defined track evident on the ground or shown on OS or other mapping.
3. The Objectors rely upon the varied depictions of this section of the Order route on the user evidence plans. One Objector prepared and produced a plan showing the extent of the area of land necessary to encompass the various representations of this section of the Order route. It shows a relatively extensive corridor. This plan has been prepared by adopting a precise interpretation of the user evidence plans. I do not accept that this approach is justified.
4. The plan which accompanies the user evidence forms is drawn to a small scale (1:7,500). The users have generally indicated the route they used by marking it with a thick pen, the line of which represents a significant corridor on the ground. The users are not surveyors and have not shown their route with cartographical precision. Even where the underlying plan shows a track, the coloured line often does not follow this precisely, although the intention is clear. It is reasonable to regard the user evidence plans as indicative of the route claimed rather than a precise representation of it. Accordingly, I conclude that the methodology used by the Objectors in preparing the plan is not merited.
5. Notwithstanding my conclusions in relation to the accuracy of the user evidence plans, the question of the alignment of the Order route between points A and B is a material one. There is currently no evidence on the ground of a route between these points, and there is no representation of a route on any mapping. The information contained in the user evidence forms is of limited assistance in understanding the precise route used and I must rely upon the evidence given orally at the inquiry and any other clues that are given in the forms.
6. All of the relevant users describe a route which started (or finished) on the B3035 and which used the track between points B and C. All described it in the context of coming from or going to Bridleway 3 which lies north of the B3035. The junction of Bridleway 3 with the B3035 is almost opposite point A. For all users the section A to B was a means of getting from the track B-C to Bridleway 3 (or vice-versa) without having to travel for any, or any significant distance along the busy road. All users accepted that the fence erected in 2008 obstructed the route they had used.
7. The oral evidence described point B as being on the track north from point C. This track at one time continued in a straight line to the road and some users referred to occasionally having used this. Most users described leaving the track in the vicinity of point B and picking a way through the trees to the road in the vicinity of point A. Some referred to there being a worn track on the ground and most acknowledged that it was necessary to ride this section in single file. One witness suggested that the available width was about 5 feet. All described using the route for the purpose of finding as direct a route as possible between point B and the road opposite Bridleway 3. None described any form of more general recreational use of this area of the woodland.
8. Evidence was given of two fences in the vicinity of point B, one being a boundary fence and the other a rabbit fence. It was said that both would have prevented progression directly north from point B. On the accompanied site visit the remains of the fences were pointed out. Users gave evidence that they would not seek to cross a barbed wire fence when riding a horse, and none of those giving oral evidence recalled facing such an impediment when using the route, and none of the user forms mention any obstruction at this point. It is reasonable to conclude that users turned off the track at or before the point of encountering the fence.
9. A series of photographs taken on 25 March 2009, were produced by Dr King in support of the case for confirmation. These were taken at or in the vicinity of point A. They show the woodland at this point apparently less dense than it is today. One photograph, taken from the north side of the road looking towards point A, shows what appears to be a worn track disappearing into the trees, although what has created this, and where it led are not apparent.
10. I recognise that the user evidence plans are not wholly consistent in their representation of points A and B and the route between. I accept that users may have used slightly different routes through the trees, but I do not accept that the variation in route was of anything like the magnitude suggested by the Objector’s plan. I consider that any discrepancy can be explained by the indicative nature of the routes drawn on the plans, and the need to find a way between growing trees. I am therefore satisfied that the use described is use of a way over land, being purposeful use, which can be distinguished readily from recreational wandering.

*Whether use was by the public*

1. The application was supported by 25 user evidence forms of which one was lost (although the author attended the inquiry and gave verbal evidence and submitted to the inquiry a recently completed form). A further five forms were submitted at a later date. Short statements were submitted from six of those who had completed user forms. These statements were in the form of notes recording telephone interviews with the users by a member of the OMA.
2. Twenty-seven of those who completed evidence forms claimed use within the relevant 20-year period and five of these claim use throughout the whole of that period.
3. Use at the beginning of the period (seven users) is less than at the end (16 users), with little use prior to 1988. Frequency of use varies considerably with several users claiming to have used the route less than five times per year. There are a number of users who claim to have used the route weekly or more frequently but the majority of use falls within the range of one to three times per month.
4. There are some inconsistencies in the route depicted on the plan accompanying the user evidence forms. All show the section of FP 1 between points D and E. Some show a continuation along FP1 north from point D to the B3035. Others show the use of different rides through the woodland, and some show the Order route together with alternatives, either continuing along FP1, or other routes through the woodland, or both.
5. Six people gave oral evidence of use at the inquiry, one of whom had not completed a user evidence form and one whose evidence form had been lost but who had sought to reconstitute it. This witness had participated in an interview with the OMA, the notes of which were available.
6. Generally, the evidence given by users was robust and convincing. The oral evidence was substantially of use on horseback, but some user forms refer to pedestrian use. It was clear that not all of the users used the Order route all of the time, with other permutations of a route north of point D also being used. This does create a difficulty in assessing the frequency with which the Order route was used rather than one of the other options.
7. Where the route or routes claimed do not include the section A-B-C-D I cannot rely on that evidence to support the Order and I have discounted it. As a consequence of these various factors the extent of reliable evidence of use of the Order route is diminished. However, notwithstanding these complications I am satisfied that the residual evidence, in its totality, is sufficient to prove, on a balance of probabilities, that the Order route was used by the public.

*Whether use was as of right*

1. Use would not be as of right if it was undertaken by force, secretly or with permission. There is no suggestion that use was in secret.
2. A submission is made that by ‘forcing’ a way through growing trees between points A and B users were not acting peaceably. As there is no evidence that the trees were planted with the purpose of excluding the public, I do not accept this submission. The correct characterisation of that use was ‘finding a way through’ rather than ’forcing a way through’.
3. One user stated that permission was given for them to use the route and in consequence that evidence must be disregarded. A landowner stated that permission had been given to the Hambledon and Hursley Pony Club and the Hursley and Hambledon Hunt to ride over their land. Any such use could not be relied upon to support confirmation of the Order but in fact no evidence of use was given by Hunt or Pony Club members.

*Whether use was interrupted*

1. The Objectors argue that use of the Order route was interrupted by the presence of a gate across the track between points E and D. The gate was said to be present for a relatively short period of about six months between 1992 and 1994. The gate was for stock control purposes. It was not always closed and was not locked. No user mentions the presence of the gate.
2. To represent an effective interruption the action must actually prevent use of the route and should generally be undertaken by the landowner with the intention of preventing public use. In this case the purpose of the gate was to control stock rather than to bar the public, and in any event public use was not actually prevented because the gate was not locked.

*Conclusions on user evidence*

1. I am satisfied that there is sufficient evidence of uninterrupted use by the public as of right to give rise to a presumption of dedication.

***Whether there was no intention to dedicate a public right of way***

1. The Objectors rely upon two actions on the part of the landowners to demonstrate a lack of intention to dedicate the Order route as a public right of way, being the presence of signs and regular challenge to users.

*Signs*

1. A landowner gave evidence that signs reading ‘PRIVATE’ had been displayed at various locations between points A and D. One such sign was said to have been attached to a tree facing the road in the vicinity of point A and a further sign attached to the fence at approximately point B. Another sign was at point D where the Order route branches out from FP1. Other signs were attached to trees on the side of the track. Two such signs were evident on the site visit, one on a tree to the west of the track between points C and B and the other attached to a tree facing the road slightly to the east of point A.
2. The landowner explained that signs were first erected before 1991 and have been replaced or reinforced twice since that time. He stated that the signs were directed at persons using the tracks forming the Order route, noting that they were placed at strategic points, including at points A, B and D. Asked whether the signs could have been placed in a better position to demonstrate that they related to the tracks, the landowner said that it was not realistic to put a sign in the middle of the track.
3. Various users recollect the presence of these signs when they were using the routes and I am satisfied that the signage was present during, and probably throughout, the relevant 20-year period.
4. I am required to assess how the signs would have been interpreted by a neutral and reasonable person. First, I address the appropriate contextual interpretation of the word ‘private’ and I must do so in a common sense manner. A dictionary definition of the word is ‘belonging to or for the use of one particular person or a group of people only’. I do not think the use of this one word permits any ambiguity; it is an assertion of an exclusive right of use and occupation of the land to which the sign relates. It is distinguishable from a sign reading ‘Private Road’ which permits the possibility of the route not being private for some purpose other than as a road. In the present context I am satisfied that the wording of the sign is capable of demonstrating a lack of intention to dedicate.
5. The second issue is whether a reasonable person would consider the signs referred to the Order route, or to somewhere else. Those users who remembered seeing the signs said they believed them to relate to the woodland and not to the woodland rides along which the Order route passes. Accordingly, the users did not consider their right to use the route was being challenged. In contrast the landowner said that the signs were to prevent public use of the woodland tracks and that the woodland behind the signs was dense and impenetrable. It was submitted on behalf of the landowner that it is risible to suggest the signs were directed only at impenetrable woodland and not at the tracks from which they were being read.
6. The signs which are of particular relevance are those at the points where the Order route enters the land within the ownership of the person responsible for erecting them, in this case points A, B and D.
7. The sign at point D was positioned on a tree just to the east of the point where the Order route leaves the track forming FP1. It was facing south and would have been apparent to anyone travelling north from point E. At this point there is, and I was told was, no access from the track into the woodland behind the sign. The positioning of the sign does not preclude completely the possibility that it was intended to relate only to the woodland and not also to the track, but on a balance of probabilities I consider it would be apparent to a reasonable person that it sought to prevent access to the entirety of the land, including the Order route.
8. The sign at point B was displayed on the boundary fence, facing the road so that it would have been apparent to anyone entering the land from the north and heading towards point C. Evidence was given that there was also a sign at or near point A which faced the road. A sign in this position is shown in the March 2009 photograph. The landowner’s evidence was that the sign seen in the photograph was then relatively new but replaced an earlier version. The land on which this sign was displayed belongs to the adjoining golf club, but was, I understand erected by the owner of the woodland.
9. Between points A and B there was no established track and I do not consider that a reasonable person would have difficulty in recognising that these signs sought to assert that all of the land was private, and the public were not permitted access.
10. Evidence was given of the presence of a different sign at point E. This sign read ‘No bridleway’, or words to that effect. The landowner gave evidence about this sign and stated that it had been put up in response to the settlement of a claim by a horse rider injured whilst riding on his land and that this was in about 2006 or 2007. Users did not recall seeing this sign within the relevant 20-year period, but this may not be surprising as, at best, it was only present for the last year or possibly two before the fence was erected in 2008. This sign would have been effective as a challenge to equestrian use of the southern section of FP1 E to D if it had been in situ during the relevant 20-year period.

*Challenge*

1. Evidence of verbal challenges to horse riders during the relevant 20-year period was given by and on behalf of both landowners.
2. None of the user witnesses acknowledged having been challenged when using the Order route before the autumn of 2008, which was about the time that the fence was erected.
3. I accept the evidence that some users were challenged, but the fact that this did not extend to any of those giving user evidence prevents me from finding that this, on its own, is sufficient to demonstrate a lack of intention to dedicate. It does however reinforce the evidence of the landowners that they sought to protect the privacy of their land throughout.

*Conclusions on lack of intention to dedicate*

1. I conclude, for the reasons given, that the presence of signage on the Order route was sufficient to demonstrate a lack of intention to dedicate during the relevant period.

***Conclusions on the Section 31 tests***

1. I have concluded that there is sufficient credible evidence of use as of right and without interruption to give rise to a presumption of dedication of the Order route as a bridleway. However, I have further concluded that the actions of the landowners during that period were sufficient to convey to the public that there was no intention to dedicate a public right of way over the Order route.

*Alternative dates for bringing into question and consequential issues*

1. For completeness and given the findings I have made in relation to the effect of the signs, I have considered whether I should interpret the erection of the signs as an act which brought into question the right of the public to use the Order route, and what the consequences of this would be.
2. In relation to the signs between points A and D, the evidence is that these were present from at least 1991 and if this is adopted as the date of bringing into question, the relevant twenty-year period would be 1971 to 1991. For this period the evidence of use would be manifestly insufficient to give rise to a presumption of dedication with only two witnesses claiming use prior to 1980.
3. In relation to the sign at point E, the landowner’s evidence is that this was installed in or about 2007, only one year or so earlier than the accepted date of challenge. The evidence of use is such that taking the period back by one or two years makes no difference to the conclusions I have reached above in relation to a presumption of dedication. I do however have to consider the impact of this earlier date upon my findings in relation to lack of intention to dedicate. If the sign at point E was sufficient to bring into question the right of the public to use the route for bridleway purposes so as to generate a 20-year period 1987 -2007, the only evidence of lack of intention to dedicate for the section E – D would be the evidence of verbal challenge. I have concluded that this evidence is insufficient, on its own, to demonstrate lack of intention to dedicate. This gives rise to consideration whether bridleway rights have been established for a cul-de-sac route E – D.
4. The principle that a cul-de-sac highway can arise as a matter of law, where, as here, the route crosses land in more than one ownership, and some, but not all landowners can demonstrate a lack of intention to dedicate, was recognised in the consent order made in *R on application of the Ramblers Association and SSEFRA and interested parties 2008.*
5. That consent order was not however the subject of judicial consideration and it pre-dated the judgment in *Rambler’s Association v SSEFRA [2017] EWHC 716 (Admin).* That case concerned an application to record a public footpath along a route which crossed a railway line. It was found that no public right of way could be dedicated over the railway line and it was thus necessary to consider whether two disconnected cul-de-sac routes, separated by the railway line, should be recorded. In giving judgment Dove J. said *“I am satisfied that the conclusions which the Inspector reached in relation to the question of whether or not it would be lawful to confirm the Order in the form of two disconnected cul-de-sacs was entirely correct. As Farwell J in the Antrobus case observed, there cannot be any prima facie right for the public to pass from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use). Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred. In the present case there was simply no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather, all of the evidence suggested that the parts of the claimed right of way which formed the two cul-de-sacs were in fact being used as parts of a single journey traversing the whole length of the path identified in the order. There was not therefore in the present case the evidence necessary to demonstrate the dedication of two cul-de-sacs omitting the “missing link” identified by the Inspector. I am therefore satisfied there is no substance in the claimant’s contentions in this respect and that the Inspector’s conclusions on this part of the case were legally robust.”*
6. In this case the application was to record a single bridleway between points A and E. In all cases the Order route was ridden as part of a longer route. A cul-de-sac route from point D to point E would serve no purpose. Although various permutations of route have been used, there was no suggestion of use of a ‘there and back’ route between points E and D.
7. The route E to D is currently recorded as a public footpath and thus recording it as a bridleway would be of no benefit to a pedestrian. For a horse rider the only purpose it would serve would be to permit passage from point E to D and return by the same route.
8. Having regard to the particular circumstances of this case I am satisfied that there is no evidence to demonstrate the dedication of a cul-de-sac route between points E and D.

**Other matters**

1. All parties have made reference to the busy nature of the B3035 and the safety issues that would arise by reason of horses crossing the road in the vicinity of point A. My own observation supports those concerns but this is not a matter which I am able to take into account in arriving at my decision.

**Overall Conclusion**

1. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed.

**Formal Decision**

1. The Order is not confirmed.

Nigel Farthing

**Inspector**

**APPEARANCES**

**For the Applicant:**

Dr Brenda King

 who called:

 Dr Katharine Hartington

 Sally Kidd

 Sue Parker

 Jacqueline Pilcher

 Rebecca Stacey

 Dr Brenda King

 **Supporters:**

 Janet Desty

**For the Objectors:**

Stephen Whale of Counsel,

 who called:

 William Newhouse

 Andrew Trott

 Jennifer Newhouse

 Anthony Newhouse

Mr Giles Wheeler-Bennett

 who called:

 William Rowsell

**For Hampshire County Council:**

 Jacqueline Lean of Counsel

**Interested Party:**

 David Jeckells

**DOCUMENTS submitted at the Inquiry**

1. Single bundle of inquiry documents
2. Additional evidence of Dr Brenda King exhibiting a sheet of 4 photographs
3. A3 plan showing approximate line of Order Route DMMO 1020 in relation to land owned by Mr Newhouse
4. Opening Statement on behalf of William Newhouse
5. Mrs S A Parker user evidence form dated 22 June 2023
6. Enlarged extract of Order plan annotated by Mr Wheeler Bennett
7. Closing statement on behalf of Anthony Newhouse
8. Closing submission by Dr Brenda King

ORDER MAP - COPY NOT TO SCALE

