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| **Order Decision** |
| Inquiry Held on 14 May 2024Site visit made on 14 May 2024 |
| **by D M Young JP BSc (Hons) MPlan MRTPI MIHE**  |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 4 June 2024** |

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| **Order Ref: ROW/3296722** |
| * This Order is made under Section 53 (2) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Somerset County Council (No. 3) Modification Order 2015.
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| * The Order is dated 22 May 2015 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
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| * There were 7 objections outstanding at the commencement of the Inquiry.
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| **Summary of Decision: The Order is proposed for confirmation subject to the modification set out below in the Formal Decision.**  |
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Procedural Matters

1. The Order route is shown between points A-B on the Order Plan (see Appendix 1) and comprises a linear route between Mill Stream Gardens and Burchill’s Hill approximately 80 metres in length.
2. The application to add the route to the Definitive Map and Statement (DMS) was made by the Tonedale Action Group and is dated 24 August 2008. The Order was considered by Somerset Council’s (the Order Making Authority (OMA)) Regulation Committee on 13 March 2014 who resolved that an Order should be made.
3. The Order route is currently closed with fencing at points A and B preventing access by the public. Since 2015 the land has been owned by Mrs Christine Curtis (the objector). Prior to that the land was owned by Mr & Mrs Lodge who purchased it from Mr & Mrs Spurway. A summary of the landownership between 1954 and 2011 is contained in the OMA’s Appendix SC/5.
4. I carried out a site visit on 14 May 2024 where I was accompanied by a representative of the objector and the OMA. At that visit, measurements were taken and agreed between the parties. As a consequence, should the Order be confirmed, it would require a modification insofar as it relates to the width of the route.

The Main Issues

1. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the same. This section requires me to consider whether the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show, on the balance of probabilities, that the right of way described in the Order subsists and that the DMS therefore requires modification.
2. The OMA rely on statutory dedication of the Order routes under Section 31 of the 1980 Highways Act. This provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of intention during this period to dedicate the route.
3. ‘As of right’ is set out in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* (1999) as being without force, secrecy or permission. The 20-year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
4. In addition to considering the user evidence with regard to the provisions of section 31 of the 1980 Act, I am also required to consider whether dedication of the claimed route has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Legal Submissions

1. I shall first consider the legal submissions made by the objector in respect of Article 6 of the European Convention on Human Rights (ECHR) and the laches doctrine.

Human rights

1. Article 6(1) of the ECHR states: ‘*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*…’.
2. The Inquiry constitutes a public hearing for the purpose of Article 6. No issue is taken with the fairness of the Inquiry or my independence and impartiality. The matter of concern stems from the time taken for this case to be determined. A period of nearly 16 years has passed since the application was made to add the claimed route to the DMS and a period of approximately 5.5 years for the OMA to reach its decision to make an Order and a further 7 years for the Order to be submitted to the Planning Inspectorate.
3. While the timeline set out above is not unusual in the context of rights of way casework, that does not make it any less acceptable to the parties who have had to wait a considerable period of time for the matter to be concluded.
4. Schedule 15 to the 1981 Act sets out the procedure to be adopted following a decision by a surveying authority to make an Order. If a duly made objection or representation is submitted to the Order and not withdrawn, the OMA is required to refer the matter to the Secretary of State for determination. Therefore, the Inquiry itself arises out of Schedule 15 and can only take place after an Order has been made. The initial investigation of the application in accordance with Schedule 14 to the 1981 Act is a separate process.
5. Having regard to the foregoing, it is likely that what constitutes a reasonable period of time for a public hearing for the purpose of Article 6 in these circumstances should be taken from the date that the objections and representations were submitted in response to the making of an Order.
6. In this case, I do not consider the period between the making of the Order and the holding of the Inquiry to be unreasonable. Nonetheless, there was a substantial period of nearly seven years between the date of the objections and the submission of the Order to the Inspectorate in March 2022. The OMA has not provided a cogent explanation for this delay and in my judgement the time taken to submit the Order to the Planning Inspectorate was towards the upper limit of what could reasonably be considered acceptable.
7. Notwithstanding the above comments, there is clearly an overriding public interest in determining whether or not a public right of way subsists along the Order route.

**The Laches doctrine**

1. The laches doctrine is applicable where a claimant has delayed in asserting a right. The objector argued that she was disadvantaged by being prevented from calling witnesses who have passed away.
2. There is a statutory duty to modify the DMS following the discovery of evidence that a public right of way subsists. I am not satisfied that the time taken for the Council to investigate the application and submit the Order for confirmation removes the need for me to reach a decision on the available evidence.
3. In terms of any potential prejudice arising from the length of time taken to determine the application, this issue could equally apply to those supporting an application and those who oppose it. The objector could, and perhaps should, have gathered evidence when the application was submitted in 2008 or when the OMA resolved to make the Order in 2014. The objector would likely have been aware of the application when she purchased her property in 2011. Accordingly, I do not consider the objector has been unduly prejudiced by the delays set out above.

Reasons

***When the right to use the route was first brought into question***

1. In order to calculate the relevant 20-year period, it is necessary to establish the point at which the public’s use of the route was called into question. There appears to be a general consensus that the previous owners (the Spurways), erected a sign which read “*Private. The Orchard. No Public Right of Way*” in August 2008.
2. There is some user and landowner evidence which supports a slightly earlier ‘calling into question’ in the form of verbal challenges from Mrs Spurway which according to her Landowner Evidence Form started from 21 April 2008. That date is significant because it is when the Spurways purchased the majority of the land crossed by the Order route.
3. However, there is no evidence to suggest she was acting on the landowner’s behalf before that date. Accordingly, any challenges before 21 April 2008 would have to be disregarded for the purposes of establishing the relevant 20-year period as neither she or Mr Spurway had the power to encourage or restrict the public’s use of the route.
4. The objector pointed out that prior to the Spurways’ acquisition of the land, Mr Spurway, was the chief engineer of Fox Bros and was therefore entitled to control the use of the routes over the company’s estate. A Land Registry document dated 11 August 1954 purporting to show the transfer of access and authorisation rights to Mr Spurway were discussed at the Inquiry. However, there is nothing in the submitted documents to suggest that Mr Spurway had authority to restrict pedestrians, or any other class of user, from using the Order route. It is also germane that Mr Spurway retired in 1987 and therefore any authorisation rights he might have had during his employment with Fox Bros would have ceased at that point.
5. Based on the foregoing and giving the benefit of the doubt to the objector in terms of the evidence relating to verbal challenges after April 21 2008, I find the relevant 20-year period in this case is April 1988 to April 2008.

***Whether there has been use by the public for the required period of 20 years***

1. In order for a presumption of dedication to arise under Section 31 of the 1980 Act, there must be actual use of the alleged route, and such use must be by the public. With regard to the number of members of the public who must use a route for it to become a public right of way, there is no statutory minimum however use must be by a sufficient number of people to show that it was use by the public. Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more.
2. 54 individuals have given evidence of use of the Order route between 1988-2008. The frequency of use varies from daily to six times a year. Many of the witnesses refer to widespread use of the route by others. None recall being challenged about their use of the route nor were any notices seen prior to August 2008. Overwhelmingly, users believed that the landowner was aware that the public at large was using the route.
3. Mrs Spurway’s Landowner Evidence Form acknowledges there was ”*occasional use before Mill Stream Gardens was developed*” with use increasing after the houses were occupied. Fox Bros who were the landowners up until 2008 also acknowledged the public’s use of the route in March 1997 when it stated, “*we share your concern for the safety of pedestrians who use our path as a short cut between Mill Stream Gardens and Burchess Hill*”.
4. The OMA discounted the evidence of several individuals who were either employed by Fox Bros during the 20-year period or used the route as part of their employment (see paras 4.2 and 4.3 to the OMA’s Proof of Evidence). Despite these omissions, there are still 35 users who gave evidence of use. Nine of those attended the Inquiry and spoke to their use of the Order route and were cross-examined on their statements and other relevant matters.
5. Although the objector raised questions over the fallibility of human memory with regard to events that took place many years ago, I found the testimony given by the witnesses at the Inquiry to be detailed and corroboratory. Their evidence also went largely unchallenged. Unlike other cases, this is not a situation where there are a small number of witnesses with a degree of ambiguity over the route used. The user evidence unequivocally shows that the Order route was used by a significant number of people ‘as of right’ throughout the 20-year period.
6. Whilst concerns were raised by the objector about the maps accompanying some of the user evidence forms, taking the evidence as a whole, I am satisfied that the respondents were referring to the Order route. With regard to the witness statements, I am satisfied from the OMA’s oral evidence that they were compiled following an interview with the witness. In some cases, the witness made handwritten amendments to the statement before signing it.

***Interruption***

1. The objector alleged three potential acts of interruption. The first was the annual closure of the Order route for repair and maintenance over ‘factory fortnight’. While the parties agreed that the factory was closed for two weeks every summer, there is little evidence to demonstrate this led to the closure of the Order route. Of the 14 users who recalled factory fortnight, none recalled the Order route being closed to the public. The OMA pointed out that factory fortnight would in any event have ceased in 1987 when the Mill Stream Gardens estate was developed.
2. The second alleged closure was in relation to construction works connected to the Mill Stream Gardens development in or around 1987-1988. However, the contention that the Order route was unavailable for a significant period of time is unsupported by the user evidence which shows an increasing amount of use from 1986 through 1988.
3. I have carefully considered the photographs provided by the objector. Only that titled ‘main sewer works’ dated 1988-89 is relevant to the 20-year period in this case. Even then, there is considerable uncertainty about the date of the photograph. Given the lack of foliage on the trees in the background, it is not unreasonable to deduce that the photograph was taken between October-March. The Land Registry evidence suggests that occupation of the Mill Stream Gardens estate commenced in and around August 1988. I find it improbable that the houses were occupied before the sewer works were completed. Therefore, on the balance of probabilities, I find the photograph was taken before 21 April 1988.
4. The third alleged closure relates to repair works to the retaining wall at the western end of the Order route. The objector submitted a 2005 photograph which clearly shows these works taking place and temporary barriers across the route at Point B (see Appendix LE5). The OMA argued that the photograph is inconclusive given that not all of the Order route is shown. While that is factually correct, I consider it very unlikely that any part of the route would have been left open given the nature of the works and the type of plant and machinery seen in the background.
5. Moreover, I was able to locate the drain cover shown on the photograph on my site visit and noted that there is very little of the Order route to the south of that point. On the balance of probabilities, I am thus satisfied that the Order route was closed at the time the photograph was taken. Nonetheless, given the works only related to a small section of the wall, I consider it likely they took days rather than weeks to complete.
6. The fact that there was an interruption, is not however the end of the matter. One must go on to consider its purpose and how it would have been perceived by the public at that time. For an interruption to be effective it must be with the intention of preventing public use (*Lewis v Thomas* 1950). In that case, Lord Evershed M.R. made the following point:

*“The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken‐down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring took place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance.”*

1. Further clarity is provided at page 46 of the ‘Blue Book’ (Rights of Way: A Guide to Law & Practice Fourth Edition” Riddall and Trevelyan 2007) which under the heading "*without interruption*" states:

"*the interruption must be with intent to prevent public use of the way. It will not be sufficient if the interruption is shown to have been for some other purpose, e.g. the conduct of longstanding building works, to prevent cattle straying, or to provide parking spaces for lorries or broken-down vehicles*". (my emphasis)

1. Given the works to the retaining wall were not intended to prevent the public’s use of the Order route, it cannot be considered an ‘effective’ interruption in the terms laid down in *Lewis v Thomas*.

***Conclusions on the user evidence***

1. I consider the level of use during the relevant 20-year period would have been sufficient to “*bring home to the landowner that a right is being asserted against him*” (*R (Lewis) v Redcar and Cleveland Borough Council*). There is no credible evidence that the use was secretive, by permission or by force. Although the level of use varies between the witnesses, overall, it has been demonstrated that it was on a regular basis.
2. The objector queried the accuracy of the user evidence but there was no significant challenge to it at the Inquiry. While there might be small discrepancies in terms of dates between some of the witnesses, when viewed as a whole, the user evidence demonstrates the public’s use of the route ‘as of right’ over the 20-year period. It is also known from contemporaneous documents that the landowner was aware of the public’s use of the Order route in 1997 which was approximately halfway through the 20-year period.
3. Overall, the user evidence demonstrates use of the Order route during the 20-year period and weighs in favour of confirmation of the Order.

***Lack of intention to dedicate***

1. The user evidence gives rise to a presumption of dedication and therefore the burden shifts to the landowner to demonstrate a lack of intention to dedicate. For there to be sufficient evidence of this there must be evidence of some overt acts on the part of the landowner, during the relevant period, to show the public at large that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner was intending to disabuse the user of the notion that the way was public.
2. I have already identified that a notice was erected by the landowner in August 2008 and that there were some sporadic challenges between April and August of the same year. However, there is no substantive evidence that the landowner took any prior actions to demonstrate to the public at large that they had no intention to dedicate the routes during the period 1988-2008.
3. It seems probable that there were signs in the locality that referred to a ‘private road’ or ‘no through route’. For example, Mr Gard’s statement refers to a sign at the bottom of the Order route which stated “Private Road” in or around 1983. Notwithstanding, this is outside the relevant 20-year period, I do not consider the wording of the sign was sufficiently clear to demonstrate a lack of intention to dedicate on the part of the landowner. In a similar vein, the “Fox Brothers Ltd” (Appendix LE7) may have stated there was no through route or set out that the land was private. However, it was established at the Inquiry that this sign was not located on or in the immediate vicinity of the Order route.
4. There is also some evidence to suggest that the landowner took sporadic action in relation to the unauthorised use of the Order route by motor vehicles and that the route may have been blocked from time to time by parked vehicles or works taking place nearby. However, even if the above did happen, any closures were ephemeral and were not concerned with demonstrating a lack of intention to dedicate on the part of the landowner.
5. I therefore find no persuasive evidence to show the landowner took actions sufficient to demonstrate to the public at large that they had no intention to dedicate the routes during the period 1988-2008.

***Common law dedication***

1. While the OMA relies upon a case made out under Section 31 of the Highways Act 1980, this does not bar the consideration regarding dedication arising at common law.
2. This occurs when the public use a way “*for so long and in such a manner that the [landowner]…must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.*” (*Mann v Brodie*). No minimum period of use is required. The greater the evidence of use ‘as of right’ (which is acceptance by the public at large of a public right of way) the greater the implication of dedication.
3. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there was acceptance of the highway by the public. Evidence of the use of a path by the public ‘as of right’ may support an inference of dedication and may also show acceptance by the public.
4. As is clear from my conclusions above, I have found that the Order route was well used by the general public over many decades up until 2008. The level of that use was such that the landowner must have been aware that members of the public were acting under a belief that a right of way had been dedicated. Indeed, the Fox Bros letter dated March 1997 makes clear that the landowner was aware of the public’s use of the route at that time. There is no credible evidence before me to show that the landowner took steps to disabuse the public of the belief that their use of the route was ‘as of right’. Finally, I am satisfied that the previous owners (Fox Bros) had the capacity to dedicate a highway, and that there was implied dedication.
5. In light of the above I find it possible to infer an intention to dedicate on the part of the landowners, with acceptance being demonstrated by public use of the route.

Other Matters

1. Various issues have been raised by those opposing the Order including, but not limited to, the suitability of the route, the effect on private property and road safety. While I note, and can appreciate the genuine concerns, these are not matters which can be taken into consideration under the 1981 Act.

Conclusions

1. I have found that there is sufficient user evidence to demonstrate use of the Order route between 1988 and 2008. There is no evidence that the use was interrupted or that it was not ‘as of right’. I have not identified any evidence to show a lack of intention to dedicate a public right of way over the Order route within the 20-year period. I am also satisfied that the evidence meets the test for dedication under common law.
2. Therefore, on the balance of probabilities, and considering the evidence as a whole, I am satisfied, that the Order route should be recorded as a public footpath. Having regard to these and all other matters raised I conclude that the Order should be confirmed subject to the modification set out below.

**Formal Decision**

1. I propose to confirm the Order subject to the following modification:
* Delete “*The width of the footpath varies between 18 metres and 4.5 metres as shown (shaded grey) on the order plan*” and replace with “*The width of the footpath varies between 16 metres and 3.4 metres as shown (shaded grey) on the order plan*”.

D. M. Young

**Inspector**

**APPEARANCES**

**For Somerset Council**

Mr Robin Carr instructed by the Head of Legal Services, Somerset Council

*He called*

Clive Gill Local Resident

Julie Gill Local Resident

Marcelle Hayman Local Resident

Peter Hine Local Resident

Sandie Butterton Local Resident

Paul Hunt Local Resident

Vivien Rae Local Resident

Peter Rae Local Resident

Marsha Webber Local Resident

Mr Andrew Saint Rights of Way Officer, Somerset Council

**In opposition to the Order**

Mr Andy Dunlop Landowner’s Agent

Chrstine Curtis Landowner

