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| **Order Decision** |
| Site visit 20 June 2024 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 04 July 2024** |

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| **Order Ref: ROW/3318929** |
| * This Order is made under Section 53 (2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Surrey County Council Revised Rights of Way Map in Definitive Form and the Surrey County Council Public Rights of Way Definitive Statement The Surrey County Council Footpath No. 637 (Reigate) Definitive Map Modification Order 2022.
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| * The Order is dated 20 February 2022 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order map and described in the Order Schedule.
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| * There was one objection outstanding at the date of my site visit.
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| **Summary of Decision: The Order is confirmed.**  |
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Preliminary Matters

1. I carried out an unaccompanied site visit on 20 June 2024.
2. This Order concerns the addition of a footpath from Atherton Road, Reigate proceeding in a north-westerly direction to the boundary of a parcel of registered common land.
3. One objection to confirmation of the Order was recorded which has not been withdrawn.
4. In this decision I have found it convenient to refer to the Order map and for ease of reference a copy is attached. The Order map is annotated with points A, B and C, which I shall refer to in this decision.

**The Main Issues**

1. The Order has been made under sections 53(3)(b) and 53(3)(c)(i) of the 1981 Act which requires me to consider whether, on a balance of probabilities, evidence has been discovered which shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist. At this confirmation stage the right of way must be shown to subsist; a reasonable allegation is not sufficient.
2. In relation to the user evidence reliance is placed 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 must then be examined to determine whether there has been use by the public and that such use has been 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 rights during this 20-year period.
4. In the event that the requirements for a presumption of dedication under the 1980 Act are not met, I will then need to consider whether there is sufficient evidence for an inference of dedication at common law.

Reasons

***Site visit***

1. The Order route is very short, being 27 metres in total.
2. Point A is located where the tarmacadam surface of the adopted highway known as Atherfield Road meets the concrete surface of the accessway and parking area to the west. On the day of my visit cars were parked on both sides of the wider concrete area but the Order route to point B was unobstructed.
3. From point A the Order route follows a direct line to point B passing over the concrete surface. This section of the route is not defined but there is a clear unmade path between points B and C, making the Order route obvious.
4. Between points B and C, a distance of only 13 metres, the Order route follows a clear unmade path with a width of approximately 2 metres. The evidence shows that this section of the Order route was previously tarmac surfaced but that this has been removed since 2017. Point C is located alongside the north-east corner of a small, square brick building which is described on the Order map as ‘Barn’. Point C also marks the boundary with the parcel of registered common land known as Earlswood Common. The Order route ceases at this point although the path continues for approximately a further 30 metres to its junction with Woodhatch Road.
5. Part way along the path over the common there is a junction with a path leading from the west side of the barn which begins at the concrete accessway north-west of point A. This route is narrower than the Order route and has a tarmacadam surface. Both routes show signs of pedestrian use and both were used in the time that I was present
6. Woodhatch Road is a relatively busy suburban road with a pedestrian path along the south side. A short distance to the west is a bus stop. Where the path which continues the Order route meets the road there is a pedestrian crossing controlled by traffic lights. The Common extends to the north of Woodhatch Road and there is a path leading into the Common which is directly opposite the pedestrian crossing referred to.
7. At the junction with Woodhatch Road there is a circular blue sign indicating that use of the route across the Common is for pedestrians and cyclists. I have photographic evidence that an identical sign stood on the Order route at point B but understand that this was removed at the same time as the tarmac surface.

***Documentary evidence***

1. The Order was made under section 53(3)(b) of the 1981 Act and relies upon user evidence to give rise to a statutory presumption of dedication. Some historical documentary evidence has been considered in relation to confirmation of the Order in the form of historic maps, various editions of the Ordnance Survey (OS) and aerial photographs of the area.
2. The historic maps, which range from 1729 to 1823, are drawn to a small scale and do not depict any feature consistent with the Order route. The route is not shown on the 1843 Tithe map. This is unsurprising as the purpose of the route appears to be to connect the Rushett’s estate to Woodhatch Road and the estate was not developed until the mid-20th century.
3. OS maps prior to the development of the Rushett’s estate (of which Atherfield Road forms part) show a route across the common land giving access to a building which has since been demolished. Prior to the 1962 National Grid map no route was shown consistent with the Order route. The 1962 map, which is the first showing the Rushett’s estate, shows the access track depicted on earlier editions but alongside this, to the west, is depicted separately a narrower route with double pecked lines, annotated ‘FP’. This route continues to point B and is consistent with the Order route and its continuation to Woodhatch Road.
4. The route shown on the 1962 OS, incorporating the Order route, is visible on a series of aerial photographs from 1971 to 2012.
5. The documentary evidence suggests that the Order route has been in physical existence since at least 1962 but this does not assist me in understanding the status and nature of that route. The annotation of the route ‘FP’ suggests that it was used by pedestrians, but OS maps usually carry a disclaimer that the depiction of a route cannot be relied upon in determining its status. None of the documents available have as their purpose the depiction of public rights of way and accordingly carry little if any weight in determining public status. They could at best only be relied upon in support of other more credible documentary evidence of which none has been found.

***User Evidence***

1. In considering the user evidence it is necessary for me to first establish the date when the public’s right to use the route was brought into question and then examine the sufficiency of the use, whether it was use as of right, whether it was interrupted and finally whether during the relevant period the landowner demonstrated sufficiently a lack of intention to dedicate.

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

1. It is not disputed that the public’s entitlement to use the Order route was challenged in 2017 by the making of an application for this Order. The Objector argues that an earlier date should be used on the grounds that its actions following acquisition of the site in 2013 were sufficient to bring into question the public’s right to use the Order route.
2. I accept that from shortly after acquiring the site the Objector engaged in a planning process which was inconsistent with the Order route remaining a public right of way on that alignment. However, the Objector’s scheme was described in its statement of case in the following terms; -

‘The application provided a detailed written statement along with maps and plans clearly setting out their intentions for the site and proposals to move the footpath’.

My interpretation of this is that the Objector was acknowledging the existence of the Order route and proposing to divert it to an alignment that would enable the proposed development to be carried out. Rather than challenging the right of the public to use the route it seems to me that the Objector was recognising the existence of that right. Procedures exist for the diversion of public rights of way, including specific provisions relating to the implementation of a planning consent which the Objector could have availed itself of.

1. It is a requirement that to bring into question the public’s right to use a route, the actions of the challenger must bring home to people actually using the route that their entitlement to do so is being challenged. Whilst I accept that the scheme put forward to the Council for development of the site is inconsistent with the Order route remaining in its current position, and that the planning process is in the public domain, I do not accept that the process would have necessarily come to the attention of users of the route.
2. The Objector refers to the erection of a ‘For Sale’ sign on the land over which part the Order route passes. Whilst I accept that this sign would have come to the attention of users of the Order route, I do not accept that the fact that the land was being sold would suggest to a reasonable user that their right to use the route was being challenged. Land over which public rights of way pass is frequently sold and the sale takes effect subject to rights that are the in existence.
3. Accordingly, I do not find that the Objector’s actions were sufficient to constitute an effective challenge such as to bring into question the right of the public to use the Order route.
4. Having regard to the foregoing, the relevant 20-year period to be considered is 1997 to 2017.

*Whether the Order route was used by the public*

1. The statutory requirement is for the way to have “been actually enjoyed by the public”. There is no definition of what constitutes the public for this purpose, nor is there a requirement for a minimum number of users. The context is to be taken into account in determining what is a representation of the public in any given situation. It is however the requirement that the level of use meets the sufficiency requirement throughout the whole of the twenty-year period.
2. The application was supported by evidence of use from 18 individuals of whom four have been interviewed by the Council together with one other user who has not completed a user evidence form (UEF).
3. The quality of the supporting user evidence is generally good. The UEFs contain a statement of truth which has been signed by each user and the forms have generally been completed fully, incorporating relevant detail where appropriate.
4. The Objector draws attention to the fact that the maps attached to the UEFs do not all show the complete route. Most show the route B to C and on to Woodhatch Road but only two indicate a clear route between points A and B. Some show an arrow from point B in the direction of point A indicating that the route they used continued in that direction. I agree that this element of the evidence is not perfect, and I attribute this to the fact that the route A to B is undefined on the ground and passes over a concrete area. However, some witnesses describe how they used the route and for what purposes and generally these descriptions are consistent with use of the entirety of the Order route. Taken together I am satisfied that the user evidence is sufficient to demonstrate that the public have used the alignment A to B albeit possibly not exclusively.
5. There is evidence of use going back to the 1960s and before. From the early 1970s the level of recorded use increased, perhaps consistent with limits of memory and people moving in and out of the area. The relevant period is 1997 – 2017 and in each of these years there is evidence of use by a minimum of ten users with the majority referring to daily or weekly use. Most state that the route was used for functional purposes such as accessing the bus stop, school or local shops. Most also refer to seeing others using the route on a regular basis, with school children referred to as regular users. My observation when I visited the site was that the Order route was in frequent use. This accords with the recollection of those who completed UEFs and is consistent with the obvious functional value of the route.
6. Not all of the users had used the Order route for the full 20-year period but there is no requirement for this, rather the requirement is that throughout the period there was a sufficient level of use. In fact, nine of the pedestrian users attest to use for the full 20-year period together with two who used the route on bicycles.
7. A number of the witnesses refer to the blue signs at the Atherfield Road and Woodhatch Road ends of the path and that they took these signs to invite use of the Order route by pedestrians and cyclists.
8. Having regard to the foregoing, I am satisfied that the route was throughout the period 1997 to 2017 used by a sufficient number of people to be representative of 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 0
2. Use by force does not necessarily require the use of physical force. It is sufficient if the use is contentious, meaning that it is continued despite the owner’s attempts to prevent it, for example, a user who ignores an explicit sign forbidding access will be regarded as not using the route as of right.
3. None of the users refer to any restriction to their use or to having seen notices relating to their use of the Order route or to having been challenged in relation to their use. None had sought or been given permission. None of the use described could be properly categorised as secretive. Accordingly, I find that the relevant use was undertaken as of right.

*Without interruption*

1. There is no suggestion that use of the Order route was interrupted for any purposes within the relevant 20-year period.

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

1. Notwithstanding that the requirements might be met to give rise to a presumption of dedication pursuant to section 31 of the 1980 Act, the presumption will be rebutted if the landowner can demonstrate a lack of intention to dedicate during the relevant 20-year period.
2. An effective rebuttal requires the landowner to demonstrate overtly to members of the public using the route that he had no intention to dedicate the route in question as a public right of way. The actions of the landowner need only to be demonstrated during the relevant period rather than throughout.
3. The Objector seeks to rely upon the planning process that it instigated after purchasing in 2013 the land between points B and C to demonstrate a lack of intention to dedicate. I have referred to these actions when considering the date when the right of the public to use the route was brought into question. The considerations in both instances are very similar. It is not sufficient simply for the landowner to act in a manner inconsistent with the existence of a public right of way. There must be an overt demonstration of this to users of the route.
4. I accept that the Objector’s plans for development of the site are inconsistent with the Order route remaining where it is located currently. I have accepted that the planning process was in the public domain, but I have also concluded that it is not a process that would have come to the attention of users and for that reason alone cannot be relied upon to demonstrate a lack of intention to dedicate. In any event, the planning application did not suggest that the landowner did not recognise the existence of a public right of way, but rather that the existence of the right was acknowledged, and provision made for it to be relocated within the site.

*Conclusions on user evidence*

1. I am satisfied that the Order route has been sufficiently used by the public for a full period of 20 years and that such use has been undertaken as of right. I am further satisfied that within the relevant 20-year period the landowner has not sufficiently demonstrated a lack of intention to dedicate. Accordingly, I am satisfied that the requirements for presumed dedication of the Order route pursuant to Section 31 of the 1980 Act are met.

***Common Law***

1. Having reached the conclusions I have in relation to presumed dedication of the Order route, it is not strictly necessary for me to consider the position at common law. However, for completeness I shall do so briefly.
2. Dedication at common law requires the landowner to have an intention to dedicate a right of way over their land. An intention to dedicate can be inferred provided the evidence justifies such an inference. Use by the public does not of itself give rise to an inference of dedication but it can be evidence relied upon to support such an inference arising. At common law there is no minimum required period of use to raise an inference of dedication. There must be a person competent to dedicate against whom dedication can be inferred, but it is not relevant that the landowner cannot be identified. The onus of proof lies on the person asserting that an inference has arisen.
3. For the reasons given dedication at common law often requires something more than just use such that an inference can properly be drawn that the landowner intended to dedicate. In this matter there are two elements which, in addition to the evidence of use, support such an inference being drawn. The first is the presence of the blue signs which invited use of the Order route, and which remained in position for some years without apparent objection or challenge. The second is the stance taken by the Objector in relation to the Order route within the planning process. The apparent acknowledgement of the route and its use by the public, and the proposal to retain the right, albeit on a different alignment, suggests a recognition that the public have an entitlement to use the route.
4. Were it necessary for me to make a finding at common law, I would, for the reasons given conclude that an inference of dedication can properly be made.

**Other Matters**

1. The Objector questions the regularity of the process leading to the making of this Order and in particular the failure of the Planning Committee to take into account the alternative route for the footpath which the Objector had proposed. For reasons I have set out, the question of an alternative route is not material to the making or confirmation of this Order. This process seeks to establish whether, by reason of the events which have occurred, the Order route has already been dedicated as a public footpath. What the Objector was seeking to achieve was a diversion of the Order route and other procedures exist for that.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

Nigel Farthing

**Inspector**

ORDER MAP - COPY - NOT TO SCALE

