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| **Order Decision** |
| Inquiry opened 28 January 2025  Site visit 28 January 2025  Inquiry closed 25 February 2025 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 19 March 2025** |

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| **Order Ref: ROW/3314686** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Kent County Council (Footpath WB72 at Tunbridge Wells) Definitive Map Modification Order 2022. |
| * The Order is dated 5 July 2022 and proposes to modify the Definitive Map and Statement for the area by the addition of a public footpath between Blackhurst Lane and Sandown Park in Tunbridge Wells as shown in the Order plan and described in the Order Schedule. |
| * There was one objection outstanding when the Kent County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination. |
| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. I was accompanied by parties supporting and opposing the Order at the site visit.
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.
3. The Order was made under section 53(2)(b) of the 1981 Act. This requires the surveying authority to, by order, make such modifications to the definitive map and statement as appear to them to be requisite in consequence of the occurrence of one of a number of specified events. In this case the Order has been made in consequence of the discovery of evidence which shows that a right of way which is not shown in the map and statement is reasonably alleged to subsist over land in the area to which the map relates. The Order does not refer to any reliance on the statutory provisions in section 31 of the Highways Act 1980 (the 1980 Act). How reliance on common law rather than statutory provisions may cause confirmation of the Order to be beyond its legal authority has not been adequately explained.
4. Whilst the initial points of dispute between the parties were limited, this Order decision must examine all matters necessary to ensure that it is adequately reasoned and correct in law. Furthermore, in this case, closure of the inquiry was extended due to the submission of late evidence and the need to seek the comments of other parties. These were factors in a material evolution of the parties’ positions between the initial submission of the Order to the Secretary of State and the final exchange of comments. Thus, this decision is not limited to a consideration of the initial points of dispute.

**The Main Issues**

1. The Kent 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. As a result, the statutory requirements of Section 31 of the 1980 Act may be 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 follows a track which passes between fencing and mature trees. Documentary and user evidence has been submitted in respect of the Order.

***Documentary evidence***

*Second Edition (c.1897-1900) and Third Edition (c.1907-1923) Ordnance Survey Maps*

1. The Order route is depicted in these documents as a physical feature between unbroken boundaries which connects to Blackhurst Lane. The large house Pembury Grange is connected by the Order route to a property annotated “Lodge” where “Hamptons” now stands at the route’s northern end. At that point there is an unbroken line across the route next to its connection with Blackhurst Lane, which may denote a gate or barrier.

*Extract from Conveyance of 21st June 1937*

1. The document conveys land at the Pembury Grange Estate. The whole of Sandown Park Road (to the south of the Order route) does not appear to be a highway at the time because a private right of way “along the roadway known as Sandown Park Road leading in a south westerly direction…as if the same were a public road” is conveyed. A “right for all purposes through over and along the roadway coloured brown on the said plan as if the same were a public road” is also conveyed. Whilst any colouring of the Order route on the document is faint on the copy before me, there is no dispute amongst the parties that the “roadway coloured brown” includes the Order route.
2. Clause 1(d) of the conveyance requires listed persons including the purchaser to contribute “from time to time on demand a rateable proportion according to the extent of the frontage thereto with the other owners or occupiers of land having similar abuttals or rights to the expense” of maintaining the roadway coloured brown. The vendor covenants to maintain the roadway on receipt of the contributions provided for by Clause 1(d).

*Aerial photograph (1946)*

1. The route is visible as a tree-lined physical feature.

*Parish Map (1950) and Draft Map (1952)*

1. The route is shown as a physical feature but is not marked as a public right of way. None of the newer houses are yet constructed on Sandown Park and the line across the route by the Lodge is still shown.

*Definitive Map (1952), Review of Survey (1970), Definitive Map (1987), Definitive Map (2013)*

1. The route is shown as a physical feature but not as a public right of way.

*Conveyance of 2 August 1968: Title No. K319593*

1. Freehold property at Sandown Park is conveyed “together also with the right for all purposes over and along the roadway coloured brown on the said plan as if the same were a public road” over the Order route. The purchaser covenanted to contribute from time to time on demand to the cost of maintaining the route.
2. The private right of way over Sandown Park Road to the south of the Order route, as set out in the 1937 conveyance, is additionally conveyed.

*Highway Boundary and Highways Gazetteer*

1. The route is not recorded as a highway in these documents.

*Documentary evidence conclusions*

1. The documentary evidence shows the physical existence of the route as a track linking Pembury Grange and its lodge until at least 1952. The remnants of a gatepost lay at the route’s northern end at the time of my site visit, and support the existence of a gate shown across the track at its northern end from the earliest evidence until at least 1952. The apparent presence of a gate across it over several decades does not provide positive evidence in favour of the route having been openly available for public use as part of a highway network over that period.
2. If the Order route had been considered to be a highway at the time of the 1937 and 1968 conveyances, it would not have been necessary for these transactions to transfer a private right of way “for all purposes” over the “roadway” “as if the same were a public road”. Furthermore, at both dates it would have been highly likely that any public footpath or vehicular highway over the Order route would have been publicly maintainable, negating any need to include the private maintenance arrangements set out in the conveyances. The conveyances consequently weigh against the Order route having a reputation as public at their respective dates.
3. Over the documentary evidence period the Order route linked Sandown Park Road and Blackhurst Lane, both of which are now highway. Where a short section of way of an uncertain status exists, it can sometimes be presumed that its status is that of the two highways linked by it. However, in this case a private right “as if the same were a public road” is conveyed along the section of Sandown Park Road to the south of the Order route by the 1937 and 1968 conveyances, suggesting that at least part of Sandown Park Road was not highway at those dates. Furthermore, a gate appears across the route’s northern end in evidence covering a substantial time period, so that it was not clearly open to the highway. These considerations mean that the documentary evidence does not indicate that the Order route linked highways at the time.
4. Neither does the documentary evidence suggest that the Order route was legally created as a highway at any point. The documentary evidence as a whole consequently supports the physical existence of the Order route for over a century, but does not support the existence of any unrecorded public rights over it.

***User evidence***

*Statutory Dedication: Bringing into question*

1. There is no evidence of a clear date on which use of the Order route on foot was challenged over the period of use recorded in the user evidence. The Order Making Authority (OMA) consequently considers that the right of the public to use the way was brought into question by the making of the Definitive Map Modification Order (DMMO) Application in accordance with Schedule 14 to the 1981 Act on 4 October 2021. This is undisputed in opposition. I see no reason to disagree with this date, so that a 20-year period of 2001-2021 (the statutory period) would arise for consideration according to the provisions of Section 31 of the 1980 Act.

*Status of the land crossed by the Order route*

1. Nevertheless, the 1980 Act and its predecessors do not bind the Crown. Any claim to record a public right of way over land which is, or was at the relevant time, Crown land, consequently cannot rely on the 20-year provisions in Section 31 of the 1980 Act.
2. The 1968 conveyance concerned the sale of land adjacent to the Order route. It conveyed a private right of way over the route. That right was granted in the 1937 conveyance concerning the sale, by a company named Morris Securities, of land adjacent to the route. The power to grant such a right would have lain with the owner of the Order route.
3. The evidence in respect of the 1937 and 1968 conveyances does not indicate that the Order route land was sold as part of those transactions. Neither is there anything before me to suggest that the land has been sold since then. It is consequently most likely that ownership of the Order route by Morris Securities continued between 1937 and the company’s dissolution, as set out below.
4. London Gazette notices concerning Morris Securities are submitted. A notice of 8 April 1960 recorded a Liquidator’s Name and Address for the company. A notice of 24 May 1967 stated that the company was being wound up and requested creditors to apply to its Liquidator with debts or claims. A notice of 22 April 1968 publicised a May meeting of company members to receive the Liquidator’s report including details of the disposal of the company’s property, and to determine how its documents should be disposed of.
5. Later evidence in respect of Morris Securities is not before me. Nevertheless, multiple notices over several years in the 1960s concerned the company’s winding up. It is consequently most likely that Morris Securities was dissolved. The 1968 notice suggested that this process was drawing to a close, so that it is likely that the company’s dissolution was complete by the early years of the 1970s.
6. The company’s property was vested in the Crown as “bona vacantia”, or ownerless land, on its dissolution. There is no evidence before me to suggest that the Crown sold the land crossed by the Order route at any point.
7. The Crown has a statutory power to disclaim its title to property that has become bona vacantia. Disclaimed property is treated as if it never passed to the Crown as bona vacantia. The disclaimed property may, however, escheat directly to the Crown Estate. Escheat is the common law process by which freehold land that has become ownerless reverts to the Crown Estate.
8. The Treasury Solicitor issued a Notice of Disclaimer in respect of the land on 13 July 2016. As bona vacantia land vested in the Crown on the dissolution of Morris Securities, the land would have reverted to the Crown Estate via escheat following the disclaimer in 2016. The land would still, therefore, have been Crown land following the disclaimer, unless the Crown had disposed of it. In this case such a disposal is unlikely, as registration would have been required on any sale of the land, and the land is unregistered.
9. As a result of the above considerations, the land crossed by the Order route was, on the balance of probabilities, Crown land from at least the early 1970s (if not before), and continues to be so. A statutory presumption of dedication of a public right of way over the land consequently cannot have arisen during that period. No other potential statutory period is suggested by the evidence to have occurred prior to the early 1970s. Dedication may, however, be presumed against the Crown at common law. It is consequently necessary to consider the evidence in this regard.

*Common law: Capacity to dedicate*

1. I have found that the Order route crossed Crown land from the early 1970s to date. An intention by the Crown to dedicate a route as public may be inferred on the same basis as that of a private landowner.
2. The Crown Estate’s evidence states that, following the disclaimer, the property may be deemed subject to escheat to the Crown at common law. This evidence is consistent with the Order route land having remained Crown land following the 2016 disclaimer by the Crown Estate. The evidence before me does not indicate that the purpose or effect of the disclaimer was to ensure that there was no-one with capacity to dedicate a right of way over the land.
3. There is nothing before me to suggest that the Crown would not have been legally capable of dedicating the way as public during the period when the Order route land was vested in it.

*Common law: Whether there was dedication by the landowner*

1. Twenty-one people provided evidence of use of the Order route on foot. The evidence of ten of these people took the form of documents such as brief emails or an incomplete user evidence form. As a result, relevant matters such as the route taken, frequency of use and whether that use was in exercise of a private right, or was challenged, are unclear due to the limited information provided in the evidence of those people. Assumptions cannot be made in respect of such matters and, where such witnesses did not attend the inquiry, it was not possible to cross-examine their evidence in order to clarify relevant matters. As a result of these considerations taken as a whole, their evidence attracts only limited weight in this decision.
2. One person’s initial evidence comprised a similarly brief email. Nevertheless, as she attended the inquiry as a witness, her initially limited evidence was expanded upon and was able to be cross-examined. I am consequently satisfied that it should attract full weight in this decision.
3. The potential common law period which reflects the greatest amount of use of the route, from the evidence which carries full weight, is the fifteen years 2007-2022 (“the earlier common law period”). Seven people used the route on foot over this period. The purposes of their use were exercise, recreation, to access local facilities or to drive to work. All of these formed use as the public.
4. The frequency of use of two of these people was weekly (and five times per week from 2020 in one case), one person used it three times per month, two people monthly until 2020 and then daily, one person monthly and one person’s use varied between weekly and “very infrequent”. No gaps are recorded in their use. Whilst this use was uninterrupted and regular, it is not especially intensive.
5. Much of the user evidence refers to having seen other people using the route, and photographs indicate that a beaten path was present along it during the earlier common law period, suggesting some level of use. However, in the absence of more detailed evidence, matters such as the frequency and nature of the use of people other than those witnesses considered cannot be assumed. The same issues arise in respect of the consideration of the user evidence described at paragraph 35 above, so that it provides only limited evidence in support of the route being a reputed highway.
6. A document of May 2020 supporting a planning application by the objector referred to the Order route as “accessible to the public”, and as an existing public footpath. As the objector has owned land adjoining the route for a significant period of time including the earlier common law period, these statements provide some similarly limited evidence in support of the route being a reputed highway.
7. Use must be “as of right” – which is to say without force, secrecy or permission - if it is to contribute to a potential dedication of public rights.
8. At the site visit two structures were present on or adjacent to the route at its northern end by the property Hamptons, and restricted its width. These were a wooden gate at or near point A and a metal barrier supported by a post at or near point B.
9. Three of the seven people recall the gate. All three people state that it was present across only part of the full width of the route. No reference to the gate ever having been locked is made by any of these people.
10. Four of the seven people recall the barrier. All four state that it was present across only part of the full width of the route. One person additionally stated that he considered that it formed a restriction to vehicles.
11. The person whose evidence was expanded upon at the inquiry stated that she had not encountered any obstructions to her use. Two further people do not record the presence of the gate or barrier in their evidence. This is consistent with the structures having formed no obstruction to the use of these three people. Furthermore, one person stated that “access was freely available”.
12. Various potential dates for the erection of the gate or barrier are given in the user evidence. The current owner of Hamptons’ evidence is that they were put up by the previous owner prior to 2019, but he does not know when. As he did not install them himself and will remember the date of his purchase of the property, this is likely to be clearly recalled. The structures appear to have been present across the northern end of the Order route for a significant part, or the whole, of the earlier common law period.
13. However, the user evidence indicates that they did not obstruct use of the route alongside them by people on foot. Overall, there is no indication that either of the structures formed a barrier over the route which had to be overcome in order to continue. Neither are there any other potential barriers to use of the route over the earlier common law period. Use was consequently made without force.
14. The user evidence forms did not ask whether any attempts were made to use the route in secrecy. Nevertheless, recollections within the user evidence include that “access was freely available”, “a lot of people are using it on a regular basis for exercise”, “you would always see other people”, “it’s very popular with walkers and cyclists” and “I often see other people”. One witness stated at the inquiry that her use was always made openly. Furthermore, the owner of the Hamptons property recalls seeing people on foot. Together, this evidence does not suggest that use was made in any way other than openly and in full visibility. Thus, the use of the seven people considered was made without secrecy.
15. Six of the seven people confirmed in their user evidence forms that they had not requested or been given permission to use the Order route. The seventh witness stated at the inquiry that she had always assumed it was a route that could be used. Thus, the use was made without permission.
16. Public use of the route was consequently as of right over the earlier common law period. This being the case, it is necessary to consider whether the owner knew and acquiesced in that use.
17. The objector sought to establish the Order route’s ownership in early 2016. As a result, the vesting of the land in the Crown came to the notice of the Treasury Solicitor, on behalf of the Crown, on 3 March 2016, as set out in its Notice of Disclaimer of July 2016.
18. Evidence is consequently before me that the Crown was not aware of its ownership of the Order route land until March 2016. Its lack of knowledge of ownership endured for more than half of the earlier common law period.
19. In order for a presumption of dedication at common law to arise, it is necessary for there to have been both public use and acquiescence by the landowner in this use. If a landowner knew of public use and did nothing to prevent it, they are presumed to have intended to dedicate a public right of way.
20. In this case, as the Crown was unaware of its ownership of the Order route land until 2016, the likelihood of the Crown being aware of public use of the route prior to that date is minimal.
21. As the evidence indicates that the Crown did not know that it owned the route for more than half of the earlier common law period, a knowledge of and acquiescence in the public use has not been demonstrated. The earlier common law period of use consequently does not raise the inference of dedication of a public footpath over the Order route. This is additionally the case for any other potential common law period prior to March 2016.
22. It is consequently necessary to consider whether dedication under common law may have occurred over the six-year period (“the later common law period”) between March 2016 and the end date of the use shown in the evidence, which is May 2022.
23. Of the user evidence attracting full weight, the evidence of nine people shows use over that period. This includes the evidence of the seven people taken into account in the earlier common law period, and the evidence of two further people. The route was used for leisure by these two witnesses, which forms use as the public. Their evidence indicates use as of right.
24. Frequency of use over the first two years of the later common law period was three times per week by two people, weekly by two people, three times per month by one person, fortnightly by one person and monthly by three people.
25. Frequency over the years 2018-2020 was two people three times per week, two people weekly, one person three times per month, three people monthly and one person “very infrequently”.
26. Frequency increased slightly over the years 2020-2022, with two people using the route daily, one person five times per week, two people three times per week, one person weekly, one person three times per month, one person eighteen times per year and one person monthly.
27. The frequency of use over the later common law period consequently averaged around once per day until 2020, from when the average use increased to around four times per day. Whilst there is nothing to suggest that this was not open use, it was not intensive even during the latter years of the period. This is particularly the case as the route’s residential surroundings, and the construction of the nearby footbridge giving access to facilities across the A21 bypass in 2018 or 2019, could be expected to give rise to more regular use.
28. Furthermore, in June 2024 the Crown was notified that the DMMO over the land had been made. There is no evidence to suggest that public use of the land came to its attention until that date. As an absent landowner, the Crown may have had the opportunity to identify and hence challenge public use for a relatively brief period from becoming aware of its ownership in March 2016 until 2022, or it may have been unaware of public use. The evidence in respect of the owner’s knowledge of and acquiescence in public use over the period is consequently not compelling.
29. Generally, the more intensive and open the use and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication. However, the later common law period is relatively short in extent and the evidence before me which attracts full weight shows use which, although open, is not intensive, in view of the route’s location. There is limited evidence in support of the route being a reputed highway, as set out at paragraphs 39 and 40 above. Nevertheless, there is an absence of compelling evidence of landowner knowledge and acquiescence over the period. The evidence overall is consequently insufficient to raise the inference of dedication of the route over the later common law period.
30. The judgment in Turner v Walsh (1881) 6 App. Cas. 636 concerned Crown land. It held that “the Judge would be right, unless some positive restriction on the power of the Crown appeared, in directing that they might presume a dedication of the road by the Crown to the public”. The judgment additionally records that the Crown’s knowledge of the route in question “was amply proved by the production in evidence of the county map, which came out of the possession of the Crown, in which the road, though only specified as a track, was marked out”. The route in question also appeared to have been used by the public for all purposes, continuously and without interruption, for twenty-one years.
31. In that case there was consequently evidence of knowledge of the road by the Crown, and a substantial period of use had been shown. In the current case there is evidence that the Crown was not aware of its ownership of the Order route land until a particular date. The later common law period is additionally brief in extent and an absence of intensive public use is suggested by the evidence. The Crown did not have the ability to challenge public use of the Order route during the period over which it was unaware of its ownership. It may have had the opportunity to identify and hence challenge public use for a relatively brief period from becoming aware of its ownership in March 2016, or it may have been unaware of public use. In any case, that use was insufficiently intensive to form clear evidence of an intention to dedicate the route as public. The current circumstances are consequently sufficiently different from those in the Turner v Walsh judgment that it does not support confirmation of the Order.
32. Given my above findings, it becomes unnecessary to further examine the issue of potential common law dedication, as it would not alter the ultimate outcome.
33. Overall, the evidence consequently does not show an intention to dedicate the Order route as public by the landowner over any common law period. Accordingly, it cannot be inferred that the route has in fact been so dedicated at common law.

**Other Matters**

1. I note the concerns of both parties regarding the other party’s approach. However, I am appointed to determine only the merits of the Order. Thus, these are not matters for this decision and therefore I have not considered them further.
2. I acknowledge representations regarding the accessibility benefits of recording the Order route as a public right of way. Nevertheless, the only issue here is whether a public right of way exists: such benefits must be disregarded in deciding whether to confirm an order. These concerns consequently lie outside the criteria set out within the relevant legislation. As a result, I cannot give them weight in reaching my decision.

**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 Council:

Noémi Byrd Counsel for the Order Making Authority

Who called:

Martin Alderman

Brenda Cliff

Mike Cliff

Pat Hyland

Neil Kerrison

Sonia Kerrison

Mike Lynch

Maria McLauchlan Public Rights of Way Officer, Kent County Council

Stephanie McMahon

**Objecting to the Order**

Gregory Jones KC Counsel for the Objector

Who called:

Katherine Miles Director, Pro Vision

**Interested party**

Ted Hood

**DOCUMENTS**

Ali v Secretary of State for Environment, Food and Rural Affairs & Ors. [2015] EWHC 893 (Admin)

Dalton v Angus (1881) 6 App, Cas. 740

Extract from Conveyance of 21st June 1937

Harper v Charlesworth 107 ER 1174

R v Cornwall CC, ex p Huntington & anor

R v Devon CC, ex p Isaac & anor [1994]

R v Inhabitants of the Tithing of East Mark 116 ER 701

Sturges v Bridgeman (1879) 11 Ch.D 852

Turner v Ringwood Highway Board (1870) L.R. 9 Eq.418

Turner v Walsh (1881) 6 App. Cas. 636

