



Report to Definitive Map and Highway Searches Team Leader

Date: TBC

Title: Claimed Public Footpath from Pinewood Road to Public Footpath No.93, High Wycombe.

Relevant councillor(s): Cllr Marcus Angell, Cllr Darren Hayday, Cllr Orsolya Hayday

Author and/or contact officer: Ela Hackling, Definitive Map Officer

Ward(s) affected: West Wycombe

Recommendations: **That the 20 year relevant period for the section A-B-C is 1997 to 2017.**

That the route shown between A-B-C [Appendix 1] be ACCEPTED on the grounds that there is sufficient evidence to show on the balance of probabilities that the route subsists under Section 31 Highways Act 1980 and should be shown on the Definitive Map and Statement as a Public Footpath.

Reason for decision: **There is sufficient evidence to show on the balance of probabilities that the route subsists under Section 31 Highways Act 1980.**

Executive summary

1.1 The purpose of this report is to determine an application for a Definitive Map Modification Order to show a path from Pinewood Road to Public Footpath No. 93, High Wycombe. The claimed route is shown between points A-B-C on the plan [Appendix 1].

1.2 On the 2nd October 2017 an application was made to modify the Definitive Map and Statement by adding the route as described in paragraph 1.1. The application was made by Mr Nigel Phillips on behalf of Sands Residents Association [pages 14-19].

1.3 The application was supported by 11 user evidence forms [pages 20-85] claiming use of the route from 1951 – 2017. The application was made on the basis that the route had been used by the public as a Public Footpath without let or hindrance for many years and

residents would like to protect it by officially registering it on the Definitive Map and Statement.

Legal Background

1.4 The Council as the Surveying Authority has a duty under section 53(2)(b) of the Wildlife and Countryside Act 1981 (WCA 81) to keep the Definitive Map and Statement under continuous review and to make such modifications to the Definitive Map and Statement that appear to be requisite in consequence of events described in section 53(3).

Section 53(3) events

1.5 The relevant events referred to in section 53(3) which are applicable in the context of the present application are:

“(3)(b) the expiration in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway.”
[Referred to below as test (a)]

and/or

(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to 54A, a byway open to all traffic.” [Referred to below as test (b)]

1.6 In relation to section 53(3)(b) the decision maker must consider whether, on the balance of probabilities, enjoyment by the public of the way over a period raises a presumption that the way has been dedicated as a public footpath.

1.7 In relation to section 53(3)(c)(i) the decision maker must consider whether the evidence produced by the applicant, together with all the other evidence available, show that either (a) a right of way subsists or (b) that it is reasonable to allege that a right of way subsists. These tests were considered in *R v Secretary of State for the Environment ex p. Bagshaw and Norton* and *R v Secretary of State for Wales ex p. Emery* in the context of section 31 of the HA 1980.

1.8 On test (a), it is necessary to find on the balance of probabilities that the right subsists. This will be the case where there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that

there was on the part of the landowner no intention during the period to dedicate the way to the public.

1.9 On test (b), it is necessary to find on the balance of probabilities that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. The evidence necessary to establish that a right of way is reasonably alleged to subsist over land is less than that which is necessary to establish that a right does subsist. In relation to test (b), whether an allegation is reasonable or not will depend on a number of circumstances. If the evidence from witnesses as to user is conflicting, but reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it is reasonable to allege such a right. Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under section 31, then the allegation that the right of way subsists is reasonable, unless there is documentary evidence which inevitably defeats the claim (for example by showing that the landowner had no intention to dedicate).

1.10 Where there is no credible evidence of 20 years' user, or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, then the decision should be that the allegation that a right of way subsists is not reasonable and that no right of way as claimed subsists.

Presumption of dedication

1.11 Section 31 of the Highways Act 1980 (HA80) provides for the presumption of dedication of a public right of way following 20 years continuous use as of right, without interruption, unless there is sufficient evidence that there was no intention during that period to dedicate it. Sub-section (1) states:-

“where a way over any land, other than a way of such character that use of it by the public 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 full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

1.12 The period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question: section 31(2) HA 1980. Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) clarified that the submission of an application to modify the Definitive Map was sufficient to call the use of the route into question by inserting subsections 7A and 7B into Section 31 HA80.

1.13 Bringing into question the public's right to use a particular route will require an act where the landowner challenges by some means sufficient to bring home to the public that he is challenging their right to use the way, so they may be appraised of the challenge

and have a reasonable opportunity of meeting it, for example putting up a notice that makes it clear to the public that he is challenging their right of way. Such evidence may consist of notices which call into question the rights of the public to use a particular way, the erection of physical barriers such as by locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under HA80 section 31 (6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit. The relevant question is when did the landowner make it clear to the public that he was challenging their right to use the way: *Fairey v Southampton County Council*.

- 1.14 Once the decision-maker has determined the date upon which the public's right to use a particular way is brought into question, the decision maker must consider the evidence of use in the twenty year period and then evidence that the landowner had no intention to dedicate.

User Evidence

- 1.15 There is no statutory minimum level of users required to show sufficient use to raise a presumption of dedication, however, use of a way must be use by the public or the community. Use of a way by different persons, each for periods of less than 20 years may be sufficient if taken together they total a continuous period of 20 years. The number of users must be such as might reasonably have been expected if the way had been a public highway: *Mann v Brodie*. Use "as of right" must be without force, secrecy or permission.

Lack of intention to dedicate

- 1.16 Once use is established as of right and without interruption, the presumption of dedication arises. Consideration must then be given to evidence that there was no intention to dedicate on the part of the landowner. "Intention to dedicate" was considered in *Godmanchester*, which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgment, Lord Hoffmann approved the obiter dicta of Denning LJ in *Fairey v Southampton County Council* [1956] who held "*in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate*".
- 1.17 It is clear from *Godmanchester* that actions satisfying the proviso will, usually, also bring the public's right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.
- 1.18 Lord Hoffmann held that "*upon the true construction of Section 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord*

Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him] of the notion that the way was a public highway".

1.19 For a landowner to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous, and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify action which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".

Common Law

1.20 A right of way can come into existence under common law. 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 1885 10 App Case 378 Lord Blackburn). No minimum period of use is required. The greater the evidence of use (which is acceptance by the public at large of a public right of way) the greater the implication of dedication.

Role of decision maker in determining the application

1.21 In determining the rights of way application, the decision maker must act in accordance with the following overriding principles set out in R v Isle of Wight County Council, ex p O'Keefe [1989] JPL 934.

- a. The decision maker must make a careful and properly informed decision as to whether all the evidence shows that a right of way subsists or is reasonably alleged to subsist.
- b. The decision maker must determine the application with a proper appreciation and weighing of the available evidence and any legal principle which might have to be applied.
- c. The decision maker must arrive at their own conclusion on the evidence and whilst the decision maker may have regard to the recommendation of the relevant Officer they must determine the application for themselves and not simply adopt the view of the relevant Officer without analysing the evidence.
- d. The decision maker must actually make a decision on the application in light of the relevant evidence and legal principles and must not rely upon the possibility of an appeal or an inquiry at a later date.

1.22 All the relevant statutory provisions and competing rights and interests have been considered in making this report. The recommendation is in accordance with the law and proportionate, having regard to individuals' rights and the public interest.

User Evidence

1.23 The application was accompanied by 11 user evidence forms claiming use of the route from 1951 – 2017. A graph identifying the periods of use is attached to this report [Appendix 2]. In addition, officers carried out interviews with six of the users [pages 2-13].

1.24 Ten of the users provided details of the period during which they used the route, with half of them using the route frequently. None of the users asked for permission or felt that they needed permission to use the route.

1.25 All of the users confirmed that there were no structures or any notices suggesting that the route is not open to the public. Most of the users commented that the path gets overgrown, and this is the only reason it is not used that often recently.

1.26 One of the users mentioned that the path is supposed to be an extension of Grove Road, which exists to the north of the path. Some of the houses were build fronting the path. One other user also mentioned that there were plans to connect the path with Applewick Lane, but the developer did not complete that work.

1.27 All of the users confirmed that the path width ranges from 1-2m or wider in some places. Some users mentioned the path was wider in the past and many gardens extended into the path. The width of the path is also affected by vegetation. During the inspection the officer noticed, there is access to private gardens from the path via private gates.

1.28 Most of the users walk the route to visit family and friends or use it as a short cut to access shops and different areas of the estate. They also use it as a safer alternative to the main road, walking the dog or recreation.

1.29 None of the witnesses know who the landowner is, and further research with Land Registry show the path to be unregistered land [Background papers, pages 93].

Documentary Sources

1.30 Documentary sources have been checked, the findings of which can be found below:-

Aerial Photos

1.31 Aerial photos taken in 1947 [page 86] shows the path as a gap between properties boundary from A-B, but less clear between points B-C. Photographs taken in 1979 [page 87] and 1985 [page 88] show the path as a gap and it is clear for the whole route between

points A-B-C. The view on aerial photo taken in 1989 [page 89] is partly restricted by tree cover between points A-B, but it is clear as colour contrast along the path between points B-C.

Comment: *Aerial photos do not provide any indication of the status of a route but only show what was on the ground at the time of the survey.*

Ordnance Survey

1.32 The path appeared on 1970-1990 and 1983-1996 Ordnance Survey maps [pages 90-91] and showed the part of the claimed route between point B-C as continuation of Grove Road. The route between points A- B is also clearly marked as a path.

Comment: *Ordnance Survey maps do not provide any indication of the status of a route but only show what was on the ground at the time of the survey.*

Local Land Charges Map

1.33 The claimed path is also visible on Historic Land Charges Maps [page 92], which were used by the Council since 1974 to carry out local land charges searches. The map is an Ordnance Survey Map and the route is recorded as a path between points A- B and as continuation of Grove Road between point B-C.

Comment: *Land Charges map used Ordnance Survey Map baseline. Ordnance Survey maps do not provide any indication of the status of a route but only show what was on the ground at the time of the survey.*

Thames Water records

1.34 During the site visit, a Buckinghamshire Council officer noticed Thames Water apparatus present along the alignment of the claimed route. Further investigation with Thames Water showed that along the path from Pinewood Road, two sewers access points are located. Also, along the alignment of whole path between points A-B-C water pipes are laid beneath the surface of the path. Relevant maps are included in background papers [pages 94-95].

Comment: *Thames Water maps show existence of apparatus along the path, but do not provide any indication of the status of the route.*

Comments

- 1.35 The claimed route was brought into question by the submission of an application in 2017 to modify the Definitive Map and Statement by adding the route to the Definitive Map as a public footpath. Therefore, the relevant period is from 1997 to 2017.
- 1.36 The documentary evidence demonstrate that the route was always along the same alignment from A to B to C. It may have been considered to have public access rights by the utility company for them to install apparatus under the surface of the route.
- 1.37 The number of user evidence forms the Council received was less than expected for an urban area, however together with documentary sources the evidence demonstrates that the elements of s31 HA 1980 have been met. The evidence is therefore sufficient for the purposes of deemed dedication under section 31 of Highways Act 1980 and for an inference of dedication under Common Law.
- 1.38 It would therefore be appropriate to make a Definitive Map Modification Order to add application route A-B-C on the plan [Appendix 1] to the Definitive Map as a Public Footpath.

Other options considered

- 1.39 The pros and cons should not be considered when determining the application based on the evidence.

Legal and financial implications

- 1.40 Financial implications should not to be considered when determining this application as the Council has a statutory duty to make an Order if it believes that there is sufficient evidence to support it. Officer time is involved in investigating the application and dealing with a public inquiry if an Order is made and there are objections to it.

Corporate implications

- 1.41 Corporate implications should not be considered when determining this application for the same reasons detailed in 1.5.

Consultation and communication

- 1.42 Consultation was carried out with the Local Member for the West Wycombe Ward, and the list of prescribed organisations and statutory undertakers for the area.

- 1.43 In an email dated 15 June 2021 [page 98-99] Cllrs Darren and Orshi Hayday supported the application and always wanted this footpath to be adopted by the Council. In the past Cllr Hayday organised community groups to cut back the vegetation along the path.
- 1.44 In an email dated 13 July 2021 N White, Senior Ecology Advisor confirmed there is no ecological impact in designating the route as an official path [page 97].
- 1.45 The Ramblers replied to the consultation on 17 June 2021 but did not have any evidence to support the claim [page 96].

Next steps and review

- 1.46 If the application is accepted an Order to modify the Definitive Map and Statement will be made and open to objections. If objections are received the Order and the objections will be sent to the Planning Inspectorate for determination. If the application is rejected the applicant can appeal the decision to the Planning Inspectorate.

Appendix 1 – Plan of claimed route.

Appendix 2 – User evidence graph.

Background papers

Pages

- 2 - 13 Witness interviews.
- 14 - 85 Application and evidence.
- 86 - 89 Aerial photographs.
- 90 - 91 Ordnance Survey Maps.
- 92 Local Land Charges Map.
- 93 Extract from online Land Registry Map.
- 94 – 95 Thames Water Maps and key.
- 96 – 99 Replies to consultation.

Your questions and views

For further information please contact Ela Hackling – ela.hackling@buckinghamshire.gov.uk

Appendix 1 – Plan of claimed route.



