
Order Decision

Inquiry held on 22 August 2018

by Alison Lea MA (Cantab) Solicitor

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 23 October 2018

Order Ref: ROW/3189777

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hampshire (Winchester City No.44)(Kings Worthy) Definitive Map Modification Order 2017.
- The Order is dated 18 July 2017 and proposes to modify the Definitive Map and Statement for the area by adding footpaths as shown in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when the Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision

Background and Preliminary Matters

1. The Hampshire (Winchester City No.44)(Kings Worthy) Definitive Map Modification Order 2017 (the 2017 Order) proposes to add 3 footpaths to the Definitive Map, which I shall refer to as Routes 1, 2 and 3. Route 1 commences at the end of FP506a on Burnet Lane, marked as Point A on the Order Plan. It forms a circuit of an area known as Top Field, passing through Points B, C, D F, and G to meet Point H at the end of FP506b which connects to Blackberry Field. Route 2 departs from Route 1 at Point C and forms a curve passing through Point E to rejoin Route 1 at Point F. Route 3 departs from Route 1 at Point D and leads away from Top Field to join Springvale Road at Point J.
2. An application was made in 1997 for similar routes and an Order was made on 26 April 2005 (the 2005 Order). Routes 2 and 3 in the 2017 Order are the same as in the 2005 Order. Route 1 in the 2017 Order differs slightly from the route shown in the 2005 Order, as the latter predates the construction of housing at Blackberry Field and Burnet Lane and the addition of FP506a and FP506b to the definitive map. There was one objection to the 2005 Order and I am informed that for various reasons the Order has neither been confirmed nor rescinded.
3. The 2005 Order was made on the basis of user evidence relating to use between the years 1972 and 1992. This consisted of 39 user evidence forms. The 2017 Order has been made on the basis of the same evidence.

4. In 2013 an application was made to record land at Top Field as town or village green (the TVG application). It was supported by 172 user evidence forms. An inquiry was held in 2016 at which a number of witnesses gave oral evidence. The application was refused.
5. In 2017 applications were made to add a number of other routes on and around Top Field to the definitive map. The applications are currently being investigated by the Council under the reference DMMO 1180 (Application 1180).
6. I carried out an unaccompanied site visit on 21 August 2018. Parts of the 2017 Order routes were inaccessible due to the growth of vegetation and it was clear that some of the accessible trodden paths were in different locations to those shown on the 2017 Order plan. At the inquiry it was accepted by all parties that this was the case. I did not consider that a further accompanied site inspection was required and no-one requested one.
7. A representative from Galliford Try Partnerships, one of the objectors, was present at the inquiry. He clarified that the objection was not withdrawn but that they did not wish to present evidence at the inquiry.
8. The Order describes the width of the paths in a number of ways including "of at least 1.8 metres width", "of a minimum width of 1.8 metres", "of 2 metres minimum width" and as "of at least 1.8 metres minimum width". The Council agrees that these descriptions are imprecise and that in the interests of recording width as accurately as possible, the Order should be modified to delete references to "at least" and "minimum".

The Main Issues

9. The Council relies on Section 31 of the Highways Act 1980 (the 1980 Act) which 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 20 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. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
10. Although relying primarily on Section 31 of the 1980 Act, which I shall therefore consider first, the Council also submits that ample evidence has been provided to demonstrate dedication at common law. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.

Reasons

When the right to use the ways was brought into question

11. The application which led to the 2005 Order was made following the gating of the entrance to Top Field from Hookpit Farm Lane in 1992. Although it appears that it remained possible to access the Order routes following this

time and many people claim to have done so, I accept that this action brought the right to use the ways into question. The 2017 Order relies upon the same event.

Whether there was 20 years' public use between 1972 and 1992

12. I have been provided with copies of the 37 user evidence forms submitted with the 1997 application. None of the people who submitted the forms was available to give oral evidence and I acknowledge that this is not surprising given the passage of time. Although I am therefore unable to test the evidence, it is, primarily, the evidence relied upon by the Council.
13. The 37 user evidence forms are accompanied by plans. They are of varying quality and it is not always clear whether the author is referring to routes in the exact location shown on the 2005 Order plan. However, they all appear to show use of at least some or part of those routes during the relevant period, with 17 claiming use throughout the entire 20 year period. The longest user claimed is 70 years. Frequency of use varies between twice a year to daily or even several times per day. All users refer to seeing others on the paths and there appears little doubt from the forms that use of paths on Top Field was frequent throughout the relevant period. However, although the paths used were clearly in the vicinity of those shown on the 2005 Order plan, it is difficult to ascertain their exact location from the user evidence forms.
14. I have also been provided with copies of the 172 user evidence forms submitted with the TVG application and the Inspector's report in respect of that application. The relevant period was 1993 to 2013 and although some of the forms refer to use of paths prior to 1993 the context in which the forms were produced limits their usefulness.
15. The Inspector heard oral evidence over a period of 5 days and concluded that the user would "have carried the appearance of path user rather than a clear assertion of TVG rights for the relevant periods". She refers to a "great deal of evidence of the use of the paths around the perimeter" and to aerial photographs showing perimeter paths. She also heard evidence from Mr Bright, who occupied Top Field pursuant to a tenancy from 1985 and found that the "evidence clearly demonstrates that, during Mr Bright's tenancy, if not before, the establishment/use of a predominant track around the Main Field, accessed from ...Hookpit Farm Lane, with a loop in the south-eastern corner and a link to the route of the dismantled railway, was tolerated so long as there was no interference with his agricultural activities". Her description fits the routes shown on the plan to the 2005 Order.
16. Copies of the aerial photographs submitted to the TVG inquiry have been made available to me. The first photograph is dated 1993. It predates the construction of the housing and shows an access to Top Field from Hookpit Farm Lane, with a clear perimeter path from Point A, passing through Point B to Point C. From C to G it is difficult to make out a path due to the presence of hedgerow. However a path is visible from G to H. A loop in the location of Route 2 is also visible although it appears to have a slightly different shape to that shown on the 2005 Order plan. Similarly a path is visible in the location of Route 3 although it is unclear exactly where it leaves Route 1. Other paths not on the 2005 Order plan are also visible.

17. Later photographs continue to show similar routes on the ground. The 1999 aerial photograph shows an area of cultivated land with a number of worn paths around the perimeter. Route 1 is clearly visible, Route 2 looks more elongated as shown on the 2005 and 2017 Order plan and where Route 3 leaves at Point D is clearly visible on this photograph. Later photographs show how the area crossed by Route 1 between Points A and B gradually became overgrown. A 2013 aerial photograph shows that construction of the housing had commenced.
18. In 2017 Kings Worthy Parish Council instigated a further consultation on historic use of the 2017 Order routes which resulted in a further 18 user evidence forms. However, few of these refer to use prior to 1992 and many of the accompanying maps only show part, if any, of the 2017 Order routes. Although 5 of these people gave oral evidence at the inquiry, the evidence is of limited assistance in relation to the period 1972 to 1992.
19. I have also been provided with some of the user evidence forms relating to Application 1180. Although they relate to a claim for other routes and to a later period, many of the plans also show Routes 1, 2 or 3 or parts of them. 46 people claim use of part or all of Route 1, 21 claim use of Route 2 and 22 claim use of Route 3. Some claim use prior to 1992 but the majority relate to a later period. One person gave oral evidence at the inquiry but her use did not commence until after 1992. She did however refer to use of the majority of Route 1 but stated that much of the route is now difficult to use due to the growth of vegetation.
20. It is clear from the user evidence forms that there was considerable use of paths on Top Field during the period 1972 to 1992 and beyond. The current landowner acknowledges that footpaths have existed over the area for some time. However, they object to the Order on the basis that the footpaths have not consistently followed the same line and I accept that the routes used have to some extent varied, particularly in more recent years, due to the presence of vegetation.
21. Nevertheless, the aerial photographs show clear routes on the ground in the locations claimed. Although they post-date the claimed period, the first was taken in 1993, only a short time after the end of that period, and later photographs show how the paths have moved as a result of vegetation growth and the construction of housing. I find the aerial photographs generally consistent with the user evidence forms and the limited oral evidence given at the inquiry. They are also consistent with the description of perimeter paths given by the Inspector at the TVG inquiry at which she heard oral evidence.
22. Taking account of all of the evidence available to me, I therefore conclude that, on the balance of probabilities, there has been 20 years' public use of the Order routes between 1972 and 1992.

Whether the use was as of right and uninterrupted

23. None of the 39 user evidence forms which led to the 2005 Order makes any reference to any obstructions other than gates, described as having been put in place in 1992 to stop travellers entering the land. These are the gates which brought the right to use the way into question. No one refers to any

notices other than one person who recalled a "Beware of the Bull" sign being in place for a period of about 12 months even though it is stated that there were no animals in the field. All but one form records that no permission was sought. The current landowners both state that they have not given permission, but their ownership does not relate to the relevant period.

24. In conclusion there is nothing to suggest that the use was by force, in secret or with permission. Similarly there is no evidence that use has at any time been interrupted between 1972 and 1992.

Evidence of landowners' intentions

25. Mr Bright occupied the land pursuant to a tenancy agreement from 1985 until around 2013. I am informed that Mr Bright's father owned the land from 1962 and used it for a few years for grazing cattle. He later sold it and there was a grazing licence to another farmer from 1966 to around 1985. After a further sale the land came, in 1992, into the ownership of a company which eventually became Gleeson Homes (Southern) Limited in 1995 (Gleeson). Gleeson was the owner at the time of the application which led to the 2005 Order, but the ownership post-dates the relevant 20 year period. The current landowner is Drew Smith, a subsidiary of Galliford Try Partnerships, with a small part of Route 3 falling within the ownership of a Mr Poole.
26. Gleeson objected to the 2005 Order, primarily on the basis that the Order was, in its opinion, invalid. The objection also stated that the Order would significantly affect the continued use of the land for the farm business and that the existing trespass already leads to problems. Information provided by Gleeson prior to the Order being made states that they had not seen the paths being used and that, if they did see anyone, then a challenge would occur. There is also reference to Mr Bright's tenancy and to fencing needing to be repaired due to vandalism.
27. One of the user evidence forms submitted with the initial application refers to meeting Mr Bright who "said nothing about people walking on the land" and was "always very friendly". In a witness statement made in respect of the TVG application, Mr Bright refers to the land having been used for cattle by a previous tenant but that local residents who liked to use the field for dog walking would often cut the barbed wire. As a result he only used the land for arable purposes. The statement recalls local people walking around the perimeter.
28. Mr Bright gave oral evidence at the TVG inquiry. The Inspector records him as stating "I have been quite happy with an unofficial path running around the field and have never tried to stop people walking there as I wish to maintain good relations with the local people". The inspector concluded, in the context of the TVG application, that a route which appears to fit the description of Routes 1, 2 and 3 "was tolerated so long as there was no interference with his agricultural activities".
29. The evidence from landowners relating to the relevant period is limited. However, there is no evidence of challenge to what appears to have been extensive use of the routes by the public. The evidence is insufficient to demonstrate a lack of intention to dedicate.

Conclusions on the evidence

30. I am satisfied that the evidence before me is sufficient to show that, on the balance of probabilities, Routes 1, 2 and 3 have been used by the public for a period of 20 years between 1972 and 1992, as of right and uninterrupted and that therefore the routes are deemed to have been dedicated as public footpaths. There is insufficient evidence that any landowner demonstrated a lack of intention during this period to dedicate the routes.
31. Given this conclusion, it is not necessary for me to consider the position at common law.

Other matters

32. Drew Smith refers to the claimed routes as being impassable through inactivity. However, the current condition of the routes is not relevant to consideration of whether or not they have been shown to subsist. Similarly matters relating to the safety of the routes and liability for public safety as raised by Mr Poole, are not matters which can be taken into account in determining whether or not the 2017 Order should be confirmed.

Conclusions

33. Having regard to these and all other matters raised I conclude that the 2017 Order should be confirmed with modifications relating to the descriptions of the width of the routes.

Formal Decision

34. I confirm the 2017 Order subject to the following modifications:
- In Part 1 of the Schedule to the Order delete the words "at least" before the words "1.8 metres width" in the description of each of the 3 paths
 - In Part 2 of the Schedule to the Order, in the paragraph headed Kings Worthy 507 delete the word "minimum " before the words "of 1.8 metres" , and the word "minimum" after the words "2 metres".
 - In Part 2 of the Schedule to the Order, in the paragraph headed Kings Worthy 508 delete the words "at least" and "minimum" from the phrase "of at least 1.8 metres minimum width"
 - In Part 2 of the Schedule to the Order, in the paragraph headed Kings Worthy 509 delete the words "minimum" and "at least" from the phrase "of a minimum width of at least 1.8 metres"

Alison Lea

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Ms C Stickland, Solicitor, Hampshire County Council

She called
Ms S Seeliger Hampshire County Council

FOR KINGS WORTHY PARISH COUNCIL:

Mr S Newell

He called
Mr J Sainsbury
Mr J Fuller
Ms J Turton
Ms B Lambert
Mr N McCleery
Ms K Clements

DOCUMENTS HANDED IN AT INQUIRY

1. Prints of aerial photographs
2. Correspondence from Gleeson to Hampshire County Council during 2001 concerning the claimed routes
3. User evidence forms and plans relating to DMMO 1180.