



Order Decision

Inquiry held on 4 December 2024

by **A Behn Dip MS MIPROW**

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

Decision date: 17 January 2025

Order Ref: **ROW/3325016**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Luton Borough Council, Footpath Reference LO75 (39 & 41 Stanmore Crescent to 35 & 37 Icknield Road, Luton) Definitive Map and Statement Modification Order 2023.
- The Order is dated 27 February 2023 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown on the Order map and described in the Order Schedule.
- There were 19 objections outstanding at the commencement of the Inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public Inquiry into the above Order on 4 December 2024 at Luton Borough Council Town Hall, Luton. I made an unaccompanied site visit on Tuesday 3 December 2024 when I was able to walk the Order route and familiarise myself with the area. A further accompanied visit was undertaken on Wednesday 4 December 2024 in the company of the landowners and Luton Borough Council (the Council).
2. In September 2021 the Council received a complaint concerning a sign that had been erected on a footpath between Stanmore Crescent and Icknield Road in Luton, indicating that it was not a public right of way. Following investigation of the route, the Council's Administration and Regulation Committee in October 2022, authorised an Order to be made to add the route to the Definitive Map and Statement for the area.
3. Following the making of the Order in February 2023, 19 objections were received, predominantly in the form of a petition, that were not withdrawn.

The Main Issues

4. The Council made the Definitive Map Modification Order (DMMO) under Section 53(2)(b) of the 1981 Act on the occurrence of an event specified in sub-section 53(3)(c)(i). Accordingly, the main issue is whether the evidence discovered (when considered with all other evidence available) is sufficient to show that a public right

of way which is not shown on the Definitive Map and Statement, subsists over land to which the map relates.

5. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist in order to make a DMMO, the standard of proof is higher for it to be confirmed. At this stage, the evidence is required to show, on the balance of probabilities that a right of way subsists.
6. The principal evidence in support of this case comprises of User Evidence Forms submitted online. The Council considered that the user evidence was sufficient to satisfy presumed dedication under Section 31 of the Highways Act 1980 (the 1980 Act).
7. The statutory requirements of Section 31 of the 1980 Act set 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.
8. If statutory dedication is not applicable, I shall consider whether an implication of dedication has been shown at common law. Common law requires me to consider whether the use of the path and the actions of the landowner have been of such a nature that the dedication of the path by the landowner can be inferred.
9. There were also historical documents and photographic imagery submitted in evidence. As regards the documentary evidence adduced, Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document provided as evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.

Reasoning

Statutory dedication

When the status of the claimed route was brought into question

10. The status of the claimed route appears to have first been brought into question by the erection of a sign in September 2021 stating, '*PRIVATE No public right of way*', followed by a fence and gate being erected in June 2022. However, one of the landowners, Mr Zaman, stated in his objection that he had first erected a sign in 2019. At Inquiry Mr Zaman clarified that the sign he erected in 2019 was damaged on two occasions and was removed each time and ultimately replaced. I have no reason to doubt this was the case, albeit google street view images provided by the Council from May 2019 and September 2020 indicate that the sign was not present on these dates.
11. Albeit the evidence before me does not appear to turn on either date and very few users recall a sign being in existence prior to 2021, I will take into account both periods. Accordingly, the relevant twenty-year periods to be considered for the purpose of statutory dedication are 2001-2021 and 1999-2019 ("the relevant periods").

Evidence of use by the public

12. An online survey by the Council returned 66 responses in the form of completed user evidence forms. Of those 66 responses, 40 stated use of the claimed route for over twenty years, albeit 22 of those respondents live in Stanmore Crescent where many, although not all, have a private right to use the route. At Inquiry the Council were able to confirm via land registry records that at least two residents of Stanmore Crescent who had completed the online survey, did not hold a private right to use the claimed route. Of the respondents who claimed over twenty years use, 17 reside in Quilter Close or Icknield Road and do not have a private right to use the claimed path.
13. A further 21 respondents claim use of under twenty years, however again, many of those respondents live in Stanmore Crescent and are likely to have held a private right. Of these 21 users, 7 did not reside in Stanmore Crescent and would not have had a private right to use the claimed path. Actual use by residents who held, or were likely to have held a private right, cannot be taken into account as such use would have been by right, not as of right, however the evidence given in their online user forms can be helpful when considering other matters.
14. Looking at those known not to have a private right, which approximates to just over one third of respondents, their use of the claimed route was predominantly on foot, with many stating daily or weekly use. Use was neither by force nor with secrecy and no users evidenced being challenged in any way. Purpose of use was varied, with evidence forms stating the route was used as a shortcut, or to avoid the busy main road, for going to the shops or the local school, for dog walking and to visit friends. Users say they often saw others using the route.
15. A number of online responses mentioned single bollards were present at some points on the claimed route, albeit it appears that these did not obstruct pedestrian passage and were thought to have been erected as a vehicle deterrent. A number of survey responses also referenced the existence of a gate, which will be examined later in this decision.
16. Two supporters of the Order spoke at the Inquiry, Mr and Mrs Watson, who held a private right to use the claimed route. Whilst their use of the path is discounted as a result, Mr and Mrs Watson were adamant in their evidence giving, that since moving to Stanmore Crescent in 1978, they had never encountered a gate or obstruction that had impeded their passage along the claimed path. They also stated seeing non-residents using the path and when the Council questioned how they knew this, they answered that over their many years of residency they became aware of who was a resident and who was not.
17. Having regard to all of the above, I find that the use of the path by at least 21 people on a regular basis, who did not hold a private right to use the Order route, is sufficient to raise a presumption of the dedication of a public footpath. Therefore, the first part of the statutory test is satisfied.

Evidence of the landowners and whether the landowners demonstrated a lack of intention to dedicate a public footpath

18. The claimed route is owned by adjoining properties and all adjoining landowners attended and spoke at the Inquiry. The landowners did not appear to necessarily refute use of the footpath, but were all, understandably, very concerned about anti-

social behaviour that took place on the route. One of the landowners, Mr Zaman, when talking about use of the route at Inquiry, acknowledged that it was used by *'non-residents ie from Icknield Road and beyond – frequently using the path together with Stanmore Crescent as this saves them a couple of dozen steps when accessing the shops in Marsh Road.'* Mr Zaman also referred to use by dog walkers from Icknield Road and felt that use of the path had increased following the opening of a Lidl supermarket nearby in 2013.

19. Mr Zaman made comment in his submissions that the Council's online survey asked the respondents to recall from memory, not events, but rather a lack of events, however I do not accept this to be the case. The survey asked clear and open questions that were specific to the use of the claimed path. Mr Zaman also questioned whether the evidence given in written responses should be accepted at face value. It is the case that whether the correspondence was in support or against the Order, it is afforded similar evidential weight, with the evidence of those who spoke at Inquiry being given greater weight.

Gates

20. To give context, Mr Zaman gave details of all of the alleyways radiating from Stanmore Crescent. Submitted documents indicate that these alleyways were previously routes to allotments that existed prior to the building of the housing estate in the 1960's. Apart from the claimed route, these alleyways are all now gated, with keys issued for at least one of those paths, to those who hold private rights of access, as determined on their deeds.
21. Aligning to the above, Mr Zaman believed that the claimed route was also gated at some point during the relevant period, with the gate being of a similar composition to the gated path that runs between Stanmore Crescent and Limbury Road. This path was subject to a public hearing in 2009, where the quality of the user evidence submitted was found to be insufficient to show that public rights had been acquired.
22. On the site visit, Mr Zaman pointed out the gate on the other footpath, and then proceeded to show those attending, the remains of what appeared to be gate hinges on the claimed route. Mr Zaman advised that when he had moved into his property in 2012, he had found remnants of the old gate in his garden. He believed that a former owner of his property used to repair and maintain the gate as well as locking it on several occasions. He advised that this former owner had died in the early 2000's and that his wife did not maintain the gate, which he believed was damaged somewhere between 2009 and 2011.
23. Mr Zaman in his written evidence, had stated that the path was gated 'between 12-17 years ago' which approximates to between the years 2005 to 2010, however he acknowledged at Inquiry that a google Streetview image from 2009 provided by the Council showed there was no gate in place at that time. A photo from 2010, provided by a resident of 71 Stanmore Crescent, also showed the path open and ungated.
24. The resident of 71 Stanmore Crescent, whilst holding a private right to use the path, was resolute in an email to the Council, that since moving to the property in 1969, the only gate that he had ever seen was the access gate to the previous allotments. He stated that the gate was never used and just rested against adjacent fencing. Another resident of Stanmore Crescent referenced that there was a gate originally used to access the allotments, but that the gate was open from 1969.

Albeit these two references to a gate corroborate with each other, the existence of this gate falls well outside of the relevant periods.

25. A resident of 10 Stanmore Crescent in his online evidence form stated that the former occupier of 37 Icknield Road erected a gate 17-18 years ago, which approximates to the years 2004-2005 when considering the date that he completed his online response. However this resident stated that the gate was removed very quickly '*just a few days later*' due to concern from residents that the structure would conceal '*would be assailants.*'
26. The same resident completed a further survey response later in the same month in which he spoke of the gate mentioned in his previous survey response. He recalled running a small business between 2004-2008 and remembered speaking to the occupier of 37 Icknield Road during this time who advised him why he had removed the gate so quickly.
27. In the same survey response, the resident of 10 Stanmore Crescent also recalled that there was a gate and '*for many years it was gated for two days over Christmas*'. It is unclear as to whether this was a different gate in situ at another time, as this statement does not correlate with the gate that he stated was removed very quickly. The resident did not attend the Inquiry and so I was unable to clarify whether two different gates were being referenced and when these alleged closures at Christmas occurred.
28. At Inquiry Mrs Watson stated that she had never encountered a gate closed on Christmas Day and Boxing Day in the many years that she had lived at Stanmore Crescent and further felt that such a gate would have been noticed and remarked upon by her parents, who attended St Joseph's Church and the local social club during the Christmas period for many years. Mr Watson stated that he had also used the Order route over the two days of Christmas for '*a Christmas walk*' and had never encountered a gate. He stated that he had spoken to previous residents of Stanmore Crescent, none of whom ever recalled a gate closure over Christmas.
29. The Council remarked upon the claimed Christmas closures. They felt that should these closures have happened, it was unlikely that such an action would have brought attention of the closure to the public, being that shops and other businesses are not generally open on those days. They drew attention to *Ali v Secretary of State for Environment, Food and Rural Affairs [2015]* where it was held that a way that is typically used to access services that would not normally be available on Christmas Day, may not necessarily constitute evidence of a lack of intention to dedicate.
30. Nevertheless, the only evidence before me that correlates with an annual closure of the gate was in an online response from a resident at 35 Stanmore Crescent, who recalled a gate that was 'shut once a year' but who also stated that it had been '*removed prior to me moving to Stanmore Crescent in 1985*'. Should this be the same closure as referenced by the resident at 10 Stanmore Crescent, it falls well outside of the relevant periods.
31. The gate that was removed quickly was also recalled by a resident of 26 Stanmore Crescent, who in their written online response, remembered that it was removed due to a fear from residents that people might hide behind it. This resident believed that the gate was in situ for a year, at some point 20-25 years ago, which approximates to the years 1997-2002. Another resident, of 73 Stanmore Crescent,

recalled a gate *'a long time ago and wasn't there for long'*. This was also the memory of another user, who in his evidence form stated that a fence panel and gate was present in the late 1980's which was not locked and *'lasted about 24 hours'*.

32. One landowner, Mr Hakeem, resident at 39 Stanmore Crescent, stated in his online response that there was a gate in situ 8 years ago, which approximates to the year 2014. However at Inquiry, Mr Hakeem advised that someone had told him this, as he was not resident at that address in 2014.
33. Ultimately nine submissions recalled the presence of a gate, albeit one of those respondents, had completed the survey twice. Half of those recalling a gate gave time frames of when it was in situ that fell well outside of the relevant periods, with another stating that there was an *'open' gate in place a long time ago* which *'wasn't there for long.'* Two of the submissions recalling a gate are adjoining landowners who have objected to the Order but were not resident at the properties during the time period that they stated that a gate was in existence. At Inquiry they clarified that they had not personally seen a gate across the claimed route, but had been told by someone else that there had been one. The remaining two submissions were submitted by the same person and as such are treated as a single submission. This submission, whilst giving detailed and coherent evidence of a gate in situ at some point in the early 2000's also stated that the gate was removed within days. This same submission also mentioned a closed gate at Christmas, however no details were given as to when this was, and the only other evidence that corroborates a gate that was subject to annual closure, was from a respondent who stated that this gate was removed prior to 1985.
34. The Council, whilst they agreed that there was evidence of a gate, felt that the evidence was inconsistent regarding any dates that it may have been in situ, They pointed out that photographic evidence did not show a gate in situ during various points of the relevant time frames and that there was also no photographic evidence illustrating a gate across the route either prior to, or within the relevant periods.
35. I do not doubt the testimony with regards to the existence of a gate along the Order route at some point in the past, indeed there is evidence of gate hinges on the Order route. However I concur with the Council that the evidence is both inconsistent and conflicting, making it impossible to ascertain with any certainty, exactly if and when a gate was erected during the relevant periods, for how long it remained in situ and whether it was locked.

Conclusions on statutory dedication

36. I have concluded that the user evidence is sufficient to raise a presumption that the claimed route has been dedicated as a public footpath. In addition, there is insufficient evidence to show that any landowner demonstrated to the public, a clear lack of intention to dedicate a footpath during the relevant periods. Therefore, I conclude on the balance of probabilities that a public footpath subsists. In light of this conclusion, there is no need for me to address the evidence in the context of common law dedication.

Other matters

37. The landowners both in their written evidence and at Inquiry, spoke at length regarding ongoing anti-social behaviour that occurred along the Order route. They spoke of drug taking, graffiti, littering, broken windows and more, and wanted to make the path safe for their children. Mr Patterson who attended the Inquiry also spoke of anti-social behaviour along the claimed route. I consider these to be very genuine and understandable concerns and they have my profound sympathy in this respect. However, as explained at the Inquiry, the legislation for determining whether or not a public right of way subsists, is quite clear that such matters cannot be taken into account.
38. With regard to the anti-social behaviour issues and the future maintenance concerns also voiced by the landowners at the Inquiry, these matters should be referred to Luton Council.

Conclusion

39. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed.

Formal Decision

40. I confirm the Order.

A Behn

INSPECTOR

APPEARANCES

For the Council:

Lois Lane Cornerstone Barristers

who called:

Mark Aaronson Highways Service Manager Luton Borough Council

Supporters:

Irene Watson

Paul Watson

Objectors:

Mr Sher Zaman Adjoining landowner

Mr Andre Davis Adjoining landowner

Mr Abul Koher Adjoining landowner

Mr M Hakeem Adjoining landowner

Interested Persons:

Mr Patterson

Mr J Mardell

DOCUMENTS HANDED IN AT THE INQUIRY

1. Opening statement for Mr Zaman
2. Photograph of the remains of fixtures of a gate
3. Land registry documents for No 13 and No 89 Stanmore Crescent
4. Land registry plan of 1962 showing Stanmore Crescent

DOCUMENTS HANDED IN AFTER THE INQUIRY

1. Closing submissions Luton Borough Council
2. Google street view images of the Order route from May 2019 and September 2020

