



---

## Order Decision

Site visit made on 2 November 2015

**by Martin Elliott BSc FIPROW**

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

**Decision date: 25 NOV 2015**

---

### **Order Ref: FPS/U4610/7/3**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Coventry City Council (Public Footpath from City Boundary to Rowley's Green Lane) Modification Order 2014.
- The Order is dated 9 October 2014 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were four objections and 18 representations of support outstanding when Coventry City 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.**

---

### **Procedural Matters**

1. I carried out an accompanied site inspection on 2 November 2015 when I was joined by one of the objectors, Mr Cleaver, and representatives from the Council. A Mr Clark was also present at the commencement of the site visit representing a Ms C Hall who had made representations in response to the notice of the Order. As a relevant person Ms Hall would have been informed of the site visit and it was open for her to attend subject to permission being granted to access private property. Mr Cleaver did not allow Mr Clark onto his property and therefore Mr Clark did not take part in the site visit other than when on the public highway of Rowley's Green Lane.
2. The objection on behalf of the Open Spaces Society (OSS), whilst not objecting to the confirmation of the Order, raises a number of issues in respect of the notice of the Order and the Order itself. The Council accepts the objection.
3. In respect of the notice of the Order, the copies provided to the Planning Inspectorate do not contain the typographical errors identified by the OSS. In any event even if notices were served containing the typographical error (repetition of 'in this') the intention of the notice is clear and there is no evidence that anyone will have been misled or prejudiced.
4. As regards the Order, the key to the Order plan refers to 'Warwarkshire' further, at Part II of the Schedule to the Order reference is made to '9a' Rowley's Green Lane which should be '7a' Rowley's Green Lane. The OSS also make representations as to the use of the word 'Short' in the description of the route in the same part of the Schedule. The point is made that this word is superfluous. I agree, the Order makes it clear that the length of the Order

route is 57 metres. I note these issues but the intentions of the Order remain clear and there is nothing to suggest that anyone will have been prejudiced. Nevertheless the Order, if confirmed, will be modified accordingly.

5. At Part II of the Schedule to the Order the width of the Order route is identified as being approximate. The use of the word approximate can lead to uncertainty as to the position and width of the Order route. The Order, if confirmed, will be modified by the removal of the word 'Approx.'

### **The Main Issues**

6. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i). The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
7. The test to be applied to the evidence is on the balance of probabilities.
8. Although the Council make reference to section 31 of the Highways Act 1980 they make no case as to any statutory dedication of the way in consequence of use during any twenty year period. I have therefore not considered this matter further.
9. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

### **Reasons**

#### ***Tithe map***

10. The tithe map for the Parish of Exhall shows the Order route coloured sienna. The Council say that this persuasive evidence of highway rights. However, in the absence of any further information as to the significance of colouring it is difficult to give the map any weight. The map shows the physical existence of the Order route and its continuation at the time the tithe map was compiled but provides no evidence as to status.

#### ***Inclosure map***

11. The start of the Order route at point C is shown on the inclosure map. However, no other evidence from the inclosure award has been submitted and the map provides no evidence as to the existence, or otherwise, of public rights.

#### ***Ordnance Survey maps***

12. The First Edition Ordnance Survey map (1881 to 1890) shows the Order route and its continuation. The Order route is shown in a similar fashion on the Second and Third edition maps (1900 to 1905 and 1913 to 1927).
13. Ordnance Survey maps were produced to record topographical features and were not produced for the purpose of recording public rights of way or the status of highways. The maps therefore show the physical existence of a route but provide no information as to whether the route is public or private.
14. Mr Cleaver has submitted a land utilisation survey of 1931-9 published by the Director General Ordnance Survey maps in 1944. He contends that this shows footpath B23 terminating at an enclosure within the old Warwickshire boundary. Further, that other paths 'marked on the OS maps are not present'. Whilst I note these contentions, it should firstly be noted that the map was prepared to show land utilisation. Secondly, it is likely that the map is based on an Ordnance Survey map and in this respect I revert to my comments at paragraph 13 above. The absence of any continuation on the map does not in any event preclude the existence of public rights on the Order route.
15. The Ordnance Survey Popular and New Popular Editions sheet 132 Coventry and Rugby is said by Mr Cleaver to support the contentions made in respect of the land utilisation survey map. I refer to my previous comments.
16. Mr Cleaver has submitted a map found in the British Library; no further details have been provided. It is noted that the Order route is not shown. However, in the absence of any further details it is difficult to reach any conclusions but the absence of the Order route from the map does not preclude the existence of public rights. It may be the case that the Order route was not a feature required to be recorded on the map.

### ***Handover map – Local Government Act 1929***

17. The Order route and its continuation is coloured yellow and is numbered 91. The schedule for the route numbered 91 states 'Woodshires Green to F.P. no 90' not as suggested by the Council 'Woodshires Green F.P. to 90'. The Column identified 'Public Footpaths maintained by R.D.C.' gives a figure of 0.47 for the mileage maintained by the Rural District Council.
18. The handover map provides conclusive evidence of the Highway Authority's acceptance of the maintenance responsibility. The identification of route 91 leading to footpath 90 and the other details provided in the schedule provides strong evidence that the Order route would have a minimum status of footpath.

### ***Parish Survey for Bedworth Rural District Council***

19. The parish survey which would have been carried out under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) shows a route, identified as number 23, continuing over the county boundary to Rowley's Green Lane. Although the area within the city was excluded from the provisions to draft a definitive map and statement the survey map is highly suggestive of the fact that the Order route is public.
20. The subsequent draft map shows a route (B23) continuing over the county boundary along the Order route to Rowley's Green Lane. However, whilst a route (B23) to the county/city boundary is shown on the provisional map, the route does not continue along the Order route. The subsequent definitive map

for the Bedworth Rural District Council and the current definitive map for Warwickshire show the route B23 in a similar way to the provisional map.

21. It is possible that the status of a route may change where it crosses an administrative boundary or indeed terminate. However, the absence from the provisional map is most likely to have been in consequence of the route falling within the excluded area. There is nothing to indicate that the point at which footpath B23 terminates is a place of public resort such as to provide a logical termination point.

### ***Planning consent***

22. On March 26 1985 Coventry City Council granted planning permission for the current property. Condition 5 requires that adequate steps should be made to ensure that the public right of way is not obstructed or interfered with in any way. The reason for the condition was to ensure that the public right of way was not obstructed during construction works. The Council advise that neither the applicant nor the landowner at the time challenged the condition.
23. The condition evidences the existence and acknowledgement of a public right of way over the application site. There is nothing before me to suggest that there was any other route over the site except the Order route.

### ***Nuneaton and Bedworth Borough Council promoted walk***

24. The Order route previously formed part of a longer recreational route. The route was withdrawn over concerns relating to the proximity of the A444 road and the fact that the close proximity of that road had an adverse effect on the attractiveness of the walk.

### ***Representations***

25. The representations received to the Order attest to regular use of the Order route from the 1980s with the earliest use dating from the 1940s. Reference is made to the recognition of the route by the previous occupier of 7a Rowley's Green Lane.

### ***Conclusions on the evidence***

26. The evidence supports the physical existence of the route, with its earliest depiction being on the tithe map. The handover map provides conclusive evidence that the Order route was a highway maintainable at public expense and indicates that the route was at least a public footpath. Although the Parish Survey carried out under the 1949 Act was not intended to include the excluded area of Coventry City the Order route was included on the map. The inclusion route on that map and the subsequent draft map gives a strong indication that the Order route was considered to be a public footpath. The planning consent given in 1985 supports the existence of public rights. If there was no evidence of public rights then the condition would not have been appropriate. The route was promoted as part of a longer route. Although it is possible that routes which are not public are promoted as walks, the inclusion of the route is entirely consistent with the evidence which indicates the existence of public rights. It may be that the walk was withdrawn due to safety concerns but this would not remove any public rights.

27. Although the Council do not make any case as to a statutory dedication in consequence of use, the representations provide evidence of use which is entirely consistent with the Order route being a public footpath. This evidence supports the documentary evidence.
28. I am aware that Mr Cleaver was advised by the Council that he could close the way as it had no legal status. There is no evidence before me to indicate whether the Council carried out any investigations as to the status of the route but it is possible that any advice would have been based on the absence of the Order route from any definitive map. However, whilst a definitive map and statement provides conclusive evidence as to the existence of rights shown thereon this does not preclude other rights from being shown to exist at a later date. There is no evidence that the Order route has been formally stopped up.
29. I also note that the property search carried out by a solicitor on behalf of Mr Cleaver revealed that there was no specific legal right of way detailed in the legal title for 7a Rowley's Green Lane. However, deeds of title are essentially prepared to deal with private rights of property and not prepared with a view to defining public rights. The absence of any record of public rights in the title does not preclude the existence of public rights.
30. Mr Cleaver contends that there was signage on the route indicating the permissive nature of the path and I note that a Council officer described access along the Order route as being with tacit permission of the landowner. However, whilst signage might have indicated that the route was permissive, the evidence is that the path has been a public highway since at least 1929. The erection of any notices identifying the permissive nature of the route would not have any effect on those existing public rights.
31. Mr Cleaver states that upon clearing the boundary line he found the remains of two buildings which were directly over the Order route. In his view the type of construction was indicative of that used within the last 100 years. Whilst I note their presence, the Ordnance Survey maps consistently do not evidence the existence of any buildings on the Order route.
32. Correspondence provided by Mr Cleaver (appendix 3 of Mr Cleaver's submissions) suggests that the previous occupier of 7a Rowley's Green Lane had obstructed the route. It is also clear that the route has been unavailable since March 2014. Whilst this may constitute an interruption to the use of the way, although the extent and circumstances of any interruptions by the previous owner are not identified, the Council, as noted at paragraph 8 above, do not rely on a presumption of dedication of the route. The cases of *Lewis v Thomas and Others 1950*, referring to *Moser v Ambleside Rural District Council 1925* and *Merstham Manor Ltd v Coulsdon and Purley UDC 1937* are not relevant to my consideration of the Order. Further, as noted above, the evidence indicates that a public right of way subsisted prior to the development of 7a Rowley's Green Lane.
33. Mr Cleaver suggests that the Order route will be a cul-de-sac due to the fact that it terminates at the junction with footpath B23 in Warwickshire. Footpath B23 in Warwickshire is a route recorded on the definitive map which provides conclusive evidence as to its existence. Whilst footpath B23 may not have been maintained, has not been used and is considered unsuitable due to its close proximity to major roads, this does not remove any public rights which exist. The Order route is therefore not a cul-de-sac.

34. I note the reference by Mr Cleaver to the Order Decision FPS/H3700/7/13. However, each Order must be determined on the evidence measured against the relevant criteria. I do not consider that the circumstances are similar such that any comparisons can be made or that any precedent is set.
35. Bearing in mind all of the evidence it is sufficient, on the balance of probabilities, to show that a footpath subsists along the Order route. Although Mr Cleaver suggests that the Council have been selective in respect of the information provided in their submissions I have been provided with no information that public rights do not subsist.

### **Width**

36. Mr Cleaver contends that when he cleared the path it was no more than 1 metre wide at any point and that, prior to clearing, the path was barely accessible. Although the trodden width may have been no more than 1 metre any public rights may extend beyond this width; any width will be defined by the evidence or, in the absence of any evidence what is reasonable.
37. The Council state that the width is based on the documentary evidence but suggest, by the application of the boundary to boundary presumption, that arguably the width in the Order may be too narrow. However, there is nothing before me to indicate that the widths specified in the Order are based on the documentary evidence; they appear to reflect the width of the land between the boundary of 7a Rowley's Green Lane and the dwelling. As to the application of the boundary to boundary presumption, before such a presumption arises it is necessary to establish whether the boundaries were established by reference to the highway. I have no evidence before me to indicate that the boundaries shown on the various Ordnance Survey maps were set out by reference to a highway. In the absence of any evidence that the boundaries were set out by reference to the highway then no rebuttable presumption arises. The width should therefore be based on what is considered reasonable in the circumstances. In my view a width of 2 metres would be reasonable. Given my conclusions at paragraph 35 I intend to modify the Order accordingly.

### **Other Matters**

38. Mr Cleaver raises a number of matters in respect of the decision making process and the actions and conduct of the Council. Reference is made to ongoing investigations in this respect. Mr Cleaver also contends that the original application to add the Order route to the definitive map is not compliant with paragraph 1 of Schedule 14 to the 1981 Act. These are not matters for my consideration. In reaching my decision I must have regard to the evidence before me measured against the relevant criteria set out at paragraphs 6 and 7 above.
39. Mr Cleaver makes submissions in respect of footpath B23 in Warwickshire. Mr Adlington also questions whether footpath 23 exists. As noted above at paragraph 33 the definitive map provides conclusive evidence as to the existence of this path. Although I note the submissions, the alignment and existence of footpath B23 in Warwickshire is not a matter for my consideration.
40. It is also suggested that there must be a need for a path for it to be added to the definitive map, reference being made to the existence of alternative nearby

routes and the desire for access to Sowe Meadows. The point is also made that Footpath B23 in Warwickshire has not been maintained and is inaccessible and that therefore the Order route serves no purpose. Concerns are also raised in respect of safety and antisocial behaviour. Matters relating to suitability, desirability and need cannot be taken into account in respect of an order made under the 1981 Act. I also note that the Council did not erect a waymarker post on the Order route but did so on footpath B25. This does not preclude the existence of public rights on the Order route and does not assist in determining the Order.

41. The OSS identify a number of typographical errors in the Statement of Reasons submitted by the Council. These errors have no bearing on my decision.

### **Conclusion**

42. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed subject to modifications.

### **Formal Decision**

43. I confirm the Order subject to the following modifications:

- At Part I of the Schedule to the Order delete 'A to B varying between 2.5 and 4.4 metres B to C varying between 4.4 and 2.1 metres as marked in grey hatched on the Order Plan' and insert '2 metres'.
- At Part II of the Schedule to the Order delete the words 'Short footpath' and insert 'Footpath'. Delete '9a' and insert '7a'. Delete 'Approx.' in respect of the column relating to width and also delete 'Varying between 2.1 metres and 4.4 metres' and insert in its place '2 metres'.
- From the key to the Order map delete 'Warwarkshire' and insert 'Warwickshire'. Further, delete 'width of footpath' and the cross hatched box.
- From the Order map delete the grey cross hatching.

*Martin Elliott*

Inspector