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## Order Decision

Site visit made on 13 January 2016

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 22 January 2016**

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### **Order Ref: FPS/T1600/7/61**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Definitive Map of Public Rights of Way for Gloucestershire (Additional Length of Public Footpath at Waverley Farm) (Parish of Edgeworth) Modification Order 2006.
- The Order is dated 21 December 2006 and proposes to modify the Definitive Map and Statement for the area by adding to them a length of footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Gloucestershire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is not confirmed**

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#### **Procedural Matters**

1. This case concerns the addition of a length of public footpath from Duntisbourne Road<sup>1</sup> (point A on the Order plan) to join an existing public footpath, BED/20, at Lower Waverley Farm, Edgeworth (point B). The application had been made to add a byway open to all traffic to the Definitive Map and Statement ('DMS') between point A and Closes Cottage, to the north. However, Gloucestershire County Council ('the Council') concluded that there was insufficient evidence to support this, but sufficient evidence to make an order to add a footpath to the DMS. It is that Order which is before me for determination.
2. In addition to the objection, made by Mrs Lindemann, a representation in support of the Order was made by Mr Clare. The applicant, Mr French, has since withdrawn his support for the Order. Since making the Order, the Council has withdrawn its support and does not seek its confirmation.
3. I visited the Order route accompanied by Mrs Lindemann, Mr Eldridge (representing Mr French), Mr Clare, and Mr Houldey (representing the Council).

#### **The Main Issues**

4. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act ('the 1981 Act'), which requires me to consider whether the evidence discovered (when considered with all other relevant evidence available) is sufficient to show, on the balance of probabilities, that a footpath which is not shown in the DMS subsists, and that the DMS requires

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<sup>1</sup> The 40889 road, also known as 'Farm Road'

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- modification. This is a higher test than required at the order making stage, whereby a right of way may reasonably be alleged to subsist.
5. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication under common law.
  6. Section 31 of the 1980 Act provides that where a way over land, other than one which is of a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been 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.
  7. At common law, a right of way may be created through expressed or implied dedication and acceptance.

## **Reasons**

### ***Documentary evidence***

8. As part of its investigations, the Council considered the historical documentary record. Extracts from various maps, and the Council's findings in relation to other sources are available to me. The Order route is not shown on the 1839 Tithe Map of Edgeworth, but is recorded as a physical feature, a track, on 25-inch Ordnance Survey mapping. However, these maps are of limited assistance as they do not establish the status of the routes they show. A deduction for public rights of way or user was recorded in the Finance Act 1910 records, but there is nothing to indicate that it related to the Order route, A-B. The Order route was not claimed by the Parish Meeting when considering routes to be included in the preparation of the DMS.
9. On balance I do not find the documentary evidence to be of assistance in determining the existence or otherwise of a public right of way over the Order route. I turn next to consider the evidence of claimed use.

### ***Presumed dedication under Section 31 of the Highways Act 1980***

#### *When the claimed footpath was brought into question*

10. In October 2003, the Council erected a 'No through road' sign at point A at the request of the landowner, to deter motorists from using the Order route. Subsequently, in November of that year a wooden farm gate was installed at point A<sup>2</sup>, together with a 'Private' sign. It was not until May 2004 that the gate was padlocked, at least on occasion, preventing use by the public. However, in April of that year the application for a definitive map modification order was made.
11. I consider the events in October 2003 were directed at motorists rather than at pedestrians. Those in November of that year did not prevent use by the public on foot, and the effect of the 'Private' sign is limited given that many public rights of way cross privately owned land. The locking of the gate in May 2004

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<sup>2</sup> The landowner states this was relocated from point B

did prevent use by the public. However, the application in itself constitutes a bringing into question, providing an earlier date of April 2004.

12. I conclude that April 2004 is the date of bringing into question, giving a 20 year period of April 1984 to April 2004.

*Use by the public*

13. The reported views of village residents and a former owner of Lower Waverley Farm (from 1946 to 1986) is that the Order route was well used by the public. Fifteen user evidence forms accompanied the application, claiming use on foot, horseback and with vehicles, the earliest claimed use commencing in 1937. Of these 15 people, 12 claim use on foot.
14. Use by the public must be as of right and without interruption during the 20 year period under consideration. It need not, however, be claimed use by the same individual for the full period. 'As of right' means it must be without force, secrecy or permission. I can find nothing in the user evidence to suggest that use was carried out by force or with stealth, and there is nothing to suggest that use was interrupted with the intention of preventing it during the 20 year period.
15. A significant amount of claimed use, whether on foot, horseback or with vehicles, concerns access to and from properties in and around Lower Waverley Farm and The Closes (to the west) whether by owners, occupiers or their visitors; access to buildings and land, including stables; deliveries to properties; delivering parish newsletters and collecting for charity. Indeed, the use described by the former owner comprised access to and from the cottages, to buildings and land. In addition, the present owner states that she has given permission to anyone in the village known to her to use the Order route, its use having been by tenants, guests and friends to access the stables and cottages, and for access and deliveries to Closes Cottage.
16. I regard use in connection with these activities to be private or permissive use, or use by invitation, and as such I shall disregard it in my consideration of the evidence. As a result, use by 7 of the 12 people claiming to have walked the Order route was by permission in one form or another.
17. This leaves 5 witnesses who claim to have used the route on foot<sup>3</sup>. Of these, 2 claim use for recreation: one of whom used it 10 or more times a year from 1983 onwards and the other from 1990 more than 10 times a year. Three people, however, claim use on foot and with a vehicle with regard to deliveries and visiting properties, in addition to recreational use on foot. One used it from 1978 to 2000 between 6 and 8 times a year; another 3 to 4 times a year from 1962; and the third from 1985 onwards, between 2 and 16 times a year. However, 2 do not state how many times they used it on foot, and none states how much of their use was for recreation and how much for the other activities which I regard as permissive.
18. In addition, the evidence of the 2 witnesses whose claimed use was solely for recreation has since been withdrawn; and the evidence of a further witness of the remaining 3 has also been withdrawn. This leaves the evidence of one

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<sup>3</sup> There is in addition, claimed use by one person on horseback for recreational purposes, whose use I regard as of right. However, her use covers only 4 years in the early part of the 20 year period under consideration and is insufficient to raise a presumption of dedication of higher rights over the Order route

person claiming use between 2 and 16 times a year on foot and another claiming use between 3 and 4 times a year. In neither case is it clear how much of this use was as of right.

19. It follows in my view that the evidence of use on foot during the 20 year period is insufficient to raise a presumption that the Order route has been dedicated as a public right of way.

*The actions of the landowners*

20. There is no evidence of any lack of intention to dedicate on behalf of any of the landowners. The present landowner challenged one of the witnesses in the 1990s, whilst photographing the cottages to the north of the Order route. She also says that users not known to her were challenged, although there is no evidence to substantiate this. There is no other evidence that any of those claiming use were challenged.

21. A tarmac surface was laid along the Order route in the mid-late 1990s (subsequently removed), however, I would not regard this as evidence that the landowner had dedicated the route for public use.

*Conclusions on presumed dedication*

22. In view of the above and on the balance of probability, I find that a public right of way on foot does not subsist over the Order route. My conclusions would be the same, for the same reasons, had I taken October 2003 or May 2004 as the date of bringing into question, and thereby a different 20 year period.
23. I have considered whether a public right of way could have become established at common law. It is evident that claimed use extends back to 1937 by one individual, with others commencing use in 1938 and 1944, and other use latterly. However, even though there may have been use over a long period of time, it remains the case that qualifying use, that is use as of right, is limited in both volume and frequency. On the balance of probability, I conclude that a case at common law is not made out.

**Other matters**

24. Matters are raised in the submissions concerning road safety and enjoyment, such that the Order route is more suitable than following the road. However, these are not matters that I am able to take into account under the 1981 Act and it follows I have not done so.

**Conclusions**

25. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

**Formal Decision**

26. I do not confirm the Order.

*S Doran*

**Inspector**