



Order Decision

Inquiry held on 23 and 24 July 2019, and 13 November 2019

Site visit made on 23 July 2019

by Helen Slade MA FIPROW

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

Decision date: 29 November 2019

Order Ref: ROW/3209564

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Swindon Borough Council Footpath 44 Wanborough Modification Order 2017.
- The Order is dated 22 November 2017 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 three objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is proposed for confirmation subject to the modification set out in the Formal Decision below.

Procedural Matters

1. I opened the Inquiry on Tuesday 23 July 2019 in the Lambourne Suite of the Holiday Inn at Swindon. I carried out an unaccompanied visit to Wanborough the afternoon before to familiarise myself with the area. I held the accompanied site visit at the end of the first day of the inquiry as it was clear that there were issues which it would be helpful to see, so that any queries could be clarified before the end of the inquiry.
2. Three parties submitted statutory objections to the Order: Wanborough Parish Council ('WPC' or 'the Parish Council'), Neil Stalker (the owner of the land crossed by part of the Order route) and Derek Williams (supporting Mr and Mrs Stalker). A letter of support was received from Mrs Catherine Inskip relating to the part of the Order route across the new housing development. At the inquiry, the residents of the new development at Sutlers Lane were represented by Mr Mark Hanson, who was objecting to the Order, although none of them had submitted a formal statutory objection.

The validity of the Order

3. The validity of the Order was questioned by those who were objecting to the Order on a number of grounds.
4. Firstly, Mr Williams submission raised the issue of an apparent discrepancy in description of length of footpath across Mr and Mrs Stalkers land (now known as Honeyfield). He stated that the length of the route was quoted as being 110 metres in Part I of the Order schedule, and 117 metres in Part II.
5. Having examined the two schedules I am satisfied that the increased figure in Part II of the schedule is a consequence of including the width of the track (7

- metres between Points C and E) in the total distance described. I agree that it might have been helpful if the two descriptions had been consistent, but I am satisfied that there is no error involved; it is merely a different way of setting out the relevant distances.
6. Mr Hanson and Mr Webster raised a question about an apparent error on the Statutory Notice for the Order, which showed two points (Points G and D) with the same Ordnance Survey ('OS') grid reference (SU20338372). They also considered that the grid reference was too short to be sufficiently accurate.
 7. I note that the schedule to the Order itself does distinguish between these two points. In Part I of the Schedule, the location of Point G on The Marsh is given as SU20338372 and the location of Point D, 10 metres north, is given as SU20338373. There is, therefore, an error on the formal Notice for the Order. However this was not identified until the last day of the inquiry and I am therefore satisfied that no-one has suffered any prejudice because of it. The Order itself is correct no-one appeared to have been in any doubt about the purpose of the Order.
 8. With regard to the number of digits in the grid reference, the Definitive Map itself is legally required to be at scale no smaller than 1:25000, although most Authorities usually now use a map at a larger scale than that. For that scale of map a six or eight figure grid reference is perfectly adequate and any more would be almost impossible to distinguish. An eight or possibly ten figure grid reference is normal when dealing with Orders of this kind. I appreciate that at the large scale of maps that Mr Webster may be used to using in his surveying work a GIS system will generate grid references that are accurate down to tiny distances, but I am satisfied that the eight figure grid references used in the Order are sufficiently accurate and, more importantly, do distinguish between the two points of concern.
 9. In their supporting statements, the residents of Suters Lane make reference to, and include a copy of, a statement of case dated 18 February 2017 which purports to relate to the present Order. It appears to be a statement of case made by Swindon Borough Council for a public inquiry, and seems to be seeking non-confirmation of the Order concerned.
 10. The statement of case submitted cannot relate to the present Order, which was not made until November 2017, and from reading the contents it appears to relate to a totally different Order.¹ I am unaware of the circumstances leading to the existence of a statement of case seemingly headed with the present Order title, but it is clearly not relevant to the case I am considering, and I have consequently not taken it into account.
 11. Finally, it was stated that the Order was invalid because it could not be demonstrated that there had been a continuous period of use of a defined route and that any use had been interrupted. It was also claimed that the route shown in the Order was not the same as the route alleged to have been used. These are matters of evidence and do not relate to the validity of the Order. I am satisfied that the Order was made using the correct procedures and that all the statutory requirements were met. Whether or not the Order

¹ Possibly The Swindon Borough Council Footpath 30 Haydon Wick Modification Order 2016; See Decision Reference ROW/3172296

should be confirmed is a matter to be determined having considered the evidence.

The Main Issues

12. This Order has been made in consequence of the occurrence of an event specified in section 53(3)(c)(i) of the 1981 Act which provides that the Definitive Map and Statement ('the DMS') should be modified where it can be shown that a right of way (in this case – a public footpath) which is not currently shown in the DMS subsists over the land in the area to which the map relates or is reasonably alleged to subsist. At the confirmation stage I must be satisfied that the right of way subsists.
13. In order to determine whether or not a highway subsists it is most usual to look at the statutory tests set out in Section 31 of the Highways Act 1980. This states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
14. I may also consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances and may be supported by documentary evidence. The burden of proof lies with the person or persons claiming the rights.
15. 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 which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. The process of determination of an Order of this type constitutes an appropriate tribunal.
16. The test I must apply is the balance of probabilities.

Reasons

Background

17. The Order route as a whole crosses land which was previously owned by Mr Gerald Sadler. He bought the land in 1984 and proceeded to build a new house on part of the land, demolishing an older property in the process. The new house became known as Ducksbridge and Mr Sadler, who had an interest in birds and animals, kept a private menagerie on the land consisting of aviaries and other enclosures. He appears to have extended previously existing ponds, and fenced the land occupied by the house, ponds and enclosures from the immediately adjoining land. An access track to other properties divided the land Mr Sadler had bought; he subsequently fenced the

- perimeter of the land on the far side of the access track, and let it for grazing horses.
18. In the process of developing his menagerie a legally recorded public footpath (Footpath 25) which ran across the land was obstructed, and it was generally agreed at the inquiry that Mr Sadler had provided for continued access across the land in question by 'moving' the path further south. He later created a small caravan site on the parcel of land adjacent to his house and garden, and he accommodated the altered line of the path within that site on a track. The altered footpath traversed the land between Burycroft and The Marsh and provided a way of avoiding a narrow section of the road which went round a sharp blind bend.
 19. In 2008, the land owned by Mr Sadler and let out for grazing horses was sold to Mr and Mrs Stalker who set about clearing it up and creating an alpaca farm. They were visited by a representative of Swindon Borough Council (Ms Annie Ellis) who was investigating a number of irregularities in the local rights of way network. The definitive line of Footpath 25 continues across the land purchased by Mr and Mrs Stalker (Honeyfield) and the situation was the subject of discussion. According to Mr and Mrs Stalker, due to the obstruction of the definitive route of Footpath 25 at Ducksbridge and the alteration put in place by Mr Sadler across the caravan site, provision for its continuation over Honeyfield was agreed, on a temporary basis, on an alignment which allowed passage directly over the access track from the path through the caravan site (referred to at the inquiry as 'the cut-off path'). Having reached this agreement, the Stalkers then double-fenced the line of the temporary path which also facilitated access to their paddocks situated on either side of it. This feature was referred to during the inquiry as 'the race'.
 20. A planning application was made in 2013 to develop the area of land which had previously been the caravan park, and which had been purchased from Mr Sadler by Bower Mapson. This procedure raised the issue of the location of the footpaths (both the definitive line of Footpath 25 and the line of the path provided by Mr Sadler). The permission, when granted, included an informative stating that the line of Footpath 25 crossing the site had to kept clear and access retained following completion of the development. No reference was made to the altered line of the path, and although provision for it was made by Bower Mapson, it was subsequently blocked and access along it prevented.
 21. In the meantime, in 2017 a small diversion of Footpath 25 was agreed and an order made by Swindon Borough Council ('the Borough Council') which re-opened the definitive line of the path. This prompted Mr and Mrs Stalker to close the race to public access and re-instate access across their land on the definitive line of Footpath 25, for which a pedestrian gate had been installed.
 22. It was apparent both at the inquiry and in the evidence submitted, that the Order route fell into two 'halves'. One half (A-B-C-D-G) consisted of the cut-off path and the other half (G-D-E-F) consisted largely of the race, with the access track to Wrightsbridge and other properties being the dividing feature. The use of each half as described on the user evidence forms and at the inquiry was frequently quite distinct and separate; although some people had used both halves, one part appeared to have received more use than the other. I have

therefore decided to address each half of the Order route separately, except where there are elements in common.

Path A-B-C-D-G

The date on which the use of the way was brought into question

23. The application was made by Mr and Mrs Warr in June 2017. It appears to have been prompted by the closure of the race in conjunction with the re-opening of the definitive line of Footpath 25. The Borough Council as Order Making Authority ('OMA') have examined the evidence in relation to this event. However, evidence given at the public inquiry suggested that the construction site may have been fenced off (for health and safety reasons) prior to that date; opinions varied between 2013, 2015 and not until 2017.
24. Two photographs of the Order route submitted by Mr Stalker show heras-type safety fencing obstructing the entrance to the path at Point C, and one of them also shows a house in mid-construction on the site behind. I believe this may be Mr Hanson's house, which he said he had moved into in July 2017. No other photographic evidence of any obstruction to the path has been submitted, and I note from Mr Webster's submission that Bower Mapson had made a decision "to put in the track between plots 3 and 4 (on the line shown in the Order) to try to appease local pressure which was being exerted on them."
25. I consider that, from a health and safety point of view, the developers would have been obliged to erect a safety fence when construction demanded it, and the construction of the houses on plots 3 and 4 would have been likely to have necessitated such measures. In February 2017 a temporary closure of the whole of the definitive line of Footpath 25 was put in place by the Borough Council, and Mr Stalker states in his submissions that the temporary permissive access also ceased across his land. The alternative route set out in the temporary closure notice does not make any mention of use of any part of the Order route as an alternative.
26. I conclude, on balance, that the Order route between Points A and G, via C, became unavailable to use sometime in early 2017, due either to the erection of safety fencing or the temporary closure, or both, and that this is the date on which the right of the public to use the way was brought into question.

Whether the way has been used by the public

27. It was claimed by WPC that the user evidence supplied, and on which the OMA had relied, had been gathered from too small a group of very local residents who did not, therefore, constitute 'the public'. It was also pointed out that some of the user witnesses lived in properties which benefitted from a private right of access along the track to Wrightsbridge, which joins one end of the Order route.
28. There is no legal definition in the 1980 Act of what constitutes 'the public' for the purposes of Section 31, but case law has determined that it must be taken in its widest sense, and that it is not unusual for a path or way to be used only, or principally, by local inhabitants.
29. The location of the Order route, and particularly the section between points A and G, is of very local benefit, in that it cuts off a nasty bend in the vehicular highway. WPC themselves acknowledge the need for such a route, and did not

originally object to this part of the Order. Latterly, their objection was extended to include this section, but not because they did not think that it served a useful purpose.²

30. Whilst an Order of this type must be made (and confirmed) on the basis of actual and evidenced usage, that usage may well be prompted by an obvious need. Such a need was widely expressed at the inquiry and no disagreement with that view was voiced. I am satisfied that, for convenience and safety, a route across this piece of land has been used by local people. The people who benefit from a right of access to their properties along the track to Wrightsbridge do not benefit from any private rights across the former caravan park, although they may have a right of access to Point C. Other people who live further along The Marsh have no such right of access. I am therefore satisfied that, despite some users having a right of access to one end of it, and also along about 10 metres of it (between Points G and D), a route across this piece of land has been used by a group of people capable of constituting 'the public', being local residents of this part of the parish.
31. However, I now need to address the issue of whether or not the path which is shown on the Order plan reflects accurately the route that was in use. This is the issue raised by Mr Webster, Mr Hanson, and is now questioned also by WPC. The objectors are of the view that the track across the former caravan site, provided or set out by Mr Sadler, did not follow quite the same line as the route provided for by Bower Mapson through the development. Mr Webster and Mr Hanson provided a large scale plan, produced by the surveyors for the development, which showed the site as it was before the development started. By superimposing the Order route onto that plan it can be seen that the two do not coincide.
32. Mr Fry sought to defend the Order by relying on the fact that the Order plan reflected the line of the path claimed by Mr Warr, but did not adequately address, in my view, the question of whether the application plan was a true reflection of the user evidence and other supporting evidence. He stated that the Order had been made on the basis of usage, and that the mapping evidence was, effectively, not relevant. However, the OMA is required by the legislation to take into account all relevant evidence when making a decision, and in my view the mapping evidence, and that of the aerial photographs, is relevant evidence.
33. The planning permission was granted in 2013 and the development was required to commence within three years of that date. It was clearly underway in 2016 and 2017 and there must have been times during that period when not only was access either difficult or impossible for the public, but once a route had been provided through the development it does not appear to have quite matched the line followed by Mr Sadler's track.
34. This fact should have been clear to the OMA at the time they made the Order because the OS base map, on which the informal consultation was based and which was prepared by Mr Enright on 4 July 2017, showed the land in its pre-development condition and the track is clearly marked on the digitised map which forms the base plan. Even Mr Enright's plan, presumably produced by digitally representing the claimed route, does not show the claimed route quite matching up with the underlying track, although I suspect that was the

² I deal with the nature of their objection in paragraph 31 onwards.

- intention. The problem arises from the technical limitations in drawing maps on computers rather than by hand.
35. The problem for the OMA is compounded by the fact that the width of the underlying track shown on Mr Enright's plan varies between approximately 3 metres at each end and up to approximately 10 metres at its widest part. The measurements given in the Order for the width of the route appear to reflect its current appearance, including the narrow section of 1.2 metres between Nos. 3 and 4 Suters Lane.
 36. It seems to me that the Order map has been prepared, and the Order schedules written, in relation to the route that is currently available on the ground, and not on the route which the mapping and aerial photography evidence shows must have been the route to which the user evidence related during the relevant period.
 37. I accept that I have powers to modify an Order, but they are discretionary and it is not appropriate in my view to use them to make good an Order which is fundamentally incorrect. If the evidence about the location of the path historically had only come to light at the inquiry, it might have been acceptable for me to make modifications if appropriate, and if I had been provided with sufficient information to do so accurately. But that is not the case here. The information about the location of the track through the caravan site was clearly available to the OMA in advance of the Order being made as evidenced by the base map used by Mr Enright. Notwithstanding that fact, Mr Fry insisted that he was not requesting a modification to be made, and he did not attempt to provide any information which would have allowed me to make any accurate alteration to the map or the schedules, despite repeatedly pointing out that such a measure was available to the inspector.
 38. I conclude that the Order as made does not reflect the location of the way that was used by the majority of the user witnesses who have provided user evidence. I accept that those people who have only used the way for a short period of time prior to 2017 may have used the way reflected in the Order, but that does not meet the necessary statutory requirements of 20 years use dating back from the date on which the use of the way was brought into question.
 39. As a consequence, and in respect of the Order route A-B-C-D-G, I am not inclined to exercise my powers of modification and find that the Order does not satisfy the criteria as it does not show the route used, although I accept that it may reflect the route claimed. This part of the Order cannot be confirmed.
 40. In view of my decision on the accuracy of the Order, it is not appropriate for me to consider the remaining statutory criteria. I would not wish to fetter any decision which might be taken in the future with regard to the existence or otherwise of a public right of way across this piece of land.

Common Law dedication

41. I have already concluded that, in respect of the Order route between Points A and G, the Order does not reflect the route that has been used and I have already declined to exercise my powers of modification for the reasons stated above. It follows that, for the same reason that I have not considered the

remaining statutory criteria with regard to the dedication of a highway, neither have I addressed the matter of a common law dedication.

Path F-E-D-G

Date on which the use of the way was brought into question

42. I have already concluded that it was the closure of the race which prompted the application for the Order. The race was closed when the temporary closure of Footpath 25 was instigated in February 2017. I therefore agree that this was the event that brought the use of this part of the Order route into question. For a statutory dedication it is therefore necessary to look at the nature of the use for the 20 year period dating back from 2017.

Whether use was by the public

43. The quality of the user evidence forms was the subject of criticism by WPC and by Mr Williams, who between them pointed out that firstly, most of the witness evidence appeared to relate to the use of the cut-off path through the caravan park, and secondly that the lack of a map (or conversely the inadequate map provided) rendered the user evidence unreliable. At the inquiry, several user witnesses appeared, some of whom had provided user evidence forms, and other witnesses appeared who were able to give first-hand evidence of the nature of the claimed route across what is now Honeyfield Farm.
44. Although the evidence of use of this section of the Order route was less both in the volume of people and the frequency of use, I am satisfied that the people who were using it qualify to be termed 'the public' as they were local residents of the area.

Whether the way has been used for an uninterrupted period of 20 years

45. The evidence was consistent that, when the land had been owned by Mr Sadler, he had provided the alternative route across his land (as opposed to the definitive route of Footpath 25) because it naturally followed on from the cut-off route through the caravan park. It also provided direct access to The Marsh. Mr Hunt gave evidence of the work he had done, on Mr Sadler's instructions, to fence the land and to install stiles. He also explained how he had re-created the ponds immediately to the west of the Order route (near Point F) and re-established the bridge or culvert to which other people referred in their evidence. As I have already stated, Mr Sadler bought the land in 1984.
46. The aerial photograph dated 1995 showed a fence-line across the paddock area along which witnesses said that they had walked. Prior to the erection of the fence, witnesses recalled heading either for the corner of The Marsh or the gap between the ponds, depending on which direction they were travelling. Sian Lewis, who rented the land in question from 1998 to 2005, and Linda Moore who rented the land for a couple of years after that, were both adamant that Mr Sadler had told them that the footpath was not to be obstructed, and both of them referred to the route alongside the barbed wire fence. Neither of them were aware that there was any other path across the land (on the line of the definitive path Footpath 25).
47. The subsequent aerial photographs were pored over in depth at the inquiry and various inferences or interpretations put upon the alleged locations of water troughs and fences. With regard to the water troughs, Linda Moore gave

evidence that during her tenancy of the paddocks (2007-8) there were no troughs on the land. She was quite clear that there was no water supply laid on and that she had had to provide water for her animals by hand. I am satisfied that the features in the aerial photographs which were initially thought to be water troughs are, in fact, part of the barbed wire fence itself (i.e. straining posts or gate posts throwing a larger shadow at intervals). As pointed out by Mr Fry and others, water troughs would usually be placed at right angles to a fence line (so that they can be accessed by animals on both sides of the fence) rather than in line with the fence which would make access to the water almost impossible.

48. The presence of the water troughs was used by the objectors (principally Mr Stalker) to try to show that the fences which are currently in situ are not in the same location as the previous barbed wire fence, implying that the route had changed and could not, therefore, have been used for the required period of 20 years.
49. However, by carefully comparing the aerial photographs, and ignoring the red-herring of the water troughs, I am satisfied that the barbed wire fence followed a line which is replicated by the north east side of the race. The user witnesses were clear that the path ran on the 'road' side of the barbed wire fence and that would accord with the position of the race.
50. WPC sought to show that a walks booklet produced in 1994 and revised in 2012 demonstrated that the public had not been walking the Order route across Honeyfield Farm in 1994 because the hand-drawn map in the booklet showed the definitive line of the path. By 2012 the route description was changed and did make reference to using the race, but as pointed out by Mr Fry, the map was the same.
51. Whether or not people were using the line now occupied by the race in 1994 is not helpful to me as it predates the relevant 20 year period. By 2012 the booklet text clearly indicates that the public were using, and being encouraged to use, the race, despite the map showing the definitive line of Footpath 25. I therefore place little weight on this evidence as showing that people were not using the Order route at the beginning of the 20 year period.
52. Nevertheless, it cannot be denied that during the period after the race was constructed in 2009, passage along and over the land in general was interrupted for a few weeks or months while a new sewer was constructed across Honeyfield Farm. This fact was not mentioned by the user witnesses in their written evidence, but some user witnesses at the inquiry acknowledged the event. Mr Stalker had provided an alternative route which utilized the access track to Wrightsbridge, but it was an informal arrangement. Upon completion of the works, access along the race was restored and no-one appears to have considered that their use of the way was being challenged by these works.
53. There is no other evidence to suggest that access along the race was compromised, except by the occasional grazing of horses, during the 20 year period dating back from 2017, and I agree with Mr Fry that the interruption caused by the sewer works was not for the purpose of denying public access. It was merely a relatively brief consequence of the excavations. Grazing horses on a public right of way is a perfectly normal activity, and a gate opened across a path does not constitute an interruption unless it is locked. There is

no evidence to suggest that any gates opened across the path to facilitate the grazing were locked. I conclude that the way has therefore been used by the public for an uninterrupted period of 20 years dating back from 2017.

Whether the use has been as of right

54. For the dedication of a highway to take place the usage of it must have been 'as of right', which the courts have upheld as being usage without force, without secrecy and without permission.
55. The witness evidence, both that given in writing and that given orally at the inquiry, is consistent with use of the way having taken place openly, without the need for force of any kind, and without permission. If a way is offered by the landowner, and accepted through usage by the public, that does not necessarily constitute permission. The Latin phrase normally associated with usage as of right is "*nec vi, nec clam and nec precario*".³ Permissive access is 'precarious' and can be withdrawn at any time. There is no indication that any indication was given to the public by Mr and Mrs Stalker that access across their land via the race was precarious.
56. Mr Stalker insisted that access across Honeyfield via the race was a temporary solution to the problem of the obstruction of Footpath 25 on Mr Sadler's land, and that it was agreed with the representative of the Borough Council (Ms Annie Ellis) that this was so. However, he conceded that the situation had gone on for much longer than he, or perhaps the Borough Council, had expected. Nevertheless, whatever may have been the verbal understanding between Mr Stalker and Ms Ellis, the fact remains that no action was taken by the Stalkers or the Borough Council to bring the alleged permissive nature of the route to the attention of the users. The views expressed by officers of the Borough Council as to its status, either then or subsequently, were simply that – opinions.
57. There are measures which landowners can take to prevent public rights of way arising across their land as a consequence of presumed dedication. Whether or not Mr and Mrs Stalker were made aware of the risks of providing the 'temporary' access, the fact remains that none of these steps appears to have been taken, and users of the route thought that the provision of the race was helpful and consistent with their use of the way as a public footpath. Until it was closed in 2017 I am therefore satisfied that the use of the way across the land that is now Honeyfield Farm was exercised by the public as of right for an uninterrupted period of 20 years prior to that date.

Whether there is sufficient evidence of a lack of intention to dedicate a highway during the relevant period

58. During the part of the relevant period of 20 years when the land was owned by Mr Sadler (1997 to 2008) there is no evidence that there was ever any intention not to dedicate the route in question as a highway. In fact the evidence all points to the fact that he did specifically intend it to be a public footpath.
59. Since the ownership of the land was acquired by Mr and Mrs Stalker, the intentions of the landowner are less clear cut. As I have already discussed, Mr Stalker's view of the situation is at odds with those of other people who used

³ i.e. without force, without secrecy and without permission

the route, and this is important to interpreting this aspect of Section 31 of the 1980 Act. This requirement of the legislation is often referred to as 'the proviso' and it has been established in case law⁴ that in order for the proviso to be effective in defeating a claim of presumed dedication, the intentions of the landowner in this regard must have been clearly communicated to the users of the path concerned.

60. In this case there is no evidence that the users of the path were aware that Mr and Mrs Stalker had no intention of dedicating the route through the race as a highway. On the contrary, the users thought it had been constructed on purpose to facilitate their passage. The signage that was erected said nothing about either the temporary or permissive nature of the route, and simply gave reasonable warning about the behaviour of horses and asked for dogs to be kept under control. These notices are not incompatible with the use of highways.
61. I am therefore satisfied that at no time did Mr and Mrs Stalker provide sufficient indication to the public of their lack of intention to dedicate a highway over the Order route until they closed it in 2017. It may not have been their understanding, but their actions were insufficient to demonstrate that negative intention during the relevant 20 year period.
62. Consequently a public footpath can be presumed to have been dedicated.

Common Law dedication

63. Having reached the conclusion above, I do not need to examine the case at common law, but for completeness I think it may be helpful to do so. Dedication at common law can occur expressly, or impliedly. Express dedication is uncommon and usually relies on some form of written deed setting out the dedication unequivocally. It is more common for dedication to be inferred from the actions of the landowner, and the actions of the public in response.

Actions of the landowner

64. In this case, I have already concluded that Mr Sadler, having obstructed the definitive line of Footpath 25, set out an alternative route over his land. With respect to the section of the Order route between Points F, E D and G, Mr Sadler instructed that stiles should be erected along the route and a fence installed along the line of the route. He also arranged for the continuation of the definitive line of Footpath 25 to be improved by re-instating the bridge between the two ponds to the west of Point F. This work was carried out by Mr Hunt and others after Mr Sadler bought the land in 1984.
65. Despite the rather ambiguous evidence of the walks booklet produced by Barbara Parnell, there is no evidence to contradict that Mr Sadler provided the route across his land and his intention was that the public should use it. The tenants of the paddocks were quite clear about his instructions that they should honour the existence of the route, and they complied with them.

⁴ R(oao Godmanchester Town Council and Drain) v SSEFRA [2007] UKHL 28

Actions of the public

66. I have already stated that the evidence of use of this section of the Order route was less in volume and in frequency than the use of the cut-off path, but the witnesses who gave evidence of their use at the inquiry were clear in their descriptions for the most part, taking account of the passage of time. There was consistency of approach in describing the route in each direction and the points for which they were heading. In one direction they were heading for the junction with The Marsh, and in the other direction they were looking out for the gap in the hedgeline between the ponds.
67. Given the fact that since 1984, or shortly afterwards, the definitive line of Footpath 25 had been obstructed by Mr Sadler it seems to me unassailable that the alternative route which he provided would have been used. Prior to that date I place much less weight on the evidence of use of a route equating to the Order route as I cannot be sure that people were not, in fact, using the definitive line of Footpath 25.
68. Nevertheless, during the majority of Mr Sadler's period of ownership (1984 to 2008) I am satisfied that he provided, and the public used, a route across his land which equates to the Order route between points F and G. Consequently the requirements for the implied dedication of a highway at common law are satisfied.
69. This means that by the time Mr and Mrs Stalker purchased the land in question, a highway had already been dedicated and any action they took in trying to negate that was ineffective in the absence of a legal order.

Conclusions

70. 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 with modifications.

Formal Decision

71. I confirm the Order subject to the following modification:
- From the Order and the Order plan, delete all reference to the route shown between Points A-B-C-D
72. Since the confirmed Order would not show a way shown in the Order as made, Paragraph 8 (2) of Schedule 15 to the Wildlife and Countryside Act 1981 requires that notice shall be given of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Helen Slade

Inspector

APPEARANCES

FOR THE SURVEYING AUTHORITY:

Malcolm Fry
Phillip Debidin

Swindon Borough Council
Solicitor for Swindon Borough Council (attended
on 13 November only)

FOR THE SUPPORTERS:

John Warr
He called:
Himself
Graham Finch
David Birley
Steven Savage
Martin Savage
Linda Moore
Peter Hunt
Sian Lewis
Robert Inskip
Rosemary Savage

Applicant

FOR THE OBJECTORS:

Mark Hanson

David Hayward
Neil Stalker
Charlie Stalker
Michael Webster

Landowner, representing four households in
Suters Lane
Representing Wanborough Parish Council
Landowner
Landowner
Resident and adjacent landowner

DOCUMENTS

- 1 Proof of Evidence and Statement of Grounds, with appendices, submitted by Swindon Borough Council
- 2 Bundle of photographs submitted by Swindon Borough Council
- 3 Proof of Evidence and Statement of Case with appendices submitted by John Warr
- 4 Proof of Evidence and Statement of Case with appendices submitted by Wanborough Parish Council
- 5 Statement of Councillor Hayward on behalf of Wanborough Parish Council
- 6 Extract from walks Booklet dated 1994 submitted by Councillor Hayward on behalf of Wanborough Borough Council
- 7 Copy of updated walks booklet dated 2012 submitted by Councillor Hayward on behalf of Wanborough Parish Council
- 8 Maps submitted by Councillor Hayward on behalf of Wanborough Parish Council
- 9 Statement and appendices submitted by Neil Stalker
- 10 Photographs submitted by Neil Stalker
- 11 Extract from Conveyance, submitted by Charlie Stalker
- 12 Aerial photograph submitted by Charlie Stalker
- 13 Statement submitted by Derek Williams
- 14 Statement and appendices submitted by Mark and Tracey Hanson
- 15 Supplementary statement submitted by Mark Hanson
- 16 Statement and appendices submitted by Christopher Trybus
- 17 Statement submitted by Michael Webster
- 18 Supplementary Statement submitted by Michael Webster
- 19 Statement and appendices submitted by Paul and Katie Gurr
- 20 Photographs submitted by Steven Savage
- 21 Photographs submitted by Linda Moore