



## Order Decision

Inquiry held on 9 July 2019

Site visit made on 9 July 2019

**by Susan Doran BA Hons MIPROW**

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

Decision date: 23 July 2019

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### Order Ref: ROW/3210164

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Hertfordshire County Council (Cheshunt 83) Modification Order 2017.
- The Order is dated 8 December 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 was one objection outstanding at the commencement of the inquiry.

### Summary of Decision: The Order is confirmed

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#### Preliminary Matters

1. This Order concerns the addition of a public footpath between Shaw Close (point A on the plan attached to the Order), following an 'alleyway' via points B and C, to The Green, Cheshunt (point D).

#### The Main Issues

2. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires me to consider whether, on a balance of probabilities, the evidence shows that a public footpath subsists along the Order route.
3. The evidence adduced is of claimed use by the public, and Hertfordshire County Council relies on a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
4. Accordingly, I must establish the date when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was no intention on the part of the landowners to dedicate public footpath rights during this 20-year period.
5. The main issues in this case are whether use was permissive and whether there was no intention by the landowner to dedicate a public right of way.

#### Reasons

##### *When use of the claimed route was brought into question*

6. It is not disputed that use of the claimed route by the public was challenged in August 2016 when it was boarded up at either end following a change in

ownership. I have considered whether other actions such as challenges made to users, and notices, could constitute a bringing into question for the purposes of Section 31 of the 1980 Act but find no substantive support for an earlier date.

7. Taking 2016 as the appropriate date provides a 20-year period of August 1996 to August 2016.

***Whether the claimed route was used by the public as of right and without interruption***

8. Some 24 individuals completed user evidence forms (UEFs). Of these, 14 provided written statements elaborating on their claimed use, and a further witness provided a written statement. Three people gave oral evidence of their use to the Inquiry.
9. Claimed use was to access the shops on Whitefield Road and further afield, going to school and work, visiting friends and relatives, dog walking and accessing local amenities such as the bus stop, parks and hostels. Claimed use began in the 1950s, well before the 20-year period under consideration.
10. The frequency of use varied and included daily and weekly use. Use by others was observed regularly including by people not known to the witnesses.
11. A shopkeeper and local resident of property adjacent to the Order route (near point C) between 1984 and 2004, had experienced various acts of vandalism and anti-social behaviour associated with the alleyway which passes to the rear of his former shop and home. Having contacted the landlord, Enfield Council, and been told it was private property, he had subsequently challenged users telling them to move on or he would call the police. However, no further details are given about when these challenges took place or to whom. Those providing evidence of use had not been challenged and were not aware of anyone else having been challenged. The actions described appear to me to have been directed at people causing nuisance rather than to users of the way, and it is unlikely that the shopkeeper was present at the rear of his shop to observe and challenge use on a frequent basis.
12. A tenant of a former Enfield Council depot adjoining the Order route (near point B), between 2000 and 2010, had also experienced acts of vandalism and anti-social behaviour associated with it. Similarly, he had been advised by Enfield Council that it was private property, although he had not been told the public should not be there. His written evidence clarified that he had challenged people causing trouble, although he had seen others using the way. Again, I consider his actions to have been directed at those causing nuisance rather than to those using the way to access shops and other local amenities. As above, users had not been challenged during this period, nor before or after it.
13. I find there is no evidence that use was by force, by stealth, or was interrupted during the 20-year period.

*Whether use was permissive*

14. The former shopkeeper's written evidence was that he had given some regular customers permission to use the Order route. However, those providing evidence of use had not been given or sought permission; and the shopkeeper had not indicated to whom he had granted permission. None of those giving

oral evidence recalled having discussed the Order route with the shopkeeper, although two knew him quite well. None recalled having been given permission by him to use the route. In any event, the shopkeeper was not in a position to grant permission as he was not the owner of the land. Indeed, users had not been given permission to use the Order route by anyone, nor sought permission from anyone to use it. Accordingly, I find that use was not permissive.

***Whether there was no intention to dedicate a public right of way***

15. As stated above there is no evidence that the former shopkeeper owned the land over which the Order route passes, nor that in challenging users or granting permission to some that he was acting on behalf of the landowners. It was Enfield Council who owned the land during the 20-year period.
16. Similarly, there is nothing to suggest the tenant of the former Enfield Council depot owned the relevant land or was acting on behalf of Enfield Council in challenging users or in putting up notices. In written evidence he said he had installed signage stating the land was private and there was no right of way and explained this to people he had found using the path. However, in a second statement he indicated his concerns about people obstructing access to his business, fly tipping and vandalism. Further, that the signage he installed on the fence and gates to his business related to parking and vandalism rather than to the status of the Order route and its use by the public as a thoroughfare.
17. Although Enfield Council Officers regarded the Order route as a private way<sup>1</sup> there is no evidence that, as landowners, Enfield Council took any actions, or communicated to the public, that there was no public right of way. Similarly, reliance cannot be placed on the same view expressed by Broxbourne Borough Council Officers in relation to a planning matter, as they were not the landowners.
18. Two notices are attached to the walls of the former Enfield Council depot. Both show signs of wear and tear suggesting they are of some age. However, photographic evidence from Broxbourne Borough Council shows neither in place in 2016<sup>2</sup>, although they were present in June 2017 when photographed by Hertfordshire County Council.
19. One sign reads *'This is Private Property Please do not let your dog foul here'*. I do not attach weight to the 'private' reference as in itself this does not preclude the existence of a public right of way - many public rights of way cross land in private ownership. Further, the request regarding dog fouling suggests an acknowledgement that people with dogs were using the way. In any event, the sign does not in my view indicate a lack of intention to dedicate a way on behalf of the landowner.
20. The second sign reads *'Private This is not a public right of way Residents only'*. Here, the wording is a clear lack of intention. However, nothing in the user evidence referred to signs being present on the Order route at any time. One of those giving oral evidence had a vague recollection of a sign before 1980 but

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<sup>1</sup> In email communications in 2016 and 2017

<sup>2</sup> In February 2016 as regards the sign on the wall between B and C, and December 2016 for the sign between B and A. Both photographs were taken by their planning department staff.

could not recall its wording. He felt sure that if it had stated there was no public right of way, he would have queried it.

21. Enfield Council had no knowledge of having put up the signs. It seems more likely than not that they were put up some time between December 2016 and June 2017, and thus outside the 20-year period. I have considered a reference to them having been found at the former Enfield Council depot and reinstated on the walls where there were existing screw holes. However, even if the evidence showed that signage had previously existed at these locations, it does not follow that the signs presently in situ are the original ones. Neither does the evidence of the former landowner, of the tenant who did not recall placing signs on the walls, or of the public using the Order route support the presence of such signs. Although, one witness had a vague recollection of a sign, and the others that it was conceivable that they had not noticed them. Nevertheless, on balance, I do not regard it as probable that the signs were in place during the 20-year period. Accordingly, I do not find the evidence sufficient to support the assertion made, nor sufficient evidence of a lack of intention on behalf of the landowner to dedicate a public right of way.

### **Conclusions on the Section 31 tests**

22. I have concluded that the relevant period is 1996 to 2016. I am satisfied that the evidence of use is credible, reliable and convincing. Further, the oral evidence confirmed the written evidence. I have concluded that use of the Order route by the public was as of right and without interruption, and notably without permission. Notwithstanding the notices currently in situ (which I find were not in place during the 20-year period), there is no evidence of any actions by or on behalf of the landowners sufficient to convey to the public that there was no intention to dedicate a public right of way over the Order route. Accordingly, I conclude the tests are met and a public right of way subsists.

### **Other matters**

23. In reaching my decision, under the 1981 Act, I am unable to take into account such matters as the suitability or desirability of the Order route for use by the public, nor issues such as alleged anti-social behaviour and vandalism. Neither is the existence of an alternative route a relevant factor in reaching my decision.

### **Conclusions**

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

### **Formal Decision**

25. I confirm the Order.

*S Doran*

**Inspector**

## **APPEARANCES**

### **For the Council:**

Rosie Scott *of Counsel* *representing* Hertfordshire County Council  
who called  
Angela Simpkins Definitive Map Officer  
Andrea Trendler  
David Bennett  
Stephen Bennett  
Ronald Ring

### **For the Objector:**

Joe Bliss *representing* Grand Oak Estates Ltd

## **DOCUMENTS**

1. Investigation Plan, Shaw Close to The Green, Cheshunt, showing location points 1-4 (page 24a of Council's document bundle)
2. Amended User evidence Table and Chart (HCC document 51)
3. Copies of Section 53 of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980 and relevant case law - *Lewis v Thomas* [1950] 1 K B 438, *Applegarth v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 487, *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, *Mervyn Darrell Burrows v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 132 (Admin), *Paterson v Secretary of State for the Environment, Food and Rural Affairs and others* [2010] EWHC 394 (Admin), *O'Keefe v Secretary of State for the Environment and another* QBCOF 94/1223/D