

HERTFORDSHIRE COUNTY COUNCIL



Rights of Way Service

Modification Order Application
Decision Report

Croxley Green Rec

Author: Helen Denton

Date: 23rd March 2016

Application Details

An application has been made to record a public footpath around the east, north and west side of Croxley Green Rec, in Croxley Green. An extract of the 2015 Definitive Map is attached. It shows where the route is and is labelled points 1-5.

This application was made by Mr Dudley Edmunds of Croxley Green on 27th August 2009. It was submitted in the prescribed form and accompanied by the evidence upon which it sought to rely, being user evidence forms and a copy of a conveyance to the land.

Description of Route

The application route runs around the sports ground in Croxley Green, a large village to the west of Watford. The sports ground lies between New Road and York Mead Primary School, and is used as private sports facilities by the Croxley Guild of Sport and Social Club. The freehold owner of the land is Three Rivers District Council (TRDC), which leases it to the Guild. The alleyway which joins the application route at point 1 to New Road is owned by TRDC, as is the car park to which the application route joins at point 4. The alleyway between points 3 and 5 is owned by HCC as it is part of York Mead Primary School.



Fig. 1



Fig. 2

The application route commences at an alleyway off New Road and the junction with Footpath 10 at point 1 on the plan and runs along a surfaced path of between one and two metres in width around the western, northern and eastern perimeter of the sports ground (see Fig. 1). At point 2 the path joins unsurfaced and unrecorded routes through Stones Orchard to the west of the sports ground. This orchard is also owned by TRDC and is maintained as public open space.

At point 3 the application route forks to run along a further surfaced alleyway that joins Fuller Way. The application route continues to run around the perimeter of the sports field (see Fig. 2) until it reaches Footpath 10 and the car park of the community centre at point 4.

Background: the evidence relating to the application

For each investigation, we check at least 10 primary sources of information for any historic evidence relating to the application route. You can view the documents listed below at Hertfordshire Archives and Local Studies (HALS) or at the Rights of Way Service (ROW). The documents are listed below with a reference number (if it has one) and where you can find it.

For further information contact:

- Hertfordshire Archive and Local Studies on 0300 123 4049 or www.hertsdirect.org/services/leisureculture/heritage1/hals/
- Rights of Way Service on 01992 555279 to make an appointment.

If you would like more information about documents and how they are important in investigating public rights of way, please go to the Planning Inspectorate's website and view their Guidance Booklet for Definitive Map Orders: Consistency Guidelines. See <http://www.planningportal.gov.uk/planning/countryside/rightsofway/rightsofway> which also gives details about related articles and case law.

Investigations into the following historical documents have not provided evidence with regard to the application route. Please note that where there is no evidence found relating to the application route, this has just been recorded as "no evidence found", and where there are no records for the document listed, this has been recorded as "no records found."

- Dury and Andrews county map, 1766 (ref. HALS CM26) - no evidence found
- Bryant's county map, 1822 (ref. HALS CM88) - no evidence found
- Tithe records for Rickmansworth, 1838 (ref. HALS DSA4/80/1) - no evidence found
- Inclosure records – no records
- Highway diversion/extinguishment records - no records found
- Railway and canal plans – none in the immediate area.
- Inland Revenue (Finance Act (1909-1910) 1910 – no evidence found
- Ordnance Survey maps, 1:2500 county series, 1898 onwards – no evidence found
- Definitive Map records (ref. RoW) – no evidence found.

Whilst the above documents did not provide evidence as to the application route's existence, the user evidence supplied by the applicant and the title deeds and legal opinion supplied by TRDC, did. This report will focus on this evidence, and will include the following:

- why we consider the evidence important when making our decision;
- what is shown by the evidence in the area of the application route;
- HCC's assessment of the evidence in relation to the legal tests and case law;
- HCC's decision in respect of the application.

Why we consider the evidence important

Contemporary evidence of use

Evidence is generally provided through the completion of evidence questionnaires by users and from information provided by the owner of the land. User evidence may support historic evidence of a right of way. However, where there is no historic evidence of a route it is possible for a public right of way to come into existence if it can be shown that members of the public have used it 'as of right' without interruption (usually) for a period of 20 years. In order for the public's use of a route to have been 'as of right' it must have been:

- **without force** (e.g. not breaking down a fence to access the route)
- **without secrecy** (e.g. not just using the route when landowners were away)
- **without permission** (i.e. not having the permission of the landowner).

Unless there is historic evidence of rights as well, legislation requires there to be evidence of 20 years' use which ends with a 'date of challenge' (section 31 of the Highways Act 1980). The 'date of challenge' is the date at which the landowner challenges the use of the route e.g. by putting up a notice. Where there is no evidence that use has been challenged,

section 31(7B) of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Under common law a right of way can also come into existence in less than 20 years if it can be shown that there was dedication of the route by the landowner and acceptance of the route by the public.

Under Section 31, after a period of 20 years use, it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that they have taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner's intentions. They can include placing and maintaining notices on site stating that the route is not public or that it is used with permission; by erecting and locking gates; or by telling people seen using the route that it is not public, etc.

In addition to placing notices on site, section 31(6) of the Highways Act 1980 (following on from the Rights of Way Act 1932) allows landowners to deposit a map and statement with the County Council showing the public rights of way across their land. Following this, declarations need to be made regularly to the effect that no additional ways have since been dedicated. It should be noted that making such deposits and declarations will not affect pre-existing rights.

Title deeds

Other sources that can provide evidence of the landowner's intention are conveyances, transfer documents and leases deal with the transfer of ownership of private property and private rights over such property. They are not prepared with a view to showing public rights of way, as such rights exist because of other legal mechanisms. Therefore, if a conveyance or transfer does not refer to a public right of way this is not evidence that the public right of way does not exist. Because conveyances grant private rights of access to certain properties they are useful evidence of which sections of the population are using a path because they have a private right to do so, or because they may have acquired a public right.

Conveyances and leases can also contain other covenants, which either require the landowner to treat the land in a certain way, or prevent them from carrying out certain activities on the land. Such covenants can require land to be held for the benefit of the public, or they can require the landowner to actively prevent public access. The existence of such covenants can be an indication of the way in which the previous or current landowners view the land. However, the courts have held that any actions to prevent public rights of way coming into being must be overt, in that the public must be made aware of the landowner's intentions.

What is shown by the evidence of use

User evidence forms from 68 people were presented with the application. Of these, 35 people attest to 20 years' use of the field or more. There is, however, some variation in the route that people use. Every person attested to walking the tarmac path that leads between points 2-3-4. This path has not always been there, but was apparently built in response to public use of a route approximately on the same line. Several people, however, say that they

would walk across the middle of the field, especially when the weather is fine and the grass is dry. There is also a variation on the route used depending on where the witnesses live and where they are visiting. The majority of witnesses live to the south and east of the application route and so while the user evidence forms provide evidence of 29 people using the route between points 2-3-4 for 20 years, they provide evidence of 13 people using the route between points 1-2 for 20 years, and 11 people using the route between points 3-5 for the same time.

Most of the witnesses provided an estimation of the width of the application route. Most appear to have based this upon the width of the surfaced route, which is approximately 1 metre. 38 witnesses estimated the width as being between 0.5 and 1.5 metres, whilst 15 estimated it as being wider, from 2 to 4 metres.

Many witnesses refer to how the Guild of Sports has treated public use of the land. In or around 2009 notices were erected at various points on the land stating that it was private land, that the public should stay on the footpaths and that the paths were liable to be closed without notice. Several witnesses also attest to being turned off the land by Guild employees in an intimidating fashion. A wire or mesh fence was erected at the entrance to the field from the orchard, at point 2, in early 2009 (reports vary as to whether it was January or March). This fence appears to have remained in place for only a matter of hours before it was vandalised and public access continued. The applicant has provided an email dated 19th February 2016 from Councillor Frank Brand, a Croxley Green parish councillor and member of the Guild of Sports committee, in which Cllr Brand states that the fence was erected by the football youth team manager without the consent of the Guild.

What is shown by the title deeds

Croxley Green recreation ground and the surrounding land is registered at the Land Registry under title number HD171950 and is described as “land and buildings lying to the north of New Road, Croxley Green” currently in the ownership of TRDC. Comprised within this title is the sports ground, the tennis courts and bowling green to the west and Stone’s Orchard to the north of the tennis courts.

The land over which the application route runs is edged blue and numbered 5 and 6 on the title plan. These numbers relate to two conveyances of the land, being a conveyance dated 7th August 1918 made between (1) Humphry Stephen Woolrych (2) Augustus Holliott Powell and Roland Moffatt Perowne Willoughby and (3) John Dickinson & Co. Limited, and a conveyance dated 5th August 1925 made between (1) Humphry Stephen Woolrych (2) Roland Moffatt Perowne Willoughby and others and (3) John Dickinson & Company Limited. Both conveyances contain identical restrictive covenants that require any houses to be built on the land to be of a certain value, and

“... that no house or building at any time erected on the said premises or any part thereof shall at any time be used or occupied for the purposes of any trade business or manufacture or for any other purposes except as and for a private or professional dwellinghouse or for any purpose associated with a Recreation Ground.”

The conveyance of Stone's Orchard to TRDC dated 21st July 1983 contains a covenant to only use the land "for open space and recreation purposes in perpetuity for the benefit of ... the residents in the locality and the residents of Three Rivers District". However, the land subject to this covenant is only Stone's Orchard, not the sports field over which the application route passes.

A separate conveyance, also dated 21st July 1983, conveyed the sports ground from DRG (UK) Ltd to TRDC. DRG (UK) Ltd was the successor company of John Dickinson & Company Ltd. The recitals of the conveyance state that the land was sold to TRDC for the sum of £1 "in order to preserve its availability to the local community as an open space for recreational purposes". However, the conveyance does not contain a covenant in similar terms, meaning that TRDC did not promise to maintain the land in this way. TRDC have provided an opinion on their ownership of the land, and have commented that the lack of covenant was probably because it was the intention that the Guild of Sports should lease the land as a private members club.

The sports ground was leased to the Guild of Sports for 30 years, commencing from 1983 and extended from 2013 for a further 15 years. In the lease the Guild covenanted the following:

- 15. To use the sports ground and such buildings thereon as a private sports ground and social club only.*
- 16. Not to allow any persons except the Club members and servants and guests of members to use the Sports Ground for any purpose other than for the purposes of participating in sporting and social activities of the Club and in particular not without the previous written consent of the Council to invite or allow the general public to enter thereon either gratuitously or on payment for the purpose of witnessing or taking part in any game match or other display or entertainment ...*
- 17. To use their best endeavours to expel any persons trespassing on the Sports Ground."*

TRDC are of the opinion that the extent of the leased land includes only that section of the application route between points 1 and 2. They believe that the tarmacked application route between points 2 and 4 lies outside of the leased area, meaning that it is unaffected by the Guild's covenants.

Furthermore, TRDC comment that both the sports ground and Stone's Orchard

"were acquired and held under general powers contained in the Local Government Act 1972, rather than under the Open Spaces Act 1906, which contains provisions for local authorities to acquire land to be held as an open space with a view to the enjoyment thereof by the public as an open space."

TRDC finish their opinion by stating that

"It is highly likely ... that the land is not Public Open Space. Although acquired by the Council for a nominal sum (£1.00) from effectively a 'donor' who expressed a desire that it should be made available to the local community as open space for

residential purposes, there was not in this transaction a statutory obligation to use the land as public open space. It could be argued therefore that the users of the land for recreational purposes do so as of right, not 'by right'."

HCC's decision on the evidence of use by the public

Section 31 of the Highways Act 1980 states that a public right of way will have come into being if:

- a) the public have used the route as of right and without interruption for the full 20 year period immediately prior to the first date that use was challenged; and
- b) during that 20 year period there was no evidence from the landowner that they did not intend to dedicate it as a public right of way.

Therefore, in order to assess whether there has been sufficient evidence of use to raise a presumption that public footpath rights have accrued on the application route, HCC first has to establish the date use was challenged. The first overt challenge to this use appears to have occurred in 2009 with the erection of 'private' notices and fence across the route as it joins Stone's Orchard. This then prompted the modification order application, which was made the same year. HCC decided that the 20 year period of use therefore occurred immediately before this challenge and the making of the application in 2009, meaning that the relevant period of use is 1989-2009.

An assessment of the 68 user evidence forms presented with the application shows that during the 20 year period of 1989-2009 13 witnesses attest to using the application route on foot between points 1-2, 29 attest to using it on foot between points 2-3-4, and 11 attest to using it on foot between points 3-5. During that 20 year period there is no evidence that use has been with force, in secret or with permission. HCC decided that this satisfies the first provision of section 31 of the Highways Act 1980, in that the public have used the application route as of right and without interruption for the 20 year period leading up to the date of challenge. The next section will consider whether during that 20 year period the landowner carried out any actions to demonstrate that it did not intend to dedicate a public right of way.

HCC's decision on the title deeds

It would appear that John Dickinson & Company Ltd had a general desire that the sports ground should be used for the benefit of the local community as a recreation ground. Whilst the deed conveying Stone's Orchard to TRDC contained covenants for TRDC to hold the land in that capacity, the equivalent deed conveying the sports ground did not. TRDC stated that they did not acquire the land pursuant to the Open Spaces Act 1906 or any similar act that allows local authorities to hold land for the purposes of public open space.

Part of the application route between points 1 and 2 lies within the land leased to the Guild of Sports by TRDC. In the lease the Guild covenanted to use the land as a private sports ground and to prohibit its use by the general public. The case of *R (Drain) v Secretary of State for DEFRA and Yattendon Estates Ltd* [2007] UKHL 28 dealt with the question as to whether covenants in private leases were sufficient to bring it home to the public that the landowner had no intention to dedicate a public right of way. In *Drain Yattendon Estates*

argued that a clause in a tenancy agreement which required the tenant to turn away trespassers was sufficient to show that it did not intend to dedicate a public footpath. The judge in the House of Lords ruled that the actions of the landowner must be clear to a 'reasonable user' of the route. A covenant in a tenancy agreement that the public were unlikely to see was held to be insufficiently overt to bring the landowner's intentions to the public's notice.

HCC decided that, following the House of Lord's decision in the *Drain* case, the fact that the Guild's lease contains a clause requiring it to prevent members of the public using the recreation ground is insufficient on its own to overtly bring it home to the public that TRDC did not intend to dedicate a public right of way.

HCC's decision in respect of the application

The user evidence shows that the public have used the application route on foot between points 1-5 without force, without secrecy and without permission for the 20 year period of 1989-2009 and that during that period there was no evidence that the landowner did not intend to dedicate a public right of way. HCC therefore decided that the evidence is sufficient to demonstrate a presumption that public footpath rights have accrued over the whole of the application route under section 31 of the Highways Act 1980.

HCC then assessed the legal width of the application route. The average width given by the witnesses is 1.5 metres, and much of the path around the recreation ground has been surfaced at approximately a metre in width. However, site visits and photographs of people using the route have demonstrated that the used width is greater than the surfaced width. HCC therefore decided that the legal width of the path between points 1-2-3-4 is 2 metres. The path between points 3-5 is determined by the physical width, as it is fenced on both sides. HCC therefore decided that the legal width of the path between points 3-5 is 1.8 metres.

There is no evidence of any limitations on any sections of the application route.

The footpath will not be a highway maintainable at public expense.

