



Order Decision

Site visit made on 9 March 2010

by **Martin Elliott** BSc FIPROW

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

The Planning Inspectorate
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Decision date:

11 AUG 2010

Order Ref: **FPS/N1160/7/3**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the City of Plymouth (Footpath No 1, Drake) Definitive Map Modification Order 2008.
- The Order was sealed on 2 June 2008 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 Schedules.
- There were two objections outstanding when Plymouth 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 set out below in the Formal Decision.

Procedural Matters

1. I carried out an unaccompanied site inspection on 9 March 2010. As I did not have permission to access the land my inspection of the Order route took place from the adjacent public highways. I am satisfied that I am able to reach my decision on the basis of my site visit and the submissions made by the various parties.
2. Following the Notice of Order a representation was received from the owner of Gulland House. The representation was circulated to the parties but did not raise any issues which I am able to take into account in reaching my decision.
3. On the submission of the Order to the Planning Inspectorate Plymouth City Council advised that there was only one objection outstanding. On consideration of the submissions it became apparent to me that a further objection raised to the Order, by solicitors acting on behalf of a Mrs West, had not been withdrawn and is extant. Both the Planning Inspectorate and Plymouth City Council made various attempts to establish whether or not Mrs West, who no longer has an interest in the land, wished to pursue her objection. No response has been forthcoming from Mrs West or the solicitors acting on her behalf. In the circumstances the objection from Mrs West and supporting documents were circulated to the other parties for comment. Mrs West was also given opportunity to make further submissions but none were received. The sole response to the further invitations for written representations was from Plymouth City Council; their comments were circulated to all parties.
4. In view of the fact that Mrs West has been given further opportunity to make representations to the Order and her original objection has been taken into account I do not consider that there has been any prejudice.

5. An objection from a Mr Kind relates to the use of the term approximate in relation to the width of the Order route and the identification in the Order of a flight of steps as a limitation. The Council asks that in deciding the weight to be attached to the objection it should be noted that the objector does not represent the view of any particular group or statutory consultee but is a member of the public offering his personal opinion. Whilst I note this point the objector has made a statutory objection which should be seen in that context. I consider this objection at paragraphs 24 to 28 below.

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. The test to be applied to the evidence is on the balance of probabilities.
7. The Council relies on section 31 of the Highways Act 1980 which provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.

Reasons

When the right to use the way was brought into question

8. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it.
9. In September 2005 the owners of Gulland House erected fencing which prevented the use of the way. Signs erected suggested that the footpath had been closed for maintenance; after maintenance the route remained closed. The Council received numerous complaints regarding the closure and it became evident that the landowner did not intend to reinstate access. The erection of the fence and notices is recognised in some of the evidence of use forms as preventing the use of the way and appears to have prompted an application (dated 26 October 2005) under the Wildlife and Countryside Act 1981 to add the way to the definitive map.
10. The actions by the landowner appears to have raised questions as to the right to use the way and would have been sufficient to bring it home to those using the way that their right was being brought into question. There is no evidence of any other challenges sufficient to bring the right to use the way into question and this sets a relevant twenty year period of 1985 to 2005.

Evidence of use 1985 to 2005

11. From my examination of the twenty four evidence of use forms there are eight individuals who have used the way on foot for the full period of twenty years with a further nine using the way on foot for part of the period. In respect of these last nine individuals, whilst the Council say that they have failed to meet the required twenty years continuous use, their evidence nevertheless demonstrates use by the public during the twenty year period. It is not necessary for all qualifying use to be for the full twenty year period but for a presumption of dedication to arise the evidence must demonstrate use by the public for a period of twenty years. Use by the seventeen individuals identified is as of right and without interruption. Many refer to seeing others on the route which was well used as part of a route between the railway station and University. The earliest recorded use is from 1960 although one individual refers to use by her mother from 1936. I have not included in my analysis the evidence from those who the Council understood were using the route in the exercise of a private right. Furthermore, one evidence of use form, whilst claiming use of the way, does not provide any dates as to such use. The evidence from this individual has not been included in my analysis but nevertheless supports use of the way by the public.
12. As regards use as of right (without force, secrecy or permission) there is no evidence that use was with force or in secrecy and none of those claiming use of the way indicate any permission being granted. However, the evidence from Mrs West is that she required those using the way to seek permission. Mr Towns was required to seek permission and this was in December 2005. This is outside the relevant period and in any event the permission relates to the placing of a skip and not for use of the way on foot. In June 2005 permission was sought by a Mr G Turner for access for builders. This does not in my view equate to granting permission for the use of the way to pass and repass on foot but is in connection with building works. Mrs West also contends that every vehicle driver was asked to 'explain themselves at the point of entry'. This relates to vehicular use of the way and not use by the public on foot. In 2006 permission was granted for the placing of a skip on the path. This again is outside the relevant period and does not relate to any permission to use the way on foot. The assertion is also made that the public were directed along the path with the permission of Mrs West. However, there is no evidence from the evidence of use forms that any permissions were granted to those using the way. Mrs West also granted permission to the occupiers of 5, 7 and 9 Winston Avenue. The occupiers of these properties have not been included in my assessment of the evidence of use since, on balance, as occupiers of the adjacent properties, they would enjoy a private right of access. Reference is made to a Mrs Fanous, the owner of the land from 1982 to 1991, granting permission to use the way by vehicles to gain access to some unregistered land. Whilst this may be the case there is no evidence that Mrs Fanous granted permission for the use of the way on foot.
13. Having regard to the above, whilst Mrs West contends that permission was granted for the use of the way on foot this is not supported by the evidence of use which indicates use without permission. It should be noted that the granting of permission to some does not prevent use by others from being

without permission. On balance the evidence indicates use of the way by the public without permission.

14. In terms of use without interruption Mrs West outlines that from 2002 to 2005 the path was blocked for maintenance. This does not constitute an effective interruption. For an interruption to be effective it must be for the purposes of preventing access. In the circumstances any blockage was for maintenance and not with the specific intention to prevent access on foot. The evidence from Mrs West also indicates that the route was obstructed to prevent the parking of cars. This does not constitute an interruption to the use of the way on foot.
15. Overall the evidence demonstrates sufficient use by the public as of right and without interruption such as to raise the presumption that the way has, on the balance of probabilities, been dedicated as a public footpath.

Evidence of landowner's intention

16. In view of my conclusions, that there is sufficient evidence to raise the presumption that the way has been dedicated as a public footpath, it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way. For there to be sufficient evidence that there was no intention to dedicate the way, other than those specifically provided for in section 31 of the Highways Act 1980, there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that he had no intention to dedicate. The test is whether a reasonable user would have understood that the owner was intending to disabuse the user of the notion that the way was a public footpath. It is not necessary to demonstrate a lack of intention throughout the relevant period but where that evidence is for a short period of time then questions of whether this is sufficient arise.
17. Reference is made to an agreement between the Great Western Railway and the Mayor Alderman and Burgesses of the Borough of Plymouth reserving the right to close the path each Good Friday. Mrs West contends that the closure was enacted by the Great Western Railway from 1908 to 1967. This falls outside the relevant twenty year period and therefore cannot provide evidence of a lack of intention to dedicate between 1985 and 2005. Mrs West points out that the condition to close the route was a requirement of a successive lease from 1967 to 1982. This again falls outside the relevant twenty year period.
18. Mrs West asserts that from 1908 to the acquisition of the land by a Mr Spears in 1991 the annual blockage of the route continued and, from 1991 to 2002, Mr Spears also closed the path one day a year. Mr Spears blocked the path with fencing which was sold as part of the property and subsequently used by Mrs West to block the path. Mr Spears is also said to have closed the path for a longer period after a pedestrian had an accident on the route.
19. Whilst I note the evidence of Mr Spears there is no suggestion from the evidence of use forms that such closures took place such as to prevent the use of the way; there is nothing to indicate that those using the way were disabused of the notion that the way was public. The first occasion when the public recognised a challenge to the use of the way was in 2005 and this was the event which brought the right to use the way into question. On balance,

whilst annual closures may have occurred during the relevant period, although there is no direct evidence to support this contention, I do not consider that this provides sufficient evidence of a lack of intention to dedicate.

20. I have already considered the closure of the way for maintenance in relation to the interruption of the use of the way and have concluded that any interruption was ineffective since it was not for the purpose of preventing access on foot. Consequently the closure for maintenance does not evidence a lack of intention to dedicate.
21. Mrs West asserts that she challenged those using the way on numerous occasions. However as outlined above there is nothing to indicate that those using the way were disabused of the notion that the way was public. Use continued throughout the relevant period and, in view of that continued use, it is reasonable to expect, if there was an intention not to dedicate the way, that further actions would have been taken. There is no evidence of any other actions until the right to use the way was brought into question in 2005.
22. Reference is made to objections to tenants of Mrs Fanous in relation to the use of the way by vehicles. This relates to vehicular use and cannot demonstrate any lack of intention to dedicate a way on foot; there is no evidence that she challenged use of the way on foot. Similarly actions taken against those who unlawfully parked cars on the route cannot be seen as evidence of a lack of intention to dedicate a right on foot. Furthermore, whilst permission to use the route for the collection of refuse has been withdrawn this does not demonstrate to the public using the way that there was no intention to dedicate. I note the point that the land is in private ownership but this does not preclude the existence of public rights nor does it evidence a lack of intention to dedicate.
23. Having regard to all of the above I conclude, on the balance of probabilities, that there is insufficient evidence to demonstrate a lack of intention to dedicate. Consequently the statutory dedication of a public footpath in accordance with section 31 of the 1980 is made out.

Use of the term approximate

24. Mr Kind contends that the specification of the width in the Order is inadequate and refers to the Planning Inspectorate's Advice Note 16.
25. In my view the use of the term approximate may give rise to uncertainty regarding the position, area, maintenance and obstruction of a right of way. I note the Council assert that the width given in Part II of the Schedule to the Order clearly and precisely states a width of 2.6 metres. They add that this is the width which will become defined in the Order and that there is no suggestion that the width will be anything other than 2.6 metres. If, as seems to be the case, the Council are clear that the width will be 2.6 metres then I consider that the use of the term approximate in Part I of the Schedule to the Order is ambiguous and should be deleted; it is inconsistent with the width given in Part II. Furthermore, for the reasons given above the use of the term approximate for a width in an Order is inappropriate. The Order, if confirmed will be modified accordingly.

Limitations

26. Mr Kind contends that the concrete steps referred to as limitations at Part II of the Schedule to the Order route are not a limitation but simply a description of this part of the Order route. The reference to steps as a limitation should be removed and included in the description of the route. A limitation is something that fetters the exercise of a right that otherwise exists, for example a gate. The steps are part of the highway which does not exist other than on the steps; no wider right is being fettered.
27. The Council disagrees with the view of the objector and asserts that an authority can include 'such particulars appearing to the authority to be reasonably alleged as to position width (of paths) or as to any limitations or conditions affecting the public right of way, as in the opinion of the authority it is expedient to record.' The Council takes the view that the existence of the steps does limit a right, namely the right of a person to use in a wheelchair or a parent with a pram. The steps in question limit the width of the way and the steps could be removed but the path would remain. The wish is to make it clear to potential users the existence of the steps and the fact that this may potentially prevent use. A limitation was something which prevented use and it is expedient to record the information as a limitation to provide information to the public.
28. I note the desire of the Council to ensure that those who may wish to use the route are aware of the existence of a flight of steps and the ability of an authority to record limitations and conditions. However, I do not accept that the steps constitute a limitation on the dedication of the way. A limitation is a residual right of the landowner or grantor to do something which is inconsistent with the existence of the highway; a point made in the paper submitted by the objector. This may for example be the right to maintain a stile or gate across a route which would otherwise be unlawful. In the circumstances the steps form part of the highway itself and are not a limitation as to its dedication. It is therefore inappropriate to include the steps as a limitation; the steps should be included in the description of the way. This would not prevent the authority from making the information available to the public since reference to the steps would in any event be included in the definitive statement. The Order will be modified to record the steps in the description of the way and not as a limitation.

Other Matters

29. The current owner of Gulland House makes representations on the basis that the Order route is of no benefit to the public due to the existence of alternative routes; the route is also of no use for access for those with disabilities. Concerns were raised in terms of safety and security in particular in respect of Gulland House. Mrs West also makes the point that other more suitable routes exist. Whilst I note these points, and can appreciate the concerns raised, the need, suitability and desirability, including the effect on security, are not matters which I can take into account in reaching my decision. The current owner also makes reference to the activities of the previous owner, the benefit to all parties, including the residents, and the desire to use the route for refuse collection. Again these are not matters before me. Mrs West refers to the

existence of steps making it impossible to use by vehicles. In this respect it should be noted that the Order is for the addition of a public footpath and it is no part of the Council's case that the way carries public vehicular rights.

Conclusions

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

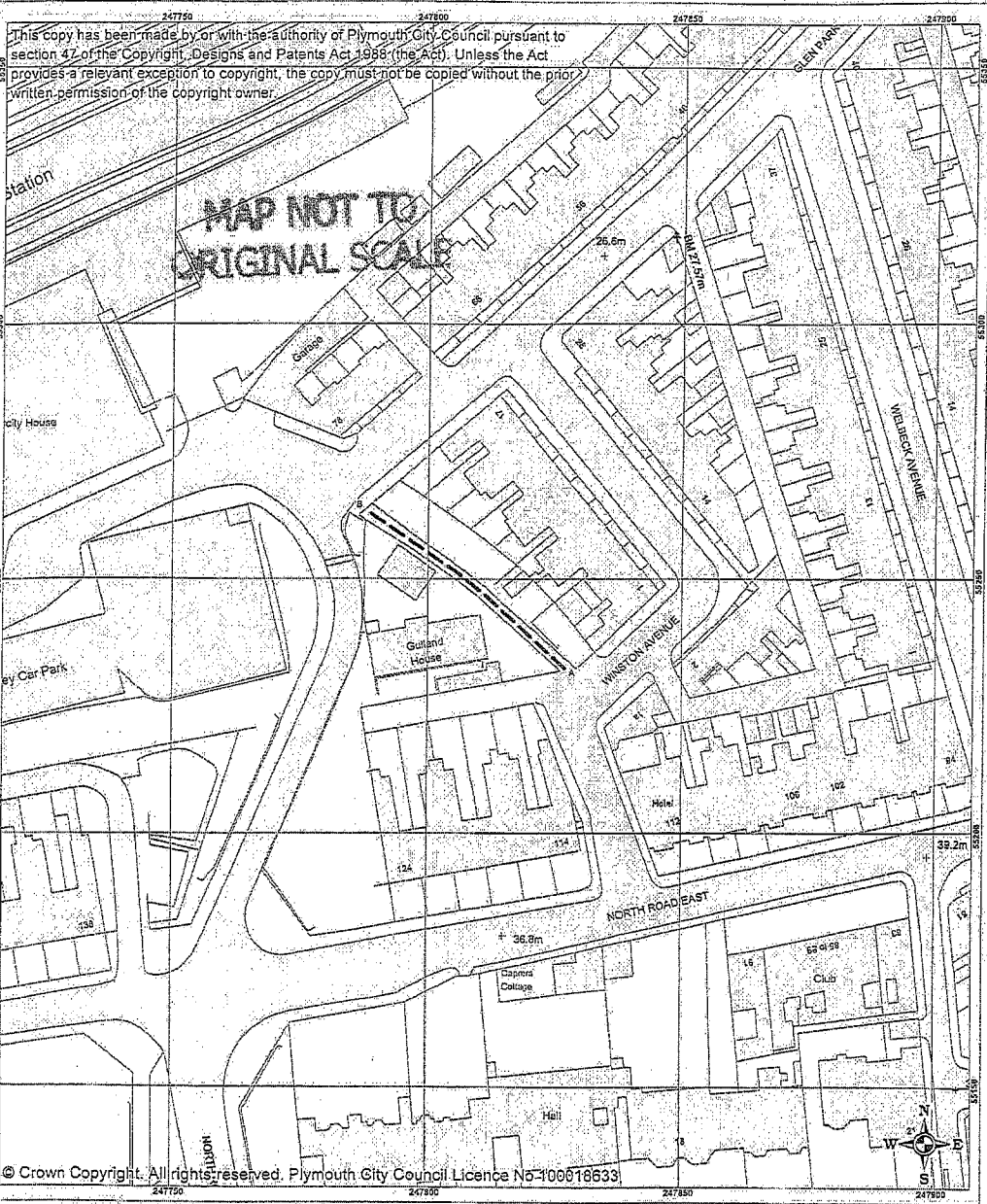
Formal Decision

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




- At line 5 of Part I of the Schedule to the Order delete the word 'approximately'.
- At Part II of the Schedule to the Order, in the section relating to position, after '50 metres' insert 'via steps (concrete, 17) at grid reference SX 4778 5526'.
- At Part II of the Schedule to the Order delete from the section entitled limitations 'Steps (concrete, 17) – SX 4778 5526'.

Martin Elliott

Inspector



WILDLIFE AND COUNTRYSIDE ACT 1981
 ADDITION OF A PUBLIC FOOTPATH FROM WINSTON AVE TO GLEN PARK AVE

	Scale 1:1000	Centre: SX47815524	Public Rights of Way Plymouth City Council Civic Centre Plymouth Devon PL1 2AA Tel: 01752 304233 Email: pro@plymouth.gov.uk Map created on 28 May 2008
	Key Claimed Route  Unaffected Right of Way 	Grid References A: SX 4782 5523 B: SX 4778 5526	