



## Order Decision

Site visit made on 23 April 2024

by **A Behn Dip MS MIPROW**

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

Decision date: 10 May 2024

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### Order Ref: ROW/3316979

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The London Borough of Sutton (Benhilton Gardens to Oakhill Road Sutton) Modification Order 2022.
- The Order is dated 14 November 2022 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when The London Borough of Sutton 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 the modifications set out in the Formal Decision.**

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### Procedural Matters

1. In June 2021, an application to add a footpath in the London Borough of Sutton to the Definitive Map and Statement was made by Peter Scouse (the applicant). In November 2021 after due investigation, The London Borough of Sutton (the Council) consented to make an Order which, following advertisement, received one objection.
2. I note that the Order states it is made under section 53(2)(a) of the Wildlife and Countryside Act 1981 (the 1981 Act), wherein it should have stated 53(2)(b). I consider this is likely a typographical error and it makes no difference to the understanding of the Order, The Order and the accompanying papers are clear upon the grounds and legislation under which it is made. Should the Order be confirmed I will modify it accordingly.
3. I made an unaccompanied site visit on 23 April 2024 when I was able to walk the entirety of the Order route.

### The Main Issues

4. The Order has been made on the occurrence of an event specified in the Order as section 53(3)(b) of the 1981 Act, namely the expiration in relation to the way the subject of this Order, of a period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.
5. According to sub-section 53(3)(c)(i) of that Act, the main issue is whether the evidence discovered, when considered with all other evidence available, is sufficient to show that a public right of way not shown on the Definitive Map and Statement, subsists over land to which the map relates.

6. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist to make a Modification Order, the standard of proof is higher for it to be confirmed. At this stage, the evidence is required to show, on the balance of probabilities that a right of way subsists.
7. The evidence in support of this case comprises of User Evidence Forms (UEF's). As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of twenty years referred to, is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
8. If statutory dedication is not applicable, I shall consider whether an implication of dedication has been shown at common law. Common law requires me to consider whether the use of the path and the actions of the landowner have been of such a nature that the dedication of the path by the landowner can be inferred.

## **Reasoning**

### ***Statutory dedication***

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

9. Use of the Order route was first brought into question in, or around April 2021, when it came to the applicant's attention that a resident of Dovercourt Lane, across which the Order route runs, had intentions to close the path, albeit it does not appear from the papers before me that this closure actually occurred. I concur with the Council that the twenty-year period to be considered for the purpose of statutory dedication is 2001-2021 (the relevant period).

#### *Evidence of use by the public*

10. Twelve UEF's were provided in support of use of the claimed route, all stating use in excess of twenty years and throughout the relevant period. The applicant stated that there were many other regular users of the path but they had not submitted statements as they had not used the path for the complete 20 year period. For clarification, it is not prerequisite that every user must have walked the route for 20 years, but that use for all users combined must span the relevant twenty year period.
11. Earliest use of the claimed route appears to be from 1981, with travel appearing to be on foot only. Frequency of use ranged from daily, several times weekly, weekly, or 'numerous / various / hundreds of times' per year, was stated on some UEF's. None of the users were told the route was not public, were turned back or were challenged. No users evidenced any gates, or obstructions on the Order route, permission was neither sought nor granted, and no users stated that they had seen any notices on the route that indicated it was not public.
12. Evidence submitted shows that usage was predominantly utilitarian by nature with many users incorporating the claimed route as part of an onward journey to go shopping, go to work, go to the doctor's, catch the bus, visit friends, or go for a walk.

*Conclusions on evidence of use by the public*

13. There is evidence from 12 users claiming use of the Order route, as of right, both during the relevant period and in the case of several users, before that time period also. Their use appears to be open, without secrecy and without use of force.
14. Having regard to the above, I find that there is sufficient user evidence to raise a presumption of the dedication of a public footpath. Therefore, the first part of the statutory test is satisfied.

*Evidence of the landowner*

15. From the papers before me it appears that the majority of the land over which the Order route runs is unregistered, albeit there is some evidence before me of private rights of access on foot and by vehicle for at least some of the properties adjoining Dovercourt Lane.
16. Reza Zamin (the objector) appears to be objecting on behalf of 6 properties that adjoin the Order route. Collectively the Order is objected to on several grounds, not all of which are relevant to the legislation to which I must adhere.
17. The objector has lived at Dovercourt Lane since 1984 and considers the route is private and for the sole benefit of residents on the Lane, making mention of a local Councillor who affirmed that the land is private and noted its poor condition. However many public rights of way run over private land and the fact that land is private does not necessarily prevent a public right of way coming into existence over that land, if it can be shown the public have used the route.
18. The objector refutes public use of the route for 20 years stating '*it has not been in use all the time I've lived here due to being full with brambles, nettles, trees*'. An undated photograph was provided in evidence with an arrow pointing towards some vegetation at the side of the route. However in an email dated 28 September 2023 the objector stated '*..others they used to use even our road without permission*', and earlier in the same email referred to '*the guy...and always using our road*'. As noted by the Council this seems to indicate that the route is used by the public.
19. The photograph in question also showed a very faded sign at the southern end of the claimed footpath near Oakhill Road, which I observed on my site visit. The writing was mostly indiscernible but for those few words I could make out, the sign appeared to say Private Road and related to not parking or blocking access of the road.
20. On my site visit I noted mature vegetation and shrubs bordering both sides of the Order route but this did not encroach to the extent that passage across the Lane on foot would have been affected. However, it appears unlikely that users would have walked the full width between the property boundaries at the southern end of the route due to the maturity of the vegetation in situ, nor would there have been a need to do so, given the width of the track.
21. Turning to the northern end of the Order route, the track stops at the end of Dovercourt Lane with the claimed path continuing to the north for a short distance then bearing west, via a narrow path, fenced on both sides. On my site visit, a well-worn track could be observed between these fences leading to Benhilton Gardens.

### *Conclusions on landowner evidence*

22. It is apparent from the written testimony of the objector, that there was never an intention to dedicate the claimed route as a public footpath, however there is no evidence that this lack of intention to dedicate was made clear to users of the path either before or during the relevant period.
23. On balance, I find there is no evidence of positive action taken by any landowner during the relevant period to demonstrate to the public that there was a lack of intention to dedicate a footpath.

### *Conclusions on statutory dedication.*

24. I have concluded that the user evidence is sufficient to raise a presumption that the claimed route has been dedicated as a public footpath. In addition, there is insufficient evidence that any landowner demonstrated to the public, a lack of intention to dedicate a footpath during the relevant period. Therefore, I conclude on the balance of probabilities that a public footpath subsists. In light of this conclusion, there is no need for me to address the evidence in the context of common law dedication.

### **Width**

25. I note the applicant's comment referencing two Ordnance Survey maps which show Dovercourt Lane not narrowing in width until the route bears west towards Benhilton Gardens. This differs from what is on the ground today. Irrespective of this, the footpath claim has been made on evidence of use over twenty years and accordingly the user evidence is what is relevant when considering the width of the claimed route.
26. The user evidence forms give no indication of the width of the route used, and there is nothing before me to suggest that the width has changed over the relevant period. Considering the nature and location of the site, Dovercourt Lane is a private road giving access to properties along its stretch. The photograph of the lane submitted by the objector shows a car parked at the end of the lane next to properties on the west side of the lane before the claimed route narrows between fence lines. A car was parked in a similar position on my site visit. As also evidenced by the objector and observed on my site visit, there is mature vegetation on both sides of Dovercourt Lane. Correspondingly I consider that the widths as stated on the Order are not available for the public to use on the ground.
27. During my site visit, I found the walkable width of the northern end of the claimed footpath to be approximately 1.2 to 1.5 metres. The route then emerges onto Dovercourt Lane at its widest point. Having been confined to the narrow width between the fence lines, when emerging from this enclosed section on to the driveway of Dovercourt Lane at its easternmost boundary, it would be reasonable to expect that users would carry on in an approximately straight line down Dovercourt Lane towards Oakhill Road. I consider it unlikely that anyone using the route would choose instead to walk westwards towards the adjacent properties and where the car was parked on the photograph and on my site visit.
28. The rest of Dovercourt Lane has a walkable width on the ground of approximately 2.5 metres, bounded both sides with mature vegetation. In the absence of evidential use of a wider width, it is reasonable to conclude use would be as is

available on the ground. Should I be minded to confirm the Order I will modify the widths as appropriate.

### Other matters

29. There was concern by the objector that Dovercourt Lane was not wide and that should a footpath be confirmed across the lane there would not be enough room to manoeuvre a car into the driveway and garage. For clarification a public right of way is the right to pass and repass over land, and does not affect any private rights of adjoining landowners to access their properties, driveways, or garages. Confirmation of this Order would not prevent the landowners from being able to exercise their private rights.
30. The objector further considered that a public footpath would require maintenance, and should have lighting, fencing and CCTV in order to be legal. Aligning to this the applicant noted that the owner of 5 Dovercourt Lane was concerned about antisocial behaviour from users of the footpath.
31. I recognise all of the above as genuine concerns, however, the legal tests on which this case must be determined do not allow for consideration of such matters as desirability, security, or safety. Such matters, along with maintenance responsibilities should be directed to the Council for clarification and consideration.

### Conclusion

32. 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

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

- On the Order at line 2, **delete** 53(2)(a), and **insert** 53(2)(b)
- On the Schedule, Part I -description of the path to be added:  
At line 1, **delete** '2 metres' and **insert** '1.2 to 1.5 metres'  
At line 3, **delete** 'varying between approximately 5.7 metres and 3.5 metres in width' and **insert** 'approximately 2.5 metres in width'
- On the Schedule, Part II – modification of statement:  
At line 1 **delete** '2 metres' and **insert** '1.2 to 1.5 metres'  
At line 3, **delete** 'varying between approximately 5.7 metres and 3.5 metres in width' and **insert** 'approximately 2.5 metres in width'

- On the Order Map:

**Delete** 5.8 meters and **insert** 2.5 metres

**Delete** 3.5 meters and **insert** 2.5 metres

**Delete** 5.6 meters

At the point just before the purple line turns westwards, **insert** 1.2-1.5 metres

At the end of the purple line where it meets Benhilton Gardens (just south west of Avondale Court) **insert** 1.2-1.5 metres

*A Behn*

INSPECTOR

ArcGIS Web Map



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