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## Order Decision

Site visit 19 February 2024

**by Nigel Farthing LLB**

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

Decision date: 27 March 2024

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### Order Ref: ROW/3306850

- This Order is made under Section 53 (2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the London Borough of Redbridge (A Footpath from The Square to Woodford Green) Definitive Map and Statement Modification Order 2022.
- The Order is dated 29 June 2022 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the date of my site visit.

**Summary of Decision: The Order is not confirmed.**

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### Preliminary Matters

1. An inquiry was scheduled to be held for two days commencing 20 February 2024. Shortly prior to the date set for the inquiry The London Borough of Redbridge (“LBR”), having previously supported confirmation of the Order, changed its stance to a neutral position. As a consequence, the parties agreed to the matter being dealt with by way of an unaccompanied site visit and written representations and the inquiry was vacated.
2. A quantity of documentary material supporting confirmation of the Order was submitted shortly prior to the date fixed for the inquiry. This material has been circulated to the Objector for comment. In reaching this decision I have taken into account this material and the Objector’s comments in response.
3. I carried out an unaccompanied site visit on 19 February 2024.
4. This Order concerns the addition of a footpath from The Square to High Road Woodford Green.
5. One objection to confirmation of the Order was recorded which has not been withdrawn.
6. In this decision I have found it convenient to refer to the Order map and for ease of reference a copy is attached. The Order map is annotated with points A, B, C, D and E which I shall refer to in this decision.

### The Main Issues

7. The Order has been made under section 53(3)(b) of the 1981 Act which requires me to consider whether, on a balance of probabilities, the evidence shows that an event has occurred, being the expiration of any 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.
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8. In relation to the user evidence reliance is placed upon a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
9. Accordingly, I must establish the date when the public's right to use the Order routes was brought into question. The evidence must then be examined to determine whether there has been use by the public and that such use 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 rights during this 20-year period.
10. In the event that the requirements for a presumption of dedication under the 1980 Act are not met, I will then need to consider whether there is sufficient evidence for an inference of dedication at common law.

## **Reasons**

### ***Site visit***

11. The Order route is relatively short. The length is not given in the Order, and I could not find reference to it in the evidence before me, but I would estimate it at between 100 and 150 metres.
12. Commencing at The Square (point A) the first section of the route passes over a hard surfaced area which gives the appearance of forming part of the access to the car park at the rear of the shops fronting on to High Road. At the time of my visit the Order route between points A and B was obstructed by parked vehicles.
13. At point B the Order route deviates from the surfaced area and follows the line of the fence / fence posts to the car park to Point C. Between points B and C the surface shows little, if any, sign of improvement. At the time of my visit, it was reasonably overgrown with no obvious sign of recent use.
14. At point B there are two metal posts, one either side of the Order route with a metal chain hanging between them. At point C there is a similar arrangement. The chains span the full width of the Order route but at the lowest point the chain could be stepped over by an adult without great difficulty.
15. Between points A and C the triangle of land lying to the north west of the Order route is open space which at the time of my visit was overgrown. This land is part of Epping Forest and is available for public access. There were no obvious pedestrian routes across this land when I inspected but photographs and evidence contained in UEFs and proofs of evidence show that at times this area has been maintained and tracks have been mown across it. These tracks have followed a variety of routes bisecting the area. At other times the area has been very overgrown with significant bramble cover extending up to, and possibly over the Order route.
16. At point C the route crosses a surfaced track which leads from High Elms at point D to the car park. Having crossed the track the route follows the northern flank wall of 475 High Road and exits onto the pavement alongside that property. This section of the route is unsurfaced and is defined by a worn path over the bare soli. There are no obstructions to this section of the route.

### ***Documentary evidence***

17. The Order was made under section 53(3)(b) of the 1981 Act and relies upon user evidence to give rise to a statutory presumption of dedication. Some historical documentary evidence has been submitted in support of the confirmation of the Order in the form of various editions of Ordnance Survey (OS) and other maps (including the Woodford Tithe Map 1839) and aerial photographs of the area.
18. The documentary evidence suggests that since at least the mid-nineteenth century a route of some description, broadly corresponding to the Order route, has been evident on the ground. The adjoining land to the north of the Order route and to the east of High Road is known as Woodford Green and forms part of the wider area of Epping Forest which is subject to the Epping Forest Act 1878. Various maps show a network of paths and tracks over this area and the depiction of the Order route on these maps is indistinguishable from this network of routes.
19. Evidence of land ownership has been provided in the form of Land Registry title details and plans. These indicate that the Order route was not included in the registration of the of the adjoining land as part of Epping Forest (the decision to exclude it being a deliberate decision after consideration of the issues). Title to the Order route remained unregistered until 2022 when the Objector secured a possessory title to the section of the Order route B to C. The possessory title was founded on the Objectors claim to have enjoyed exclusive possession of this piece of land to the exclusion of all others.
20. Although the maps and documents suggest that a route has existed for many years, they do not assist me in understanding the status and nature of that route. OS maps usually carry a disclaimer that the depiction of a route cannot be relied upon in determining its status. None of the documents available have as their purpose the depiction of public rights of way and accordingly carry little if any weight in determining public status. They could at best only be relied upon in support of other more credible evidence of which none has been produced.

### ***User Evidence***

21. In considering the user evidence it is necessary for me to first establish the date when the public's right to use the route was brought into question and then examine the sufficiency of the use, whether it was use as of right, whether it was interrupted and finally whether during the relevant period the landowner demonstrated sufficiently a lack of intention to dedicate.

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

22. It is not disputed that the public's entitlement to use the Order route was challenged by the erection of notices in 2020. These notices read "Private. No Public Access" and therefor unequivocally denied the existence of any public right of way. I accept these notices were effective to bring into question the right of the public to use the Order route in 2020.
23. I have considered whether any other actions by the landowner had the effect of bringing the public's entitlement to use the route into question at an earlier date. The actions I have considered are the existence of the posts and chains in 2001, the parking of cars so as to obstruct the Order route and the verbal challenge of users.

24. It is the Objector's evidence that the posts and chains were already in place when he acquired the adjoining property in October 2001. There is no evidence to indicate when the posts and chains were first installed. The Objector was given the keys to the padlocks securing the chains by the vendor. He maintained the posts and chains and in 2011 replaced them with the metal posts still present. His evidence is that the chains were usually kept locked in place and this would seem to be supported by a number of photographs and by the evidence of many of the users.
25. The evidence of several users is that they were able to step over the chains and that they did so in order to continue using the route. Others state that the chains caused them to deviate onto the car park.
26. In considering whether the posts and chains had the effect of bringing into question the right of the public to use the route, the appropriate test to apply is to consider what impact their presence would have upon a reasonable user. The fact that the obstructions did not physically prevent use is not material; gates can be climbed and signs ignored but are no less effective in demonstrating the landowner's intention to keep people out. In my judgement the enclosure of a section of the route with locked chains at both ends is a clear statement that people were not welcome to enter, and thus a challenge to the right of the public to use the land for passage.
27. Section 31(2) of the 1980 Act provides that the period of 20 years use "is to be calculated retrospectively from the date when the right of the public to use the way is brought into question". The section envisages an act undertaken on a date which will form the starting point of the calculation. I do not consider that this requires utmost precision, and a year rather than a specific day or month may suffice. However, in this case, where there is not before me any evidence as to when the posts were first erected, I do not consider that the requirements of section 31(2) can be met.
28. I have considered whether the replacement of the posts and chains in 2011 meets the requirements for bringing into question but conclude that the replacement would not have caused those using the route to recognise any change.
29. The evidence demonstrates that various cars were at various times parked between points A and B and within the enclosed section of the route B to C. The vehicles and their positioning changed. At times the vehicles significantly impeded the Order route while at other times they could be negotiated by a pedestrian without undue difficulty. The presence of vehicles on the route is not in itself something that would necessarily bring into question the right of the public to use it. Where the evidence shows a deliberate and blatant course of conduct aimed at preventing use, this may suffice. There is evidence that on occasion notices were left in the obstructing vehicle stating that the land is private, but the majority of witnesses do not mention this. In my judgement the evidence in this case does not meet that threshold to bring into question the right of the public to use the Order route.
30. There is some evidence of verbal challenge to users but this is limited to a small number of individuals and is not sufficient to constitute a challenge to the public at large

31. Having regard to the foregoing, the relevant 20-year period to be considered is 2000 to 2020.

*Whether the Order route was used by the public*

32. The statutory requirement is for the way to have “been actually enjoyed by the public”. There is no definition of what constitutes the public for this purpose, nor is there a requirement for any minimum number of users. The context is to be taken into account in determining what is representative of the public in any given location. It is however the requirement that the level of use is sufficient throughout the whole of the twenty-year period.
33. The application was supported by evidence of use from 14 individuals although one referred to vehicular use only and therefor is to be disregarded. Two families are represented by five of the 13 relevant users.
34. The quality of the supporting user evidence is variable. Some of the user evidence forms (UEFs) are not signed, some do not have completed maps making it impossible to know the route being referred to and some show part only of the Order route or include routes which are not the Order route.
35. Eight of the 13 users claim to have used the route for the full 20-year period, two for 14 years and three for 8 years, in each case leading up to 2020. Most claim to have used the route regularly, generally daily or weekly. Having regard to the fact that the Order route is situated in a residential area of north London the number of users is at the minimum level I could consider to be representative of the public. Given the additional issues with the quality of some of the evidence, I had concerns as to its overall sufficiency. However, in addition to the evidence submitted in support of the application, a substantial amount of supporting material was submitted in anticipation of the inquiry and immediately following the inquiry being vacated.
36. A total of 45 late submissions were made, all seeking to support confirmation of the Order. Seven of these were from individuals whose evidence was already before me and these did not add any material new information.
37. Of the remaining 38 items, 24 expressed support for confirmation of the Order but did not contain any material evidence of relevant personal use. The remaining 14 submissions contained some information about the Order route or use of it. A number are vague about the route used or the period of use. Eight of these acknowledge the presence of obstructions along the route. Of the remaining six submissions, three were maps or plans with no supporting statement or commentary and one appears to concern a route not within the Order.
38. Although the value of the additional evidence is variable and limited, when considered with the evidence submitted with the application, I consider it would be sufficient in quantity to give rise to a statutory presumption of dedication.

*Whether use was as of right*

39. Use would not be as of right if it was undertaken by force, secretly or with permission. There is no suggestion that use of the Order route was undertaken permissively or with secrecy.

40. Use by force does not necessarily require the use of physical force. It is sufficient if the use is contentious, meaning that it is continued despite the owner's attempts to prevent it, for example, a user who ignores an explicit sign forbidding access will be regarded as not using the route as of right.
41. In order to effectively prohibit use of the route, the person seeking to do so must be able to demonstrate a better right to possession of the land in question than the user. Usually there will be a known landowner with the authority to control access to the land. In this case there was no registered owner of the land until after the date that the public's right to use the route was brought into question. However, in 2022 the Objector secured a registered possessory title on the basis that he had been in exclusive occupation of the land for a period of 12 years. Furthermore, the evidence demonstrates that the Objector had in fact been in occupation of the land since his acquisition of it in 2001 and as occupier he would have had the right to exclude others.
42. In this case I find that the presence of the posts and locked chains was a clear and unambiguous assertion that use of the Order route was not tolerated. In consequence use of the Order route whilst the chains were in place would not be use as of right. The same principle would apply to the presence of cars placed deliberately so as to prevent use.
43. I am satisfied that use of the Order route throughout the full 20-year period was not as of right.

*Without interruption*

44. Use by the public would be interrupted where there is an actual and physical stopping up of the way by the actions of, or on behalf of the landowner.
45. In this case the presence of the posts and locked chains, and possibly the parked vehicles, would constitute an interruption to public use.
46. The evidence shows that there were periods when the Order route was so overgrown as to prevent passage. This would not however constitute an interruption because it does not arise from any action on the part of the landowner.

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

47. Notwithstanding that the requirements might be met to give rise to a presumption of dedication pursuant to section 31 of the 1980 Act, the presumption will be rebutted if the landowner can demonstrate a lack of intention to dedicate during the relevant 20-year period.
48. An effective rebuttal requires the landowner to demonstrate overtly to members of the public using the route that he had no intention to dedicate the route in question as a public right of way. The actions of the landowner need only to be demonstrated during the relevant period rather than throughout.
49. It is my judgement that in this case there are various actions undertaken by the Objector which would sufficiently evidence a lack of intention to dedicate. These include the maintenance of the posts and chains, the obstruction of the route with vehicles and possibly other materials and acknowledged verbal challenge to users.

### *Conclusions on user evidence*

50. Although I am satisfied that the Order route has been sufficiently used by the public, I have found that such use during the relevant period was not as of right and was interrupted, Furthermore I have found that the landowner has sufficiently demonstrated a lack of intention to dedicate. In consequence there has been no dedication pursuant to section 31 of the 1980 Act.

### **Common Law**

51. For the reasons given, section 31 of the Highways Act cannot be relied upon to support dedication and it is therefore necessary for me to consider the position of the Order route at common law.
52. Dedication at common law requires the landowner to have an intention to dedicate a right of way over their land. An intention to dedicate can be inferred provided the evidence justifies such an inference. Use by the public does not of itself give rise to an inference of dedication but it can be evidence relied upon to support such an inference arising. At common law there is no minimum required period of use to raise an inference of dedication. There must be a person competent to dedicate against whom dedication can be inferred, but it is not relevant that the landowner cannot be identified. The onus of proof lies on the person asserting that an inference has arisen.
53. I have earlier concluded that the documentary evidence does not, on its own, support an inference of dedication although it does demonstrate that an apparently available route has existed since the mid-nineteenth century. I have considered whether there is evidence of use which, when considered with the documentary evidence might together be sufficient to give rise to an inference of dedication.
54. For the reasons I have given the presence of the posts and chains was sufficient to demonstrate a lack of intention to dedicate and for the same reason no inference of dedication could arise when these were in place. The evidence shows that the posts and chains have been present since at least 2001. No inference of dedication could arise whilst the posts and chains were in place.
55. On balance there is insufficient evidence of use to give rise to an inference of common law dedication. Furthermore, for the reasons given earlier, no matter what level of use there has been, the existence of the various obstructions is sufficient to prevent a finding that the landowner has intended to dedicate public rights of way over the Order route.

### **Overall Conclusion**

56. Having regard to these and all other matters raised I conclude that the Order should not be confirmed.

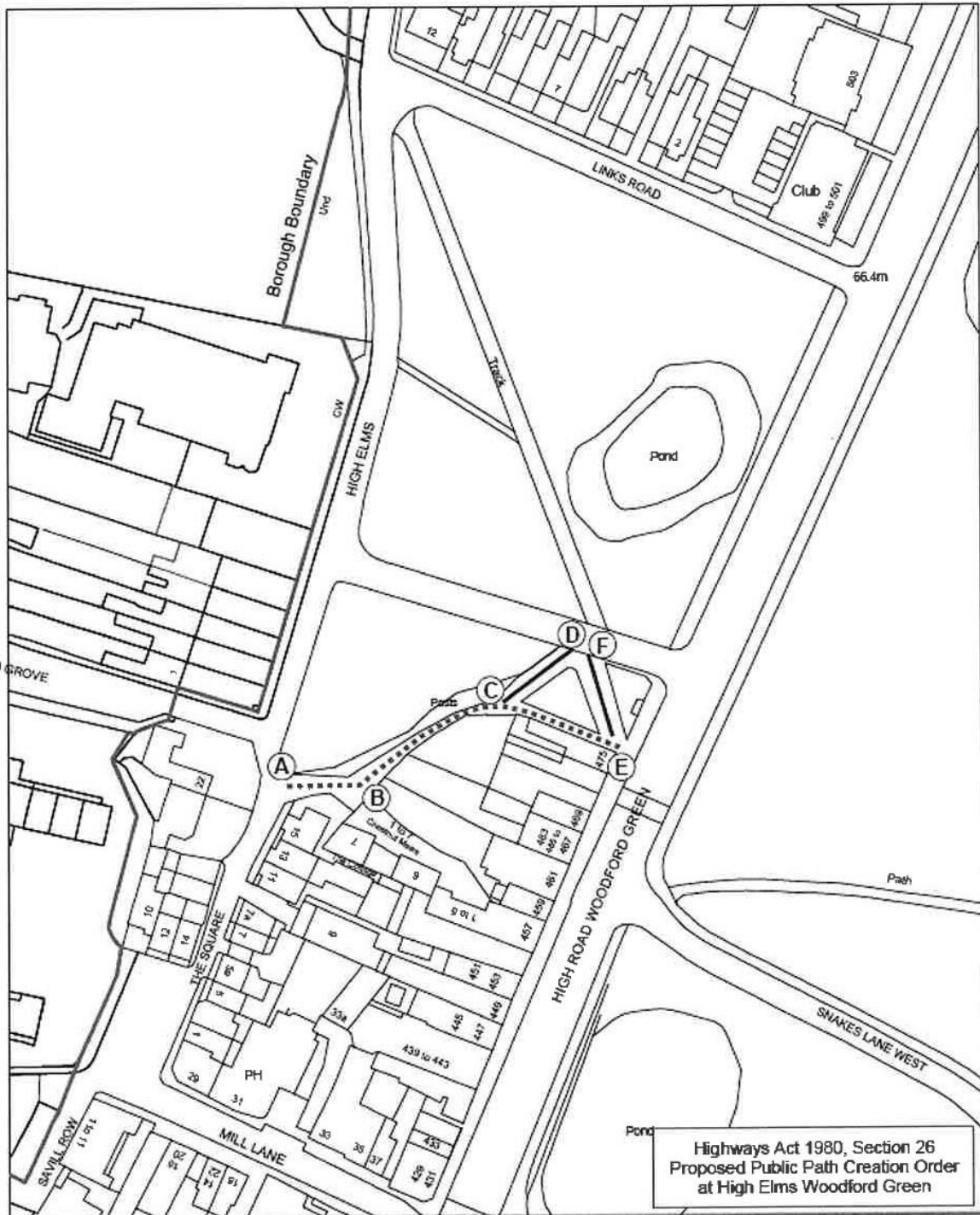
### **Formal Decision**

57. I do not confirm the Order.

*Nigel Farthing*

**Inspector**

ORDER MAP - COPY - NOT TO SCALE



Highways Act 1980, Section 26  
Proposed Public Path Creation Order  
at High Elms Woodford Green

This plan shows the general position, not the exact line of the boundaries. Measurements from this plan may not match the same measurements on the ground. It is for Guidance Purposes Only. There is no Guarantee the information given will always be accurate, complete or up to date.

<p>Proposed Public Footpath at High Elms Woodford Green</p>	<p>Scale: NTS</p>		<p>Public Footpath to be Created ..... Epping Forest Held Land (C)-(D) (E)-(F)</p>
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