

REGULATORY COMMITTEE
6th FEBRUARY 2002

**SUTTON VENY: OBJECTION AND
REPRESENTATION TO MODIFICATION ORDER**

Purpose of Report

1. To consider and comment on the objections and representation received to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981 providing for the definitive width of Footpath 18 Sutton Veny to be recorded as varying from 1.1 to 2.5 metres. Footpath 18 is shown hatched A-B on the plan attached at **Appendix A**.

Background

2. On the 20th July 2000, Mr. Henthorne, Chairman of Sutton Veny Parish Council, formally applied for an Order under Section 53(2) of the Wildlife and Countryside Act 1981 to vary the particulars in the Definitive Statement for the section of Footpath 18 Sutton Veny (known locally as The Drain) from the High Street to the Graveyard to have a width varying between 4 and 8 feet, shown A-B on **Appendix A**.
3. The application was supported initially by 16 completed witness forms, 12 additional forms submitted in June 2001 (summarised at **Appendix B**), a letter of support from Mr. H. West and the original Parish claim form dated 9th June 1950.
4. The witness evidence dates from 1929 to the present day, with many of the users having known and used the way on an extremely regular basis for decades.
5. There is a consistent message from the witnesses that the width of the way varies. The width from Best's Lane to the churchyard is referred to as being approximately 3 feet, expanding to 4 feet until the garage of 88/89 High Street, then splaying to 8 feet. The positions of the churchyard and garage are identified on the plan at **Appendix A**.
6. Mr. H. West stated in his letter that as a boy he lived by the side of the path and lived in the village until the mid 1930s. He says the path was used as a public right of way over the full width.
7. The path was claimed as a public footpath by the Parish Council at the preparation stage of the Definitive Map. The Parish claim form states that the path was surveyed on the 9th June 1950 and the width was described as being between 4 and 8 feet. When the Definitive Statement was prepared by the County Council it was described as being 3 feet.
8. The application to modify the definitive width would appear to have been triggered by renovation work on 88/89 High Street and, in particular, the widening of the driveway of the property. The property is owned by Mr. and Mrs. de Bretton-Gordon.

9. Mrs. de Bretton-Gordon contacted Dr. Murray who was the previous owner of the property for 40 years. Dr. Murray was one of the Parish Council's witnesses who stated the entire drive had been open for the past 20 years. Mrs. de Bretton-Gordon reported that Dr. Murray informed her that people walking northwards on the path walked on the left-hand side and vice versa, and in reality the only person using the area close to the house was Dr. Murray himself to carry out weeding, but *"perhaps a gaggle of people but this was infrequent."*
10. Mrs. de Bretton-Gordon submitted 12 statements from users of the path who stated that they did not walk near the house but kept to the "obvious route" on the left-hand side of the path. Details of these statements are summarised in **Appendix C**.
11. Mrs. de Bretton-Gordon also submitted a photograph of her property taken before 1938 when the property was two dwellings accessed via the footpath. The footpath by the property can clearly be seen on the photograph at **Appendix D**, as can two porches. The porches were removed in 1938. Two further photographs were shown of the driveway and path prior to recent works.
12. On the 26th June 2001, the Clerk to the Parish Council notified the County Council that *"after a frank discussion"* it wished *"to retract the application for a change to the definitive map statement."*
13. The Parish Council was advised that since a formal application and evidence had been brought to the attention of the County Council, it was statutorily obliged to determine it.

Legal points considered in determining the application

14. Section 53 of the 1981 Act imposes on the County Council, as a surveying authority, a statutory duty to keep the Definitive Map and Statement up to date. Section 53(3)(c)(i) requires that an authority issues a modification order where:

"the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:

(i) that a right of way which is not in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which the part applies."

Schedule 14 of the 1981 Act sets out the procedure to be followed, where a party requests the surveying authority to modify the Definitive Map and Statement. If the authority refuses an application to modify, there is a right of appeal to the Secretary of State for the Environment. In the event of a refusal by the Secretary of State, there is no further right of appeal.

If the application under Schedule 14 is granted, by either the authority or the Secretary of State, then Schedule 15 requires the authority to issue notices. If objections are received that cannot be resolved, these must be referred to the Secretary of State who can confirm or refuse the Order. It is usual for him to hold a Public Inquiry. Any substantial issues would be determined at that stage.

15. Section 32 of the Highways Act 1980 states:-

"A court or other tribunal before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled and the custody in which it has been kept and from which it is produced."

16. Highways and their widths come into existence through dedication of a right of way to the public by a landowner and acceptance by the public of that dedication. Dedication of a way as highway may be presumed after public use over 20 years. This is given statutory effect under Section 31 of the Highways Act 1980:-

"(1) Where a way over any land, other than a way of such character that use of it by the public 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 full period of 20 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.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes:

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway

and

(6) An owner of land may at any time deposit with the appropriate council:

(a) a map of the land on a scale of not less than 6 inches to 1 mile and

(b) *a statement indicating what ways (if any) over the land he admits to having been dedicated as highways; and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time:*

(i) *within six years from the date of deposit; or*

(ii) *within six years from the date on which any previous declaration was last lodged under this section*

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."

17. It was established in *R v Secretary of State for the Environment ex parte Blake* (1984) that the word "enjoyment" means having the amenity or advantage of using.
18. Proof of 20 years enjoyment calls for evidence of use by members of the public generally. Lord Parke observed in *Poole v Huskinson* (1843) that:-
 - (i) there cannot be a dedication to a limited part of the public
 - (ii) the trial judge should not have told the jury that, as such a partial dedication in favour (only) of the residents of a particular parish and their visitors would nevertheless operate, against the intention of the owner of the soil, in favour of the public.
19. The term "as of right" means that the use of the way must not rely on permission to use the path given by the owner of the land it crosses.
20. The use of the way must be without interruption. Once the 20 year uninterrupted use as of right has been proved, the burden then moves to the landowner to show that there is sufficient evidence that there was no intention to dedicate.
21. The County Council must, in accordance with *R v Secretary of State for Wales ex parte Emery* (1998) and *R v Secretary of State for the Environment ex parte Bagshaw* (1994), consider whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. This does not require the County Council to find that a right of way actually exists.

22. In the case of *R v Secretary of State for Wales ex parte Emery* (1998), under Section 53(3)(c)(i) of the 1981 Act, the Court had to consider whether there is evidence that:
- (i) a right of way subsists or
 - (ii) a right of way is reasonably alleged to subsist.

The latter test is inevitably less onerous than the former.

23. Where there is no credible evidence of 20 years use at all, or there is incontrovertible evidence that the landowner had no intention, during the period, to dedicate the way to the public, the authority should declare that there is no evidence that a right of way as claimed subsists at all. A problem arises, however, where there is conflicting evidence on one or other or both issues.
24. The Court of Appeal confirmed in *Emery* that the correct approach is that which was set out by the High Court in *R v Secretary of State for the Environment ex parte Bagshaw* (1994) 68 P and CR 402. In *Bagshaw*, the High Court explained the difference in approaching the two tests. For the first test, it is necessary to show that on balance of probabilities a right of way exists. For the second test, it is only necessary to show:

"that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist."

25. If, looked at objectively, the evidence from the witnesses conflicts, but that, by reasonably accepting one side's evidence and reasonably rejecting the other side's, the right would be shown to exist, then, according to *Bagshaw*, it is reasonable to allege such a right. Effectively, the authority does not have to find that a right actually exists, only that it is reasonable to claim one.
26. Officers looked objectively at the evidence and noted that the area adjacent to the house was wide enough to have allowed the former owner of 88/89 High Street to drive along it to access the garage to the rear of the house.
27. Witnesses have stated they had the advantage of using this full width and did so as of right.
28. From the middle of the 19th century, there is a consistent line of cases where the Courts hold that there is a presumption that a fence near to the highway has been erected by reference to the highway, and that unless the presumption can be rebutted, everything between the fences, however irregular in width the verges are, is part of the highway. Most of these cases look back to *R v United Kingdom Electric Telegraph Company Limited* (1861). The judge laid down at the trial *"In the case of an ordinary highway, although it may be of varying unequal width, running between fences, one on each side, the right of passage or way, prima facie, and unless there is evidence to the contrary extends the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may have been metalled or kept in order for the more convenient use of carriages and foot passengers."*

29. Having applied the legal tests outlined above and, in particular, set out in paragraph 25, Officers made an Order on the 25th October 2001 showing the definitive width to be as hatched on the plan at **Appendix A** in line with the application.

Objection and Representation received to the making of the Order

30. Mrs. de Bretton-Gordon of 88/89 High Street has objected to the Order. She believes that whilst the drive was wide enough to drive upon, the former width of the path as shown on the photograph at **Appendix D** was 1 metre. This width was confirmed when resurfacing the drive. She further believes the obvious route is away from the house and there is no benefit to the public in the path being wider than 1 metre.
31. In relation to the land to the rear of the house, a former hardstanding would have meant the public were unlikely to have used a width of more than 1 metre.
32. Mr. Crane of Sutton Veny has written in strong support of the Order. He was asked by the Parish Council to collect evidence to support the application.

Comments on the Objection/Representation

33. Mr. Crane's support to the Council carrying out its statutory duty is welcomed.
34. Mr. and Mrs. de Bretton-Gordon acquired absolute title of their property on the 23rd December 1999.
35. Since the demolition of the porches in 1938 when a single dwelling was achieved, the wider width claimed for in the Order has been possible. The former owner of the property for 40 years has not, by his own admission, taken steps to prevent use of this width and has occasionally acknowledged people using it.
36. The construction works in the Summer of 2000 brought into question the public right to use the path. Mr. and Mrs. de Bretton-Gordon are not in a position to effectively challenge the public use of this land in the 20 year period prior to 1999.
37. There is an absence of proof of a contrary intention not to dedicate the entire area between existing fences, walls and hedges along the entire length of the path.
38. In the face of all the relevant evidence available, a 'reasonable' person could 'reasonably' allege that the width of the way should be as laid down in the Order.

Conclusions: Options Considered

39. Officers do not doubt that prior to the removal of the porches and setting back of the former railings, the path alongside 88/89 High Street was probably about 1 metre wide. This does not, however, mean that the public could not have established rights of the wider area in the intervening 62-63 years.
40. Taking into account the legal points to be considered, Officers are satisfied that it was correct to make the Order and no other options are available other than submitting the Order to the Planning Inspectorate.

Recommendation

41. That the Order be submitted to the Planning Inspectorate, together with the objection and representation letters, comments thereon and all relevant paperwork, with the request that the Order be confirmed without modification.

Reason for Recommendation

42. To comply with the law.

RICHARD J. LANDER

Director of Environmental Services

The following unpublished documents have been relied on in the preparation of this Report:

Correspondence with Mr. and Mrs. de Bretton-Gordon, Mr. Crane, the Parish Council and other interested persons.

Environmental impact of the Recommendations contained in this Report:

None.

