

Application for a Definitive Map Modification Order to add public footpaths to the Definitive Map and Statement for Bromley: Land to the rear of Heath Side.

Report for the London Borough of Bromley Council

Application for a Definitive Map Modification Order to add public footpaths to the Definitive Map and Statement for Bromley: Land to the rear of Heath Side.

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Introduction

1. This report covers the results of investigations into an application for a Definitive Map Modification Order to add public footpaths to the Definitive Map and Statement for Bromley affecting land to the rear of Heath Side, Petts Wood, Orpington. It aims to assist the Council in determining the application for an Order to modify the Definitive Map and Statement for the London Borough of Bromley in accordance with the Council's statutory duty, under the Wildlife and Countryside Act, 1981.
2. The report is divided into the following sections:

Background

Legislative Framework

The evidence in support of the application

Landowner's evidence

Evaluation of the evidence against the tests in Section 31 of the 1980 Act

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Background

3. On 16 February 2019 Mrs Karen King made an application for a Definitive Map Modification Order ("DMMO") to modify the Definitive Map and Statement for Bromley by adding a network of footpaths over land to the rear of Heath Side. The application was accompanied by 19 Public Rights of Way Evidence Forms, each of which had been completed by an individual member of the public, detailing their use the application paths.

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4. A plan showing the routes claimed is at Appendix A (Doc2 Page 5). For ease of reference the path network has been divided into three sections: A-B being a short length of path that connects the other two paths to Council owned land; B-C runs broadly along the northern boundary of the site ("the northern footpath" and B-D runs to the south of this ("the southern footpath"). Both B-C and B-D connect to an existing public footpath No 134 which runs behind some of the houses on Heath Side.
5. The application was prompted by the change in ownership of the land crossed by the paths; the land was bought by 168 Group Limited in November 2018. Local residents feared that the land would be developed and it was this that appears to have prompted Mrs King to make her application.

Legislative Framework

6. By virtue of the Wildlife and Countryside Act, 1981 ("the 1981 Act") the Council is the surveying authority for its area.
7. The 1981 Act places a duty on surveying authorities to keep the definitive map and statement under continuous review, and under s 53(2)(b), to make orders that make such modifications to the map and statement as appear to the authority to be requisite as a consequence of the occurrence of an event. The events referred to in s 53(2)(b) are specified in s 53(3) and includes at s 53(3)(b):

The expiration....of any period such that the enjoyment by the public of the way during that period raises a presumption that a way has been dedicated as a public path or restricted byway.

8. The provisions of s 31 of the Highways Act 1980 ("the 1980 Act") are also relevant. Section 31(1) provides that:

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Where a way over land, other than a way of such a 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 highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

Section 31(2) provides that:

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) of otherwise.

9. Section 7A and 7B provide that:

Section 7B applies where the matter bringing the right of the public to use a way into question is an application under Section 35(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the Definitive Map and Statement

10. If a full 20 year period of user is not made out, a right of way may nevertheless be dedicated under the common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be presumed, or deemed to have occurred. Evidence about the openness and frequency of user, and the knowledge and acquiescence of the landowner will be taken into account.

11. The test to be applied to evidence for and against the public status of the claimed routes is the civil test of 'on balance of probability'.

The evidence in support of the application

12. Nineteen people completed Public Rights of Way Evidence Forms ("Forms") that were supplied with the application. The earliest date of use of the application routes was 1960 (Mr L King), with 18 people claiming that their use continued until 2018, when most Forms were

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completed. (Mrs S Buller stopped using the routes for health reasons in 2004.) The majority of users had used the routes without a break (Ms J Sheary noted a short break in her use in 2017); even where users had moved away for a period (Ms J Abram, Ms E Buller) they continued to use the routes on visits back to the area to see family members.

13. Where frequency of the use was detailed, use varied from daily or more than daily to weekly.

All 19 people stated that they saw other people using the routes and considered that they would have been seen by others. No user had permission to use the routes. No user was connected to the landowner. There were no signs visible from the routes. The routes were never obstructed by man-made obstructions; the only obstructions were natural overgrowth from the sides of the routes, the occasional fallen tree or branch and flooding.

14. The majority of users used the routes on foot. Eight users had used some of the routes for some of the time on bicycle.

15. The investigation into the user evidence started as the country went into lockdown in response to the covid-19/coronavirus pandemic. It was not therefore possible to interview any witnesses face-to-face. Some user witnesses (Ms J Abram, Ms E Buller, Mrs S Buller, Mrs King, Mr Lyddall, Mr and Mrs Taylor and Mrs Ward) have been contacted by email or telephone and have made more detailed statements about their use; giving more information about whether their frequency of use or mode of use has changed over time and more detailed information about whether or not they have used all parts of the network to an equal degree or not. Witnesses were asked about the width of the routes and one witness (Ms J Abram) provided photographs taken in August 2020 and a sketch with measurements of the width taken at various points along the routes (the photographs and sketch are at Appendix D). Witness statements from witnesses interviewed in this way are in Appendix B.

16. Following interviews, the evidence has been clarified in the following ways:

- One witness (Mr R Lyddall) has never used the northern route, and has not used the southern route in the last 30 years;

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- One witness (Mrs J Ward) has never used the northern route ;
- For some of those witnesses who used both northern and southern routes, use of the northern route has been far less than use of the southern route. (Ms E Buller, Mrs S Buller, Mrs K King and Mr and Mrs Taylor.) Nevertheless, users report both the northern route and the southern route to be very-well used.
- None of the sections of path are fenced. Over the years the routes have varied in width and at some points on both the northern route and the southern route it has been necessary to step off the trodden paths to allow another user to pass. The section of path from A-B is the widest part of the paths and is wide enough to allow two families to walk side-by-side (Mrs K King). No witness reports any difficulty in stepping of any part of the narrower sections of path to allow other users to pass.
- The majority of use has been on foot, with some users cycling. Other walkers and cyclists have been seen; horse-riders have been seen rarely.

Landowner's Evidence

17. No evidence has been submitted on behalf of the landowner. The land is registered under Title SGL464283 to 168 Group Limited. Communications sent to the registered address for the company have not been responded to. Research at Companies House showed that 168 Group Limited had one director, Ms Yan Hu. Correspondence sent to her, recorded delivery, at the correspondence address was returned 'uncalled for'. The applicant advised that her correspondence to Greenland Petts Wood Ltd (believed by the applicant at the time to have an interest in the land) c/o 168 Express Limited Unit 2 Birch Walk Erith was received. But later correspondence sent recorded delivery to this address was eventually returned 'addressee unknown'.

Evaluation of the evidence against the tests in Section 31 of the 1980 Act

18. Section 31 provides that the 20 year period of use from which a presumption of dedication can be drawn runs back from the date at which the right of the public to use a route is brought into question. In this case use has not been physically prevented and there have been no signs erected to be visible from the routes indicating that the public may not use the routes. The matter bringing the right of the public to use the routes into question is the application made by Mrs King. The relevant date for the purposes of Section 31 is therefore 16 February 2019 and the 20 year period is February 1999 to February 2019.
19. Mrs King collected evidence in late 2018, after she and other local people became aware of the sale of the land. There is, therefore, an apparent gap in the written evidence in user evidence forms between the date when the evidence was collected and the date of the application. This gap was caused by the Council incorrectly telling Mrs King that she needed to pay an application fee, which delayed Mrs King's application until she had raised the necessary monies to pay the fee. However, it is apparent from interviews that witnesses have continued to use the routes in much the same way as they had before. There would appear to be no actual gap in use and several users contacted for interview reported that they were continuing to use the paths in much the same way as they had previously; albeit with amendments following changes in their day to day lives owing to restrictions placed on them to deal with the pandemic.

Is there a way over land?

20. The application routes are all clearly defined routes between terminal points sufficient to qualify as ways over land.

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Are the ways of such a character that dedication could occur at common law?

21. The ways are physically defined linear routes and although they appear to terminate at a dead end at Point A, the land to the west of A is owned by the Council (under title SGL497114) as land for public recreation and the public have a right of access for recreational purposes and for research. Whilst it is usually the case that public rights of way begin and end on other highways there is no rule of law that says a public right of way may not be a dead end; though it is unusual for dead end rights of way to arise from deemed or presumed dedication following a period of use by the public. In this case the public has the right to access the Council owned land to the west of A and it is clear from the evidence that members of the public have either used the routes to specifically access the Council-owned land or to cross over it to other destinations.

Have the ways been enjoyed by the public?

22. Enjoyment in this context is held to mean used. The evidence discussed above shows that the public has used the application routes and that use has been by members of the public in addition to those who completed evidence forms and those whose evidence has been clarified at interview.

Is the use by the public 'as of right'?

23. 'As of right' is defined as being without force, without permission and without secrecy. Use by the public has been open and frequent. There is no evidence that use has been with force or has been contentious. None of the 18 people who have used the routes in the 20 year period have had permission from the current or any previous landowner. There is no evidence that the land was fenced against the public and there were no signs forbidding access. Use therefore appears to have been 'as of right'.

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Has the use been for the full period of 20 years?

24. Fifteen members of the public have used the southern route and A-B for the full period of 20 years. Fourteen members of the public have used the northern route for the full period of 20 years. Other users have used the routes for lesser periods or during periods outside the 20 year period.

Is there any evidence of a lack of intention to dedicate the routes to the public?

25. As noted above, the current landowner has not responded to correspondence. There is no evidence of the current or any previous landowner erecting any signs at all and no landowner has submitted statements or deposits under Section 31(6). There is no other evidence that any landowner has carried out any other actions that would qualify as evidence of lack of intention to dedicate with the qualifying 20 year period.

Status

26. Mrs King's application was to record the routes as public footpaths. There is some evidence of use by the public on bicycles (see for example Ms J Abram) and some indirect evidence of use by horse-riders. The predominant use by the public seems to be on foot. Some users who have in the past made use of the routes on bicycle did so as children. The evidence as a whole tends to point to the status of the routes being footpaths.

Width

27. The Planning Inspectorate's Rights of Way Advice Note 16 advises that all DMMOs should contain a width. (Additional advice on specifying widths in Orders was issued to English local authorities by Defra on 12 February 2007.) See Appendix E for these documents.

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28. In this case the widths of the routes vary considerably and have varied over time. Whilst it is possible to measure the width of the current trodden paths (as Ms J Abram has done) this almost certainly does not reflect the width of the routes throughout the 20 year period. It is also clear from the evidence collected at interview that where sections of the paths were narrow the public was easily able to step to one side to allow other users to pass; the public therefore appears not to have felt constrained to stick to the narrow, trodden path.
29. Advice in the 2007 Defra letter for cases where there is no or little evidence of the width of a route is as follows: *“There will be a small number of cases where there is little if any evidence, either documentary or user, as to the width of the route. In such cases the OMA [Order-Making Authorities] should include a width that appears appropriate having regard to all relevant factors which may include, for instance, the type of user, location and the nature of the surface and other physical features. OMAs should bear in mind that such a width should be the minimum necessary for the reasonable exercise of the public right in these circumstances, enough for two users to pass in comfort, occasional pinch points excepted.”*
30. It is suggested that this case falls to be considered in this way.

Limitations or Conditions

31. There is no evidence that dedication to the public was subject to any limitation or condition (for example, the right of the landowner to have a gate or stile on a route).

Recommendation

32. On balance, the evidence supports the making of the Order applied for and appears to meet the test set out in s 53(3)(b) of the 1981 Act. If the Council decides to make the Order it is

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recommended that the Council follows the advice in the 2007 Defra letter and specifies a width of 2 metres.