

Cornwall Council – Environment Service Countryside Access Team

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A STATEMENT BY THE ORDER MAKING AUTHORITY GIVING THE GROUNDS ON WHICH IT IS CONSIDERED THE OPPOSED PART OF THE ORDER SHOULD BE CONFIRMED IN RESPECT OF:

The Cornwall Council (Addition of Footpaths at Babis Lane and Town Quay in the Parish of Saltash) Modification Order 2017

Cornwall Council made the abovementioned order in accordance with its general duty under the Wildlife and Countryside Act 1981 Section 53 to keep the definitive map and statement under continuous review.

More particularly the Council had regard to the duty as expressed in Paragraph (2) of Section 53 of the 1981 Act:-

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the [definitive] map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the event specified in subsection (3); and
(b) as from that date, keep the map and statement under continuous review and as soon as practicable after the occurrence on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

The abovementioned Order was made under section 53 (2)(b) because of the occurrence of an event as set out in section 53(3)(c)(i) of the 1981 Act:-

An event whereby, "...the discovery by the authority of evidence which - when considered with all other evidence available to them shows - that a right of way which is not shown in the definitive 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 such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic...".

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EVIDENTIAL TEST TO BE SATISFIED FOR CONFIRMATION OF AN ORDER:

When considering whether to **make** an Order under Wildlife and Countryside Act 1981 Section 53 (2)(b) the Council has to be satisfied that an event under section 53(3)(c)(i) of the 1981 Act had occurred. The Council had to decide whether the available evidence shows that a right of way subsists or is reasonably alleged to subsist (the “reasonable allegation” test).

When considering whether to **confirm** an unopposed Order made as a result of the occurrence of an event under Section 53(3)(c)(i) of the 1981 Act, the Council has to decide whether the available evidence shows, on the balance of probabilities, that a right of way exists (the “balance of probabilities” test). This requirement is set out in paragraph 6(1)(a) of Schedule 15 to the 1981 Act.

As the Order is opposed, Cornwall Council cannot confirm the Order itself and must submit it to the Secretary of State for a decision on confirmation. The test that the Secretary of State must consider is:

*When considering whether to **confirm** an Order made as a result of the occurrence of an event under Section 53(3)(c)(i) of the 1981 Act the Secretary of State has to decide whether the available evidence shows, on the balance of probabilities, that a right of way exists. Again this requirement is set out in paragraph 6(1)(a) of Schedule 15 to the 1981 Act.*

In order to assist the Secretary of State in their decision as to whether to confirm the Order, Cornwall Council sets out below the grounds on which it considers the Order should be confirmed.

In seeking confirmation of the opposed Order, the Council is satisfied on the balance of probabilities that an event has occurred under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. Namely, that the available evidence shows that the Order route between Points A-B, C-E and D-F on the Order map subsist as public footpaths because their existence has been established at statute, Section 31 of the Highways Act 1980.

HOW THE EVIDENCE MEETS THE TESTS FOR THE INFERENCE OF DEDICATION AT SECTION 31 OF THE HIGHWAYS ACT 1980:

Section 31 of the Highways Act 1980 provides that ‘where a way over any 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 a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'. Therefore, evidence of use by the public over a period of 20 years not offset by any evidence that the landowner during that time had no intention to dedicate the way, can be sufficient to raise the inference of dedication.

- In relation to the claim for a public footpath shown between Points A-B, C-E and D-F on the Order map, the application was supported by User Evidence Forms indicating that the way had been used by individual members of the public.
- The Council has reviewed the evidence and concluded the following tests have been met:
 - that the way has been shown to follow a defined route and is not an area over which the public has wandered to establish multiple alternative routes;
 - that use has been by the public at large, not simply by a class of people such as employees in exercise of access to a workplace, or customers accessing a business;
 - that use has been 'as of right' without force, secrecy or permission.
- For the purposes of Section 31 of the Highways Act 1980, where it is not possible to ascertain the date upon which public rights were brought into question the Highways Act 1980 (as amended by the Natural Environment and Rural Communities Act 2006) advises that the date when a legally valid application is made should be treated, for the purpose of deliberations, as the date upon which public rights were brought into question. In this instance it is considered that public use on foot was brought into question by the submission of an application in 2001.
- Prior to 2001 there is no relevant evidence of a landowner's negative intention to dedicate represented with an overt contemporaneous act by way of erecting a notice, evidence to show a gate has been locked, or lodging a declaration under Section 31(6) of the Highways Act 1980 to bring to the attention of the public their contrary intention.
- The length and frequency of use of the routes on foot between Points A-B, C-E and D-F on the order map, combined with the

acquiescence of the affected landowner who took no action to prevent that use, is sufficient to show the ways have been used as of right for the relevant 20-year period before rights were brought into question and have therefore been dedicated as public footpaths.

- While the available evidence of use by the public on foot between Points B-C on the Order map, which was also included in the application claiming rights in 2001, was no different from use over the sections of path added by this Order, on balance the Council considered this was not of a character that public use could give rise under Section 31 of the Highways Act 1980, or at common law, to the presumption of dedication.
- This was due to the nature of topography over the alleged way. In addition to numerous obstructions in the form of boathouses, boats and mooring ropes, there is no clearly defined path, partly at least, as a consequence of the foreshore being under considerable depth of water and inaccessible for long periods around high tide. With the surface of the foreshore constantly changing over time, there is evidence on the ground that indicates users will have deviated from the path they claimed to have used, but no physical evidence to demonstrate that they used the same path consistently and have not, given the nature of the area and underfoot, wandered at large.
- The Council has concluded that the route between Points B-C on the Order map has failed to meet all the tests meaning the evidence is insufficient to show a way has been used as of right for the relevant 20-year period before rights were brought into question and therefore this has not been dedicated as a public footpath

CONCLUSION

Cornwall Council is satisfied its original determination that the Order be made and that the Order, if opposed, be submitted to the Secretary of State for confirmation was based on a reasonable interpretation of the available evidence and also satisfies the tests laid out in Section 53 of the Wildlife and Countryside Act 1981. There was nothing that was raised in the contents of the objections to the Order that causes Cornwall Council to consider that the Order should not be confirmed.

The Council considers the evidence indicates that, on the balance of probabilities public footpath rights over Points A-B, C-E and D-F on the Order map have been established by inference of dedication at statute, Section 31 of

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the Highways Act 1980. It is therefore considered that the Order should be confirmed.

Signed: *Julie Bate*

Dated: 28 March 2022