

STATEMENT OF CASE

DEFINITIVE MAP MODIFICATION ORDER APPLICATION

FOOTPATH BETWEEN 147 CROW LANE & 149 CROW LANE, BS10 7DS

BRISTOL CITY COUNCIL

Planning Inspectorate Ref: ROW/3245803

1. INTRODUCTION

- 1.1. Bristol City Council as highway and surveying authority (“the order making authority”) is under a statutory duty, under Section 53(2) of the Wildlife and Countryside Act 1981 (“the Act”), to keep the Definitive Map and Statement under continuous review and to determine any valid applications for modifications to the Definitive Map and Statement that it receives.
- 1.2. Section 53(5) of the Act enables any person to apply to the order making authority for an order to be made to modify the Definitive Map and Statement as respects any of the ‘evidential events’ specified in paragraphs (b) and (c) of section 53(3) of the Act.
- 1.3. Following an application to modify the Definitive Map by adding a footpath as a public right of way between 147 Crow Lane and 149 Crow Lane, the order making authority carried out a consultation before determining that, on the balance of probabilities, the way had been used as a Public Right Of Way for in excess of 20 years.
- 1.4. On that basis, the order making authority resolved to make a Definitive Map Modification Order (DMMO) for public consultation. Following the making of the DMMO on 28 May 2019 and its subsequent consultation, objections were received. As those objections have not been withdrawn, the order making authority is required to submit the DMMO to the Secretary of State for confirmation.

2. DETAILS OF CLAIM OR APPLICATION

- 2.1. The DMMO application was submitted on 24th September 2013 and validated on 11th December 2013. The application is to modify the Definitive Map and Statement by adding a footpath from Crow Lane to Machin Road. The claimed route begins at the footway on Crow Lane and then runs between 147 and 149 Crow Lane before crossing an open space or yard at the rear of 143-147 Crow Lane to the footway on Machin Road, opposite the Machin Road Public Car Park. A copy of the map submitted with the DMMO application is attached at Appendix A of the Committee Report (see **Appendix 1**) and shows the claimed route.
- 2.2. The action that brought the public right into question and prompted the DMMO application was the erection of a sign, in early 2012, stating that the route was 'PRIVATE NO PUBLIC RIGHT OF WAY'. This sign was visible from Crow Lane, and a further sign still in place on the wall adjacent to the Machin Road footway at the time of the report to Committee (Appendix H.4 of the Committee Report – **Appendix 1**) is similar enough in style to suggest both were installed at the same time. The photographic and user evidence is clear that there was a sign in place, and that such a sign was sufficient to bring into question the public's right to use the route. On this basis, the relevant 20 year period should end in early 2012, and begin in early 1992. Two metre palisade fence and gates were installed between 147 and 149 Crow Lane and adjacent to the Machin Road footway in 2014, which effectively prevented subsequent public use of the claimed route (see photos at Appendix H of the Committee Report – **Appendix 1**). Further evidence to corroborate the date on which the public's right to use the way was brought into question is set out in the summary of user evidence (see section 5 and Table at Appendix J1 of the Committee Report – **Appendix 1**).

3. LEGAL TESTS TO BE APPLIED

- 3.1. The relevant statutory provision is set out in Section 53(3)(b) of the Act which requires the order making authority to modify the Definitive Map and Statement following:

“the expiration, in relation to any way in the area to which the map relates, 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 or restricted byway;”

3.2. Section 31(1) of the Highways Act 1980 provides for the presumption of dedication of a public right of way following 20 years continuous use. It states:

“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 actually been 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.”

3.3. Section 31(2) states:

“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 ... or otherwise.”

3.4. Given the right of the public to use the way was brought into question when the signs were erected, the 20 year period should therefore be calculated retrospectively from early 2012 i.e. to early 1992.

3.5. In determining whether to make an order, case law has clarified that the test that the order making authority has to meet is whether, on the evidence, it is reasonable to allege that the right of way subsists. However, when determining whether to confirm an order, the surveying authority, or Secretary of State as appropriate, must be satisfied that on a balance of probabilities, the right of way subsists (see Todd v Secretary of State for the Environment, Farming and Rural Affairs [2004]1 WLR 2471 (**Appendix 2**)).

4. DOCUMENTARY EVIDENCE

4.1. The applicant did not provide any further documentary evidence, other than the user evidence, in support of his application.

4.2. It is the order making authority's practice to search historical records held by the Bristol Records Office or held on digital archives such as 'Know Your Place – Bristol'

alongside analysing the available Definitive Maps and other relevant mapping held by the Highway Authority or otherwise publicly available.

- 4.3. The evidence obtained and its detailed review by officers is set out in the Committee Report at paragraphs 4.4 to 4.8 and the corresponding appendices (see **Appendix 1**). The documentary evidence includes the Definitive Maps of 1954 and 1966, historic plans including title plans, planning permissions and development proposals, a site visit, and street view images.
- 4.4. In summary, prior to the development of the roads, shops and housing in the area, there is no record of public footpaths following the route claimed, or a similar route, with the route between Crow Lane and Machin Road coming into use after the Co-operative store (149 Crow Lane) and the bank of shops (144-147 Crow Lane) were completed.
- 4.5. In terms of landowner evidence, the current landowner (Ms Rowbottom) has stated in a telephone call that land was previously owned by Bristol City Council, and that there was a gate on the rear access to the shops which was knocked down by a lorry and was never replaced (Appendix K of the Committee Report – **Appendix 1**). Following receipt of the formal consultation letter, evidence was submitted by the current landowner and is included in Appendices L1-8 of the Committee Report (**Appendix 1**).
- 4.6. In summary, the current landowner:
 - 4.6.1. states that there was a 'No Thoroughfare' sign (subsequently defaced to read 'roughfare') when working in 147 Crow Lane in 1966. No other evidence of this sign is provided.
 - 4.6.2. states that she took out a sub-lease in 1983. In 1989 she reports that she purchased the head-lease and freehold of 147 Crow Lane.
 - 4.6.3. states that, in February 2007, she acquired the former commercial yard at the side and rear of 147 Crow Lane and that this was formerly in the ownership of Bristol City Council.
 - 4.6.4. refers to a restriction/barrier, providing evidence in relation to the available mapping and photographs (Appendices L3-8 of the Committee Report) of the barrier or restriction. It is clear from all available evidence that this barrier existed, along with referred to '9" Step' (Appendix L2). The current landowner

states that the space was approximated 12"/13", and advises that she has retained the barrier and that, as the original footings can still be seen, the size of this restriction can be demonstrated upon request.

4.6.5. reports various antisocial behaviours (in the letter at Appendix L2 of the Committee Report (**Appendix 1**)), and that the way was 'in no way a safe, suitable or viable short cut'. There is also reference to vehicles and deliveries obstructing the entrance to the route on Machin Road.

4.6.6. refers to 'many signs' being installed over 35 years (though the current landowner was only landowner of the land in question for the period 2007-2012 of the relevant 20 year period). The current landowner also states that, since occupying 147 Crow Lane in 1983, she and other staff members have stopped or attempted to stop individuals attempting to squeeze past the barrier.

4.7. Further consultation was carried out with the current landowner following the receipt of the initial detailed evidence. The landowner confirmed that:

4.7.1. when asked if there was any further evidence available on signs and stopping members of the public, she confirmed that she had stopped '20 or so individuals per week', mostly during daylight hours, though she could not provide details of times or dates, and had not kept any records of signs erected (Appendix N of the Committee Report (**Appendix 1**)).

4.7.2. when asked if she had any responsibilities or other relationship with the land between 147 and 148 Crow Lane and 143-147 Crow Lane prior to purchase in 2007, the current landowner stated that she had stopped or attempted to stop people from accessing the commercial yard for many years before 2007, though could not provide any evidence that she had any maintenance or other responsibilities for the land, except that it was not maintained, repaired or lit by Bristol City Council (Appendix N of Committee Report – **Appendix 1**)

4.8. The current landowner provided further comments following an opportunity to respond to the draft committee report, including a measurement of the gap between the barrier and the adjoining property (Appendix P of the Committee Report - **Appendix 1**). The letter also included comments on the accuracy of witness statements and 'supposition' regarding Google street view images. There is also a

further comment about signs erected, but there is no additional evidence of these signs (see Appendix P of the Committee Report – **Appendix 1**).

4.9. Consultation with the landowner and the applicants suggests that the restriction was installed not long after the shops and flats (143-147 Crow Lane) were constructed, by the mid-1960s.

4.10. Landowner evidence also implies that there were additional notices (prior to those in 2012 which brought the route into question), stating that they had ‘erected many signs over the years which were ignored, defaced, removed or destroyed’, and that in 1966 there had been a sign stating ‘No Thoroughfare’. This is in contrast to the 8 users not providing any record of these signs. The land in question was owned by Bristol City Council until 2007, and there is no evidence that this landowner put up any notices to deter public use of the route in the 20 years prior to selling the land in 2007.

5. USER EVIDENCE

5.1. The DMMO applicant provided 8 user evidence forms (UEFs) (see **Appendix 3**) in support of its claim. The forms provide evidence of use of the claimed route for varying periods of time between 1961 and 2013 when the application was submitted and confirmed, following the installation of signs stating the way was private in 2012. The evidence contained in the UEFs and accompanying maps is summarised in paragraphs 5.5.1 to 5.5.9 of the Committee Report (**Appendix 1**)

5.2. Use of the route as a public footpath is claimed in the user evidence forms and public use of the route is supported by the available Google street view imagery. As mentioned above, the landowner of the adjacent building (147 Crow Lane) and, since 2007, the current owner of the land which the claimed route crosses, supports this evidence in referencing their actions taken to deter use. All eight of the witnesses who completed evidence forms claimed to have used the route for at least 20 years unhindered and unchallenged, except by a restriction which was, according to all reports, in situ for the entirety of the relevant 20 year period.

5.3. None of the witnesses stated that they had asked or been given permission to use the route. Only one of the 8 witnesses (see page 4 of **Appendix 3**) could be reasonably alleged to be exercising a private right, although they have not referred

to any private right and there is no record of a private right on the relevant property deeds.

5.4. The current landowner asserts that the barrier/restriction provided a gap of only 12 or 13 inches. There is conflicting user evidence of the width of the gap left by the restriction or tubular barrier that was in place for the entirety of the 20 year relevant period. It is clear that the public bypassed this barrier/restriction and a step or change in level. The bypassing of this obstruction was done without secrecy, force or permission.

5.5. The order making authority consider that the nature of the reported restriction does mean that the only rights that can reasonably be alleged to subsist based on the user evidence is use by foot, or as a public footpath. The information in the user evidence forms supports this status as a footpath for the claimed route.

6. COMMENTS ON OBJECTIONS OR REPRESENTATIONS

6.1. Following the making of the Order and subsequent consultation, objections were received by members of the public. None of these objections have been withdrawn. The objections related to, variously, the risk of criminal activity, impact on residential amenity, risk of fly tipping, never being seen in use, the presence of the barrier, a section of the unrestricted area being blocked by a wall until 1995, and signs being erected and people being challenged as evidence of no intention to dedicate.

6.2. The order making authority accept that the objections have been duly made. As the desirability, suitability or necessity of adding the route to the Definitive Map are not matters that can be taken into account under section 53 of the Act, the objections based on potential criminal activities and residential amenity are not matters that can be considered by the Secretary of State in determining whether to confirm the Order.

6.3. The order making authority suggests that the only matter for consideration by the Secretary of State is whether or not the presumption of dedication has been established so that the public right exists.

6.4. The evidence by an objector that they had never seen the route used as a footpath is in contradiction to the evidence presented in the Committee Report (**Appendix 1**).

Without any further evidence to support this claim, this objection provides very little weight in the balancing exercise to be undertaken.

- 6.5. The landowner's evidence repeats that evidence already considered in the Committee Report and on which the Committee resolved to make the order. The presence of the barrier was also considered in the Committee Report.
- 6.6. The only point raised which is of relevance for further consideration by the Secretary of State is the new evidence that suggests that the unrestricted area of the way was narrower than previously believed between 1992 and 1995. Given this new information, it may be that Point C of the proposed route needs to be modified if the Secretary of State determines that the Order should be confirmed.

7. SUMMARY

- 7.1. The order making authority considers that, on the basis of evidence available and on the balance of probability, there is sufficient evidence to reasonably allege that the presumption of dedication contained in Section 31(1) of the Highways Act 1980 has been raised for the claimed footpath. It appears more reasonable than not to allege that the public has used the claimed footpath for 20 years or more.
- 7.2. The onus on the landowner is to produce evidence that there was no intention on their part to dedicate; for example an overt act on the part of the landowner to show the public at large that there was no such intention. Such evidence may consist of notices or barriers, or the locking of the way on one day in the year and drawing this to the attention of the public; or the deposit of a Statutory Declaration under Section 31(6) of the Highways Act 1980 to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit. The order making authority proposes that, to date, there has not been sufficient evidence submitted by the landowner to rebut the presumption of dedication, nor to rebut the claimed use of the way.