

Order Making Authority's Comments on Objections to the Order

During the specified period for objections and representations to the Order, the Order Making Authority ("OMA") received two objections. One of the objections, filed by Woodcocks Haworth and Nuttall Solicitors on behalf of Mr Osgood and Miss Wilcox has not been withdrawn so the Order is opposed and cannot be confirmed by the OMA.

A copy of the letter of objection is contained within the List of Documents (Document 4). Comments relating to points made under the heading 'Factual Background' and the 'Reasons for objection to the application' are summarised in italics below together with the Authority's response.

A further letter was received from Woodcocks Haworth and Nuttall Solicitors dated 15th May 2023 detailing the same objection but providing some additional points. This letter is also included within the List of Documents (Document 4) and additional points raised are summarised below in italics together with the Authority's response.

Factual Background

Gap in the boundary wall at point C on the Order Map

In paragraph (5) of the letter of objection it is stated that a previous owner of the land crossed by the Order route (Ms Tang) left a gap in the wall at point C because of a requirement not to obstruct a gas pipeline's maintenance easement strip and that this did not mean that it had been built with the intention to create a footpath and that it did not carry public rights of access.

The OMA consider that whilst the gap in the wall may not have been provided with the intention of creating a public footpath, the user evidence supports the fact that it was open and available and used by the public for a period in excess of 20 years prior to 2019. The fact that a gap was provided – or a route kept clear or maintained for a different purpose does not mean that public rights could not subsequently come into being along the route and the fact that the gap was provided and remained unobstructed (until 2019) supports public use made of the route and confirmation of the Order.

Locked gate across vehicular access to car park from Grane Road

In paragraph (6) it is stated that during her ownership Ms Tang erected a gate which was closed and locked at night to prevent vehicles accessing the car park and that the sign referred to by the OMA on page 39 of the Regulatory Committee report (Document 21) was 'likely' to have been erected in 2003 when the restaurant started

trading. Reference was also made to the fact that residents on Warburton Street had keys to the gate 'as they had permission to access along the footpath'.

The gate referred to in the objection letter is not on the Order route and there is no suggestion that the Order route was blocked off or that any signage provided made any reference to anything other than vehicular use/restrictions relating to the car park itself.

Provision of keys and permission for residents of Warburton Street (or Buildings) to park cars on the car park is a separate matter to the use and dedication of public footpath rights over the Order route A-B-C. The user evidence submitted in support of the Order refers to use of the full length of the Order route on foot from a cross section of the local community and is not limited to those few residents that may have had permission to park a vehicle on the car park.

Reasons for objection to the application

In paragraph (8) of the objection letter it refers to the conditions required to show footpath rights have been established at common law; whilst those conditions are agreed, they apply to deemed dedication under S31 of the Highways Act 1980 rather than common law.

1. Use as of right

The objection states that 'it has been contended within the Application that the width of the footpath from the edge of the wall from point B-C is ranging between 1-2 metres wide. However, there has always been commercial refuse bins situated on this part of the proposed Footpath which are measured at 1.3 metres wide. Furthermore, since 2003 or alternatively, as seen from google earth images vehicles have been parked on the Land since 2009. These vehicles would be visitors of the restaurant.'

Attached with the objection, regarding this point, is a picture taken which, it is claimed 'contends that the Footpath was blocked on a frequent basis and therefore, interrupts the use'.

'Furthermore, there is insufficient evidence to state that the Footpath has been used prior to 31 December 2000. In the circumstance, the Footpath from point B-C has only been exercised during the period of 2000 until 2003 when the path was obstructed such that it has been obstructed for the last 18 years.'

The OMA cannot choose to record the width of the Order route to be wider or narrower than what width the evidence suggests was used by the public. The Order route has been recorded as 2 metres between point B and point C on the Order Map i.e. along the edge of the car park because the user evidence specified use of a route along the boundary. There is no evidence to suggest that use was constrained by any physical boundary within the car park or that a route had been marked out on the ground. A direct 2 metre wide path allows sufficient width for the public to pass one another.

It is recognised that the route crosses land that formed part of a car park. At times it is accepted that cars may have been parked across or on the Order route. However, the

restaurant was not open 24 hours a day and visitors using the car park would have been there for a limited time and more often during a relatively short period of time during the evening. When cars were parked it is unlikely that they were parked so close to the fence that people were unable to get past and the objector has not provided evidence that this was the case.

Members of the public that claim to have used the route have not been prevented from using it as a result cars being temporarily parked on the land or by the fact that part of the width of the route had, for a substantial part of the 20 year period, commercial bins located on it.

Users of the route have been interviewed and confirmed that if or when necessary they walked around any parked vehicles and past the bins but never considered either to be anything more than temporary obstructions or restrictions and never considered that the bins or occasional parked car intentionally blocked access.

The Objector states that there is insufficient evidence to show that the Order route had been used 'as of right' prior to 31st December 2000 and that use since 2003 has been obstructed. Whilst there is no map or documentary evidence from which dedication of the route can be clearly inferred, the map and documentary evidence does support the user evidence submitted for the section A-B from at least 1891 and Ordnance Survey maps, aerial photographs and Google Street View images provide additional assistance in relation to the route B-C from 1983 onwards and the OMA, having interviewed a number of people who completed user evidence forms, consider that there is sufficient evidence that the route was used by the public between 1999 and 2019 and that with regard to the statutory test for deemed dedication under section 31 of the 1980 Act, the statutory tests for confirmation of the Order have been met.

2. Without force

The objection provides that 'as noted from the site inspection, Ms Tang erected a sign on the Land specifically stating that the car park was for use of Valley Cantonese customers only.'

It is said that 'therefore, any arguments raised that the residents have not used force is contested pleading ignorance in order to still exercise over land has been held as using physical force. In the case of Winterburn v Bennett [2016] EWCA Civ 482, the Court of Appeal held that a landowner could prevent easements arising by prescription by placing notices on its land. The Court of Appeal held that the continuous presence of clear signs indicating that the Car Park was private property and for use by the Club's patrons only was sufficient to make the parking use by the Winterburns, their customers and suppliers contentious. The Court further held that if the land owner has made its position clear by placing signs on the land, there is no obligation on it to take further action, such as writing letters, confronting users in person or bringing legal proceedings. The judgement confirms a non-confrontational way for landowners to protect against others acquiring easements by prescription over their land. The signs are sufficient to make the position clear to those using the Land.' Making reference to the factual background details provided by the objectors, the objection states that 'within the statements of the Applicants the majority have openly accepted that they

have been prevented from using the Footpath between point B-C.' The objectors say that any use has therefore been with force.

The user evidence in support of the application to record the Order route as a public footpath consistently refers to the fact that use of the Order route was first challenged when builders erected fencing at point B and point C in 2019. Prior to this date the OMA has no evidence to suggest that use of the Order route on foot was challenged or that there was any suggestion that the route was used by force.

The relevant period under consideration is 1999 to 2019 and during that time there is no evidence that members of the public were prevented from using the route. User Evidence Statements submitted at the time the application was made are consistent with information obtained from subsequent interviews carried out by the OMA with no references within the relevant 20 year period to use 'by force'.

In the Committee Report it was noted that none of the users refer to having seen signs or notices along the route. The sign was not positioned on or by the Order route but halfway between the gap through which pedestrians entered and the vehicular gate and it faced Grane Road so could not be read from the Order route. Furthermore although the objection states that the sign said 'This car park is for the use of Valley Cantonese customers only' that statement was below the warning 'Wheel Clamping in Operation' and before the warning '£50 penalty charge for non-customers' and therefore must be read in the context of parking vehicles not pedestrian using the Order route.

Interviews carried out by the OMA with people who provided user evidence forms stating that they had used the Order route prior to 2019, consistently confirmed the view that the signs related to vehicular use of the car park and were not relevant to pedestrian use of the Order route.

The objection refers to the locked gate. This gate was the vehicular entrance to the car park and did not affect the users of the Order route.

3. Without secrecy

The objection states that 'the Applicants have failed to provide sufficient evidence that the Footpath has been used without secrecy'.

The OMA has no reason to consider that use of the Order route was in secret. On the contrary, residents of Warburton Buildings – along the front of which the route A-B runs can testify to seeing people regularly using the route on a daily basis, at all times of the day and night.

The applicant provided 14 user evidence forms (3 comprising use by couples) which refer to regular use of a route from as early as 1940. All 17 users provided evidence of use of the Order route during the period under consideration (1999-2019). The main purposes stated for use of the route were for pleasure and use as an access route, use of the route to get to work and dog walking. 5 additional user evidence forms submitted after the making of the Order also detail use of the Order route within the 20-year period.

All users referred to having witnessed others using the route.

There is nothing contained within the evidence provided to suggest that use of the route was by secrecy. There is no indication that use was at times or in a manner that a landowner, who ran a business from the property crossed by part of the route, could not be expected to have been aware of.

4. Without permission

The objection refers 'to the statements of the Applicants who accept that they have had permission to use the Footpath between point B-C and that they were provided with a key to the gate to gain access.'

Attached to the letter of objection is a copy of a page from the Property Information Form, stated to have been completed by Ms Tang in 2019 and to confirm that she has had an arrangement over the Land with the neighbouring properties, the Applicants. The objection goes on to state that 'any permission given would be on the basis of a licence, and not a right. When the Land was sold in 2019 the licence would have automatically terminated upon the transfer. A licence does not run with the Land.'

The Applicants have confirmed that they were never given permission to use any part of the Order route – as stated in their joint User Evidence Statement and individually prepared Witness Statements. They have explained that they previously parked their car on the car park mid-week when the restaurant wasn't busy but that they had no agreement with the previous landowner to do so. Witness Statements will be provided to the Planning Inspectorate by both applicants confirming this point.

Several residents of Warburton Buildings have explained that they were given permission within the 20 year period under consideration to park vehicles on the car park and had keys to the barrier. All have confirmed that this was a specific agreement relating to parking vehicles on the car park and did not relate to their use of the Order route on foot.

Conclusion

The OMA submits that the objections received do not in any way undermine the evidence that the Order route is, on balance, already a footpath in law, and respectfully requests that the Secretary of State confirms the Order.