



Order Decision

Site visit on 11 August 2015

by Sue Arnott FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 24 August 2015

Order Ref: FPS/R4408/7/15

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Metropolitan Borough of Barnsley (West Riding of Yorkshire County Council Definitive Map and Statement)(Royston) Modification Order (No.7) 2014.
- The Order is dated 22 August 2014. It proposes to modify the definitive map and statement for the area by adding a footpath from Cross Lane to Midland Road via the canal towpath at Royston, as shown on the Order map and in the Order schedule.
- There was one objection outstanding when Barnsley Metropolitan Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

The Main Issues

1. The main issue here is whether the evidence shows that in the past the Order route has been used in such a way that a public footpath can be presumed to have been established.
2. The Order was made by Barnsley Metropolitan Borough Council (BMBC) under Section 53(2)(b) of the Wildlife and Countryside Act 1981 on the basis of an event specified in Section 53(3)(c)(i), namely the discovery of evidence which shows a public right of way which is not recorded in the definitive map and statement subsists over land in the area to which the map relates.
3. Whilst the evidence need only be sufficient to *reasonably allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. At this stage, evidence is required which shows, *on the balance of probability*, that a right of way subsists along the order route if that order is to be confirmed.
4. The requirements for the presumed dedication of a public right of way under statute are set out in Section 31 of the Highways Act 1980 (the 1980 Act). This requires use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.

Reasons

5. The first matter to be established is when the public's rights were brought into question so as to identify the relevant twenty year period.

Bringing into question

6. Until 2013, BMBC owned¹ almost all of the land affected by the claimed footpath (shown as A-B on the Order plan) and had done so for many years. In December 2013, it sold the central section (which I shall refer to as 'the site') to the objector, Ms Bland, whilst retaining ownership of the canal-side length. A short (1 metre) length of the path at its southernmost end lies on unregistered land where ownership is not known.
7. Four houses previously stood on the site in Cross Lane but these were demolished sometime in the late 1960s. Following its investigation, BMBC concluded there is no evidence that at any time since at least 1972 the public have been physically stopped or otherwise challenged whilst using the route.
8. The Council submits that there are three possible points in time when the right of the public to use the route in question may have been at issue. The first is in February or March 2010 when improvement works were being carried out on the site by the Council which involved re-seeding the land and installing a knee-high post and rail fence around the perimeter.
9. BMBC established that the purpose of this fence was to prevent vehicles turning and parking on the site rather than to obstruct public access on foot. At that time the claimed route was recognised as an informal cut through and it was suggested that the path be blocked and altered to run along the access road in front of The Lilacs, connecting with the towpath via steps. It appears that a local councillor (Mr Kyte, also a claimant) intervened and as a result the path remained on its present course with a gap being left in the low fence for pedestrians near to point A at the Cross Lane end.
10. BMBC takes the view that the status of the path was not brought into question during this period since the owner (the Council) did not make clear to the public that their right to use it was being challenged and it seems none of the claimants were prevented from using the route by these works, other than on a very temporary basis.
11. In fact it is not necessary for the status of a way to be challenged by *the owner* of the land², either by notice or otherwise. Here it seems to me that if the Council's original intention had been to obstruct and re-route the path but local users opposed this, insisting that the path remain, and the Council acceded by leaving a gap in the fencing, the status of the way must have been 'in question'. Indeed, one of the claimants (Ms Whitehead) describes the only time the way was challenged as "*when we had the small fence around (the site)*". She continues: "*(the Council) blocked (the path) so we got Graham Kyle up and had it unblocked because we've always used it and still do*".

¹ I note that one of the claimants, Mr Bridgewater, disputes BMBC's title to the site but no evidence has been produced to support his contention.

² See *Applegarth v SSETR (QBD)*[2001] EWHC Admin 487, [2002] 1P & CR 9, [2002] JPL 245, [2001] 27 EG 134 (CS)"

12. The second incident was the submission of a planning application in January 2014 by Ms Bland for permission to develop the site by building two houses. The approved layout would result in the Order route being obstructed. This drew attention to the status of the footpath across the land although it has remained open for use by the public as before.
13. BMBC does not regard this as bringing into question the rights of the public since people continued to walk the path unhindered. I take a different view. Since it was this planning application which, BMBC acknowledges, "*triggered public interest in recording the claimed route*" and led to the submission of the application for this Order in February 2014, I consider the planning application did bring into question the public's right to walk across the site.
14. Since it submits there is no other relevant challenge, BMBC has taken the date of the application for the Order to be the relevant date from which the previous twenty years is counted. In this case, whether January 2014 (the planning application date) or 24 February 2014 (the definitive map modification order application date) is taken as the date of 'bringing into question' makes little difference to the ultimate outcome. I have no doubt that, together, these two events demonstrate that the status of the route was brought into question at that time. However I shall take the earlier of the two events so will examine the twenty year period ending in January 2014.
15. In summary, I have concluded that the status of the Order route was brought into question in February/March 2010 and again in January 2014 so will examine claimed use by the public during the preceding twenty year period(s).

Evidence of use by the public

16. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been actually enjoyed as of right, without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.
17. The evidence of use on which BMBC relies consists of the written statements of 12 local people who have known and used the route regularly for various periods, some dating as far back as 1948 (although the precise line of the present path would not have been possible until the houses were demolished). It has been used as a short cut to shops, to school and to the doctors' surgery and for regular dog-walks. It is said to be preferred by elderly residents to the alternative via roadside pavements in Cross Lane and Midland Road as it avoids a hill. It has been used by people going fishing in the canal and also provides access to, and follows part of, the Trans-Pennine Trail.
18. For both periods being considered, 7 of the claimants used the route throughout all 20 years, with 4 others using it for lesser lengths of time. Although these numbers are not great, I agree with the Council that there is sufficient activity on the claimed footpath to represent uninterrupted use by the public.
19. Although copies have not been submitted, aerial photographs are said to show a worn path along the line of the Order route in 1979, 1989, 2002 and 2013; this evidence has not been disputed. Whilst this is not proof of a public right, it is good evidence that the route existed on the ground during the relevant period(s) of claimed use and is entirely consistent with the information provided by the claimants.

20. From the supporting evidence it is clear that at no time during the periods in question were any of the claimants told they could not use the path by personal challenge, by notice or otherwise. It was not suggested that the claimed use had taken place in secret or been by force. No one stated they had ever sought or otherwise been given express permission to use the path.
21. Although all the claimants have used the path on foot, I have noted that four state they have also ridden bicycles along the Order route. However this evidence is insufficient to support any status higher than footpath in my view.
22. Having considered all the relevant written submissions, I am quite satisfied that this demonstrates regular use of the Order route by the public on foot, as of right and without interruption, throughout both twenty year periods, (1990-2010 and 1994-2014) sufficient to raise a presumption that the route had been dedicated as a public footpath.

Intentions of the landowner(s)

23. Three owners have been identified as holding land during the relevant twenty year period(s). However no actions have been noted which may be construed as demonstrating (to the public) a lack of intention to dedicate a public right of way over the claimed route.
24. The construction of the low fence in 2010 resulted in a gap being left for the public to continue walking the route. I interpret this more as a positive acknowledgement of the public's right of way than as a rebuttal of such a right.
25. The only other action that could conceivably represent a lack of intention to dedicate was the submission of the planning application by the new owner in showing the footpath to be obstructed by the proposed houses. Whilst I might attribute a degree of weight to this as evidence of a lack of intention, I would not regard it as sufficient to rebut the presumption of dedication. In any event it was this action which led to the status of the path being brought into question so that it can have no retrospective effect on the presumption arising from use over the preceding twenty years.
26. No maps, statements or statutory declarations have been deposited by any of the landowners concerned under the statutory procedures set out in Section 31 of the 1980 Act to formally rebut any presumption of dedication.
27. Consequently I find insufficient evidence that during the periods February/March 1990 – February/March 2010 and January 1994 - January 2014 the relevant landowners made clear to the public a lack of intention to dedicate a public right of way between Cross Lane and Midland Road along the route shown on the Order map. It follows from this that a public right of way on foot can be presumed to subsist.

Summary

28. Having examined all the available information, I conclude that the evidence is sufficient to show use of the way in question by the public on foot continuously from 1990 to 2014 and therefore to raise an initial presumption that this had been dedicated as a public footpath. I have also concluded the owner(s) of the way did not demonstrate to the public a sufficient lack of intention to dedicate the route as a public footpath at any time during this period so that the presumption of dedication was not rebutted. I therefore reach my final

conclusion that the evidence before me is sufficient to show, on the balance of probability, that a public footpath subsists over the Order route and should be recorded on the definitive map and statement.

Other matters

29. The objector highlights the fact that planning permission has been granted for the construction of two dwellings on the site. She also submits a plan showing the route of a possible diversion which she argues will make the path safer than at present. These are not matters which are relevant to the essential question here which is whether or not a public right of way has been established through long usage. Applications for the diversion of a public path under the Town and Country Planning Act 1990 or the Highways Act 1980 may be made to the planning authority or highway authority respectively.
30. I have noted that many of the claimants indicate their concern that the development proposed on the site will affect their use of this footpath. In reaching my conclusions on the evidence I have not considered the desirability (or otherwise) of retaining a path in this location. Determination of this Order rests on evidence of long use, not the merits of the path itself.
31. In her submission, the objector takes issue with the width of the path as defined in the Order. She argues that 1.2 metres is not achievable at the gap between the site and the canal where a concrete wall limits the available width. Given the width(s) estimated by the claimants, the trampled width of the path on the ground (as opposed to the central worn trod) and noting that the Order Schedule records a gap at this particular point (thus restricting the width of the public right of way), I am satisfied that the details shown in the Order Schedule are appropriate since it is clear that the public has acquired a right of way subject to this limitation.

Conclusion

32. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

33. I confirm the Order.

Sue Arnott

Inspector