



Order Decision

Inquiry held on 5 December 2017

Site visit made on 5 December 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 18 April 2018

Order Ref: ROW/3170967

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Cumbria County Council (Parish of Whitehaven: District of Copeland) Definitive Map Modification Order (No 4) 2016.
- The Order is dated 6 December 2016 and proposes to modify the Definitive Map and Statement for the area by adding two public footpaths as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns the addition of two public footpaths at Mid Street, Kells, Whitehaven, one running from point A to point B on the plan attached to the Order between Nos. 7 and 8 Mid Street, and the other from point C to point D, between Nos. 8c and 9 Mid Street (the Order routes).
2. I visited the Order routes on the afternoon before the Inquiry when I viewed them from points A and C. Following the close of the Inquiry, I made an accompanied visit and walked both routes with a representative of Cumbria County Council (the Council), Mr J Roddis and Mr D Challinor.
3. Further to the Inquiry, and in view of a lack of clarity regarding the ownership of a strip of land approximately 0.8 metres wide along the length of each of the Order routes (abutting Nos. 7 and 9 Mid Street), I asked the Council to serve notice of the Order on the owner(s) and occupier(s) on the land affected¹. No further objections or representations were received as a result. I have therefore reached my decision on the basis of the evidence submitted to and heard at the Inquiry.

The Main Issues

4. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires me to consider whether, on a balance of probabilities, the evidence shows that public footpaths subsist along the Order routes.
5. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the ways as public footpaths has occurred

¹ In accordance with Schedule 14(2) of the Wildlife and Countryside Act 1981

through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act), or by implied dedication under common law. In this case, the Council relies on a presumption of dedication arising further to the tests laid down in Section 31 of the 1980 Act.

6. Accordingly, I must establish the date when the public's right to use the Order routes was brought into question. The evidence can then be examined to determine whether use of them by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowners to dedicate public footpath rights over the routes.
7. A further main issue in this case is the width of the Order routes.

Reasons

Background

8. Historically, the Order routes lay between the gable ends of Nos. 7 and 9 Mid Street and a building variously described as a Club, Institute, and Reading Room. Ordnance Survey (OS) mapping provided by Messrs Challinor - a six-inch map of 1842-1852, a 1:25000 1937-1961 sheet, and one-inch to 1 mile map of 1952-1961 - show no gaps representing the Order routes between the buildings. However, I am satisfied that the scale of these maps is too small for such detail to be depicted. Indeed, both the 1:2500 OS maps of 1925 and 1938, submitted by the Council, show both Order routes, confirming their longstanding existence as physical features, though not of their status (public or private).
9. The building between Nos. 7 and 9 Mid Street was demolished in the 1970s and the site left open. It was later grassed over and then acquired for the development of a row of new dwellings (Nos. 8 to 8c Mid Street).
10. I heard that the Order routes connect Mid Street with a service road at points B and D which is recorded in the Council's List of Streets - this being the record of publicly maintainable highways.
11. Mrs Graham had been told by her Solicitor that the route A-B adjacent to her property was a public right of way and was referred to in her Deeds. Copies of land searches conducted in relation to the property, one of which marked the route A-B in red, were submitted. However, these do not assist in determining the status of the route and the property deeds themselves, which may shed further light on the matter, were not available.

When use of the claimed routes was brought into question

12. It is not disputed that the public's right to use the Order routes was brought into question in 2015 when the new dwellings were constructed and the site fenced off. This provides a 20 year period of 1995 to 2015.

Whether the claimed routes were used by the public as of right and without interruption

13. Fourteen user evidence forms (UEFs) were submitted claiming regular use on a daily basis for between 4 and 69 years. Use was claimed as of right (without

force, secrecy or permission) and went unchallenged and unobstructed, and was thus uninterrupted. None of the UEFs indicated that use was permissive. Maps were attached to most of the forms showing both Order routes, and where signed carry more weight. Two UEFs referred to accessing garages at the rear of the properties and it is possible that this was in exercise of a private right which would not attract weight as evidence of public use.

14. I heard evidence of use from five individuals. Whilst reference was made to children playing on the open land during the 20 year period, I heard no evidence of wandering by members of the public, but rather claimed use of the Order routes. These provided access to local facilities including shops and businesses as well as a bus stop, and were used as a short cut, including for going to work. Such activities are typical of use as a public right of way. Mrs Bowes described her use as nearly every day, and Mr Bowes as 4 to 6 times a day to and from work. Mr Cunningham and Mr Blight described their use from childhood. Mrs Graham described walking the route A to B with her husband. All referred to use of the Order routes by others.
15. At the Inquiry, both Mr S Challinor and Mr J Roddis accepted that there had been use of the Order routes, although Mr Challinor believed the evidence of use for C to D to be less clear as the UEFs did not distinguish the frequency of use of each route.
16. The evidence indicates that the route between A and B was a tarmacadamed feature throughout the 20 year period until it was removed during the construction of the new dwellings. This is supported by photographic evidence dated 2009. Between C and D, however, it was said the route had become overgrown with grass. Certainly the 2009 photographs indicate a grassed surface here, but it is not clear whether or not a hard surfaced route lay beneath. Mr Challinor stated he had seen no visible wear on the route C-D when the land was cleared prior to development, and this area was wet and muddy with no evidence of an underlying surfaced path. Mr Cunningham indicated that he tended to use the tarmacadamed path or the one that was "cleanest".
17. On balance, and having regard to the evidence as a whole, I am satisfied that there has been use of both Order routes during the 20 year period. I further conclude that use was as of right and without interruption during this period and sufficient to raise a presumption of dedication.

The evidence and actions of the landowners

18. One UEF indicated that notices of a contrary intention were seen, but gave no further details. Mr Roddis referred to notices on the site. However these were put up in relation to the construction of the new dwellings and there is no evidence of any signage of a contrary intention during the 20 year period. Accordingly I find there is no evidence of any actions by the landowners to indicate there was no intention to dedicate the Order routes as public rights of way.

Conclusions on the Section 31 tests

19. I have concluded that the relevant 20 year period is 1995 to 2015. I find that during this time use by the public meets the necessary tests in Section 31 of the 1980 Act. Further, there is no evidence to indicate that the landowners did

not intend to dedicate the Order routes as public footpaths. Therefore I conclude that the footpaths subsist and should be added to the Definitive Map and Statement. I turn next to consider the evidence regarding the widths of the Order routes.

Width

20. The Order provides for a 1.8 metre width for both paths. This is the standard width adopted by the Council for a public footpath where there is no evidence as to the width used by the public². Throughout the 20 year period 1995-2015, the land was open. It is not known when the tarmac surface was laid along A-B, and C-D had become overgrown with grass. The Council concluded it had no evidence as to the width used by the public during the relevant period.
21. Historically, the Order routes had been restricted to a width defined by the adjoining properties. They had originally been surfaced in part with tiles laid in a herringbone pattern and in part with cobbles, as described by Mr Blight and Mr Cunningham at the Inquiry. They are said to have remained in situ following the demolition of the former building until their removal in 2015 as a result of the development. Both the oral evidence at the Inquiry, and the evidence of the UEFs indicated that A-B had been slightly wider than C-D. Estimated widths from the UEFs varied from 1 metre to 2.5 metres for A-B, with most suggesting a width of 2 metres; and for C-D, 1.5 metres to 2 metres, with most indicating a width of 1.5 metres. Witnesses' spoke of the routes being known as the 'Big Path' and 'Little Path', and this seems to reflect widths available when the building was in situ. Once the land had become open, use by the public was unrestricted, and this was the situation during the 20 year period.
22. Mr Roddis believed the appropriate width during the 20 year period to be 0.6 or 0.7 metres, and this reflected the tarmac path adjoining No.7 Mid Street (as seen in the 2009 photograph), and the width between his property boundary and No. 7 Mid Street. He had measured the width of the remaining cobbles in situ between Nos. 7 and 8 Mid Street as no more than 77 centimetres. As a child, and within the 20 year period, he had played on the land and his recollection was the path was no more than 0.8 metres wide. Mr Challinor also estimated the width of the tarmac route A-B to be less than 1 metre wide. He regarded the width proposed for the paths as excessive and more than what would reasonably be required for users to pass.
23. I do not consider it is possible to determine with any accuracy the width of the tarmac path (A-B) from the photograph available, and it provides no assistance as regards C-D. I heard from Mrs Graham that she and her husband were able to walk side by side along the tarmac route A-B, and to do so suggests a width in excess of the 0.8 metres or so claimed by the Objectors.
24. Defra guidance seeks that widths be recorded as accurately as possible, based either on the evidence available or on the type of user and what is reasonable. A recorded width, in the absence of evidence to the contrary, should be sufficient to enable two users to pass comfortably. The UEFs describe periods of use covering, in some cases, many decades including when the former

² Based on the powers in Schedule 12A to the 1980 Act

building was present. The approximate widths given are not inconsistent with the widths provided in the Order. Mrs Graham's evidence for A-B of an existing surfaced path during the 20 year period³ capable of accommodating two adults walking side by side whilst not in my view consistent with a width of 0.8 metres is not inconsistent with the width given in the Order. On balance I conclude on the available evidence for the 20 year period that the width of 1.8 metres for both paths is appropriate.

Other matters

25. I note that the properties were developed in accordance with the planning permission granted, and that searches did not reveal the existence of any recorded public rights of way. Nevertheless, this does not preclude the possible existence of unrecorded rights. I also note that the Objectors wish to see a compromise that would allow the paths to be opened up to the public, but that would not impact adversely on the newly constructed properties. Whilst I have sympathy with this view, my decision must be based on the evidence.
26. I am aware of concerns about antisocial behaviour that has occurred in the past and that it is feared would occur again in the event that the Order was confirmed. I understand these concerns and the impact of such activities on those affected. However, the legislation does not permit me to take these matters into account in determining whether or not the claimed public rights of way subsist.

Conclusions

27. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should be confirmed.

Formal Decision

28. I confirm the Order.

S Doran

Inspector

³ She purchased her property in 2004

APPEARANCES

For the Council:

Mrs P Christie	Planning Solicitor, Cumbria County Council
who called	
Mr A Sims	Countryside Access Officer, Regulatory Services, Cumbria County Council

For the Objectors:

Mr S Challinor

Mr D Challinor

Mr J Roddis

Others who spoke

Mr A Cunningham

Mrs A Bowes

Mr M Bowes

Mr M Blight

Mr D Graham

Mrs J Graham

Mr M Roddis

DOCUMENTS

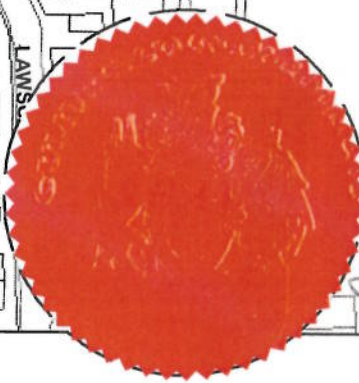
1. Witness Statement of Mr A Sims
2. Local Land Searches dated 27 July 1995 and 20 April 2001 submitted by Mr and Mrs Graham

Legend

Footpaths to be added



MAP NOT TO ORIGINAL SCALE



KAR
06836



Wildlife and Countryside Act 1981 Section 53

Definitive Map Modification Order

Mid Street, Kells, Whitehaven

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Scale 1:1250 @ A4

