
Order Decision

Inquiry opened on 17 July 2018

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 17 September 2018

Order Ref: ROW/3184750

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Nottinghamshire County Council (Misson Footpath No. 13) Modification Order 2012.
- The Order is dated 7 September 2012 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between Bawtry Road and Bridleway No. 2, Misson, as shown on the Order Map and described in the Order Schedule.
- There were 4 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public inquiry into this Order on 17 and 18 July 2018 at the Mayflower Bar and Eatery, Austerfield. I made an unaccompanied site inspection on Monday 16 July when I was able to walk most of the Order route and view the remainder. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary although I revisited part of the route unaccompanied.
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

3. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
4. Most of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

5. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

Documentary Evidence

6. Ordnance Survey maps show that the claimed route has existed since before 1885 but do not indicate whether the public had any rights over it.
7. Other historic documentation such as that prepared in connection with the construction of the North Eastern Railway in 1901 and the 1910 Finance Act give no indication of public rights over the route. The route was not identified in the Parish Survey of rights of way carried out as part of the process of preparing the first definitive map in the 1950s, was not claimed by the Parish Council and has subsequently not been included in the definitive map.
8. Accordingly, the determination of this Order depends entirely on the evidence of public use of the claimed route that is available and whether this indicates that a public right of way can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred at common law.

Statutory Dedication

Date that public use was brought into question

9. In 2004 ownership of the land around Norwith Hill changed hands and soon after work commenced to re-develop the derelict farm complex to create 7 new dwellings. As the development progressed, the Order route was obstructed by garden walls, gardens and garages associated with 3 new dwellings although it is possible that users of the route could still walk around obstructions. However, by 2007, when dwellings were occupied, signs had been erected stating that there was no public access and challenges were made to people attempting to use the Order route causing public use to clearly be brought into question at that time.
10. However, in 2004, the new owners of Norwith Hill, Mr and Mrs Gelder, moved a gate which crossed the route close to Point B to a new location further to the north so as to ensure that construction traffic did not need to obstruct Newington Road in order to open the gate. This was done with the agreement of the then owner of the land on which the gate was located. In its new position the gate blocked the whole of the available route and it was locked at times when not in use for construction traffic. It would therefore appear that public use of the Order route was brought into question by the locking of this gate in 2004.
11. Although the same gate had been in place for some time before 2004 and was said to have sometimes been closed and possibly locked on some occasions, it does not appear to have prevented public use of the Order route as there was a gap at one side of it said to be wide enough for pedestrians, cyclists and horse riders to pass. Path users appear to have believed this gap had deliberately been left to facilitate public use other than in vehicles and it did not therefore bring such use into question. Also a sign close to the gate reading "*Private*

Property” was not interpreted as meaning that all public access was not allowed.

12. In these circumstances it is my view that public use of the Order route was brought into question in 2004 and therefore the relevant period of 20 years public use which would raise a presumption that the route has been dedicated as a public right of way in accordance with the provisions of the 1980 Act runs from 1984 to 2004 in this case.

Evidence of Users

13. I have seen forty-six User Evidence Forms (UEFs) which were submitted in support of the application for the Order route to be added to the definitive map, one of which was completed on behalf of two people. I have also seen signed reports of interviews carried out by an officer of Nottinghamshire County Council, the Order Making Authority (OMA) with 18 people, three of whom had not previously completed UEFs. Four users also appeared at the inquiry, one of whom had not previously completed a UEF or interview. In total therefore I have been able to consider evidence of use provided by 51 people.
14. This evidence describes use of the Order route from the 1940s, in one case, until 2007. People claimed to have used the route on foot, horseback and bicycles, many having used more than one mode. In total, 43 people claim to have used the route on foot, 30 on bicycles and 19 on horseback. Twenty-four people claimed to have used the route throughout the period from 1984 to 2004, twenty-three for part of that period and four either not within the period or no dates given.
15. The frequency of use claimed varied between daily and as little as once per year. However, most of those providing evidence claimed to have used the route weekly or more frequently.
16. Although a considerable amount of user evidence is available in this case, its value is to some extent limited by a number of factors.
17. Eleven people claimed to have used the route solely on foot, the other 32 people who used it on foot also used it by other means but neither the UEFs nor the interview reports state how frequently each mode of use took place. It is therefore not possible to quantify the total amount of use on foot (or other modes).
18. Some use may have been with permission or in connection with employment. This is also difficult to quantify except in a few cases where permission was explicit or use in connection with employment was clear. More often people heard from other users by word of mouth that use of the route was allowed but cannot be said to have received explicit permission. In particular, it appears that horse riders seem to have often heard from other riders that use of the route was allowed.
19. During the period from 1984 to 2004 much of the land crossed by the Order route was owned by companies which did not occupy it and the land was farmed by the Arden family as tenants. However, they themselves were to some extent absentee tenants and the land was looked after by two farm managers. Mr Paul Arden has said in a written statement that only one person, a horse rider, was given permission to use the route. Several users of the route acknowledged having been acquainted with one of the farm managers and

- having spoken to him whilst on the route. As a result they were clear that their presence was not objected to but this does not necessarily mean that their use was permissive rather than being 'as of right'.
20. No evidence was submitted of permission having been granted to any user by the actual owners of the land crossed by the route.
 21. A further complication arises from the fact that since around 1996 an alternative route to the northern part of the Order route was available and sometimes used. This was known as the haul road which was constructed in connection with quarrying activity that took place close to the route between 1996 and 1998. It would seem that some users of the Order route sometimes only used the southern part of the route in conjunction with the haul road. However, users stated that quarrying activity at no time interrupted their use of the Order route.
 22. It was suggested before the inquiry that use of the Order route might have been interrupted in 2001 when there was an outbreak of foot and mouth disease which necessitated the closure of many paths. However, it was stated at the inquiry that this had not been the case in respect of the Order route and this was not contested.
 23. In the light of the above it has been necessary to take account of the fact that some use of the Order route may not have been 'as of right', uncertainty about the frequency with which many people used it by different modes or only used part of the route and other inconsistencies in the UEFs and statements in analysis of the evidence. Nevertheless, after consideration of the evidence as a whole, it is my view that there is enough evidence of use of the route on foot throughout the period from 1984 to 2004 to raise the presumption that the route had been dedicated as a public footpath unless there is sufficient evidence that during the same period the owners of the land had no intention of dedicating a public right of way.
 24. Although there is also evidence of public use of the route on horseback and bicycles, the route was not claimed to be a bridleway by the applicant and not considered to be such by the OMA. Use other than on foot appears to have been less frequent and possibly more likely to have been with permission or otherwise not 'as of right'. In these circumstances, I do not think it can be presumed that the route had been dedicated as a public right of way of a higher status than footpath.

Evidence of lack of intent

25. The owner of the northernmost part of the Order route has raised no objection to the Order and provided no evidence of any action to indicate a lack of intent to dedicate the route as a public right of way.
26. It is accepted that there was a gate across the route close to Point B which was sometimes closed and possibly locked. However both users of the route and the tenant of the land state that there was a gap at one side of the gate wide enough to permit pedestrians (and horse and cycle riders) to pass. Users appear to have thought that this gap had been left deliberately to allow access other than by vehicles. There is also evidence that a piece of agricultural machinery, a cultivator, was positioned so as to block the gap. However, the evidence of users is that there was always still sufficient space for walkers and

riders to pass and their use was never interrupted. Users who appeared at the inquiry stated that it would have been possible for the cultivator to have been placed closer to the gap so as to make continued access difficult but that it was not. They therefore concluded that the cultivator was there as an added precaution to restrict access in vehicles.

27. There is also some evidence that there was a sign close to the gate with the words 'Private Property' although most users stated that they had not seen it. As this sign was not large and faced towards the south, it seems quite plausible that people using the route from north to south may not have seen it. Others who do not recall the sign may have taken no notice of it as they did not think it related to their use of the Order route. The sign did not state that there was no public right of way or that access on foot was not allowed. It appears to have been erected in association with the gate which was widely believed to only be for the purpose of controlling vehicular access.
28. On balance, it is my view that the presence of the gate, the sign and the cultivator was not sufficient to indicate a lack of intention to dedicate a public footpath or to bring public use of the Order route into question.

Conclusions regarding Statutory Dedication

29. After consideration of all of the available evidence, it is my view on the balance of probability that the amount and nature of public use that was made of the whole of the Order route on foot throughout the period from 1984 to 2004 was such as to raise the presumption that the route had been dedicated as a public footpath. The evidence of action by landowners during the same period was not sufficient to rebut this presumption and therefore it can be concluded that the route has been dedicated as a public footpath in accordance with the provisions of the 1980 Act.

Common Law

30. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
31. In this case, there appears to be no specific evidence of action by landowners to indicate their intention to dedicate a public right of way although there is evidence that members of the public used the Order route over a considerable period. However, in the light of my conclusion regarding statutory dedication of the route it is not necessary to pursue this matter any further.

Conclusions

32. Having regard to these and all other matters raised, I conclude that the Order should be confirmed.

Formal Decision

33. I confirm the Order.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Steven Eastwood Principal Legal Officer, Nottinghamshire
County Council (NCC)

Who called:

Angus Trundle Definitive Map Officer, NCC

Julia Willerton Path user

Anthony and Jean Gibbins Path users

Tony Foster Path user

Objectors

Michael Wood ET Landnet, representing John and
Marie Gelder, Mark and Margaret Howe
and Kristian Jones

Who called:

John and Marie Gelder Landowners

DOCUMENTS

1. Statement of Case and supporting documents, NCC.
2. Proof of Evidence of Angus Trundle.
3. Proof of Evidence of Julia Willerton.
4. Statement of Case on behalf of John and Marie Gelder, Mark and Margaret Howe and Kristian Jones with supporting documents, ET Landnet.
5. Proof of Evidence of John Gelder.
6. Statement of Case of Kevin and Jane Rowan with supporting documents.
7. Opening Statement, NCC.
8. Closing Statement, NCC.
9. Closing Statement, on behalf of objectors, ET Landnet.

