



Direction Decision

by **Alan Beckett** BA MSc MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 24 December 2018

Ref: FPS/V3500/14D/11 & 12

Representation by John Andrews

Suffolk County Council

Applications:

To add a footpath from the northern end of Clare FP 14 in a generally easterly direction to the B1063 road at grid reference TL 756 481 ('14D/11')

To add a Byway Open to All Traffic in the parishes of Cavenham and Lackford running from the U6211 road at grid reference TL 771 717 in a south-easterly direction along the road to Cavenham Mill and continuing from there in a generally south-easterly direction to the C626 road at grid reference TL 784 705 ('14D/12')

- This representation is made under Paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') seeking a direction to be given to Suffolk County Council ('the Council') to determine applications for Definitive Map Modification Orders ('DMMOs') under Section 53(5) of that Act.
 - The representation is made by Mr John Andrews, dated 27 July 2018.
 - The certificate under Paragraph 2(3) of Schedule 14 in relation to 14D/11 is dated 22 March 2016.
 - The certificate under Paragraph 2(3) of Schedule 14 in relation to 14D/12 is dated 17 January 1996.
 - The Council was consulted about the Applicant's representation on 8 August 2018 and the Council's response was made on 6 September 2018.
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Decision

1. The Council is directed to determine the above-mentioned applications.

Statutory and policy context

2. Authorities are required to investigate applications as soon as reasonably practicable and, after consulting the relevant district and parish councils, decide whether to make an order on the basis of the evidence discovered. Applicants have the right to ask the Secretary of State to direct a surveying authority to reach a decision on an application if no decision has been reached within twelve months of the authority's receipt of certification that the applicant has served notice of the application on affected landowners and occupiers.
 3. The Secretary of State in considering whether, in response to such a request, to direct an authority to determine an application for an order within a specified period, will take into account any statement made by the authority setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the authority or
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expressed intentions of further action on the application in question, the circumstances of the case and any views expressed by the applicant¹.

Reasons

The Council's Statement of Priorities and the reasonableness of its priorities

4. The Council acknowledges that it has not yet commenced a full investigation of these applications which remain on the backlog of cases for future investigation. The Council's register of applications is set out in chronological order and shows that there are currently 58 applications which are yet to be determined. The application 14D/12 is the third oldest in the register, whereas 14D/11 is in 36th place.
5. The Council's Statement of Priorities is set out in its Rights of Way Improvement Plan ('ROWIP') 2006 – 2016. Objective E of the ROWIP concludes that changes to the network need to be prioritised on the basis of those that provide the greatest public benefit. To achieve this objective the Council's officers meet six times per year to consider and prioritise new claims and public path order requests.
6. The Council's prioritisation scheme shows that 14D/11 is 11th place within its Case Progress Monitor ('CPM') register, with 14D/12 being in 30th place. The Council's CPM register shows that 9 applications are currently under consideration. Of those 9 cases, 5 have been given a higher priority ranking than 14D/11 whilst 4 cases are under investigation are ranked as having a lower priority. With regard to 14D/12, of the 9 cases currently being investigated, all bar one² have a higher priority ranking.
7. The Council estimates that a minimum of 8 DMMO applications will be determined during 2018. The Council submits that the number of applications on its backlog will reduce once the provisions of the Deregulation Act 2015 ('the 2015 Act') are brought into operation as it will be able to return those applications which do not satisfy a preliminary evidential assessment test. The CPM register notes that the evidence submitted in support of 14D/11 is not considered sufficient to satisfy the test being introduced under the 2015 Act and that consideration of it should be deferred until the provisions of the 2015 Act are brought into force.
8. The Council has developed a system whereby the resources available to it can be allocated in such a way to accord with the aims and objectives set out in its ROWIP. That the Council have established a priority ranking system does not alter the statutory duty on the authority to investigate the matters stated in the DMMO applications as soon as is reasonably practicable following the receipt of the paragraph 2(3) certificate.

The actions or intended actions of the Council

9. The Council notes that 14D/11 has been assessed as being in the high priority category but considers that the evidence submitted is insufficient to support even a 'reasonable allegation' of the existence of public rights over the route claimed. The Council proposes to defer consideration of the application until the provisions of the 2015 come into operation and when the new preliminary assessment test can be applied to it.

¹ Rights of Way Circular 1/09 Version 2, October 2009. Department for Environment, Food and Rural Affairs.

² Case 144 (ranked 34) is however being investigated with case 143 (ranked 17) for reasons of efficiency

10. As regards 14D/12, the application has been assessed as being in the medium priority category, and has been re-assessed following the 2015 Court of Appeal judgement in *R (oao John David Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWCA Civ 669 ('*Andrews No.2*'). Although the priority score for this application had increased, it remained in the medium priority category. The Council estimates that this application is likely to be determined within 3 years.
11. The scale of the task facing surveying authorities dealing with definitive map modification order and other rights of way casework is recognised and understood. It is also acknowledged that the Council has limited resources available to it with which to undertake such work and that the Council has sought to prioritise those DMMO applications which it has received. However, the investigation of section 53 applications is a statutory duty which the Council must carry out and the Council is expected to investigate an application as soon as is reasonably practicable after the receipt of the paragraph 2(3) certificate.
12. In the case of 14D/11 it is not known when the 2015 Act will be brought into force and at what date the Council will commence its investigation of the application. Deferring investigation of the application for an unspecified length of time is, on the face of it, wholly inconsistent with the Council's statutory duty to investigate a section 53 application as soon as is reasonably practicable following the receipt of the paragraph 2 (3) certificate. Consequently, there is uncertainty for the Applicant as to when a decision is likely to be reached. The lack of action by the Council, and the failure to set out any firm intended action, would justify the making of a direction that the application should be determined before the end of a specified period of time.
13. In the case of 14D/12, although the application made in 1996 appears to have been held in abeyance following the decision of the High Court in *R v Secretary of State for the Environment, ex p Andrews* (1996) 71 P & CR 1 ('*Andrews No. 1*'), it would have remained open to the Council to determine the application even if that had meant rejecting it on the basis of the *Andrews No. 1* judgement.
14. If determination of 14D/12 is to take a further 3 years, it will mean that almost 25 years will have passed since the application was first made. It is not considered reasonable for such a period of time to elapse between an application being made and its determination. The lack of action by the Council over the past 22 years and the uncertainty as to when in the next 3 years action will be taken leads to the conclusion that it is unlikely that a determination will be made in the near future without intervention. Such uncertainty for the Applicant would justify the making of a direction that the application should be determined before the end of a specified period of time.

The circumstances of the case and views of the Applicant

15. The Applicant states that prior to seeking a direction from the Secretary of State, he had been in correspondence with the Council's rights of way officers during which he tried to persuade them to investigate these two applications but had been refused.
16. The Applicant submits that the refusal is because the Council had set up its own priority scoring system which, in his view, fails to conform to the Council's statutory duty to deal with such matters as soon as is reasonably practicable.

The applicant contends that the priority scoring system has the effect that the Council can continue to refuse to investigate an application as it has done in the case of 14D/12 for over 22 years. The applicant considers that this approach is not only unreasonable but also unlawful.

17. The Applicant has waited 22 years thus far for one of his applications to be determined and would appear to be required to wait a further 3 years for the Council to reach a determination. With regard to the other application, the Council has given no indication of when investigation will commence. I find that the age of the applications and the uncertainty as to when they may be determined to be compelling reasons for the setting of a date by which the applications should be determined.

Conclusions

18. The Council has set out its Statement of Priorities in accordance with its ROWIP but has failed to take action on one of these applications during the past 22 years. Other than an indication that 14D/12 will be determined within the next 3 years the Council has not proposed any concrete action which could be described as it attempting to determine either application as soon as is reasonably practicable. I conclude that there is a case for setting a date by which these applications should be determined.
19. In the circumstances I have decided that there is a compelling case for setting a date by which these applications should be determined. Although I am aware that the Council is currently investigating a number of applications and will require some time to carry out its investigation into these applications and make a decision on them, I do not consider it appropriate to allow more than 6 months for the Council to do so.

Direction

20. On behalf of the Secretary of State for Environment, Food and Rural Affairs and pursuant to Paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981, **I HEREBY DIRECT** the Suffolk County Council to determine the above-mentioned applications not later than six months from the date of this decision.

Alan Beckett

INSPECTOR