



Order Decision

Inquiry held on 13 February 2020

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 06 April 2020

Order Ref: ROW/3225621

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Bath and North East Somerset Council (Public Footpaths BA27/79 and BA27/80, Glenavon Farm, Saltford) Definitive Map Modification Order 2019.
- The Order is dated 10 January 2019 and proposes to record two footpaths: one running generally north-westerly from Manor Road to join an existing footpath and the other generally north, east and north from that route to join an existing footpath south-west of the A4, Bath Road, in the Parish of Saltford. Full details of the routes are given in the Order and plan.
- There were three objections and representations outstanding when Bath and North East Somerset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. On 9 March 2015 an application was jointly made by Mr Griffiths and Mr Williams to Bath and North East Somerset Council, the order-making authority ("the OMA"), under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to add two footpaths to the Definitive Map and Statement ("DMS") for the area.
2. The OMA investigated the claim and decided that the evidence did not show that a right of way subsisted or was reasonably alleged to subsist. The application was refused on 10 April 2018. This decision was appealed and, on 7 December 2018, the OMA were directed by the Secretary of State to make an Order¹. As the OMA were directed to make the Order, they decided not to support it and took a neutral stance at the Inquiry, although assisting with organisational matters.
3. It would normally be the case that support for the Order in such circumstances would be led by the applicants. However, in the lead up to the Inquiry discussions were held between the applicants, Saltford Parish Council ("SPC") and the landowner, and/or his representative, with regard to reaching an agreement on the matter. A Memorandum of Agreement² was signed on 16 January 2020 that the landowner would dedicate a footpath running north from point C³ on the Order map along the westernmost field boundary to join Footpath BA27/27b ("FP27b") north-west of point F.
4. Dedication of this route would be dependent upon the applicants withdrawing, so far as they were able, their application for the Order routes and the Order

¹ Appeal Decision FPS/F0114/14A/2

² Inquiry Document 3

³ Points A – F are used on the Order map to show the Order routes.

before me being not confirmed. By the time this agreement was signed the statements of case for the Order had been submitted to the Planning Inspectorate in line with the Inquiry Timetable set out in the Notice of Order. As a result of the agreement no proofs of evidence were submitted.

5. The applicants chose not to actively support the Order at the Inquiry and called no witnesses to support their case. One individual appeared as an interested party to give evidence of his own use. The objector also presented no further evidence to the Inquiry, although I requested copies of background documents which were missing from the statement of case appendices⁴.
6. I made an unaccompanied site visit on 12 February and held a Public Inquiry into the Order on 13 February 2020 in the Keynsham Community Space. No-one requested an accompanied site visit following the close of the Inquiry.

Legal Framework

7. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c)(i), which states that an Order should be made to modify the DMS for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."

8. It will be noted that the Schedule 14 decision was made on the basis that there was a conflict of evidence, but no incontrovertible evidence that the rights could not be reasonably alleged to subsist. This decision, under Schedule 15 to the 1981 Act, must be taken with regard to the higher test; I must be satisfied that the rights subsist over the land on the balance of probabilities.
9. I shall consider the Order by reference to the statutory requirements of section 31 of the Highways Act 1980 ("the 1980 Act"). Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'brought into question'. The use during that period must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years. If the presumption of dedication arises then consideration need to be given as to whether there is sufficient evidence of a lack of intention to dedicate a public right of way.
10. Should the claim fail under the statute then I will consider whether there is evidence of common law dedication by the relevant landowner and acceptance of dedication by the public. At common law, the question of dedication is one of fact to be determined from the evidence as a whole.

Main issues

11. I am aware of a desire, at least from some parties, for the agreement to take effect. However, as I made clear at the Inquiry, I cannot give weight to this agreement at this stage. I must consider the evidence before me, which includes additional user evidence forms ("UEFs") and other information submitted since the decision was taken at the Schedule 14 stage.

⁴ Inquiry Document 4

12. It was thought that the date that use was brought into question was 2000/2001, when the routes were signed as permissive routes under the Countryside Access Scheme ("CAS") under Countryside Stewardship⁵, which would give a relevant twenty-year period of 1980/ 1981 – 2000/2001. However, it was argued that parts of the routes were inaccessible at the start of that period due to various uses of the land. I have considered whether there was an earlier date at which use was effectively brought into question.
13. There was some challenge to the reliability of the user evidence, particularly with the situation of such evidence not having been called to the Inquiry and so, with one exception, on paper only.

Reasons

Physical characteristics

14. The route that would be recorded as Footpath BA27/79 ("FP79") commences from a junction with Manor Road (Point A) and proceeds in a generally north-westerly direction to a junction with Footpath BA27/30b ("FP30b") at point C. The route that would be recorded as Footpath BA27/80 ("FP80") commences from a junction with FP 79 at point B and proceeds in a generally northerly, easterly and then northerly direction to a junction with FP 27b, point F.

Section 31 of the Highways Act 1980

When the status of the claimed route was brought into question

15. The Order routes were included as conservation walks under the CAS which appears to have been brought into effect in 2001. Although the objector indicates that the routes were signed into the scheme in October 2000 this matter would not seem to have been in the public domain at that time. The claimed route FP80 and section A – B of FP79 were available as permissive bridleways under the scheme. Section B – C and the route proposed to be dedicated under the agreement were provided as permissive footpaths. I am satisfied that the provision of permissive access on the routes was sufficient to have brought into question the rights of the public to use the routes as public rights of way. Subsequent use, including a later period when payments were made through local agreement for access over these and other routes, would not be 'as of right' as required by the statute, being by permission.
16. It was said in objection that the route of FP79, A – B – C, did not exist until it was put in place as part of the CAS. The objector indicated that the pedestrian gate on Manor Road was not erected until the year 2000, however, those commenting on the evidence, indicated that there was access in this location.
17. It was argued that at the beginning of the twenty-year period 1981 – 2001 FP79 would not have been available due to tipping and landfill works. There is some supporting evidence in relation to that claim with a grant of conditional permission⁶ dated 14 May 1980 for *Reclamation of land adjacent to Keynsham Manor, Manor Road, Keynsham (2.63 acres approximately) for agricultural purposes* with the tipping to be discontinued on or before 31st May 1982.
18. I cannot be satisfied that the application dated 23 July 1982 relates to the same land as it refers to "*Land adjacent Manor Road, Manor Farm, Burnett,*

⁵ Department for Environment, Food and Rural Affairs, administered by Natural England (current designations)

⁶ No. W.K. 6404/A

Keynsham". Manor Farm, Burnett lies some distance to the south of Keynsham Manor. Nevertheless the granting of a waste disposal licence⁷ on 15 March 1983 relating to Manor Farm (Keynsham), which can be seen to the south of point A on the Order map, clearly identifies land at Grid Ref ST 670 670. The conditions relating to this landfill site included a requirement for "...lockable gates...installed at the entrance to the site and access by unauthorised persons prevented by the provision of secure fencing and/or natural barriers....Access gates shall be kept locked at all times when the site is unattended."

19. Without the operational plan it is not possible to determine the precise location of such works. However, the 1972 Ordnance Survey ("OS") map sheet referenced in the 1980 planning permission is also the base map in Sheet 2 of 4 in the Deed of Grant with British Gas, dated 1 June 1982. That clearly identifies the OS plot no. 0006, of which part is referred to as the relevant land in the 1980 permission, as the area of land through which section A – B of FP79 passes. Taking this information together I am satisfied that it appears likely that this section of FP79 would have been affected by tipping works at the start of the twenty-year period. An earlier twenty-year period may be relevant, running from 1960/62 – 1980/82 in relation to this section.
20. It does not appear that section B – C or FP80 would have been affected by any works, lying as they do to the north of plot no. 0006. In relation to the 1982 Deed of Grant I consider that the attached plans clearly show the works – including the easement strip - lie to the north-west of the claimed routes. I do not accept that this would necessarily directly affect point C, particularly taking account that it lies on the other side of a long-standing boundary, which is still place. However, this remains a matter of conflicting evidence on which I cannot be entirely satisfied.
21. Witness statements from those involved in the land management refer to the use of the section E – F, which I understand to have been concreted in 1970, as a route for cows being gathered for milking at Glenavon Farm⁸, to the north-east of point F, on the opposite side of the A4, Bath Road. It was said that the route would not have been in a fit state for the public to walk when cows were using it, which would have been twice daily in the period March – October. Across two farming families this was said to have covered the periods from around 1949 – 1966 and 1968 – at least 1983. I do not consider that the use of the route by cows would have brought use by the public into question but will consider it alongside the user evidence.
22. The objector said that after the cows left the land to the south of point D was used for arable crops in rotation, with the fields ploughed to their edges such that the public could not have used the routes as claimed. It was also said that fencing for the cows grazing prevented use until it was opened for the CAS in 2001. This is a little confusing when there is reference to the land being used from the mid-1970s for cropping, with maize being mentioned as in rotation.
23. The SPC 'Saltford on Foot' map, December 1996⁹ and May 1998 versions, do not show routes in this location, although apparently showing both rights of way and permissive routes. It was updated in April 2008 and showed a good representation of the claimed routes, which were by then within the CAS.

⁷ No. L/WK/T/137

⁸ Also referred to as Glen Avon Farm

⁹ Original produced by the Saltford Residents Association

24. Whilst it was suggested that those working on the farm would have challenged people using the routes there is no indication that this ever occurred. I also do not consider ploughing to be capable of bringing use into question. There does not appear to be any earlier date of challenge to public use and so I consider 1981 – 2001 to provide the relevant twenty-year period, with a potential earlier period in relation to section A - B.

Evidence of use

25. Fourteen UEFs were submitted to support the application to record the routes, with a further thirteen submitted with the statement of case from one of the original applicants. I heard from one interested party at the Inquiry, who gave evidence relating to his use of the routes. In their submission the OMA provided information arising from interviews that they had undertaken with nine of those supplying the original UEFs when investigating the application.

Section A - B

26. Eleven or twelve people appear to claim use of the route A – B in the early 1980s, at the time when it seems to have been affected by the tipping works. The use varied from daily, weekly or monthly to occasionally.
27. In this area in addition to the pedestrian gate, which is included as part of the Order route, there is a field gate a short distance to the east. There was some mention of this becoming overgrown and of the route being diverted to the farm gate but it not clear when this was. A user from 1974 onwards referred to her access as being “...onto Manor Road via a farmstyle gate...”. On my site visit I noted evidence of use by walkers and dogs of both the pedestrian gate and the farm gate near point A.
28. The person who gave his evidence to the Inquiry thought that the claimed route was shown on the OS map; it became clear that he was thinking of FP30b, which FP30b further to the west has a stile onto Manor Road. This may explain the reference by some witnesses to stiles.
29. Only one person referred to waste, in a later UEF, submitted after the evidence from the objector on this point. The UEF referred to “*Start at kissing gate...path through dumped dubious material to point B...*”. One of those interviewed by the OMA had walked the area in the relevant period and apparently indicated that it could be walked around without any difficulty. One of the applicants, who had not used the area in the relevant period, said that although there was tipping it did not prevent access along the route. There was also reference to children sliding on boards down the slope.
30. There is some difficulty in this case interpreting the evidence without the benefit of testing it through the Inquiry process. Taking the evidence as a whole, there is confusion as to the access points available on Manor Road during the relevant time period and which may have been used. There is clear contemporaneous documentary evidence supporting works having occurred in this area, which would have been likely to interrupt use of the claimed route in the early part of the relevant twenty-year period.
31. There is insufficient evidence to decide whether there was another alignment that should be considered in this area. I also consider the evidence in any twenty-year period prior to this is insufficient in terms of volume or detail to

support the claim. On the balance of probabilities the evidence does not lead to a presumption of dedication in relation to the section A – B.

Section B – C and B – D – E – F

32. In relation to the remaining section of this route, B – C, and the claimed FP80, B – D – E – F, between 9 and 26 people claim use of the routes in each year 1981 – 2001. One of the longer term users indicated in relation to obstruction that there was "*Poss elec fence occasionally when cows in field*" but that this did not prevent or deter him from using the route. The OMA indicated that none of those they interviewed recalled any fences or dry stone walls across the routes or the surface of field margins impeding their use. One user said that occasionally he walked in a different location to the claimed route (to the north of the boundary rather than the south, presumably on section D - E) when the field was very muddy.
33. One UEF relating to use from 1974 – 2008 said that they "*...sometimes used the concrete road to the field but only after the cows left because it had been too mucky & slippery.*" This corresponds with the evidence of a former landowner: "*...I'm quite sure if there had been [a footpath on the track] there would have been an outcry as to the state of it for people to walk through.*" It is not clear when the cattle no longer used the track, with a former herdsman to 1983 saying that grazing to the south of point E continued beyond his time.
34. Again the evidence is compromised by the inability to clarify and test it at the Inquiry stage. The user indicates that she used the claimed routes on the map but from her written evidence she did not use the section E – F when it was used by cattle. According to the objector this appears to have been for up to six months of the year through at least the start of the identified twenty-year period although in support it was said that cattle were rarely seen in that area. With corroborative evidence on the sides of objection and support I give weight to the likelihood that, in general, use of the section E – F would have been difficult and probably did not occur at certain times.
35. The evidence I did hear in person related to use from 1987 onwards, being more regular in the period from 1995 when he had a dog to exercise. I am satisfied that there was uninterrupted use for this individual at this time.
36. Considering all the evidence, with limitations of being unable to test either that of the users or objectors, I am left with some evidence of use prior to 2001 which I consider likely to meet the relevant tests to be as of right. However, I cannot be satisfied that at the beginning of that twenty-year period, when it seems alternative routes were used, there was sufficient use to give rise to a presumption of dedication of the route C – B – D – E – F as a public footpath.

Evidence of lack of intention to dedicate a public right of way

37. I consider that there is some evidence to suggest that the relevant landowner lacked an intention to dedicate a public right of way over the routes in question within the relevant twenty-year period. This relates to discussions, which were publicly known as they were carried out with SPC, about provision of permissive access on other land at Worlds End. The evidence is only slight but, nevertheless, without sufficient evidence to give rise to the presumption in the first instance does not assist the case for confirmation.

Common Law

38. As the Order fails under the statute I will consider the common law case. There was no argument against the finding of the OMA that there was no documentary evidence to support dedication of the Order routes. The 1972 OS map does not show physical routes having been identified by the surveyor and this supports the very sparse indication of use in UEFs at this time.
39. The OS base map used in the Order map identifies only the physical feature of the 'Track' on section E – F, which simply shows the existence of the concrete road. Any other documentary evidence, from 2001 onwards relates to permissive use of the routes, including discussions about locally agreed payments for access. The 1996 and 1998 local mapping does not identify the routes in any way. I do not consider this is suggestive of any intention to dedicate the routes on the part of the relevant landowners.
40. There is user evidence which I consider could relate to use as of right. However, given the remaining questions about precise routes used on alignments A – B and E – F in particular I am not satisfied that I can place weight on this evidence to show use in acceptance of a dedication. I entirely accept that the evidence has been given in good faith but in trying to clarify evidence going back almost forty years it is difficult for me to give weight to some of the information as it has been provided.
41. At common law the burden of proof to show the intention of the landowner to dedicate along with the acceptance of such dedication by the public lies with the claimant. In this instance that burden has not been discharged.

Other matters

42. I note the concern at potential lack of open amenity space in the area due to continued development between Keynsham and Saltford. I also note comments about safe access to school. In addition there were concerns at potential loss of existing permissive access. These are not matters I am able to take into account under the provisions of the 1981 Act.

Conclusions

43. Taking account of the evidence as a whole, and being unable to satisfactorily test it, I am left at the same situation as at the Schedule 14 stage. There remains a conflict of evidence and whilst the rights may be reasonably alleged to subsist I cannot be satisfied that they subsist over the land in question.
44. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

45. I have not confirmed the Order.

Heidi Cruickshank
Inspector

APPEARANCES

For the Order Making Authority (neutral stance):

Mr G Stark Principal Officer: Public Rights of Way, Bath and North
East Somerset Council

In Support of the Order (presenting no evidence):

Mr R Williams

Interested Parties in Support of the Order:

Mr C Pillinger

Interested Parties (neutral stance):

Mr H Griffiths

Cllr D Hounsell

In Objection to the Order:

Mr J Cheal *Mogers Drewett on behalf of* The Stratton Family –
Glenavon Farm Partnership

INQUIRY DOCUMENTS

- 1 The Order
- 2 Comment of Bath and North East Somerset Council on the Memorandum of Agreement
- 3 Memorandum of Agreement (16 January 2020)
- 4 Appendices to Objectors Statement of Case
- 5 Statement of Mr H Griffiths

