



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: 8 June 2020

Ref: FPS/D0840/14D/41

**Representation by Robert Fraser, Ramblers Association
Cornwall Council**

Application to add Footpaths and a Restricted Byway from road U6002 Trevegean (grid ref SW 3666 2933) to Footpaths 25, 26 and 27 (grid refs SW 3677 2936, 3677 2933 and 3677 2931) (OMA ref. WCA 651)

- The 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 Cornwall Council to determine an application for an Order, under Section 53(5) of that Act.
 - The representation is made by Mr Robert Fraser on behalf of the Ramblers.
 - The certificate under paragraph 2(3) of Schedule 14 is dated 12 February 2019.
 - The Council was consulted about the representation on 18 February 2020 and the Council's response was made on 8 April 2020.
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Decision

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

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 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's Statement of priorities for dealing with modification order applications was issued in June 2006, but the current version was revised in December 2011. The Council gives priority to those applications in which the path at issue is categorised as, or links to a 'gold path' (as defined by the

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

Council's Public Path Improvement Programme), or is within the 'coastal corridor' (as defined in Natural England's South West Coast Path Strategy); or links to areas of 'open access' land; or links to Public Open Spaces, Country Parks, Woodlands, Heritage Sites and Local Nature Reserves. If the path at issue would be classified as a 'gold path' or 'silver path' were it to be added to the definitive map, such applications would also receive priority. All applications given priority would be dealt with in chronological order. All other applications would be dealt with in chronological order when resources permitted. The Council may also give greater priority to some applications, taking them out of turn should exceptional circumstances warrant such action.

5. The Council notes that the application relates to sections of path missing from the definitive map that will provide a link between and access to a right of way categorised as a 'gold path' for 3 other public rights of way. The application therefore meets the criteria set out in the policy and has been given a higher priority.
6. Application WCA 651 is currently positioned at number 93 on the priority list. In a review of the priority list the position of WCA 651 has changed as operative orders and applications promoted by direction of the Secretary of State or being given higher priority by virtue of exceptional circumstances have been taken off the list.
7. I am satisfied that the Council has developed a system whereby the resources available to it can be allocated in such a way to determine the applications it has received. However, although the Council has established a priority ranking system, this does not alter the statutory duty on the authority to investigate the matters stated in the application as soon as is reasonably practicable following the receipt of the paragraph 2(3) certificate.

The actions or intended actions of the Council

8. With current levels of resources, the Council estimates that it will be able to determine approximately 10 to 12 modification orders per year. With that as a guide the Council predicts a determination of this case in approximately 7 to 8 years' time.
9. The Council submits that, having validated the application, the applicant was made aware that the Council was handling a very large backlog of Definitive Map Modification Order ('DMMO') claims and that this application would be held on file until such a time that it could be processed in accordance with the Council's published policy statement.
10. The Council submits is aware that the application is intended to add public rights over a way that is intermittently obstructed, but the Council has already taken enforcement action to ensure access to existing rights is protected for pedestrians using the routes.
11. The Council does not consider there are any other mitigating factors or exceptional circumstances in this instance that would merit its promotion above outstanding similar cases, or more particularly, cases still awaiting their turn for processing that have been on the register much longer than 12 months and where the application relies on witnesses where valuable evidence of use might be lost by any further delay that could be a consequence of promoting this application.

12. The Council considers that a direction on this application would ultimately be to the detriment of the other cases on the priority list and in this instance the applicant has failed to provide sufficient grounds to justify why his application should be elevated above other cases.
13. The scale of the task facing surveying authorities dealing with DMMO 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.
14. If determination of the application is to take another 7 to 8 years, it will mean that almost nine years will have passed since the application was first made. Should exceptional circumstances arise in respect of any of the applications ahead of this case on the priority list, the timescale for its determination would invariably slip. 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.

The circumstances of the case and views of the applicant

15. Cornwall Council has verified the application and added it to the register. It has consulted the parish council, landowners, occupiers and user groups for their views on the application. It is the applicant's belief that the Council intends taking no further action until the application reaches the top of their priority list.
16. The applicant considers that the Council has not allocated sufficient resources to dealing with all its applications "as soon as reasonably practical" and within the guideline period of a year. Although the Council's website gives the target date for determination of this application as 14 February 2020, there has been no notification given of any progress having been taken towards making a determination.
17. The applicant contends that the Council is only making determinations of applications where the Secretary of State has made a direction. Of those applications where there has been no direction, the older ones were made in 2004 and 2005. Without a direction and on the current rate of progress, this application is therefore unlikely to be determined for about another 15 years.
18. The applicant submits that the application route is presently obstructed by a gate which is at times locked. There are notices advising the public that the land is private and that there is no public access. Legal action is being taken through the civil courts to prevent the owners of an adjoining dwelling using the application route to reach various access points to their property including their front door, garage door and garden. It is the applicant's view that while the court may be sympathetic to a stay in proceedings pending the final decision on the DMMO application, it is unlikely to be content to delay for any significant length of time, which could otherwise be as long as 10 or 15 years.

19. Until the gate and notice was erected around 2018, the route was used freely by the public without challenge. Without the application route, the connecting footpaths are dead ends with no real value. An adjacent property owner is being denied access to the claimed public right of way and is facing civil action by the owner of the land; without a determination, this unsatisfactory situation might continue for many years.
20. The applicant considers that the failure of the Council to determine this application within the specified time frame may be contrary to Article 6 of the European Convention on Human Rights.
21. The applicant also notes that in contrast with DMMO applications, the Council is able to process Public Path Diversion Orders within a period of three months. Although the costs borne by the parties and the amount of work required in process these orders are different to DMMO applications, the disparity between 3 months and 15 years to determine applications is grossly inequitable. The applicant submits that the Council should be directed to determine the application within three months of the direction.

Conclusion

22. An applicant's right to seek a direction from the Secretary of State gives rise to the expectation of a determination of their application within 12 months under normal circumstances. I have taken into account the Council's current work programme and its estimated timescale of being unable to determine this application for at least a further 7 years. The applicant draws attention to the Council's recent record in determining DMMO applications and suggests that it may take the Council up to 15 years to reach a determination.
23. I acknowledge the applicant's concerns regarding the litigation between the owner of the land crossed by the claimed path and an adjacent property owner and how an early determination may impact upon that litigation. However, on the face of it, this litigation appears to be of a private nature and not concerned primarily with the question of whether a public right of way on foot subsists over the claimed route.
24. Nonetheless, in the circumstances I consider that there is a case for setting a date by which the application should be determined. The applicant submits that this application should be determined within 3 months of any direction given. According to the applicant, some consultation has already been carried out by the Council, however it is appreciated that the Council may require some additional time to finalise its investigation and determine the application.
25. In ordinary circumstances, I would consider that the Council should determine the application within six months of a direction being given. However, I also consider that the impact of the current coronavirus outbreak on local authorities may limit the Council's ability to adhere to a six-month timescale.
26. Accordingly, and to give the applicant some certainty that this application will be determined in the near future, I consider it appropriate to allow the Council a period of 12 months for a decision to be reached.
27. Representations were made to the effect that the applicant's rights under Article 6(1) of the Human Rights Act 1998 would be violated if the authority is not directed to determine the application. Article 6(1) provides that in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial

tribunal established by law. However, my decision as to whether the Council has investigated and determined the application as soon as reasonably practicable in accordance with paragraph 3(1) of Schedule 14 of the 1981 Act does not amount to a determination of the applicant's civil rights and obligations. Article 6(1) is not applicable to this decision.

Direction

28. 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 Cornwall Council to determine the above-mentioned application not later than twelve months from the date of this decision.

Alan Beckett

INSPECTOR