



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: 02 October 2020

Ref: FPS/G3300/14D/41

Representation by Simon Keyes for the Friends of the Somerset River Frome

Somerset County Council

Application to add a Public Footpath to Somerset County Council's definitive map and statement at Wallbridge, Adderwell (OMA ref. MOD860)

- 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 Somerset County Council to determine an application for an Order, under Section 53(5) of that Act.
 - The representation is made by Simon Keyes on behalf of the Friends of the Somerset River Frome and is dated 8 June 2020.
 - The certificate under Paragraph 2(3) of Schedule 14 is dated 7 June 2018.
 - The Council was consulted about the representation on 24 July 2020 and the Council's response was made on 7 September 2020.
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Decision

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

Reasons

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

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

4. The Council acknowledges that it has a backlog of applications awaiting determination which it states will take a number of years to process. The backlog is said to have arisen due to a disproportionate number of applications having been received, as the Council's rate of determination of applications is said to be comparable with other surveying authorities with a similar size public rights of way network. The Council notes that it has recently made additional resources available for the determination of DMMO applications which in time, is likely to increase the rate at which cases can be determined.
5. Under the priority scheme which the Council operated prior to 28 November 2011, applications received were allocated a priority score with the score determining the position of the application in the priority list. From 28 November 2011, the Council aims to determine applications in chronological order of receipt. In all cases, applications received on or before 29 November 2011 will be investigated first.
6. However, the Council's Statement of Priorities provides that applications can be taken 'out of turn' in certain circumstances; these include where the path concerned is subject to a Small Improvement Scheme or is affected by a Future Transport Plan; where the claimed path is likely to be obstructed as a result of development; or where the path concerned is subject to a Section 130A notice and the status or the alignment of the path is in dispute, and where determination would enable the Council to respond to the Section 130A notice with a greater degree of certainty. In addition, the Statement of Priorities provides for applications to be grouped together where that would make the most efficient use of available resources and allows for low priority applications to be considered alongside an application which is about to be investigated.
7. The Council's Statement of Priorities sets out the approach it will take with regard to the consideration of applications. The Council has identified several factors which could lead it to conclude that an application could be considered 'out of turn', but that otherwise applications would be dealt with in chronological order of receipt. Whilst there is nothing before me to suggest that the approach taken by the Council for bringing and keeping the Definitive Map and Statement up to date is unreasonable, that does not alter the statutory duty placed on the Council to investigate the matters stated in DMMO applications as soon as is reasonably practicable.

The actions or intended actions of the Council

8. The application currently stands at number 332 in the register of applications with a further 52 applications having been submitted to the Council after the application at issue. It is noted that of the 384 applications set out in the Council's register, a number are under active investigation or have resulted in a Definitive Map Modification Order having been made. The Council submits that based on its current rate of determination of applications, it is considered that it will be at least 15 years before work commences on those applications received after 28 November 2011.
9. Although the applicant has set out his reasons as to why the application should be considered 'out of turn', the Council does not consider that there are any relevant special circumstances in the case. Although the applicant considers that the evidence submitted to be sufficient, the Council notes that this is not a relevant matter in determining whether a direction should be given. Although the Council acknowledges the likelihood of witnesses becoming unavailable due

to the passage of time, it is submitted that this is a factor in many applications which involve evidence of use; prioritising this case over others would increase the delay in the determination of those other cases and the likelihood of witnesses in other cases being unavailable would be disproportionately increased. The Council submits that if the claimed route were to become blocked by fences or other development, that would not remove any public rights which had been accrued; enforcement action could be taken if the right of way (when included on the definitive map) was obstructed.

10. The Council requests that consideration be given to the cumulative effect of directing it to determine multiple applications. Since 2016, the Council has been directed to determine 38 applications by the end of 2021, with many directions only allowing a six-month period in which to arrive at a determination. Given the number of directions already given, and the investigations of the other cases which are already underway, it is suggested that should a direction be given, the time which may be considered 'reasonable' for determining the case will exceed the 12 months suggested by the applicant.
11. The Council recognises the applicant's concern about the time taken to process applications, and their wish to resolve these matters as quickly as possible; there are many other applicants with similar concerns. The Council does not consider there to be any special reasons why these applications should take precedence over applications which have been waiting for a much longer period.

The circumstances of the case and views of the Applicant

12. The applicant acknowledges that the Council has a published Statement of Priorities but considers that there are grounds for considering this application out of turn. First, some of the key witnesses who have provided evidence of use for 20 years or more prior to 2016 are elderly now and may not be in a position to provide that evidence in 15 years' time. Secondly, the route is under imminent threat from development with threatens to extinguish the path altogether, and due to lack of vegetation management is becoming obscured by invasive species.
13. The applicant submits that the application is supported by evidence of use by 27 individuals whose use spans several decades with use extend over a period of 80 years in total. The path at issue crosses the last remaining leat meadow in Frome and has been blocked by railing at the Wallbridge end of the path since October 2016.
14. It is submitted that part of the land over which the path runs is currently for sale and potential purchasers have indicated a desire to eliminate the path and deny future public access. The applicant believes that the path at issue is demonstrably a public right of way and early determination of the application would bring clarity to both path users and potential purchasers.
15. It is requested that the Council be directed to determine the application within twelve months.

Conclusions

16. 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. The scale of the task facing all surveying authorities

- dealing with DMMO and other rights of way casework is recognised and understood. It is also acknowledged that despite additional resources being allocated to the investigation of DMMO applications, the Council has limited resources available to it with which to undertake such work.
17. Similarly, it is acknowledged that the Council has recently been directed by the Secretary of State to determine 38 other applications which have been made to it and which had not been determined within 12 months of the receipt of the relevant paragraph 2(3) certificate. It is acknowledged that the granting of further directions in respect of these applications will add to the burden already imposed upon the Council.
 18. However, the investigation of section 53 applications is a statutory duty which the Council must carry out and the Council is expected to determine an application as soon as reasonably practicable after receipt of the paragraph 2 (3) certificate. I have taken into account the Council's current commitments in relation to the work already in hand and the cases which it has been directed to determine and its estimated timescale of being unable to determine applications made after 28 November 2011 for at least a further 15 years. I note that since December 2011, 105 applications have been made to the Council prior to the application at issue being made. Assuming that it will take the Council 15 years to begin to determine those applications made in 2011 and assuming it would be possible to determine 10 applications per year, the applicant in this case is likely to have to wait around 25 years before a determination is made.
 19. Whilst only 27 months have elapsed since the application was made it is not considered reasonable for the applicant to have to wait around 27 years in total for the application to be determined. It can only be concluded that the Council has taken no action on this application and would appear to have no intention of taking any action on it in the foreseeable future. Despite the Council's Statement of Priorities indicating that an application may be taken out of turn if the route at issue were to be threatened by development, the Council appears to place no weight upon the threat of development in this case suggesting instead that any issues which arise can be addressed through enforcement action at a later date. In addition to appearing to be contrary to the Council's Statement of Priorities, not acting upon the application does not provide certainty to either the prospective developer or those who claim to have used the path in the past.
 20. Deferring the investigation of the application for anything between 15 and 25 years 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) notice and means that there is uncertainty for the Applicant as to when a decision is likely to be reached. The lack of action by the Council and its failure to set out any firm intended action, would justify making a direction that the application is determined before the expiration of a given period.
 21. In the circumstances, I consider it highly unlikely that the Council will commence its investigation of this application without intervention and I have decided that there is a case for setting a date by which time the application should be determined.
 22. I note that the applicant has requested that the Council be directed to determine the application within 12 months and I also note the submissions

made by the Council in relation to its ability to determine the 38 applications on which the Secretary of State has already issued a direction. Notwithstanding these submissions, 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.

23. 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.

Direction

24. 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 Somerset County Council to determine the above-mentioned application not later than twelve months from the date of this direction.

Alan Beckett

INSPECTOR