



Order Decision

Site visit made on 14 June 2016

by Mark Yates BA(Hons) MIPROW

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

Decision date: 11 July 2016

Order Ref: FPS/L3055/7/92

- 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 (Fiskerton cum Morton Footpath No. 30) Modification Order 2012.
- The Order was made by The Nottinghamshire County Council ("the Council") on 27 January 2012 and proposes to add a footpath ("the claimed route¹") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There was one objection outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

Procedural Matter

1. I undertook a visit to the site on 14 June 2016 accompanied by Mr Brennan for the Council and the current landowner (Mr Hammond). The statutory objector (Mr Padgen) accompanied me and Mr Brennan in relation to the property he occupies (Mill Cottage).

Main Issues

2. The Order relies on the occurrence of an event specified in Section 53(3)(b) of the 1981 Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows the expiration of a period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path. The burden of proof to be applied is the balance of probabilities.
3. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
4. If the statutory test fails, consideration should be given to common law dedication. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and the public has accepted the dedication.

¹ This route proceeds along a flood bank and links at each end with Footpath No. 18

Reasons

Statutory dedication

When the status of the claimed route was first brought into question

5. The Council put forward a proposal in 1976 to move Footpath 18 from its cross-field route onto the flood bank. Following the receipt of an objection, the relevant proposal was not pursued further. Subsequent proposals to realign Footpath 18 onto the flood bank were objected to by the occupiers of Fiskerton Mill and Mill Cottage and were also not pursued. I do not consider that these objections would serve to bring the public's use of the claimed route into question. The same applies to a letter from the owner of the land crossed by the claimed route in 1993 (Mr Smith²) to the Council in which he stated that he did not accept it was an official right of way. As outlined below, it is apparent from the user evidence that it was not until later that people using the route were made aware its status was disputed.
6. There is evidence of signs being erected in 2006 by the landowner at the time (Mr Bowyer³) which were worded: "NO RIGHT OF WAY ALONG FLOODBANK". An additional Council sign, stating: "NO REGISTERED RIGHT OF WAY", is said to have been erected in 2008. These signs are acknowledged by a number of the people who have provided evidence of use of the claimed route. A note of a telephone conversation between Mr Brennan and Mr Bowyer in 2011 records that Mr Bowyer indicated that the signs were not intended to stop people using the claimed route. However, I consider the wording of the signs served as a clear challenge to the public's use of the route. The Council says that Mr Bowyer submitted a statement/statutory declaration under Section 31(6) of the 1980 Act to deny the existence of additional rights of way across his land in 2008.
7. Having regard to the above, I conclude on balance that it was the signs erected in 2006 that first brought the status of the claimed route into question. This means that the period for the purpose of statutory dedication is 1986-2006 ("the relevant period").

Evidence of use by the public

8. Twenty-three user evidence forms ("UEFs") were submitted on behalf of twenty-four people in support of use of the claimed route. A proportion of these people completed questionnaires or were interviewed by the Council. The UEFs provide evidence of use throughout the relevant period. In a few cases, the stated use dates back to the period when the flood bank was re-built in the 1950s. This evidence is not challenged and is supported to some extent by the references to public use in correspondence relating to the proposals to realign Footpath 18 and the observed use noted in a proportion of the UEFs. In particular, in a letter of 1 March 1999, Mr Padgen states "*many people already walk along this flood bank*". This use is illustrated on four photographs attached to his letter.
9. The Council says that the use in order to deviate away from Footpath 18 by reason of a growth in crops or ploughing would have been '*by right*' as opposed to '*as of right*'. However, the Council's files record only one occasion during the relevant period when the landowner/tenant was asked to remove crops

² The landowner until 2002

³ He was the landowner between 2002-2012

obstructing Footpath 18. Such use is only considered to constitute a small percentage of the use. There are some references in the UEFs to agricultural operations making Footpath 18 difficult to use on occasions but the wet nature of the field is also mentioned. The latter was clearly evident during my visit to the site, which followed a prolonged spell of rainfall. I agree with the Council that the evidence points to the claimed route being the preferred route irrespective of the agricultural use of the field. Further, there is no evidence to suggest that any works by the Environment Agency on the flood bank served as a significant interruption to public use during the relevant period.

10. The Council draws attention to the potential permissive use by three of the users, although one of these people was unsure whether she had been given permission. In the circumstances, it would be unsafe to rely on the evidence of these users. Nonetheless, I consider the extent of the use from the remaining users, along with the supporting evidence of use, to be sufficient to demonstrate that there was use of the claimed route during the relevant period to such a degree to raise a presumption of dedication. In reaching this conclusion, I have had regard to the fact that the use was mainly for recreational purposes and the claimed route is located in a rural location.

Whether any landowner demonstrated a lack of intention to dedicate a footpath

11. It is apparent that during the relevant period the claimed route passed over land owned by Mr Smith and then Mr Bowyer. Mr Hammond was the tenant between 1993 and 2012 until he purchased the land. I have concluded that the letter from Mr Smith in 1993 was not sufficient to bring the status of the claimed route into question and it falls outside of the relevant period.
12. The file note of the telephone conversation involving Mr Bowyer indicates that he never challenged people using the claimed route. In contrast, an evidence form he completed in 2010 refers to him politely informing people that the route was not a designated footpath. An evidence form completed by Mr Hammond also refers to him informing walkers that the route was not a footpath. However, no dates are specified for these potential challenges. Nor can it be determined that any challenges issued by Mr Hammond when he was the tenant were undertaken at the request of the landowner. From looking at the user evidence, it cannot be determined that the couple of challenges mentioned occurred during the relevant period.
13. I cannot conclude that no verbal challenges were issued during the relevant period. However, having regard to the above, I do not find on balance that any action taken was sufficient to communicate to the public a lack of intention by Mr Smith or Mr Bowyer to dedicate a footpath during the relevant period.

Conclusions

14. For these reasons I find on the balance of probabilities that the claimed route has been dedicated in accordance with Section 31 of the 1980 Act and the test set out in paragraph 2 above is satisfied. In light of this conclusion, there is no need for me to address the evidence in the context of common law dedication.

Other Matters

15. Whilst I appreciate the concerns raised about the impact of the route on Mill Cottage, this matter has no bearing on the determination of whether a right of way subsists. The same is applicable to the potential damage to the flood

bank. Therefore, I have not considered it necessary to address these issues in the decision.

Overall Conclusion

16. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed.

Formal Decision

17. I confirm the Order.

Mark Yates

Inspector

**THE NOTTINGHAMSHIRE
COUNTY COUNCIL
FISKERTON CUM MORTON
FOOTPATH NO.30
MODIFICATION ORDER 2012**



Scale 1:2500

Produced by: e brennan

Date: 23/01/2012



= Existing
Unaffected Route

= Proposed Route
to be added

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MAP NOT TO
ORIGINAL SCALE

