



Order Decision

Inquiry held on 1 September 2016

by Mark Yates BA(Hons) MIPROW

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

Decision date: 14 October 2016

Order Ref: FPS/X2600/7/112

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Norfolk County Council (Alpington) Modification Order 2015.
- The Order was made by Norfolk County Council ("the Council") on 10 June 2015 and proposes to add a footpath ("the claimed route") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There was one statutory objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. This Order was originally scheduled to be determined by way of the written representations procedure. However, in light of the conflicting evidence provided, I held a public inquiry into the Order on 1 September 2016 at Alpington Village Hall. I visited the site alone prior to the inquiry and conducted a further visit accompanied by the interested parties following the close of the inquiry.
2. All of the points referred to below correspond to those delineated on the Order Map.
3. At the inquiry, the Council adopted a neutral stance and the case in support was outlined by the applicant for the Order (Mrs Rundle). The one statutory objection was submitted by Mr D. Aldis who owns the western field crossed by the claimed route. Ms Key subsequently made a submission in opposition to the Order on behalf of the owners of the eastern field crossed by the claimed route (Messrs Hibbett and Key).
4. It is apparent that the process was instigated by Mrs Rundle in early 2013. The formal application was made on 1 March 2013 and revised in June 2013 in light of matters raised by the Council, including the extent of the route claimed. However, I note that the route in the revised application follows a straight alignment rather than the dog-leg between points C-D-E.
5. At the inquiry, Mrs Rundle referred to phone calls and a visit to her house by Mr Hibbett following the submission of her application. She is concerned about this issue and submits that potential witnesses may have been deterred from providing further evidence in support of the Order. Mrs Rundle's personal concerns appeared to me to be genuine. However, I did not detect any intimidation from the sample voice messages played at the inquiry. In essence, Mr Hibbett wished to discuss the matter with Mrs Rundle. Nor is there any evidence of people being deterred from giving evidence at the inquiry due to the conduct of the landowners.

Main Issues

6. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
7. 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.
8. 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 that the public has accepted the dedication.

Reasons

The documentary evidence

9. Mrs Rundle believes the claimed route is a highway of some antiquity but the evidence in support is sparse. I note that the Council did not discover any historical documentary evidence in support of the route being a highway when it investigated the application. The 1907 Ordnance Survey map provided by Mrs Rundle shows a route by way of double pecked lines leading out of Church Road which links with another route from the church and continues southwards. Neither route corresponds to the claimed route. These routes are also shown on the 1906 Ordnance Survey map along with the annotation "FP".
10. From a review of the information supplied, I am unable to conclude that the claimed route is a historical highway. The Order therefore needs to be determined in light of the user evidence provided.

Statutory dedication

When the status of the claimed route was brought into question

11. Hibbett and Key refer to the erection of a notice on a post near to point B in 2012 and its subsequent replacement when removed or vandalised on occasions by persons unknown. The notice is stated to have been worded "*No Entry Private Property*" and erected in response to complaints regarding the use of the field by motor cycles. A gate in this locality was removed at some point between 2002 and 2005 but it is apparent that the gate was not locked whilst it remained in place. None of the user evidence forms ("UEFs") submitted in support of the application mention such a sign or the earlier gate. Mrs Rundle interpreted the sign as only indicating that the land was private.
12. The evidence in support of the notice was submitted in response to the application and was supported to some extent by Ms Key at the inquiry. However, her recollection is that the notice was worded "*Private No Public Right of Way*". In either case, the stated wording and siting of the notice should have made it clear to a reasonable user that their right to use the claimed route was being brought in question. In this respect, I note that the UEFs were

for the most part completed in late 2012. An unlocked gate, even if closed, would not in my view have brought the status of the claimed route into question.

13. Having regard to the above, I conclude on balance that it was the notice of 2012, rather than the application in early 2013, that served to bring the status of the claimed route into question. It follows that the relevant twenty year period to be considered for the purpose of statutory dedication is 1992-2012.

The user evidence

14. Fourteen UEFs have been submitted on behalf of seventeen people. The Council sought clarification from the users on a couple of points but no interviews were carried out to verify other information contained in the forms. Mrs Rundle gave evidence at the inquiry and an additional party (Mr Blower) provided some evidence in support of use of the claimed route. However, none of the other users gave oral evidence. This means that it was not possible for the user evidence to be clarified to any reasonable extent. The issue of most concern from an examination of the UEFs is the extent to which the claimed route was used.
15. The A-B section of the claimed route proceeds between property boundaries on Church Meadow. It then continues across the eastern field towards point C. Hibbett and Key state that the extension at Church Meadow, which involved the construction of seventeen properties, commenced in 1991 and that the site was fenced during the construction process. They say the development was completed between 1992 and 1993. However, it is apparent that Mr and Mrs Gardner purchased No. 36 Church Meadow in 1990.
16. In my view, the specific route leading out of the western end of the road and the claimed alignment across the adjacent field is unlikely to have been used prior to the relevant part of Church Meadow being constructed, whenever during the early 1990s that this occurred. Even if I am wrong on this issue, the development is likely to have served as an interruption to any public use of the claimed route.
17. Having regard to the above, I accept that the claimed route could have been used by the public for the required twenty year period. In terms of when particular people moved into properties on Church Meadow, I agree with Mrs Rundle that these people may have used the claimed route prior to moving into their current property. Although this issue could not be clarified with the relevant parties at the inquiry. Further, a lack of observed use by particular parties does not demonstrate that the use outlined in the UEFs did not occur.
18. However, an issue arises from the change in the periods of use specified in the UEFs completed in 2012 by a proportion of the users who responded to the Council on this issue. The revised periods of use were less favourable in terms of statutory dedication. A common theme is that the original date in these cases involved the claimed use commencing in 1993 or a stated period of use of twenty years. One of the users (Dr Fewster) claimed that the date in her form had been altered after she had submitted it. This issue raises doubts about the reliability of the original UEFs and considerably reduces the extent of the claimed use during the early part of the relevant period.
19. The straight route shown on the revised map with the application is generally replicated on the maps with the UEFs. It may be the case that the nature of

- the vegetation meant that people deviated from the straight route but the extent to which this occurred cannot be determined from the evidence.
20. The objectors have provided evidence of periods during which crops were grown in the fields. It is stated that the late Mr Andrews was the former tenant of the eastern field and that he cropped the land between 1995 and 1999. This evidence was supported by Mr D. Aldis at the inquiry. On this issue, I note the discrepancy with the later date provided by Ms Key. It is also stated that no complaint was made by Mr Andrews regarding any damage to the crops and no sign of a route through the crops was evident when the land was inspected by Hibbett and Key. Ms Key has provided an aerial photograph she believes dates from around 1999, which shows the eastern field cropped. Mr D. Aldis also says that his field was cropped until 2008 but this is less significant given that the claimed route proceeds along the edge of the western field. There is no evidence to show that pedestrians could not have proceeded along the edge of his field when crops were being grown.
21. Ms Key acknowledges that it is possible that a route could exist through crops but she points to the absence of any such route visible on the circa 1999 aerial photograph. She says that the longstanding users are likely to have utilised a route around the edge of the field which does not correspond with the claimed route. The cropping process is stated to cover the majority of the year. In my view, the presence of crops during the relevant twenty year period could suggest that the actual claimed route was not used throughout this period. People may have continued at such times to use alternative routes around the edge of the eastern field but this cannot be determined from the evidence.
22. Mrs Rundle obtained an aerial photograph in November 2012. It is evident that the photograph was taken at some point during the relevant twenty year period and it is similar to a circa 2011 aerial photograph supplied by Ms Key. These photographs show a worn path within the eastern field which can be taken to generally correspond to the claimed route. The worn path visible continues along the western and northern sides of the field and could correspond to a circular route around the field. In this respect, the photographs may offer some support for use of the claimed route. However, they are also supportive of the existence of another route. Further support for the additional route was provided at the inquiry by Mr Blower. The alternative route could coincide with a proportion of the use outlined in the UEFs.
23. The objectors gave evidence at the inquiry of the fields being used by the public for other purposes, such as the exercising of dogs, rather than the use of a particular route. This evidence is supported to some extent by an email from Alington Parish Council to the Council on 4 October 2013. I do not believe that I can dismiss the evidence of use of a through route which was supported by Mr Blower. Although the duration and frequency of his use was not significant in nature. However, I do not consider that I can conclude from the written evidence alone that the use was confined to the claimed route. There are also doubts regarding the route used when crops were being grown.

Conclusions

24. Having regard to the above, I am not satisfied on balance that the evidence is sufficient to raise a presumption of dedication under statute in relation to the claimed route. Therefore, the first part of the statutory test is not satisfied and there is no need for me to consider the issue of statutory dedication further.

Common law dedication

25. I have concluded that the historical documentary evidence is not supportive of the claimed route being a highway. There is no evidence of positive action by the landowners from which it is possible to infer the dedication of a public footpath. The issues outlined above will also for the most part have a bearing on the assessment of the user evidence for the purpose of common law dedication. Whilst there is likely to have been heavier use of the land during the period leading up to the erection of the notice in 2012, doubts remain over the extent to which the actual claimed route was used.
26. On balance, I am not satisfied that the user evidence is sufficient to raise an implication of dedication at common law.

Other Matters

27. Issues relating to whether it is desirable for the claimed route to be recorded as a public right of way are not relevant to my decision.

Overall Conclusion

28. 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

29. I do not confirm the Order.

Mark Yates

Inspector

APPEARANCES

Supporters:

Mrs K. Rundle Applicant

Mr C. Blower

Objectors:

Ms. S. Key

Mr R. Aldis

Mr D. Aldis

Interested Party:

Ms M. Lee Case Officer for the Council

DOCUMENT

Opening statement for the Council

