
Order Decision

Inquiry opened on 15 November 2016

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 07 December 2016

Order Ref: FPS/Q2500/7/79

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lincolnshire County Council, addition of Public Footpath Numbers 1105 and 1106 Utterby, Definitive Map Modification Order 2014.
- The Order is dated 30 January 2014 and proposes to modify the Definitive Map and Statement for the area by adding 2 footpaths in the area of Grange Farm, Utterby, as shown on the Order Map and described in the Order Schedule.
- There was 1 objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public inquiry into this Order on Tuesday 15 and Wednesday 16 November 2016 at Louth Town Hall. I made an unaccompanied site inspection on Monday 14 November when I was able to walk the whole of both Order routes. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

3. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
4. Much of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.

5. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

6. The Order includes two separate routes. Footpath 1105 links two adopted highways running along a track between the eastern end of Grange Lane (Point A) and Holywell Lane at Point E. This route is referred to as Route 1. The other route also runs from the eastern end of Grange Lane (Point A) but then follows a track past the farmhouse and yard of Grange Farm, across a disused railway line which is now a permissive bridleway (Points G-H) and terminates at a ditch which marks a field boundary (Point K). The westernmost section of this route (Points J-K) is not defined on the ground. This route is referred to as Route 2. All of the land crossed by both routes is owned by CJ Wilkinson and Son and currently managed by Mr Nicholas Wilkinson.
7. Both documentary evidence and evidence of public use of the Order routes has been considered in this case. I deal with the different types of evidence separately.

Documentary Evidence

8. Early Ordnance Survey (OS) and other maps prepared up to 1945 show a route similar to the southern part of Route 1 (Points B to E). However, from Point B northwards the route continued in a straight line to Grange Farm. Aerial photos from 1972 onwards and more recent maps show the current Order route. It would therefore appear that the route was diverted to its present alignment at some time between 1945 and 1972 (or possibly between 1945 and 1963 based on the evidence of one witness).
9. The western part of Route 2 has been shown on maps since 1818 and the whole of the route from Point A to Point J since around the 1830s. The easternmost section of the route (Points J to K) has not generally appeared on maps but the field headland along which it runs has been evident on aerial photos taken from 1999 onwards.
10. The 1839 tithe plan and apportionment do not specify the status of the routes but they are shown in a similar manner to other routes described as 'Occupation Roads'. The 1845 documents prepared in connection with the construction of the East Lincolnshire Railway also describe the section of Route 2 which crosses the proposed railway (near Points G to H) as an 'Occupation Road'.
11. The routes were not identified as public rights of way in the surveys carried out in the 1950s in connection with the preparation of the first definitive map and they have not been recorded as such at any time since then.
12. There is no evidence that either route has been expressly dedicated as a public right of way at any time.

Conclusions regarding Documentary Evidence

13. The documentary evidence that is available indicates that the Order routes have largely existed in some form for a considerable time as physical features on the ground. However, OS and the other maps do not indicate the status of

the routes or, in particular, whether the public had any rights to use them. The indications that they may have been regarded as being 'Occupation Roads' is in fact suggestive of them having been private.

14. Accordingly, the determination of whether any public rights now subsist over the routes must depend on the evidence of public use of the routes that is available and whether this shows that they have become public rights of way either as a result of a presumption of statutory dedication in accordance with the provisions of the 1980 Act or by inference that such rights have been established at common law.

Statutory Dedication

Date when public use was brought into question

15. It is accepted by all parties that signs stating "Private. Keep Out" or words to that effect were erected on both Order routes in November 2011. It was also stated at the inquiry that one sign on Route 1 stated that access was by permission only. These signs apparently soon disappeared and were replaced in February 2012 by signs stating that the routes were not public rights of way. These signs are still in place. The erection of signs clearly brought public use into question at that time and led directly to applications being made for the routes to be added to the definitive map.
16. It was also generally agreed that a piece of agricultural equipment known as a 'drag' was left near the northern end of Route 1 from November 2009 until July or August 2010. This had been placed there after an incident in which a refuse lorry had used the route and, when challenged, the driver was said to have been rude to Mr Wilkinson's mother. Mr Wilkinson stated that the drag had been placed so as to prevent all use of the route and not just unauthorised vehicular use. However, users stated that it was easily by-passed and did not interfere with pedestrian use of the route. Users also stated that they did not recognise that the placing of the drag was intended to prevent their use of the route on foot. In these circumstances, I do not think the temporary placing of the drag without any additional explanation was sufficient to bring public pedestrian use of Route 1 into question.
17. Mr Wilkinson also stated that he had kept geese between 1991 and summer 2010 and again since spring 2011. These had roamed in the area near the farmhouse and would often be present on both the Order routes close to Point A. He said that they had been acquired to deter people from using the routes. However, although some users recorded the presence of geese and a few admitted they had been wary of them or thought they were intended to discourage use of the routes, none had stopped using the routes because of them. At the inquiry users stated that it was not unusual for farms in the area to keep geese and the presence of the geese does not appear to have brought public use of the Order routes into question.
18. Lincolnshire County Council, the Order Making Authority (OMA), has taken November 2011 as the date when public use of both Order routes was brought into question as a result of the erection of signs. This would mean that the relevant period of public use which could raise a presumption that the routes had been dedicated as public rights of way in accordance with the provisions of the 1980 Act runs from November 1991 to November 2011. I agree that public use of the routes was indeed brought into question in 2011 and that the

presence of the 'drag' and geese did not bring it into question before then. However, there is evidence of other actions taken by landowners such as the locking of gates, challenges to users and the granting of permission which may also have brought public use into question earlier and I consider these later.

Evidence of users

19. Forty-three User Evidence Forms (UEFs) were submitted in support of the application for Route 1 to be added to the definitive map and 32 in support of Route 2. Many forms were supplemented by statements providing more detail of the use claimed. The forms and statements describe use of the routes from the 1960s (and from the 1950s by one person) until 2011. A number of UEFs were discounted by the OMA either because it appeared that the use described had been with permission from the landowner or because of inconsistencies within the forms. This left UEFs of 38 users to be considered in respect of Route 1 and 28 in respect of Route 2.
20. Ten people, all of whom had also completed UEFs, appeared at the inquiry and gave evidence in person.
21. Nearly all of the use claimed had been on foot. Although a small amount of use on bicycles, with horses or with motor vehicles was also described, this was not of a sufficient level to raise any presumption that a right of way of higher status than a footpath had been dedicated.
22. The frequency of use claimed varied from 2-3 times per day to 5 times per year for Route 1 and once per day to twice per year for Route 2. In general the frequency of use claimed for Route 2 was significantly less than for Route 1. It is also evident from the forms that not all users always walked the full length of Route 2. All users claimed to have walked the section A-G but not all then continued to Point J and those that did, did so less frequently. Very few people claimed to have walked between J and K.
23. Between 15 and 35 people claimed to have used Route 1 in each year from 1991 to 2011 and between 9 and 15 people claimed to have used Route 2 (from Point A to Point G).
24. Users generally claimed to have walked the routes without encountering any obstructions or signs, without being challenged and without permission. However, a few people stated that they knew the Wilkinson family and referred to a 'tacit agreement' that they could use the routes. A few also stated that they were aware that other people had been given permission to use the routes.

Evidence of landowners

25. There is evidence that gates have been in place across route 2 at different times. A gate close to Point A was installed by Mr Wilkinson in 1993 and is still present. His evidence is that this gate was erected at that time because the disused rail line had become a permissive bridleway in 1992 and to safeguard the privacy and security of his house and farmyard he wished to discourage use of Route 2 as an access to the line. He stated at the inquiry that this gate was normally open during the day but closed and sometimes locked at night and also sometimes left locked in the day at weekends or holidays. Some users of the route stated that they found this gate closed occasionally but none reported finding it locked. However, Messrs Motley and Robinson (in letters)

and Messrs Bell and Rodgers (at the inquiry), all of whom were regular visitors to Grange Farm, stated that the gate was sometimes locked, particularly at night or early in the morning.

26. The available evidence suggests that there were gates on both sides of the railway (Points G and H) when it was active but that one of these (at H) may have fallen into disrepair later and in any event had a stile alongside so that it did not necessarily constitute an obstruction to pedestrians. However, the gate at G was said by Mr Wilkinson to be regularly closed and often locked. In 1990 Mr Wilkinson installed a new wider gate at G to enable the passage of larger agricultural machinery. This gate was removed and not replaced in 2000. Mr Wilkinson stated that between 1990 and 2000 this gate was often locked, sometimes for long periods at quiet times but at busy times such as harvest it would be left open to facilitate farm traffic. This evidence was corroborated by that of Miss Beaumont, and Messrs Buckley, Robinson and Rodgers, all of whom were regular users of the route (by permission). On the other hand no other people who claim to have used the route recorded having encountered a locked gate at G.
27. It is perhaps not surprising that people who provided evidence of use of the route did not encounter a locked gate at night as they would have been unlikely to have attempted to walk then. However, the evidence that gates were locked in the daytime, particularly that at Point G, is difficult to reconcile with the evidence of users.
28. Mr Wilkinson provided evidence of challenges made to people using the routes and of permission granted to people by himself, his partner (Miss Beaumont) and his father and mother. A number of specific instances of challenge were cited and a list provided of people said to have been given permission to use Route 1. A written statement submitted by his mother and father also referred to specific challenges and permissions. Mr Wilkinson also referred to 3 families from the village who he regarded as close friends of his family and who he considered it would have been inappropriate to restrict or challenge with regard to their use of the Order routes or other parts of his land. He regarded members of these families as having implied permission to use the routes. He and Miss Beaumont stated that, particularly after they moved into Grange Farm in 1990 and the disused rail line became a permissive bridleway in 1992, they had sought to discourage public use of Route 2 past their house but had been happy to continue to permit village people to use Route 1. He also stated that in consultation with the parish and county councils he had created a permissive access from Holywell Lane across his land to the disused rail line in early 1993 so as to facilitate access from the village to the permissive bridleway without any need to use Route 2. Mr Wilkinson stated that it had been made clear to the parish council at that time that no other public rights of way were recognised over his land.
29. This evidence was to some extent disputed. Some users accepted that they had been challenged on occasion and/or had been given permission to use the routes, particularly Route 1 but others, including some of those named by Mr Wilkinson, said that this was not the case. At the inquiry Mr Wilkinson identified 50% of all those claiming to have used Route 1 as people he regarded as having had explicit or implied permission to use it and a greater proportion of those claiming to have used Route 2.

30. The issue of permission, particularly implied permission, is to some extent problematic. Utterby is a relatively small village and the Wilkinson family and many of the users of the Order routes have been resident there for a long time. Consequently a large proportion of users of the routes were well known to the Wilkinsons. In such circumstances it is perhaps not surprising that many people had received no formal permission to use the routes even though the Wilkinsons regarded their use as being with permission. The extent of misunderstanding appears to have become apparent after the erection of signs in 2011, which many villagers interpreted as meaning that they could no longer use the routes, including some close family friends of the Wilkinsons, whereas Mr Wilkinson stated that he never intended to prevent anyone who had previously been permitted to use the routes from continuing to do so and was 'devastated' to learn that close family friends had felt excluded.
31. It was not disputed that permission to use the routes had been sought on behalf of organised groups such as the Louth Heart Support Group and Guides and Brownies and that permission had been granted to them.

The Character of the routes

32. Route 1 is a track linking two adopted highways and is in my view clearly of such character that its use by the public could give rise to a presumption of dedication as a public right of way.
33. On the other hand, Route 2 is a cul de sac which terminates at a ditch (Point K) which cannot be regarded as a place of public resort or interest. Close to Point J there is a grassed area, a stone seat, a tree and a large boulder. This marks the place where the ashes of Mr Wilkinson's late brother are buried and, although this is accordingly a significant place for members of the family and close friends, it is not a place of wider public interest. As previously mentioned, the disused rail line which crosses the route between Points G and H is a permissive bridleway and it can therefore be argued that this should be regarded as a place of public resort, although this may not necessarily remain the case as it is the ambition of the owners of the line to re-open it as a railway at some time. There would not in my view appear to be any special circumstances that would suggest that it would be appropriate for the section of Route 2 between Points G and K to be recognised as a public right of way.

Conclusions regarding Statutory Dedication

34. The section of Route 2 between Points G and K is a cul de sac which does not provide access to a place of public interest or resort. In the absence of any other special circumstances, it is not in my view a route of a character which can reasonably be presumed to have been dedicated as a public right of way.
35. Public use of Route 1 and the remainder of Route 2 was brought into question by the erection of signs in November 2011. Use of these routes in the 20 year period November 1991 to November 2011 was sufficient in terms of total quantity to raise a presumption that the routes had been dedicated as public footpaths in accordance with the provisions of the 1980 Act.
36. However, although the available evidence is somewhat conflicting, it is arguable that public use the routes was also brought into question as early as 1990 after Mr Wilkinson moved into Grange Farm and began locking gates on Route 2 and challenging users on both routes and giving permission for local

people to use them. Evidence of use of both routes in the period between 1970 and 1990 is much more limited than for a later period and is not in my view sufficient to raise a presumption of dedication. It is also possible that public use may have been brought into question earlier than 1990 as Mr Wilkinson and his parents stated that the gate at G would sometimes have been locked before then and challenges were made to some users and some permissions given.

37. The evidence also suggests that a significant proportion of the use of the routes by the public was not 'as of right' as required under the 1980 Act but by right in accordance with the permission of the landowner or, in some cases, contentious in as much as it continued after being challenged by the landowner.
38. When considered as a whole, it is my view that the available evidence in this case indicates a consistent pattern of action by Mr Wilkinson and his family to discourage public use of Route 2 and to allow only permissive use of Route 1 by local people. Although public use of the routes does not appear to have been interrupted by actions of the landowners before 2011, it is my view that the actions were sufficient to bring public use in to question by 1990 or even earlier and to indicate a lack of intent to dedicate the routes as public rights of way. In these circumstances, it would not be reasonable to presume that either route has been dedicated as a public right of way in accordance with the provisions of the 1980 Act.

Common Law

39. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
40. In this case, although there is evidence of use of the routes by the public, the evidence of actions by the landowners which has already been described does not suggest that they had any intention of dedicating them as public rights of way. It cannot therefore be inferred that such dedication has taken place at common law.

Conclusions

41. Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

Formal Decision

42. I do not confirm the Order.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Mandy Wood	Solicitor, Lincolnshire County Council (LCC)
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Who called:

Andrew Pickwell	Definitive Map Officer, LCC
Mrs Maureen Scott	Applicant and path user
Philip Walker	Path user
Mrs Dawn Frobisher	Path user
Mrs Rosemary Kirk	Path user
Mrs Doris Coxon	Path user
Bryan Coxon	Path user
Mrs Eileen Sharp	Path user
Stuart Sharp	Path user

Supporters

Geoffrey Wilson	Path user
Graham Dalton	Path user

Objectors

Nigel Farthing	Solicitor, Birketts LLP (representing Mr N Wilkinson)
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Who called:

Stephen Robinson	Frequent visitor to Grange Farm
Nicholas Wilkinson	Landowner
Stephen Buckley	Owner of adjoining land
Stewart Rodger	Agronomist
Tim Bell	Frequent visitor to Grange Farm
Lynette Beaumont	Partner of N Wilkinson

DOCUMENTS

1. Two bundles of documents assembled by LCC.
2. Proof of Evidence and summary of Andrew Pickwell, LCC.
3. Proofs of Evidence of Bryan Coxon, Doris Coxon, Rosemary Kirk, Dawn Frobisher, Maureen Scott, Eileen Sharp, Stuart Sharp and Philip Wallker.
4. Statement of Case on behalf of Nicholas Wilkinson.
5. Proof Evidence and summary of Nicholas Wilkinson.
6. Proofs of Evidence of Lynette Beaumont and Stephen Buckley.
7. Letters from Mr T Bell (16/04/2013), Stewart Rodger (09/03/2013) and Stephen Robinson (not dated).
8. Statement of Mr & Mrs C Wilkinson.
9. Opening Statement, LCC.
10. Closing submission notes on behalf of N Wilkinson.
11. Closing submission notes, LCC.

