
Order Decision

Site visit made on 27 September 2016

by Susan Doran BA Hons MIPROW

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

Decision date: 03 November 2016

Order Ref: FPS/Q2371/7/53

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No.3) Order 2012.
- The Order is dated 15 February 2012 and proposes to modify the Definitive Map and Statement for the area by adding to them a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 5 objections outstanding when Lancashire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns a claimed public footpath between St Clements Avenue and Bristol Avenue, Farington passing to the west of Clifton Parade. The matter is being dealt with by way of written representations. I carried out an accompanied site visit attended by Jayne Elliot on behalf of Lancashire County Council (LCC), Patricia McDonald (Applicant), Mick Loftus (Objector), Andrew Thornhill (Objector), Tony Miller (Operations Director, representing the Spar shop), Mrs Pilkington (adjacent local resident), Mike Otter (County Councillor) and Paul Walton (Borough Councillor).
2. At the site visit it became apparent that some present had not received all the submissions made regarding the Order. A 'missing' document was circulated and, in the interests of fairness, parties were afforded an opportunity to comment on it. I have taken the comments received into account in reaching my decision.
3. The case is based on claimed use of the Order route by the public. LCC investigated historical documentary evidence (for the period prior to the housing development in the mid to late 1960s) but do not rely on this.

The Main Issues

4. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981 Act'), which requires me to consider whether the evidence discovered (when considered with all other relevant evidence available) is sufficient to show, on a balance of probabilities, that a footpath which is not shown in the Definitive Map and Statement subsists, and that they require modification. As regards the evidence, I must consider whether dedication of the way as a public footpath has occurred through use by the

public. In this case reliance is placed on presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), and under common law.

5. Section 31 of the 1980 Act provides that where a way over land, other than one which is of a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually 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. I must therefore consider the date on which the right of the public to use the claimed footpath was brought into question; whether it was used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question; and whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner(s) to dedicate the claimed footpath.
6. Should these tests not be met, I shall consider the evidence under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

Reasons

Presumed dedication under Section 31 of the Highways Act 1980

When the claimed footpath was brought into question

7. For the right of the public to be brought into question, it must be challenged by some means sufficient at least to make it likely that some of the users are made aware that their right to use the way as a highway has been called into question, so that they have a reasonable opportunity to meet that challenge. Such a challenge occurred in 2009 when barriers were erected across the Order route coinciding with the opening of one of the shops on Clifton Parade. The barriers, placed at points A and C on the Order plan, obstructed the route, thereby preventing access.
8. Prior to this, one of the adjacent residents on St Clements Avenue apparently indicated his intention to close the path in 2003, and a sign was put up. Some residents contacted local councillors, and user evidence forms were gathered. However, it seems that nothing came of this, and the closure did not take place. A user was canvassed in 2004 about the possible closure of the path; and another recalled a neighbour preventing use for about a week in 2006. It is not clear if these are separate events, or possibly the same incident with a lack of precision as to the year it took place.
9. I consider it is possible that use of the path was challenged in 2003, but the details are somewhat sketchy. I am satisfied, however, that events in 2009

brought into question the public's right to use the Order route, giving a 20 year period of 1989 to 2009 to consider.

Use by the public

10. Evidence of claimed use by the public is provided in 33 user evidence forms. In addition, a further 41 abridged evidence forms are submitted. In assessing this evidence I attach less weight to those forms which are incomplete, and disregard evidence that may be considered as exercising a private right. I note some forms describe use to the shops which I take to be those on Clifton Parade, but do not regard as use of the way as a through route. Nevertheless, most also refer to using the Order route to reach other destinations.
11. Of the evidence forms, use is claimed for periods of up to 41 years and is consistent with use of a public right of way. This includes visiting family and friends, to access the bus and trains, dog walking and walking to school. Frequency of use is given as varying from daily, twice a day, and weekly, to between 2 and 6 times a week. Of the abridged forms, use is claimed for periods of up to 46 years for similar reasons, varying from daily, weekly, or fortnightly use, to use 2-3 times a week, or once or twice a year. None of those providing evidence had been stopped, challenged or seen notices contrary to the Order route being available for use by the public.
12. Seven users provided detailed statements of their use. Mary Hodgson had known the path from 1969 when she purchased her property and of its use by the public since then. Similarly, John Nix had used it since 1969, saying the path was available to use before the houses were built. Mary Martin had used the Order route daily from 1972 until 2009 and comments it was well used by the community. Patricia McDonald began using it in the 1970s up until 1995 and refers to a 'No Cycling' sign (as did Mary Hodgson) from the St Clements Avenue side. Her use was almost daily and she knew of it being in constant use. Lesley Thom's use began in 1981 and was daily or more often. A street lamp and dog waste bin were seen along the Order route. Trevor Bibby used it from 1990 to 2009. Susan Little's use began in 1997 and she used it as a short cut between 2 and 5 times a day, commenting that it was well known as a cut through. She recalls a 'No Cycling' sign between B and C.
13. There is nothing to suggest that use was with force, by stealth or with permission: in other words claimed use was as of right. As regards interruptions to use, Mary Martin says a resident put up a notice in 2006 saying the footpath was closed. However, there is nothing to suggest that resident owned the Order route and thus was entitled to stop the public's enjoyment of use of the way.
14. Users describe the path initially as fenced between A and B in the late 1960s and having been tarmacked as a separate feature from the adjoining land prior to that land later being acquired by adjoining residents (in the 1990s) and fenced off against the Order route. Before this the adjoining land is said to have been allocated to accommodate a Senior Citizens' Club, but was later tarmacked for use by children as a play area. A street lamp located near to point B is said to have been installed for the benefit of that area rather than for the path itself. Patricia McDonald recalls cobbles or sets marking the line of the path between C and H, providing photographs of this feature between C and D. These she said had been tarmacked over at various times from the 1990s. Others though do not recall this feature continuing from D to H. John Nix,

Susan Little, Trevor Bibby and Lesley Thom cut across the area between C and E as it was more convenient than walking around the perimeter (C-D-E).

15. Many of those claiming use were or are residents of St Clements Avenue and it is suggested do not constitute 'the public'. However, having regard to the evidence and noting that not all those claiming use reside there, I am satisfied that the body of evidence is sufficient to represent the public.
16. I conclude that there is evidence of use of the Order route by the public as of right and sufficient to raise a presumption of dedication for the period 1989 to 2009.

The actions of the landowners

17. There is no evidence that any of the three adjoining landowners between A and C owns the Order route, or any part of it. Originally this land is believed to have been held by the developers of the estate in the late 1960s. It is understood that the developer retained a private right of way over the "footpath leading from Bristol Avenue to St Clements Avenue" when they sold the land. From C to H the land is privately owned, and ownership of the section C to A is also claimed.
18. It is stated that attempts were made by the landowners to rope off or chain off the area prior to the obstructions in 2009, but that these were cut by persons unknown. There is nothing in the user evidence to confirm this, despite claimed use being daily by many users, and no evidence that claimed use was by force. Further, it is not clear where along the route, when or how long such obstacles were in place. I conclude that such attempts were not recalled and in any event caused no difficulties to users of the Order route.
19. One of the adjoining residents on St Clements Avenue claims to have put up 'Private Property' notices at the entrance to the path which were removed by persons unknown. But again, it is not clear when or for how long they were in place. In any event, such signs do not indicate there was no public right of way (many public footpaths cross land that is privately owned) and they were not put up by the landowner. Adjacent residents also state that it was never intended that the Order route should become a public right of way, and that it has never been adopted. However, I note that the route was tarmacked and adjoining properties fenced against it. Further, there is no evidence of any signs or other contrary indications in this regard. That it has not been adopted in the past does not prevent the acquisition of public rights over it.
20. I conclude on the available evidence that there is insufficient evidence of a lack of intention to dedicate the Order route as a public footpath on behalf of the landowners during the 20 year period 1989 to 2009. It follows that a public footpath subsists as claimed between points A and H.
21. Had I taken 2003 as the date of bringing into question of the public's right to use the Order route as a footpath, giving a 20 year period of 1983 to 2003, then my conclusions would be the same. The user evidence is the same and there is nothing to suggest that during those 20 years use was not as of right or was interrupted by the landowners with the intention of stopping the public's enjoyment of the way. Further, there is no evidence that during this alternative 20 year period the landowners took any, or sufficient, actions to

indicate that they had no intention to dedicate the Order route as a public footpath. The same is true had I taken 2004 or 2006 as the relevant date.

22. Since I have concluded that the tests under Section 31 of the 1980 Act have been met, it is not necessary for me to consider the evidence at common law.

Modifications

23. In view of the statements made by users of a short cut between C and E (avoiding D) and the claim the route was demarcated on the ground between D and H, LCC suggests that the Order, if confirmed, could be modified by increasing the width to 8 metres between D and E and reducing it to 2 metres between D and H, depending on whether confirmation of the Order rests on common law dedication or by reference to section 31 of the 1980 Act.
24. Four of the users refer to taking a direct line from C to E. However, whilst it may be practical or convenient to do so, there is no evidence that other users did the same. There is conflicting evidence regarding the demarcation of the route on the ground for the section D to H. Further, if the route was demarcated here as claimed, the precise date when it was tarmacked over and no longer visible is not clear, and accordingly may have fallen within or before the 20 year period. Accordingly, I decline to modify the Order as suggested by LCC.

Other matters

25. Concerns are expressed in the objections about security, vandalism and other forms of anti-social behaviour which are considered may resume if the Order were to be confirmed. A suggested compromise is that gates be installed and locked overnight. In addition, it is submitted that confirmation of the Order would be detrimental to the convenience store located on Clifton Parade and its deliveries, and would contravene the terms of its Premises Licence. The existence nearby of an alternative route is also highlighted.
26. I understand the concerns and issues raised and their importance to those affected. However, they are not ones that I can take into account under the legislation in determining whether or not the Order route subsists as a public right of way. Neither is it relevant to my decision that there is another convenient route for the public to use nearby. The possible gating of the Order route is not an issue that falls within my powers under the 1981 Act. Therefore I have not taken these matters into account in reaching my decision.

Human Rights

27. I note submissions regarding the right to the peaceful enjoyment of one's property under the Human Rights Act 1998 (the 1998 Act). Whilst I appreciate this is a matter of concern to those raising the issue, Definitive Map Modification Orders are made under the primary legislation of the 1981 Act. As such, the criteria are strictly limited, and do not allow me to take personal considerations into account. I am unable to interpret the 1981 Act in such a way so as to do so (Section 3 of the 1998 Act). The primary legislation has to be followed. Section 53(3)(c)(i) of the 1981 Act is concerned with whether or not a right of way exists, and if it does, its status. However, should any rights have been interfered with, then it is considered that any such interference is proportionate and necessary in the interests of the wider public.

Conclusions

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

Formal Decision

29. I confirm the Order.

S Doran

Inspector

