
Order Decision

Site visit made on 27 May 2015

by Martin Elliott BSc FIPROW

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

Decision date: 4 August 2015

Order Ref: FPS/M2372/7/9

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Borough of Blackburn with Darwen (FP257 Darwen)(Higher House Farm)(Definitive Map Modification) Order 2013.
- The Order is dated 24 April 2013 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were three objections outstanding when Blackburn with Darwen Borough Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. The Order arises from an application for a definitive map modification order made on 1 September 2009¹. The Council does not support the Order and takes a neutral stance.
2. A public local inquiry was scheduled to commence on 27 May 2015. The applicant for the Order, Mr Helliwell, indicated that he was unable to present a case for the confirmation of the Order at an inquiry. No other party was identified to make a case for the confirmation of the Order. In view of this all of those who completed evidence of use forms, including the applicant, were invited to submit evidence and were asked to indicate whether they intended to be present at the inquiry.
3. Following the expiration of the timescales specified in the 'Notice of Order' no party had submitted a statement of case or proof of evidence. The Council were relying on their statement of grounds. Additionally, none of those who had completed evidence of use forms, or any of the objectors gave any indication that they would be in attendance at any inquiry. In the circumstances the inquiry was cancelled and I have considered the Order by way of written representations. In the absence of an inquiry I have not had the benefit of the evidence being subject to cross examination and the evidence has to be taken at face value.
4. The applicant had indicated that if no one came forward to make a case for confirmation of the Order then he would be prepared to provide a written statement. Following the cancellation of the inquiry the applicant was asked if he wished to make any further written representations. The applicant

¹ The Council made an order in respect of the same route on 12 May 2011 but this was fundamentally flawed and incapable of confirmation.

submitted further representations which were circulated to the parties and this led to additional exchanges of correspondence. I have had regard to the additional representations, where relevant, in reaching my decision. The applicant subsequently withdrew his personal objection to the closure of the Order route.

The Main Issues

5. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
6. The test to be applied to the evidence is on the balance of probabilities.
7. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
8. Should the test for statutory dedication fail under section 31 of the 1980 Act then it may be appropriate to consider the dedication of the way at common law. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. For a dedication at common law the burden of proof rests on those claiming the public right of way.

Reasons

Background information

9. The Order route provides vehicular access to Higher House Farm. The route was constructed in 1975. Higher House Farm was in the ownership of a Mrs E Brown with the land being transferred to her son Mr S Brown together with his wife Mrs B Brown on her death in 2001. The Order route is shown on the Order plan as passing between points A and C, the letters A to C referred to in this decision relate to the points shown on the Order plan. Point A is at Higher House Farm with point C being at the junction of the Order route with footpath 121a which proceeds from Whitehall Road.

Statutory dedication – section 31 Highways Act 1980

When the right to use the way was brought into question

10. In July 2009 the Council received several letters of complaint that the Order route had become obstructed at both ends. The Council advise that in July

2009 a locked gate had been erected at point C with a notice stating 'private road keep out'. Additionally a fence had been erected at the farmyard end of the path with the words 'private keep out' painted onto it. A sign was also positioned next to the barrier indicating the route of footpath 121a. The obstruction of the route appears to be the event which resulted in the application for a definitive map modification order.

11. The obstruction of the route would have brought the right to use the way into question and sets a relevant twenty year period of 1989 to 2009. No other information has been put before me to suggest any other date on which the right to use the way was brought into question.

Evidence of use

12. From my examination of the evidence of use forms (UEFs) there are seventeen individuals who have used the Order route for the full twenty year period. A further fourteen have used the way for part of the twenty year period. Three individuals state that they have used the Order route in the 1980s and 1990s; it is likely that these individuals would have used the way for part of the twenty year period. Use was on a regular basis, often weekly or monthly. Mr Helliwell suggests that use of the Order route commenced almost from the day the track was installed. Many completing the UEFs refer to seeing others on the route including the landowners.
13. The UEFs completed by C and M Almond indicate that they have used the way for 'Over 12 years'. It is not clear from the UEFs as to whether this use would have been during the relevant twenty year period although reference is made to challenges in 2009 and it may therefore be the case that their use was during the twenty year period. However, in the absence of further information it is difficult to attach any weight as to their use during the twenty year period.

Use as of right

14. Use as of right is use without force, secrecy or permission. There is no evidence that use was with force or in secret.
15. The UEF of Mr Horrocks states that he had obtained permission from the late Mrs E Brown in 1985 which in his view continued until her death in 2001. An additional statement from Mr and Mrs Horrocks outlines that after Mrs E Brown passed away Mr Horrocks was stopped by Mr Brown who advised Mr Horrocks that the Order route was not a footpath. When Mr Horrocks advised that he had been given permission to use the way Mr Brown is said to have responded along the lines 'that's ok then'. I note that the additional statement refers to use of the way by Mr and Mrs Horrocks four times a year, together or separately. However, their evidence of use forms indicates twice daily use. It is difficult to reconcile this difference; nevertheless, it is clear that Mr and Mrs Horrocks have used the way during the twenty year period. Given this discrepancy it is difficult to put any significant weight on this evidence as to the frequency of use. In any event the use of the way by Mr Horrocks up to 2001 was with permission. The inference from the conversation with Mr Brown is that the permission continued after the death of Mrs E Brown.
16. The UEF of Ms R Whitsey indicates that she considered the Order route to be a permissive path although there is nothing to indicate how she had reached that view. Ms Whitsey did not obtain permission to use the Order route.

17. Whilst it appears that Mr Horrocks had permission to use the way and his use would not be as of right this does not prevent use by others from being as of right.

Challenges

18. A number of UEFs indicate that use was challenged. The UEFs completed by Miss Lord and Mr and Mrs Simkin state that other people had been challenged but no details as to dates are provided. Mrs Almond was aware that others had been challenged but this was in 2009 when the right to use the way would have been brought into question; this was therefore not during the relevant period. A Mr S Jones refers to his wife being stopped and told not to use the driveway; this would have been early in 2009. Mr Jones also refers to the landowner blocking off the route at point C with his car. Ms C Starbuck was challenged as to her use of the route some three times in the nine months up to August 2009 when she completed the form. She was informed that the way was not a public footpath.
19. Correspondence from Mrs Brown, one of the current landowners, refers to challenges to a group of people, when her husband advised the group that the Order route was not a footpath. Mrs Brown also states that on occasions she would turn people away from the Order route. No dates of these challenges have been provided and it is unclear whether such challenges were during the relevant period. The correspondence is dated 18 September 2009 so it is possible the challenges were after the date when the right to use the way was brought into question. However, it is known from the evidence of use forms that challenges did take place towards the end of the twenty year period. Mrs Brown also recalls the wrath of Mrs E Brown for walking up the Order route. This would have been prior to 2001.
20. Correspondence from Mr A Dewhurst, former tenant of Mrs E Brown until the mid 1980s, suggests that throughout his tenancy there was a locked gate at the top of the private road going into the farmyard. It is contended that, at this time, use of the Order route would not have been possible. This contradicts the evidence of use which suggests use of the way from the time when the driveway was constructed. After Mr Dewhurst's tenancy expired the gate fell into disrepair and it was then that Mrs Brown challenged people as to the use of the Order route on a daily basis until her death in 2001. Mr Dewhurst states that he challenged several people about using the Order route and in 2008 spoke to a group of hikers. Although Mr Dewhurst says that he challenged people on the Order route it is unclear, apart from those in 2008, as to when the challenges took place.
21. Evidence from Mr Warren, also a previous tenant of Mrs E Brown, is that Mrs E Brown was a sharp lady who was always vigilant to anyone passing by. Mr Warren states that she would not have allowed anyone to pass through a white painted gate which led into the yard. This is the gate referred to by Mr Dewhurst and shown in a photograph taken in June 1977; it cannot be ascertained from the photograph as to whether the gate was locked as asserted by Mr Dewhurst. Mr Warren says that the driveway from the Whitehall end of the path was always signed as private and the footpaths clearly marked.
22. In contrast Mr Helliwell said that he never heard Mrs E Brown shout at anyone who used the track and he recounts an incident when assisting Mrs Brown with

her shopping and meeting some people out walking. On that occasion Mrs Brown did not question their presence and pleasantries were exchanged. Although Mr Helliwell refers to pleasantries being exchanged, in the absence of an opportunity to test this evidence, the exact circumstances cannot be ascertained. It may be the case that Mrs E Brown chose to challenge some using the route and not others.

23. Mr Helliwell adds that, following the death of Mrs E Brown, Mr S Brown, who regularly appeared outside the property, did not turn people back. However, submissions from Mrs Brown indicate that between 2003 and 2009 Mr S Brown was not at the property, except for pottering about at times in 2008 although not personally carrying out any renovation work. Nevertheless Mrs Brown asserts that he would have spoken to anyone using the Order route. I have no direct evidence from Mr S Brown and it is therefore difficult to give this assertion much weight. However, it would appear that Mr S Brown was not regularly at the property between 2003 and 2009 and would not be in the position to challenge use. Between 2001 and 2012 Higher House was unoccupied during renovation work.
24. Mr Helliwell refers to a written submission on file from a former tenant and friend of the landowner which says that 'Mrs Brown was a forthright character and would have shouted at anyone usurping her Rights and she would have stopped them from using the "track"'. Mr Helliwell asserts that such evidence is hearsay and not admissible as evidence. I have not been provided with a copy of the submissions and as a consequence I have given the written submission no weight.

Notices

25. A number of UEFs refer to the presence of notices on the route including those which were erected in 2009 which brought the right to use the way into question. Mr R Helliwell refers to the erection of a homemade sign some '8 years ago' at point C on the Order map. Given that the UEF was completed in 2009 this would have been in 2001. The sign was said to read 'Private LAND, Keep Out' but the lettering on the sign became eroded and the sign became obscured by vegetation. Mr Helliwell understood the notice to relate to the land behind the sign. Other evidence of use forms refer to a notice stating 'Private land keep out' which was said to have been altered in around July 2009 to read 'Private road keep out'. It was also understood that the notice related to adjacent land. Although some of the UEFs recognise the existence of a notice at point C there are others which make no reference.
26. The statement of Mr and Mrs Horrocks states that Mr Horrocks remembered a sign saying 'Private Woods' at the end of the access road but that this referred to the fields and not the track. However, Mrs Horrocks recalls a notice in the same location which said 'Private Keep Out'. The statement suggests that the notice did not exist until after the death of Mrs Brown in 2001.
27. Correspondence from Mrs Brown notes that Mr Dewhurst erected a sign saying 'Private Land Keep Out' although Mrs Brown said that the sign actually read 'Private road keep out'. However, Mr Dewhurst states in his letter that the sign at the Whitehall end of the path said 'Private land keep out'. Although Mrs Brown considers that the wording of the sign was different, the recollections of Mr Dewhurst are consistent with the notices referred to in the UEFs. Given the difference in opinion as to the wording of the sign I do not accept the assertion

of Mr Helliwell that the facts stated by the Dewhurst family arise from suggestions from the Brown family. It is stated by Mrs Brown that Mr Dewhurst put the original notice up for Mrs E Brown at the time the access road was constructed in 1975 and that the notice was replaced when necessary.

Conclusions on statutory dedication

28. Having regard to all of the above, it is clear that the public have used the way during the twenty year period. Although the Order route was not constructed until 1975 the evidence from Mr Dewhurst is that use would not have been possible in the 1980s due to the presence of a locked gate at point A. However, this fell into disrepair after the expiration of Mr Dewhurst's tenancy and none of those completing user evidence forms make reference to any barrier at this location until 2009. There is evidence of use from 1976 which suggests that access was available and on the balance of probabilities it is likely that use of the Order route commenced in 1976. There is nothing to suggest that use during the relevant twenty year period was prevented by a locked gate at point A. It is of note that Mr Horrocks obtained permission to use the route in 1985 and it is therefore more likely than not that the gate did not prevent access from this time.
29. Notwithstanding the above, some of the UEFs refer to challenges being made in the last nine months of the twenty year period. In addition to those challenges, the evidence from the landowner and tenants is that up until 2001 the owner Mrs E Brown would challenge use of the Order route. Whilst none of those who have completed UEFs were challenged by Mrs E Brown, there is nothing to suggest that Mrs E Brown did not challenge others. Other challenges are said to have been made but no dates have been provided as to when these took place. However, although Mr Horrocks had permission to use the route he was challenged by Mr Brown after 2001. This is consistent with the evidence that challenges were made to those using the route.
30. In addition to challenges, notices advising 'private land keep out' were present at the Whitehall end of the Order route. I note the view of some that the notice was referring to adjacent land. However, a notice worded in such a way at the end of the Order route is just as likely to relate to the roadway as to the adjacent land. There is no evidence that the notice was intended to relate to the adjacent land and, although those using the way do not recall a notice at this location until 2001, the notice was said to have been erected in 1975 on the construction of the track. This would suggest that the notices were referring to the track rather than the adjacent land but this evidence cannot be tested. However, the notices are consistent with the fact that challenges were made to the use of the way.
31. Bearing in mind the above, whilst there is evidence of use by the public as of right, the landowner took action to demonstrate a lack of intention to dedicate the way. As such the statutory dedication fails.

Dedication at common law

32. In view of my findings as to the statutory dedication of the way it is appropriate to consider whether there has been a dedication at common law. However, bearing in mind the evidence I have considered above in respect of a statutory dedication it cannot be inferred that the landowner intended to

dedicate the way as a public footpath. There is no evidence of any express dedication.

Other Matters

33. The objection from Mr and Mrs Brown refers to issues with a neighbouring landowner, the abundance of wildlife and issues as to health and safety. Other objections make reference to security and privacy and the existence of two other footpaths in the area.
34. Mr Helliwell raises concerns as to delays by the Council in dealing with the application and other actions by the Council. Reference is also made to an alternative arrangement in respect of public access at Higher House Farm.
35. Whilst I note these issues and concerns they are not matters which I can take into account in determining the Order. I am required to consider the evidence measured against the criteria set out at paragraphs 5 to 8 above.

Conclusion

36. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

37. The Order is not confirmed.

Martin Elliott

Inspector