

Order Decision

Site visit made on 31 May 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 7 July 2016

Order Ref: FPS/Q2500/7/78

- 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 (amendment of Lindsey County Council (Rural Districts of Louth and Horncastle) Definitive Map and Statement – Evidential Events (No. 1) Modification Order 2008.
- The Order is dated 12 December 2008 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 4 objections outstanding when Lincolnshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the site on Tuesday 31 May 2016.
2. The order was made in response to an application made in April 1986 by South Willingham Parish Council for the addition of a footpath running from Grange Farm Low Barns to Skirbeck House. The application does not appear to have been accompanied by a plan showing the claimed route and although the application was not compliant with the requirements of Schedule 14 to the 1981 Act, the Council had processed the application in the normal way.
3. The Council made the Order on the basis that a reasonable allegation of the existence of the claimed footpath could be made. However, as the Council acknowledges, the test to be applied to the evidence for the Order to be confirmed is the civil standard of proof; that is, on a balance of probabilities. The Council has conducted a review of the evidence submitted in support of the application and now considers the evidence to be unreliable and no longer supports the confirmation of the Order. South Willingham Parish Council also no longer supports the confirmation of the Order.

The Main Issues

4. The main issue in this case is the requirements of section 53 (3) (c) (i) of the 1981 Act namely, whether the evidence discovered, when considered with all other relevant evidence available, shows on the balance of probabilities that a right of way not shown in the map and statement subsists over the land in question.
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5. In a case where there is evidence of claimed use of a way by the public over a prolonged period of time, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
6. If the statutory tests set out in section 31 of the 1980 Act are not satisfied I am required to consider whether dedication of the claimed route has taken place at common law.

Reasons

The date on which the right of the public to use the way was brought into question

7. It is not known what prompted South Willingham Parish Council to make its application on 30 April 1986. In the absence of any specific event such as the obstruction of the claimed path or the erection of a prohibitive notice, section 31 (7A) and (7B) of the 1980 Act provides that the date of the application to add the path to the definitive map can be taken as the date public use was called into question for the purposes of section 31 (2).
8. Accordingly, the relevant 20-year period in this case is 1 May 1966 to 30 April 1986.

Whether the claimed right of way was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question

9. Fourteen user evidence forms were submitted in support of the application. These UEFs carry two signatures; one from the witness whose evidence is set out in the form with the second signature being that of the person who took their statement. The UEFs were completed between March 1985 and November 1985 and provide evidence of use prior to the date when each form was completed. Taking November 1985 as the latest use evidenced by the forms, the evidence of use can at best demonstrate use up to a date which is six months prior to the date of bringing into question identified in paragraph 8 above.
10. None of those individuals who completed a UEF could demonstrate continuous individual use extending back into the mid-1960s. Even if the claimed use is aggregated to show that there had been continuous collective use, the claimed use as set out in the UEFs would still be six months short of the full period of 20 years prior to 1 May 1986. In addition, it is clear from a reading of some of the forms that the respondents had not walked the whole of the route. Three of the respondents indicate that they have only walked as far as Skirbeck House, which suggests that they had not travelled over that part of the route from Skirbeck House to Panton Road.
11. In 2009, the Council managed to interview two of the original fourteen individuals who had completed a UEF. Although use was said to have continued until 2007, these witnesses confirmed that they had rarely travelled to Skirbeck

- House, had not walked as far as Panton Road and had primarily used that part of the path between Barkwith Road and Carman Gorse Wood.
12. The Council acknowledges that the clarification of the UEF evidence obtained through interview does not demonstrate use of the whole of the route by those respondents who had continued walking at least part of the route until 2007. The Council submits that it has not assumed that use by those respondents who it was not possible to interview would have continued their use until 1 May 1986, but had analysed the evidence of use for the 20-year period prior to the UEFs being completed. Aggregating the claimed use over this period would show that there had been continuous use during the 20-year period 1965 to 1985.
 13. I do not consider that this is the correct way of implementing the test set out in the 1980 Act. The test under s31 of the 1980 Act is not to consider whether there has been use of the required quality during *any* 20-year period, but whether there has been use of the required quality during the 20-year period immediately prior to such use being brought into question. I have discounted the interview evidence obtained in 2009 as it is clear that the respondents who had used the path up to 1986 had made much greater use of the section of path between Barkwith Road and Carman Gorse Wood; one interviewee had difficulty recalling the route south of Carman Gorse and the other had only walked through to Panton Road on one occasion. To my mind, the interview statements do not provide evidence of use of the whole of the route during the relevant 20-year period.
 14. As the evidence of use found in the UEFs only runs to November 1985, it does not provide evidence of use during the six months prior to that use being called into question on 30 April 1986. On any view of the user evidence, at best it can only demonstrate use during the 19.5 years prior to the date of bringing into question, and use which is deficient by six months is insufficient to satisfy the requirements of section 31 of the 1980 Act. On this ground alone, the evidence is insufficient to raise a presumption of the dedication of a public right of way.
 15. There are however other aspects of the user evidence which give me cause for concern regarding the reliability of the evidence which was submitted. The UEFs state that the evidence relates to a path running from Grange Farm Low Barns to Skirbeck House, but none of the UEFs were accompanied by a map which showed the alignment of the route that is said to have been walked.
 16. In the absence of an application map and in the absence of maps accompanying the UEFs, it is by no means certain that the evidence of use set out in the UEFs relates to the route shown in the Order and not to a path on a different alignment. Consequently, in addition to the absence of evidence of use for the full 20-year period prior to 30 April 1986, I cannot be certain that the user evidence put forward in support of the application actually relates to the route identified in the Order.
 17. Furthermore, in five of the user evidence forms, the description of the terminal points of the route appear to have been written in a different hand to that which answered the questions on the form. Whilst it may be possible that the terminal points of the route may have been completed by someone in the parish council prior to the forms being handed to witnesses to complete, equally it may be the case that the terminal points were inserted after the form had been completed. If that had been the case, the credibility of the evidence

contained in those UEFs would be undermined; it cannot be determined with any degree of certainty that the evidence found in these five forms relates to the route applied for or the route shown in the modification order.

18. In summary and for the reasons set out above, I conclude that the evidence of use adduced is insufficient to raise a presumption of dedication under section 31 of the 1980 Act.

Common law

19. There is no fixed period of use required for dedication at common law to be inferred but it is generally accepted that the shorter the period, the more intense the use must be. In addition, the use must be of a frequency that the landowner must have been aware of the use and had the opportunity to do something about it if he or she were so inclined. If use was of a frequency to make the landowner aware that a public right was being asserted and the landowner tolerated that use and did nothing to prevent it, it may be inferred that the landowner accepted that the public had a right to use the path as a public right of way.
20. Many of those who completed a UEF only provided vague answers with regard to the frequency of their use. The claimed frequency ranged from once per week to less than once per month. One witness claimed use about 20 times per year, a second claimed use around once per month; three claimed use "several times per year"; once claimed use 6 times per year. Other respondents describe using the path "lots" of times, "dozens" of times or "numerous" times without clarifying what was meant by those terms.
21. An analysis of the claimed use shows that the period with the highest number of users is between 1984 and 1985 when six individuals claimed to have used the path. However, during this period there were two couples amongst these six people. I concur with the Council that it is likely that these couples would have walked the path together at least some of the time, which would have reduced the number of occasions which the landowner may have observed these six people using the path. One of the couples claimed use of the path on a weekly or fortnightly basis, whereas the other couple used the path less than once per month.
22. During the period 1966 to 1975 only four individuals claim to have walked the path, that number drops to 3 in 1976 and between 1977 and 1983 five individuals claim to have used the path. Although the claimed path is in a rural location, I consider that the limited extent of use is unlikely to have come to the attention of the landowner, particularly when many of the claimed users did not walk as far as Skirbeck House. The limited extent of use provides support to the objector's contention that there has been little or no use of the access track to and through the farm, other than use by those who had been given permission to cross the land.
23. It is not unusual for a landowner to deny knowledge of use of a path as a defence against a claim for a right of way. Where such a claim is made, it has to be viewed in the light of the user evidence and a determination made as to whether the extent of use would have led a reasonable on the spot landowner to realise that the public were using his land in such a manner as to assert that a right to do so existed. In those cases where the user evidence is of a daily or weekly frequency and is in the physical numbers commensurate with the

location of the path in relation to its proximity to a town or village, the likelihood of a reasonable owner being unaware of such use is less than where use is sporadic, infrequent and limited in number or where the path is in a remote location.

24. Where use is frequent and in large numbers the lack of action on the part of the landowner is more likely to be ascribed to acquiescence in the use of the path as opposed to ignorance of that use. However, in the current case, the limited extent and frequency of the use of the claimed path is such that it is highly likely that the owner was unaware of the claimed use; some of the users did not walk as far as Skirbeck House and those who did, did so infrequently that the landowner was unlikely to be aware of their use. If the landowner had been aware of that use, the infrequent and sporadic nature of it is more likely than not to have been viewed as occasional trespass as opposed to members of the public asserting a right to cross the land.
25. There is no evidence of the landowner having taken any action to prevent use of the claimed path by the public or of any attempt having been made to dissuade the public from doing so. In the circumstances of this case, it would not be possible to reasonably ascribe the inaction of the landowner to toleration or acquiescence of the claimed use as he is unlikely to have been aware of it.
26. I conclude that the frequency and extent of use in this case is insufficient for an inference of dedication to be drawn at common law.

Conclusions

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

Formal Decision

The Order is not confirmed.

Alan Beckett

Inspector

