The Planning Inspectorate

Order Decision

Inquiry held on 8 September 2015

Site visit made on 7 September 2015

by Susan Doran BA Hons MIPROW

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

Decision date: 9 October 2015

Order Ref: FPS/U1050/7/88

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Derbyshire County Council (Footpath from Lea Road to Footpath No 38 – Parish of Dethick, Lea and Holloway) Modification Order 2012.
- The Order is dated 17 May 2012 and proposes to modify the Definitive Map and Statement for the area by adding a Footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns the addition of a footpath at Lea Bridge along a track from Lea Road to join Footpath 38 at Lea Wood. The Objector to the Order is Mr Bowmer, whose land is affected by some 25 metres or so of the Order route, marked between stone gate posts on the Order plan south-west of point B. Mr Bowmer is prepared to accept a public footpath, but not a route open to use by cyclists or horse riders. Nevertheless, he has not withdrawn his objection to the Order which challenges the user evidence adduced by Derbyshire County Council ('the Council').

2. In addition, from a safety and security point of view, Mr Bowmer requests that where it crosses his land the Order route be located and fenced off in parallel with the present westerly boundary fence of his property, enabling him to retain his security gate. Whilst I note Mr Bowmer's preference, and an offer to so fence the footpath at his own expense, my decision as to the existence or otherwise of the claimed footpath, its position and width, must be based on the evidence, which I consider below.

3. I visited the site on the afternoon of 7 September, unaccompanied, when I was able to walk or view sections of the Order route.

4. There are two routes leaving Lea Road which together meet point B on the plan attached to the Order and continue as one; the western limb being the Order route between Lea Road (point A) and point B. At the Inquiry, the Council invited me to consider a modification to the Order so as to add the 'eastern limb' based on the evidence it had discovered in preparing its witness statements. Again, I shall consider this below.

5. Mr Bowmer did not appear at the Inquiry.

The Main Issues

6. 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 the balance of probabilities, that a footpath which is not shown in the Definitive Map and Statement ('DMS') subsists, and that the Map and Statement should be modified.

7. There is some documentary evidence to consider, but the main evidence relied on by the Council is claimed use by the public and a presumption of dedication arising under Section 31 of the Highways Act 1980 ('the 1980 Act').

Reasons

Documentary evidence

8. The Council researched a range of documents, of which copies of the Ordnance Survey maps for 1880 (First edition) and 1899 (Second Edition) were provided. Both clearly show a wide and unobstructed track corresponding with the Order route, passing the 'Lodge' (now known as Lea Hurst Lodge, at point B on the Order plan). However, these provide no evidence as to its status, only its physical features.

9. A draft Agreement and Plan of 1836 formalising the construction of a road along the line of the Order route in 1819 are referred to by the Council. It was named 'Coal Road', a 'Private Road', to be closed every Good Friday. It was also known as 'Slack Road', as described in a book of childhood reminiscences of Lea Wood and Lea Bridge.

10. I conclude the documentary evidence points to the Order route being a private road, at least in the 19th century. To establish whether or not public rights have since been acquired over it, I must turn to the evidence of claimed use.

User evidence: Presumed dedication under Section 31 of the Highways Act 1980

11. Section 31 of the 1980 Act requires the date to be established when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner(s) to dedicate public footpath rights.

When the claimed route was brought into question

12. Mr Bowmer noticed an increase in use of the Order route on foot, horseback, bicycle and with vehicles from 2006, and put up notices indicating the land was private. In addition he installed an electric gate between stone gate posts. The installation of security measures took place in April 2008. The evidence of users was that the stone gate posts were erected first, followed by two gates, at around the same time, in early 2008. The southern of the two gates was not locked and was mostly encountered open. However, the electric gate formed an obstruction to use. Prohibitory signs were installed around the same time, and users were verbally challenged around this period.

13. An alternative date of August 2007 was also considered by the Council. This is when a witness who was with her daughter on horseback was verbally challenged by Mr Bowmer. However, Mr Bowmer considered the date of bringing into question to be 1997 when Lea Wood was sold to the Leawood Trust and a gate on the southern boundary of his property was originally installed. This gate was not recalled by witnesses, other than by Mrs Smith who did not recall it closed or forming an impediment to use.

14. A 'bringing into question' arises by means such that at least some of the users are made aware that their right to use the way as a highway has been challenged, so that they have a reasonable opportunity to meet that challenge. I find nothing in the evidence to support the installation of a gate in 1997 as such an event. There is nothing to suggest that any gate that may have existed then was locked and formed an obstruction to use. The challenge in 2007 appears to have been an isolated incident concerning horse riding, and does not appear to have been communicated to the public at large. However, the events in 2008, I conclude, brought the public's right to use the Order route into question as public access was denied, leading to complaints to the Council about the obstruction.

15. It follows in my view that early 2008 is the appropriate date, giving a 20 year period of 1988 to 2008.

Use by the public

16. Some 119 user evidence forms were submitted in support of the claim, with claimed use extending back as far as the 1930s. The majority claimed use on foot, with 15 on a bicycle, and one on a horse. Twelve forms referred to seeing horse riders and 48 forms to seeing cyclists. Use by vehicles was referred to in 27 forms. However, some 10 forms were only partially completed and in some cases unsigned and these are discounted in my overall assessment of the evidence.

17. As regards those witnesses who gave evidence of use, most described using it as part of a longer walk, usually a circular walk, in conjunction with other public rights of way and routes in the area. These included Mrs Stevenson who used it most days, and Mrs Dickinson whose use began in 1969 or 1970 as part of a weekly dog walking circuit. Mrs Lambeth also walked her dog along the route from 1980, having only used it occasionally in the 1970s. Mr Lambeth used it at least weekly, sometimes daily. Similarly, Mrs Smith took her dog for a walk there daily or twice a week from 1980. Mr Godfrey's use of the Order route began in 1989, and from 1998 he used it weekly. Mr Morrisey had used it twice since 1979. Mr Blackburn spoke of using it for over 30yrs, with varying frequency, more recently about monthly, including with groups. All used the Order route until it became obstructed in 2008.

18. The user evidence forms provide a similar picture of use of the Order route as part of a longer walk in the area, to access Lea Wood and the Canal, for recreational use. Some users walked alone, whilst others described family walks or using it as part of a group, and for one claimant it was part of his running route. Almost all the forms indicated use over many years, well in excess of the 20 year period under consideration, with frequency varying from weekly, monthly or less often, to daily. Many referred to seeing or meeting other users. None describe any interruptions to use prior to 2008.

19. Conversely, prior to 2006, Mr Bowmer says there was no significant access by members of the public. He also casts doubt on the evidence forms, believing that some refer to different footpaths and access points, including other paths through Lea Wood, and some refer to features on other routes. Whilst that may be so, the user evidence as a whole is, in my view, consistent with the Order route forming part of a longer route used by claimants. However, Mr Bowmer suggests that use by some claimants as members of the Leawood Trust, other local organisations and public bodies, would have been permissive.

Whether use was permissive

20. Until 1997 when it was sold to the Leawood Trust[1], Lea Wood was owned by Mr Bowmer's family. At that time, an agreement was drawn up to grant the Leawood Trust, and persons lawfully authorised by them, a right of vehicular and pedestrian access over the Bowmer's land (forming part of the Order route) which was necessary for the maintenance of the woodland and removal of timber. A 'Brief History of the Leawood Trust…' also refers to the Trust having inherited a "clearly stated right of way from Lea Road through to Aqueduct Cottage", but also sought an "express right of way detailing their pedestrian and vehicle access rights". Mr Foster, a Trustee, suggested the agreement was to allow express access to Lea Wood, and that the Trust had given everyone permission through the Parish Council and media. Mr Wolsey also believed the agreement referred to the public. However, correspondence on behalf of Mr Bowmer indicates it was never intended that in allowing the Leawood Trust to have access that this would lead to members of the public being able to walk over his land.

21. The relevant document has not been provided. However, it seems to me from the submissions that it refers to private rights of access to the woodland rather than to public rights. Indeed, in his objection, Mr Bowmer states there is no reference to a public right of way.

22. It is possible that some of those completing evidence forms enjoyed a private right of access over the Order route to Lea Wood. Yet this it seems would apply to only 4 of those completing forms. Mr Foster as a Trustee may therefore have enjoyed permissive rights of access. As regards others using the Order route as a member of a group, there is nothing to suggest that permission had been sought or granted. Neither is there anything to suggest that use by the remaining claimants was permissive.

The actions of the landowners

23. Mr Bowmer provided a photograph of the Lodge, attached to 1953 Sales particulars, showing a gate. However, I am satisfied from an examination of the photograph together with mapping and the evidence of users that this is not on the Order route but on the track to the east, shown on the Order plan running alongside the Lodge. Accordingly the notice also shown on the photograph, the wording of which is not visible, is not on the Order route. The extract from the sales particulars refers only to the Lodge, not to any right of way, public or private. Sales particulars for 1996 refer to a right of way to the beginning of Lea Wood and an un-adopted drive to Wharfe Cottage, but provide no indication of whether any rights were public. Such documents were though more likely to be concerned with private rights.

[1] The land is now owned by the Derbyshire Wildlife Trust

24. A letter dated 1971 refers to barbed wire blocking access, although it is not clear where this was, nor whether, if on the Order route, it prevented public passage on foot. None of the user evidence refers to such an obstruction.

25. When Lea Wood was transferred to the Leawood Trust, Mr Bowmer says a new lockable gate was installed at the southern boundary of his property. A photograph of this is provided. As mentioned above, most witnesses did not recall a gate here until shortly before or at about the same time as the powered security gate at the northern end of the property boundary. Indeed, the photograph shows both gates. A witness who did recall a gate, found it open and not locked. A sign located on the east side of the gate, reads 'Private Property'. If it was in place during the 20 year period, and none of the witnesses recalled it, I would not regard this as an effective lack of intention to dedicate the Order route. Many public footpaths cross private land, and the notice in question does not state that there is no public right of way.

26. The 1997 deed of grant (paragraph 20) has not been produced and, in any event, does not appear to have been a document brought to the attention of the public.

27. In 1999, the Leawood Trust dedicated the Order route between Footpath 38 and the northern boundary of Lea Wood, as a public right of way on foot. A notice concerning the dedication, displayed locally and circulated to the Parish, District and County Councils, made clear that the footpath was a 'no-through way' as the land beyond the Wood's boundary was in private ownership. It seems to me more likely than not that this is what Mr Foster was referring to as regards 'giving everyone permission' (paragraph 20). However, I consider the 1999 act on behalf of the Trust to be clear evidence of an intention to dedicate the section of the Order route between Mr Bowmer's ownership and point C.

28. I conclude the evidence on behalf of the landowners does not indicate there was no intention to dedicate the Order route during the 20 year period. Indeed, the evidence shows that one landowner dedicated part of the Order route in the late 1990s, although this was not formalised with the Council.

Conclusions on presumed dedication

29. There is a large volume of user evidence in this case and I am satisfied that use of the Order route during the 20 year period 1998 to 2008 was regular, frequent and uninterrupted until the electric gate was installed. I find the evidence of use cogent, that it was as of right, that is, without force, secrecy or permission, notwithstanding that a small number of claimants may have used it with the permission of the Trust. Accordingly I conclude that a presumption of dedication has been made out. There is a lack of evidence, however, to rebut this presumption in that the actions of the landowners do not demonstrate they had no intention to dedicate a public right of way on foot.

30. However, if I am wrong and 1997 is the date of bringing into question as Mr Bowmer contends, giving a 20 year period of 1977 to 1997, then I agree with the Council that there is sufficient user as of right and without interruption (some 68 claimants for the whole period and 29 claiming use for part of it) to raise a presumption of dedication, and no evidence on the part of the landowner(s) to rebut that presumption.

Position and width

31. Witnesses described the Order route as wide enough for vehicles (at least car width or sufficient for a refuse lorry) with grassy edges. Estimated widths in the user evidence forms varied, with 2-4 metres generally suggested for the track. One witness described using it with walking groups, walking 3 or 4 abreast; and others to using its full width. Some described it as having the appearance of a 'road' with no impediments or restrictions to use; although reference was made to boundary changes on the eastern side of the Order route which may have reduced the overall width slightly. The Council confirmed that the widths given in the Order are taken from actual measurements on the ground and are consistent with the user evidence.

32. There is nothing to suggest to me that public use of the Order route at any time has been confined to a particular part of the available width that would permit a modification as sought by Mr Bowmer (paragraph 2). Accordingly, on the basis of the evidence I decline to modify the Order as suggested.

Higher rights

33. The Council in determining the application considered evidence of use by the public on horseback and with bicycles, which could give rise to a Bridleway or Restricted Byway respectively. Several of the evidence forms refer to such use (paragraph 16) and I heard from witnesses at the Inquiry that they had seen the occasional equestrian and cyclist over the years. There is also reference to vehicular use, although from the available evidence this appears to be private use in connection with accessing Wharf Cottage to the south. The current owners of that property state their deeds afford access by foot and vehicle without let or hindrance.

34. I conclude that there has been some use of the Order route by the public on horseback and with pedal cycles. However, I find that the evidence before me is insufficient in volume and frequency to lead to the conclusion that higher rights subsist over the Order route. In addition, as the Council pointed out, there have been signs in Lea Wood (erected by the Leawood Trust) since 1999 prohibiting use other than on foot on their land.

The 'eastern limb'

35. It is evident that a number of witnesses have used the eastern limb, in some cases as frequently as their use of the Order route between points A-B, and for most depending on where they were travelling to and from. For example, Mrs Stevenson favoured it as it was the most direct route for her to use, as did Mrs Smith. Mrs Dickinson used it as often as she did the Order route, likewise Mr Foster. Mrs Lambeth used it one in four times, whilst her husband found it more convenient.

36. Nevertheless, even if I were to conclude that there is sufficient evidence to support the existence of a public right of way on foot over the eastern limb, it would not be possible for me to modify the Order. Although almost all the route is shown on the Order plan, the northernmost section extends beyond the area of land shown. Accordingly it is not possible to show the full extent of any such modification on the Order plan, and its details therefore could not be accurately transferred to the DMS. It follows that I decline to modify the Order to add the eastern limb as suggested by the Council.

Other matters

37. The existence of nearby footpaths providing access to Lea Wood is not a relevant consideration in my determination as to whether or not a public right of way subsists over the Order route.

Conclusions

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

Formal Decision

39. I confirm the Order.

S Doran

Inspector

APPEARANCES

For the Order Making Authority:

Lisa Edwards	Solicitor, Derbyshire County Council
who called	
Linda Phillips	Legal Assistant, Rights of Way
David Blackburn	
Jacqueline Dickinson	
Harry Foster	
Nigel Godfrey	
Audrey Lambeth	
James Lambeth	
Alison Smith	
Joy Stevenson	
David Wolsey	

Others who spoke in support of the Order:

John Morrissey

DOCUMENTS

1. User evidence spreadsheet, submitted by Derbyshire County Council
2. Location plan at 1:1250 scale showing the Order route and 'eastern limb', submitted by Derbyshire County Council
3. Signed witness statements of David Blackburn, Jacqueline Dickinson, Nigel Godfrey, Audrey Lambeth, James Lambeth, Alison Smith, Joy Stevenson, David Wolsey, Jean Baguley, Robert Baguley, Dennis Brook, Jonathan Edwards, Cathryn Frost, David Frost, Peter Robinson, Lawrence Ward and Patricia Ward, submitted by Derbyshire County Council
4. Closing submissions on behalf of Derbyshire County Council