
Order Decision

Inquiry held on 27 September 2016

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 10 October 2016

Order Ref: FPS/X2600/7/114

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Norfolk County Council (Wickmere) Modification Order 2015.
- The Order is dated 18 November 2015 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway running between Lower Street and Footpath 6, Wickmere, as shown on the Order Map and described in the Order Schedule.
- There were 2 objections outstanding at the commencement of the inquiry.

Summary of Decision: I propose to confirm the Order subject to modifications that require advertising.

Procedural Matters

1. I held a public inquiry into this Order on Tuesday 27 September 2015 at Wickmere Village Hall. I made an unaccompanied site inspection on Monday 26 September when I was able to walk the whole of the Order route. 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 to which I have added an additional point (Point Z).
3. The Order Making Authority (OMA), Norfolk County Council chose to adopt a neutral stance at the inquiry. Wickmere Parish Council representatives took the lead in supporting the confirmation of the Order.

The Main Issues

4. 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.
5. Some 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 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

6. 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.
7. As this Order is concerned with a possible unrecorded vehicular route, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which extinguished rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

Reasons

8. An application was made in March 2014 by Wickmere Parish Council for a footpath running between Footpath 7 at St Andrews Church (Point Z on the attached map) and Footpath 6 (Point C) to be added to the definitive map. After investigating the claim, the OMA felt that documentary evidence indicated that it was reasonable to allege that the whole Order route (Points A-C) should be recorded as a Restricted Byway and accordingly the current Order was made.
9. Both documentary and user evidence was adduced in this case. I deal with the different types of evidence separately.

Documentary Evidence

Early maps and documents

10. Faden's map of 1797 appears to show a route similar to the Order route as part of a through route. However, Bryant's map of 1826 shows only the westernmost end of the route.
11. The inclosure map of 1823 shows the land crossed by the route included within land owned by the Earl of Orford as does the tithe map of 1840. The tithe apportionment describes it as 'Plantation'.
12. The Ordnance Survey 1st edition map (probably surveyed 1879-86) shows the route in its present form leading to the Rectory as does the 2nd edition map of 1905. Both these maps also show what is now Footpath 7 terminating at the boundary of the route.
13. These documents therefore show that the Order route has existed in its present form since at least the 1880s. This is logical as it is understood that the Rectory was built in the 1850s and it is likely that the driveway to it was provided at the same time. However, these documents do not indicate any public rights over the route.

Finance Act 1910

14. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be

made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.

15. In this case, the Order route is shown uncoloured on the survey map and excluded from adjacent land holdings and thus not liable for taxation. This is the way in which public roads were shown and it was suggested on behalf of the OMA that this was indicative of the existence of public vehicular rights over the route. However, that is not the only possible explanation for the exclusion of the route.
16. The land crossed by the Order route was owned by the church and constituted part of the glebe. The church's terrier of its property prepared in 1894 states "*There is a private road to the Rectory, the property of the living between land on the North and South belonging to the Earl of Orford and going from the Rectory gate to the Queen's Highway past the Church*". Similar statements are included in the terriers prepared in 1933 and 1941. These references clearly relate to the Order route and explain why the route was not included within adjoining hereditaments in the Finance Act Survey. They also in my view suggest that the exclusion of the route from taxation might not have been on account of the existence of public vehicular rights over it.

Other documents

17. When the church sold the Rectory along with its driveway in 1957 the conveyance made provision for the church to retain the right to use the driveway for all purposes connected to use of the remainder of the glebe land. Objectors argued that this would have been unnecessary if the route had been subject to public rights. Supporters of the Order argued that this simply reflected the fact that public rights had not been recorded at that time.
18. In the National Farm Survey of 1941-42 the Order route is uncoloured. However, this only confirms that the route was not owned as part of farms on either side. As mentioned above the route was then still in the ownership of the church.
19. The definitive map does not include the Order route but shows Footpath 7 terminating at a point where there is a gate giving access to the Order route. Supporters of the Order argued that this suggested that it must have been considered that there were public rights over the Order route.

Conclusions regarding Documentary Evidence

20. The documentary evidence that is available indicates that the Order route has existed on its current alignment since the latter part of the 19th century at least. However, it is my view that, on the balance of probabilities, it does not indicate the existence of public rights of any sort over the route although it is not inconsistent with the possibility that such rights might subsist.

Statutory Dedication

Evidence of users

21. The Rectory and the land crossed by the Order route changed hands in 2008 and although the new owners, Mr and Mrs Buchan, did not live at the property until 2012 they visited it regularly and began challenging users of the route

and advising them that it was not a public right of way. In late 2008 or early 2009 they also erected signs close to Points B and C stating that the route was not a public right of way. At the inquiry Mr Buchan stated that signs had not been placed close to Point A which might have been considered more logical, that being the point where the claimed route joins the public road, because he was aware that the first section of the drive was sometimes used for parking in connection with events at the church such as funerals and he had no wish to prevent that use continuing even though he did not accept that there were any public rights over any part of the route. In any event, it is my view that the actions of Mr and Mrs Buchan in 2008 were sufficient to bring public use of the whole of the Order route into question. The 20 year period of use which would raise a presumption that the route had been dedicated as a public right of way in accordance with the provisions of the 1980 Act therefore runs from 1988 to 2008 in this case.

22. Twelve User Evidence Forms (UEFs) were submitted in support of the application for a footpath running along that part of the Order route between Footpath 7 and Footpath 6 (Points Z-C) that was made by the parish council. Nine people who had completed UEFs appeared at the inquiry and stated that in fact they and others had used the whole of the current Order route. On behalf of the parish council it was explained that the section between Points A and Z had not been claimed because there were no signs on this section to indicate that it was not a public right of way. At the inquiry most users stated that they used the section of the Order route between Points A and Z or Footpath 7 on a roughly equal basis although a few said they used the Order route more frequently.
23. The UEFs describe use of the Order route from 1960 to 2014. Nine people claimed to have used the route throughout the relevant 20 year period and the other three for part of that period. Most users claimed to have walked the route weekly or less frequently and only three claimed to have used it more than once per week and then not throughout the relevant period.
24. Only one person claimed to have used the route on horseback and she may have had permission from the landowner. All the others used the route on foot and almost all of them said that they saw other people using the route on foot.
25. No users said that they had been obstructed or challenged before 2008. At the inquiry several users accepted that the gate providing access to the Order route from Footpath 7 had at times been overgrown and difficult or impossible to open. However, they also said that this had not prevented their use of the Order route as it had been easy to by-pass the gate.
26. The Order route has featured in walks published in the Eastern Evening News in 1966, 1986 and 2009. It is not known how much use resulted from the publication of these walks. However, at least one person is known to have cut out the walks for future use and she recorded in a scrapbook having used the Order route in 1988, albeit by mistake when trying to follow another published walk.

Actions of landowners

27. It is clear that the current owners of the land crossed by the Order route have been aware of public use of the route and have taken steps to discourage it.

28. Mr Rice, who owned the property from 1999-2008 also stated in an Email and an evidence form that he was aware of public use and states that he frequently challenged users. However, he subsequently is reported to have stated in an interview that no one used the route and if they did it was with permission.
29. Mr Boligbroke-Kent, who owned the land from 1978-1998, stated in an evidence form and at the inquiry that no one ever used the route so he did not have occasion to challenge anyone. He said he had gates erected near to Point A in 1984 and that these were closed on one day each year. He could not recall on which day but thought it might have been New Year's Eve. He accepted at the inquiry that because the Rectory is surrounded by trees he would only have seen people using the route when he himself was using the drive or was in the Parish Room close to Point A and that people might have used it without his knowledge. His former wife, Fiona Wrigley, who also lived at the Rectory from 1978-1998, stated in a letter that *"...everybody was allowed free access to the drive. It linked the footpath which crosses the entrance at the end of the drive"*.
30. Mrs Bell, whose grandfather and father farmed glebe land to the north of the rectory from the 1930s, has stated that *"There was always free access allowed along the driveway for foot travel from the footpath."*
31. Paddy Seligman, the clerk to the Parochial Church Council, stated in an evidence form on behalf of the church that the drive had been used by locals for over 100 years.
32. Mrs Hurn, owner of land on both sides of the Order route, stated that the route has always been open for everyone to walk safely.

Conclusions regarding Statutory Dedication

33. The available evidence of use of the Order route is to some extent limited. However, as well as the first hand evidence of use of the 12 people who completed UEFs there is evidence that others were seen using the route both by these people and by landowners. There is also evidence of the route being publicised in the local paper. Wickmere has a relatively small population and a rural character and, in these circumstances, it is my view that the available evidence is sufficient to raise the presumption that the route has been dedicated as a public footpath in accordance with the provisions of the 1980 Act as a result of public use in the period 1988-2008. It is also my view that actions taken by landowners were not sufficient to indicate that there was no intention during that period to dedicate it.
34. However, there is insufficient evidence of public use other than on foot to indicate the establishment of any higher rights over the route.

Common Law

35. 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.
36. In this case, it would appear that the Order route has been used by the public over a considerable period and it seems that until relatively recently landowners did little to discourage such use. Accordingly, if I had not already

concluded that the route has been dedicated as a public footpath under the provisions of the 1980 Act, it could be argued that dedication could be inferred at common law, possibly before the land was sold by the church.

The 2006 Act

37. In view of my conclusion that public vehicular rights have not been established over the Order route there is no need to consider the implications of the 2006 Act.

Other Matters

38. On behalf of the Open Spaces Society it is suggested that the Order should be modified to state that no limitations exist along the route. However, the OMA has stated that this would not accord with their usual practice or with any official advice or legislation. I agree that such a modification is not required.

Conclusions

39. Having regard to these and all other matters raised, I conclude that the Order should be confirmed subject to modifications to describe the route as a public footpath rather than a Restricted Byway.

Formal Decision

40. I propose to confirm the Order subject to the following modifications:

In the Schedule to the Order, Parts I and II, delete the words "Restricted Byway" and insert "Footpath".

Amend the Order Map accordingly.

41. The proposed modifications would have the effect of showing as a highway of one description a way which is shown in the Order as a highway of another description. It is therefore required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act that notice of the proposal to modify the Order be given and an opportunity for objections and representations be made regarding the proposed modifications.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Marcia Lee	Norfolk County Council
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Supporters

Richard Hembling	Vice Chair, Wickmere Parish Council (WPC) and path user
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Who called:

Alison Harmer	Path user
Kevin Burton	Path user
Judith Barker	Path user
Mark Sayers	Path user
Barbara Shaw	Path user
Lesley Ash	Chair, WPC and path user
Phillida Hurn	Adjoining landowner and path user
Laney Burton	Clerk, WPC and path user

Objectors

John Trevelyan	ROWTAC, Consultant
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Who called:

Charles Buchan	Landowner
Sharon Buchan	Landowner
Noel Bolingbroke-Kent	Former landowner

DOCUMENTS

1. Document bundle including Statement of Case assembled by NCC.
2. Statement of Case of Wickmere PC.
3. Response to objectors' statement, WPC.
4. Statement of Case on behalf of MR & Mrs Buchan, John Trevelyan, Rowtac.
5. Proof of Evidence of Charles Buchan.
6. Proof of Evidence of Noel Bolingbroke-Kent.
7. Proof of Evidence of Sharon Buchan
8. Statement of Case of IM Witham on behalf of the OSS.
9. Statement of Case of Mrs Barbara Shaw.
10. Statement of Case of Kevin Burton.
11. Statement of Case of Mrs A Harmer.
12. Statement of James and Judith Barker.
13. Letter and enclosures dated 4 July 2016 from Ian Mitchell, Ramblers.
14. Photograph of gate at Point Z, J Trevelyan.
15. Opening Statement, NCC.
16. Closing submission on behalf of Mr and Mrs Buchan, J Trevelyan.

