
Order Decision

Site visit made on 8 May 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 12 May 2017

Order Ref: FPS/U1050/7/109

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Derbyshire County Council (Footpath between Gadsby Rise and Footpath No 119 at Nether Heage – Ripley) Modification Order 2012.
- The Order is dated 27 September 2012 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 was 1 objection outstanding when Derbyshire 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 subject to the modifications set out in the Formal Decision.

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 path at issue on Monday 8 May 2017.
 2. The sole statutory objection to the Order related to the omission of the width of the path in Part I of the Schedule to the Order and to the use of the term 'Approx' in Part II of the Schedule to describe the width of the footpath.
 3. In response to the points raised in the objection, the Council stated that it would be content with whatever decision I might make in relation to Part I of the Schedule and if it was concluded that Part I of the Schedule required modification this could be achieved by the insertion of the words "*varying between 5.2 and 6 metres wide*" after the word "*Footpath*". The Council submitted that it adheres to the non-statutory guidance on the recording of widths issued in February 2007 which followed the publication of advice Note No. 16. It was considered that as the non-statutory guidance recommended that widths are rounded up or down to the nearest 0.1 metre use of the word 'Approx' as a heading in Part II of the Schedule was appropriate.
 4. The objector submitted that the act of rounding up or down a measurement to the nearest 0.1 metre specifies with a degree of accuracy what the width of the route is; as there was no approximation involved, use of the term "Approx" as a column heading was inappropriate.
 5. Schedule 2 of Regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 sets out the form in which the Schedule of a definitive map modification order should be made. Part I of the schedule deals with the modification of the definitive map and Part II deals with the
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modification of the definitive statement. Under the heading "Description of path or way to be added" for Part I of the Schedule, Schedule 2 of Regulation 4 reads "*(Describe position, length and width of path or way in sections, e.g. A-B, B-C etc, as indicated on map).*"

6. Whilst the definitive statement provides conclusive evidence as to the position and width of a right of way (section 56 (1) (e) of the 1981 Act), Schedule 2 of Regulation 4 nonetheless requires the inclusion of the width of the path in Part I of the Schedule to an Order. Consequently, if I consider that the Order should be confirmed, I will modify Part I of the Schedule to include the width which is set out in Part II of the Schedule; to follow the suggested wording submitted by the Council would lead to the Order being internally inconsistent as Part II of the Order describes the path as being 6.6 metres wide at its maximum. I will also delete from Part II of the Schedule the word "Approx" from the column heading regarding the width of the footpath.
7. I consider that the description of the width found in Part II of the Schedule complies with the guidance found in paragraph 11 of Advice Note No. 16 which reads "*In some cases, the width of the way to be recorded may vary frequently along its length making a simple written description difficult. In such cases a suitable form of wording might say 'varying between X metres and Y metres as shown on the order plan'".* I do not consider it necessary to repeat in Part I the whole of the text found in Part II as it is Part II of the Schedule which provides the authority for the modification of the definitive statement.
8. The land crossed by the claimed footpath is in the ownership of Futures Homescape Limited ('FHL'), the successor to Amber Valley Housing Limited. FHL did not object to the Order during the statutory period allowed following its advertisement, although representations were made to the Council in response to pre-Order consultations and after the close of the statutory period allowed for objections. Despite these representations not having been duly made, I have taken them into account in reaching my decision.

The Main Issues

9. The main issue in relation to this Order 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 public right of way not shown in the map and statement subsists over the land in question.
10. 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.

Reasons

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

11. The Council received an application to add the Order route to the definitive map and statement on 20 April 2009. The application had been made in response to the erection of a fence in 2007 at point B which prevented access to footpath 119 from Gadsby Rise. Accordingly for the purposes of section 31 (2) of the 1980 Act the relevant 20-year period of use is 1987 to 2007.

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

12. The application was supported by 17 user evidence forms ('UEFs'). Ten respondents claimed to have used the Order route for a period of 20 years of more prior to 2007; of these 10 respondents 7 claimed to have used the path for more than 30 years, with 2 claiming use for more than 40 years.
13. All the respondents had used the Order route on foot and 2 had also used it when on a pedal cycle. Seven respondents had observed others using the path on foot, 9 had seen others using the route on foot or with a pedal cycle and one had observed use by others on foot and on horseback. Ten respondents claimed to have made use of the Order route on a daily basis, 5 had used it on a weekly basis and 2 on a monthly basis. The respondents had used the path as an access to the Spanker Inn, to the recycling facilities which had been located in the car park of the Inn and to other village amenities located on Shop Lane.
14. None of the respondents recalled any prohibitive notices on the land crossed by the claimed path or permission to use the path having being sought or granted. Twelve respondents noted the existence of gate posts or hinge pins in the fence line and three respondents stated that a gate had been present in the fence line during the 1970s. There is no evidence that a gate was present in the fence line during the relevant 20-year period or that there was any structure which prevented the public from accessing footpath 119 during that period.
15. FHL submitted that the land crossed by the claimed footpath is the forecourt to a number of garages and that the forecourt is provided for the benefit of residents of Gadsby Rise. FHL stated that licensees of the garage plots have permission to use the area and that 2 of the respondents have a garage plot agreement with FHL. FHL noted that 10 of the respondents lived at Gadsby Rise. FHL also noted that there were no longer village facilities on Shop Lane as the shop and post office had closed prior to 2006 and that the recycling centre had been removed from the car park of the Spanker Inn in 2010.
16. I acknowledge that 2 of the respondents have garage agreements with FHL and that the use of the claimed footpath by those individuals cannot be regarded as use by members of the public as they would have had a right to be present on the land by reason of their garage agreement. However, the remaining respondents who live on Gadsby Rise do not appear to have any tenancy or other contractual arrangements with FHL and can therefore be regarded as members of the public.

17. There is a no legal interpretation of the term "the public". A dictionary definition is "*the people as a whole, or the community in general*". Coleridge C. J. (1887)¹ commented that use by 'the public' "*must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge*". Although 10 of the respondents live on Gadsby Rise, those people being "*residents in the neighbourhood*" should be regarded as members of the public.
18. Even discounting the evidence of two respondents whose use is likely to have been in association with a private right, the remaining evidence demonstrates uninterrupted use of the claimed path as of right by the public between 1987 and 2007 and is sufficient to raise a presumption of dedication of the claimed path as a public right of way.

Whether there is sufficient evidence that there was during this twenty-year period no intention to dedicate the claimed footpath

19. FHL did not submit any evidence to show that during the relevant period under consideration, it or its predecessor in title, Amber Valley Homes Limited, had erected notices on the land to say that the path was not a public right of way, nor was there any evidence that the occupiers of the land during the relevant period had erected such notices. As noted above, none of the respondents recalled the existence of prohibitory notices along the route, nor did they have any recollection of challenges being made to their use of the claimed path by the landowner or its representatives.
20. There is also no evidence that a statutory declaration under Section 31 (6) of the 1980 Act as to the extent or absence of public rights of way had been lodged with the Council by Amber Valley Housing Limited in relation to this property whilst it was the owner of the land. The making of such a declaration and its submission to the highway authority is sufficient evidence of a lack of intention to dedicate. Such provision has been available to landowners, whether a local authority or private citizen, since 1932.
21. In the case of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffman LJ held that in terms of the intentions of the landowner, the "*intention means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is.... objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending to disabuse him of the notion that the way was a public highway*".
22. In this case, there is no evidence that either the owner or occupier of the land during the relevant 20-year period took any steps to disabuse those members of the public using the path that it was not a public right of way. I conclude that the presumption that the path has been dedicated as a right of way which is raised by the user evidence has not been rebutted and that the claimed path should be recorded in the Definitive Map and Statement.

¹ R. v. Inhabitants of Southampton (1887) 19 QBD 590; RWLR April 1998 S6.3 pp55

Conclusion

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

Formal Decision

24. I confirm the Order subject to the following modifications:

in the Schedule, Part I, line 1, after "Footpath" insert "varying between 5.2 and 6.6 metres wide";

in the Schedule, Part II, delete "Approx" from "Approx width".

Alan Beckett

Inspector

MAP NOT TO
ORIGINAL SCALE

Ripley
Footpath No 119

Path (un)

BANK VIEW ROAD

SHOP LANE

SPANKER LANE

Spanker
Terrace

Spanker Inn
(PH)

Crich View

GADSBY
RISE

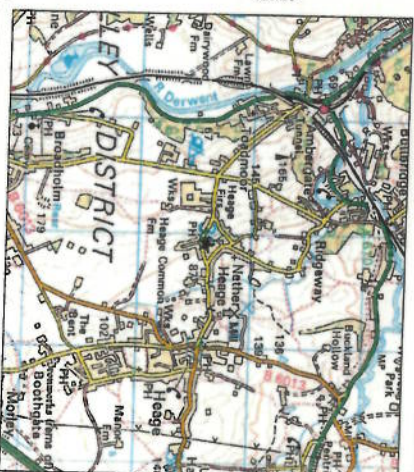
Southerndown

The
Birches

Howes
Tarn

Bindur

Willandor



Wildlife and Countryside Act 1981 S.53
The Derbyshire County Council
(Footpath between Gadsby Rise
and Footpath No. 119 at Nether
Heage - Ripley)
Modification Order 2012

KEY

Footpath to be added ———

Existing footpaths - - - - -



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County Council
Improving life for local people

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