



Order Decision

Site visit on 23 August 2017

by Sue M Arnott FIPROW

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

Decision date: 07 November 2017

Order Ref: ROW/3168409

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Nottinghamshire County Council (Mansfield Woodhouse Footpath No.58) Modification Order 2016.
- The Order is dated 9 September 2016. It proposes to modify the definitive map and statement for the area by recording a public footpath at Clipstone, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Nottinghamshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

The Main Issues

1. The main issue here is whether the evidence is sufficient to show that in the past the Order route has been used in such a way that a public footpath has been established.
 2. The Order was made under the Wildlife and Countryside Act 1981 on the basis of events specified in sub-section 53(3)(c)(i). Therefore if I am to confirm it I must be satisfied, on a balance of probability, that the evidence discovered, when considered with all other relevant evidence available, shows that a public right of way subsists along the route described in the Order.
 3. If the Order is to be confirmed, the level of evidential proof required is higher than that necessary to justify making it when, at that earlier stage, it was sufficient to reasonably allege that a footpath exists.
 4. It is not disputed by the parties concerned that the land affected by the Order route is regarded as Crown land since it falls under the jurisdiction of the Forestry Commission. Consequently the possibility of dedication of a public right of way arising under the terms prescribed in Section 31 of the Highways Act 1980 is ruled out. If such a dedication is to be established, it could only do so under common law principles.
 5. The issues I need to consider are therefore whether, during any relevant period in the past, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right by the public. In doing so I bear in mind that the burden of proof lies with the applicants who assert the right exists, not the objectors who say it does not.
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6. Under the common law approach, it is not sufficient simply to demonstrate use by the public of a certain route for a long time. Where such use did occur and no steps were taken to prevent it, the public's use of the way may constitute evidence that the landowner was quite content it should continue and therefore contribute to the justifiable conclusion that dedication of the way could quite reasonably be implied. However the focus needs to be the landowner – what actions were taken (or not) in relation to the public and what could fairly be deduced from that in relation to the status of the way in dispute, assuming of course that the level of public use was sufficient to make the owner aware that a right of way was being asserted.
7. Nottinghamshire County Council (NCC) made the Order on the direction of the Secretary of State following a successful appeal¹ by Mr Parkhouse, one of the original applicants². Having previously concluded that the evidence was not sufficient to justify the Order, NCC has taken a neutral stance as regards confirmation of the Order.

Reasons

Capacity to dedicate

8. In taking the common law approach, I shall examine the actions of the landowners to determine whether dedication of a public right of way might be presumed from what they expressly said, did or failed to do. Dedication may sometimes be inferred from use by the public where this has occurred openly, for no fixed period of time but to such an extent that it must have come to the attention of the owner who failed to do anything to stop it. The first task is therefore to establish landownership and the capacity of the owner(s) to dedicate a public right of way.
9. Although ownership of the northern most section of the Order route through the Spa Ponds Nature Reserve changed in 2014 when land was sold to the Forest Town Nature Conservation Group, prior to this the full length of the route at issue was in the ownership of members of the Shaw-Browne family of (or formerly of) Cavendish Lodge, Clipstone, and is understood to have been held by them since 1945.
10. Since 4 November 1952, the majority of the relevant land³ has been occupied by the Forestry Commission (FC) for forestry purposes under the terms of a 999 year lease between Edmund Shaw-Browne and the Minister of Agriculture and Fisheries.
11. The agent for FC argues that, under this lease, there were not sufficient rights reserved to the freeholders to enable them to dedicate a public right of way along the claimed route and, since public access is not permitted under the terms of the lease, it would be unreasonable to suggest that the landlord had intended to dedicate a public path.
12. In general, FC does not permit public access to leasehold land where this is not permitted under the terms of a lease. However in this case the lease is silent on the subject of public access. FC is obliged to maintain stock proof fences

¹ Decision reference FPS/L3055/14A/14 issued on 9 March 2016

² The application was made jointly with Clipstone Parish Council

³ Part follows a track which runs alongside a recreation ground. Although this land is unregistered, the applicant has submitted evidence which indicates that it formed part of Lot 86 sold to Mr E Shaw-Brown in 1945. I note that it also appears to be included in the land leased by Mr Shaw-Browne to FC.

along boundaries with adjoining agricultural land owned by the lessor but no mention is made of any obligation to fence the woodland to protect against trespassers or to take steps to prevent any form of illegal use or user.

13. Since the lease restricts the lessee's use of the land to forestry purposes only with (limited) rights reserved to the lessor, it seems clear that FC does not have power to grant a right of access to the public; that matter must therefore remain wholly with the owner(s) although it was not expressly reserved.
14. Consequently I am satisfied that the freeholders, the Shaw-Browne family, had retained the capacity to dedicate a public right of way over the leased land (unless this adversely affected FC's forestry use of the land, a point I address below).

The intentions of the landowners

15. When the lease was signed in 1952, the absence of any mention of public access would not preclude the possibility that public access was envisaged within the leased land, yet it is certainly not evidence of such an intention. However it does seem clear that once trees were planted and the woodland became established, local people began to use the claimed route.
16. Support for the Order rests primarily on the 47 user evidence forms completed by people claiming use of the way over a significant period of years. Although one claimant records their use back as far as 1932, most people began to walk this path in or after the mid-1950s and continued until 2008 when the application to record a public right of way was submitted to NCC⁴.
17. Each form is clear, attaches a plan showing the route used and is signed by the claimant. There is no evidence to suggest these people were ever challenged whilst using the path, by notice or otherwise, or that they used the route in secret or with express permission. Consequently it seems their use was 'as of right' and is therefore capable of establishing a right of way.
18. Some of the claimants say they rode bicycles or horses along the route. However, under the Forestry Commission Byelaws made in 1982 (through Statutory Instrument No. 648) both activities would have been prohibited here after 1 June 1982. Although there is some evidence of such use prior to this, I am not satisfied that this occurred to any significant extent such as to establish a public right.
19. However pedestrian use was not expressly prohibited by the FC byelaws. It is arguable that the very existence of byelaws (which apply to "*lands of the Commissioners*" being "*lands which are under the management or control of the Commissioners and to which the public have, or may be permitted to have, access*") implies an acceptance by FC that the public may go onto the land one way or another. However, I have already concluded that the capacity to dedicate a public right of way does not lie with FC and therefore the intention of the lessee is not the issue. It would therefore seem reasonable to conclude that the existence of the byelaws would have been known to the landowner(s).
20. Nevertheless NCC formed the view that there was insufficient evidence to show that the current or previous landlords were aware of the footpath in question.

⁴ It was apparent on the date of my site visit in 2017 that use by the public is still continuing.

21. Given that the lease provided, indirectly, for the owners to continue to enjoy the sporting rights over the leased land, and that (until recently) they lived locally, there seems to me a very strong likelihood that they were aware of the substantial use that was taking place along the Order route by the public. Yet at no time were steps taken to prevent this use or to position notices either denying or granting permission for access. The applicant has highlighted notices along paths leading north eastwards into woodland from the section A-B, yet none have ever been located along the claimed footpath.
22. There is no evidence before me directly from the owners in response to this Order. In a letter dated 6 November 1990, responding to a claimed bridleway elsewhere on the Clipstone Park Estate⁵, Mr A Shaw-Browne referred to the sensitive management of public access within the woodland in the Spa Ponds area as an example of good practice. This tends to confirm that the presence of the public generally in this vicinity was known to the family although no specific path was identified in this letter⁶.
23. NCC interpreted reference in this letter to access being "allowed to many organised groups" and it being "under sufferance" as an indication that it was by permission. Even if that were the case (which does not appear so in my view), there is no evidence at all that the landowners' permission was communicated to path users in any way and therefore any intention to authorise use was never made known to the public.
24. NCC pointed out that on a lease of this length, the landlord may be absent for many years and may not be aware of use of the route, but that does not appear to have been the case here. I also acknowledge the Council's concern that if a landlord were to dedicate a highway this could interfere with the lessee's use of the land. Again, I do not consider that to be a barrier to dedication here since the lessee, FC, operates byelaws to regulate public access, prohibiting certain types of use but not people on foot. If the presence of pedestrians along the line of the Order route had interfered in any way with forestry operations over the last 50 years or more, no doubt that use would have been challenged in some way.
25. Yet there is no evidence at all of any action taken by either the landowner(s) or FC to prevent the use from continuing. The statements from local people demonstrate that both the quantity and the quality of use were such that a reasonable landowner would have been aware of it, especially one living in the locality, yet no action was taken to stop it. Whilst there may not have been any overt acknowledgement of dedication of a right of way for use by the public, the acquiescence of the owners to this use over such a long period of time is, in my view, sufficient from which to infer that dedication was intended.

Acceptance by the public

26. As I have already noted above, there is evidence from 47 claimants to demonstrate a significant quantity of regular use of the Order route for at least 50 years before the application was made to record it as a public path. In my view, this is more than sufficient to show acceptance of the right of way by the public.

⁵ I understand a public inquiry in 1994/5 raised questions over the status of other ways in adjoining woodland but not the present Order route.

⁶ The attached map showed only the definitive Bridleway 31 as "Existing Bridleway", not the Order route.

Summary

27. It is my conclusion that, despite the lease, the landowners retained the capacity to dedicate a public right of way; that during the 50 years or more that the public walked the Order route, the landowners must have become aware that this was happening but took no steps to prevent it, and that the public duly accepted the offer such that dedication of a public right of way on foot can be implied.

Other matters

28. I have examined the other historical evidence submitted but, like NCC, find these unhelpful since use of the claimed route does not appear to have developed until the middle of the twentieth century. I find the applicant's submission that the Order route formed part of a path that circumvented the medieval deer park entirely plausible but I have seen no evidence to show this was a path used by the public at that time.

29. I have accorded little weight to the absence of the Order route on the survey plans produced in the 1950s in preparation for the first definitive map and statement. I find this unsurprising since the evidence from the claimants is that use by the public began only after the land was sold to the Shaw-Brownes and leased to FC for forestry.

Conclusion

30. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

31. I confirm the Order.

Sue Arnott

Inspector

WILDLIFE & COUNTRYSIDE ACT 1981

Nottinghamshire County Council

(Mansfield Woodhouse Footpath No.58)

Modification Order 2016



Nottinghamshire
County Council

Scale 1:5000

Produced by: e b4D

Date: 28/06/2016



Footpath to be added



Existing recorded bridleway



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MAP NOT TO
ORIGINAL SCALE

