



Order Decision

Inquiry opened on 10 October 2017

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 17 November 2017

Order Ref: ROW/3166740

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Buckinghamshire County Council (Parish of Edgcott) Definitive Map Modification Order 2016.
- The Order is dated 4 July 2016 and proposes to record a public footpath running generally north-east from Lawn House Lane, off Grendon Road, to Footpath 11, in the Parish of Edgcott. Full details of the route are given in the Order Map and Schedule.
- There were two objections¹ outstanding when Buckinghamshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary Matters

1. The Order was made under section 53(3)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act"). However, Buckinghamshire County Council, the order-making authority ("the OMA") indicated that it should have been made under section 53(3)(c)(i), which sets out that an Order should be made where there is a reasonable allegation that a public right of way subsists. I can only confirm the Order if I am satisfied, on the balance of probabilities, that a public right of way subsists. As I have not confirmed the Order there is no need for me to make this modification.

Procedural Matters

2. I made an unaccompanied site inspection on 9 October 2017 and opened a Public Inquiry into the Order on 10 October. I made an accompanied site visit on that day.
3. As a result of the evidence presented to the Inquiry I identified some case law which may have been relevant to my decision. To allow the parties to comment on those cases I adjourned the Inquiry, closing it in writing on 16 October 2017.

Main issues

4. The Order was made under section 53(2)(b) of the 1981 Act. As mentioned in the Preliminary Matters it should be considered by reference to section 53(3)(c)(i).
5. Arguments were put to me on the basis of the Order route meeting the statutory requirements of section 31 of the Highways Act 1980 ("the 1980 Act"). The main issues are:

¹ One from the owner of Lawn House and one from Parrott & Coles Solicitors acting on his behalf

- i. when the status of the claimed route was called into question;
 - ii. the extent and nature of the claimed use;
 - iii. whether there is evidence of a lack of intention to dedicate a public right of way.
6. Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be “...*calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.*” The use during that period must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years. The OMA relied on there having been such use during a twenty-year period, culminating in a calling into question in the mid-2000s by a locked gate. The objector argued that there had been notices on site at earlier periods which were sufficient to call use into question, as well as a challenge to use.
7. In relation to the user evidence the objector challenged whether it could have taken place, given matters relating to gates and overgrowth, as well as whether it was as of right or sufficient to raise a presumption of dedication in any potential twenty-year period.
8. The OMA also referred to the common law, indicating that although the user or documentary evidence alone would be insufficient, in combination this may show that dedication had taken place. The burden of proof at common law lies with the person making the claim. The evidence as a whole needs to show that dedication of public rights on the part of the landowner has occurred, along with acceptance of those rights by the public. In considering such matters I shall bear in mind the requirements of section 32 of the 1980 Act, which sets out in relation to *Evidence of dedication of way as highway* that:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

Reasons

Background

9. The land crossed by the Order route is not registered at Land Registry (“LR”) and the Secretary of State granted dispensation for notice of the Order to be given by reference to paragraph 3(4) of Schedule 15 to the 1981 Act. The land sits to the north of land registered to the property Lawn House, which has formerly been known as The Rookery. Lawn House was bought by the current owners in 2006, with the application to record the Order route made in 2013.
10. As the land crossed by the Order route was not included in the paper title to Lawn House the former owner, from 1936, completed statutory declarations (“SDs”) in connection with issues of land ownership and access to and from Lawn House over this land. SDs in mid-2000s by Executors of the Estates were also related to access, presumably in relation to the sale of the Lawn House.

11. Whilst it has been suggested that the former owners of Lawn House acquired title to the land crossed by the claimed route by adverse possession it is my understanding that at least one application to the LR to register the land on this basis has failed. Given the role of LR in determining such matters I am not satisfied that it has been demonstrated to me that ownership of this land is connected to Lawn House.
12. To the east is a recorded public footpath, Edgcott 11 ("FP11") which ends at point C² on the Order plan, close to one of the Lawn House buildings. The existing fence on the corner where the access road runs south and south-west to the buildings and yard area is placed across FP11.
13. To the west the lane is known as Lawn House Lane, although previously known as Rookery Lane. This runs to Grendon Road and there are residential properties to the north and south.

Section 31 of the Highways Act 1980

Calling into question

14. Although I am not satisfied that the land crossed by the Order route has been shown to be owned by Lawn House, that is not a relevant matter in relation to whether any actions taken in relation to that land may have called use into question. Ownership only becomes relevant in relation to showing a lack of intention to dedicate a public right of way; I agree with the OMA that only a freehold landowner can dedicate a public right of way and, therefore, is also the only person who can show a lack of intention to do so. I am satisfied that matters such as those set out below may be relevant in calling rights into question, regardless of landownership issues.

Gates

15. The March 1967 SD by the former owner of Lawn House indicated that he erected a gate north-east of point C in about 1945, when he said that use of the route as access to and from Lawn Farm ceased. This does not tally with evidence from a lady who visited her future husband at this property, indicating that her in-laws had lived there from around 1946 – 1959. As she was born in 1936 it seems unlikely she would have been visiting as early as 1945 and her user evidence form ("UEF") indicates that she visited from 1955 onwards.
16. Evidence to the Inquiry referred to this as a stock-proof gate in connection with Lawn Farm, whose owners used to bring milk-churns along the Order route to Grendon Road. This witness said that Lawn Farm was demolished when Springhill Prison was built.
17. The same SD refers to the erection of a gate at point A in about 1963. I agree with the objector that the SD provides information on the erection of the gates, even if the memory of dates on all sides may be uncertain. The gate at point A is still in place, the original wooden gate having been replaced with a metal one in 2007 after the change in ownership. The gate posts of the other are still in place. This gate was across the recorded public right of way, FP11, and was intended for replacement by the County Council in 2002 according to correspondence with the then owner of Lawn House.
18. An Executor of Lawn House estate said that from 2005 the gates at points B and to the north-east were locked. The Building Survey Report, 25 October

² Points A – C are shown on the Order map

2005, ("the BSR") sets out that the iron gate to the entrance drive, which appears to be the gate at point B, does not close against the stone piers. In relation to the gate referred to as being beyond this gate the BSR mentions stone walls and a field gate, which was dilapidated and no longer effective.

19. I am satisfied that there were gates on the Order route, as well as on FP11 to the north-east, which were erected at various times from the mid-1940s/50s onwards. The earliest evidence of a locked gate was from 2005, following the passing of the former owner of Lawn House, with keys necessary to allow access for those visiting until it was sold in August 2006. The gate at point B remained locked following the purchase by the current owner and I understand it to have been altered to the current electronic closing mechanism in 2007.
20. Although the OMA originally relied upon the electronic gate mechanism locking as the event calling use into question, I am satisfied that the gate was locked from 2005. This would give a relevant twenty-year period of 1985 – 2005.

Notices

21. The objector suggested that notices erected by the former owner of Lawn House called use into question. I was referred to *R. (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust v Oxfordshire County Council (2010)*³ ("Oxfordshire") and *Paterson v SoS for EFRA and others (2009)*⁴ ("Paterson") in relation to notices. I asked for submissions in relation to *Burrows v Secretary of State for Environment, Food and Rural Affairs (2004)*⁵ ("Burrows").
22. *Oxfordshire* sets out that "*The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known.*"
23. "*Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user. The nature and content of the notice, and its effect, must be examined in context.*"
24. "*The notice should be read in a common sense and not legalistic way...The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did...*".
25. *Paterson* and *Burrows* similarly indicate that the important matter is how a user might interpret signs in their particular context. There was a difference of opinion between the parties as to how the specific signs in this instance might be read by the users.
26. The SDs and letters between the former owner and Buckingham Rural District Council ("the RDC") show that a 'Private Road' sign was erected in 1973 alongside the road name Rookery Lane. I understand this to have been at the

³ [2010] EWHC 530 (Admin)

⁴ [2010] EWHC 394 (Admin)

⁵ [2004] EWHC 132 (Admin)

junction with Grendon Road, where there are now signs "AVDC⁶ LAWN HOUSE LANE" with the standard 'No through road for vehicular traffic' symbol.

27. There were properties on this lane requiring access; a recorded public footpath, Edgcott Footpath 7, running from this lane; and the position of the sign meant that it did not specifically relate to the Order route. Taking account of this context in relation to this sign I am not satisfied, on the balance of probabilities, that it would be sufficient to call use into question.
28. Between 1973 and 1987, when another SD was prepared, a sign was erected at point B saying '*Private Road. Access to Lawn House only.*' Whilst the objector argued that this would have called use into question I agree with the OMA that the term 'private road' is most often seen as a matter relating to vehicular access. Despite the suggestion of the objector in correspondence that the footpath waymarker was put up after the gate was altered in 2007 there is clear evidence from the BSR that it was on the gatepost in 2005. It was also referred to by a witness to the Inquiry. The BSR indicates that "*The strip of land presumably also includes the line of public footpath.*"
29. It appears that the two signs together, taken in context, did not give rise to an impression that there was no footpath in conjunction with such private rights as may exist over this unregistered land. I agree with the OMA this was similar to the situation arising in *Burrows*. Taking all these matters into account I am not satisfied that this sign was sufficient to have called use into question.

Challenge

30. There is limited information relating to a challenge to a user, whom I understand was part of a group undertaking the beating of the bounds, as the parish boundary runs along this land. This matter does not appear to have been known generally, as it was not referred to by any of the other users and it is unclear whether it only arose due to the number of people involved in that event or was in relation to general use. On the information available I agree with the OMA that it was not sufficient to call use into question.

Summary

31. In terms of weight to be given to SDs I agree that they provide some relevant information, although not prepared in relation to a claim for a modification order such as this. Although I am sure they were prepared with due care there are inconsistencies, such as reference in the 1987 SD that "*...no-one apart from myself and others requiring access to my property used the said access road...*" which contradicts the 1963 SD where the use of the route by the neighbouring Lawn Farm was acknowledged until at least the mid-1940s.
32. Considering all the above matters I am satisfied that the event sufficient to have called use into question was the locking of gates in 2005, giving a relevant twenty-year period of 1985 - 2005.

User evidence

33. There were some UEFs submitted with the application and three people completing them attended the Inquiry to assist me. It was fairly accepted by an objector witness from the evidence provided by those who spoke at the

⁶ Aylesbury Vale District Council

Inquiry that they walked the claimed route, their use ending at around the time that ownership altered.

34. However, in considering whether the use is 'sufficient' to raise the presumption of dedication the tests arising are whether the use is 'as of right', as described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner). I agree with the objector that the evidence is limited and the analysis shows that a number of the users appeared to be making use of the route as part of a private route, at some or all times, in connection with adjacent farmland and working at, or attending events at, the prison or Lawn House, which appears to have private rights over the land. Some had received permission to use the route, although I disagree with the objector that simply being a friend of the adjacent landowners would give rise to any permission, or presumption of permission, to use the route.
35. In relation to the untested UEFs there is little or no mention of the gates or notices on the route. It seems likely that these did not affect use, as the gates do not appear to have been locked until recently and users may have ignored notices, as they were not seen as relevant. However, the failure to record the existence of such matters, when referred to directly in the UEF, begs some question as to the care taken in completing the UEFs and the reliability of the rest of the answers on those forms.
36. The OMA fairly accepted that there was some doubt as to whether the user evidence could be said to be representative of the general public, with generally low levels of use by a relatively small number of people. The Inquiry seeks to clarify the written evidence and, as a result of that process, I am not satisfied that I have sufficient information in relation to the written untested evidence, even taking account of the interviews carried out by the OMA during the investigative process, to give great weight to it.
37. I am satisfied that there has been use of the Order route but I am not satisfied that it has been shown, on the balance of probabilities, that there has been sufficient use, by the public, as of right, for a full and uninterrupted period of twenty years prior to such use being called into question, to raise a presumption of dedication. As a result, I do not consider that the route can be presumed to have been dedicated as public footpath prior to being called into question in 2005. The Order fails under the statute and I shall need to consider the common law position.

Common law

Documentary evidence

Small-scale mapping

38. The 1770 Jeffreys map shows Lawn House with a track leading to it but no indication of a continuation. Bryant's 1825 map shows a similar length of route, coloured as are other routes which are now adopted highways. Lawn House is not named on this map and the access to Lawn Farm, to the north-east, appears to be directly from the south, not over the track which is part of the Order route.
39. These maps support the existence of a physical route, which appears to be related to access.

Ordnance Survey maps

40. The formation of Ordnance Survey ("OS") was a response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century. Since the late nineteenth century OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey.
41. The 1822 - 35 OS map shows a through-route to what was seen as Lawn Farm on the Bryant map of the same period. The 6" 1876 - 86 map shows this as Edgcott Lawn, with Lawn House seeming unnamed until 1900, when it was The Rookery. Grendon Hall, to the south-east, was identified on this map too. There was no obvious alteration in relation to these properties and access in the following OS maps until the 1972 - 90 1:10,000 series map when Edgcott Lawn, or Lawn Farm, was no longer shown and there was no physical route on the ground. By this time the properties lying to the north of Lawn House Lane, which are, or were, Council properties, had been built.
42. I consider that the OS mapping series shows that the Order route, in conjunction with the western section, now recorded as a highway maintainable at public expense, was a feature lying between hedges or fences. The continuation to the east, apparently providing the access to Lawn Farm, was less defined, being shown by pecked lines within a wider area and field. The OS maps do not show whether the route was public or private but may assist in conjunction with other information.

Grendon Underwood Tithe Map, 1844

43. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land and consist of the apportionment, the map and the file. Three maps had to be produced: an original and two statutory copies and there can be variations between the maps, which may be due to error or be deliberate. Tithe maps are generally good evidence of the topography of the area but can give no more than an indication as to whether a route is public or private, as a private right of way can also diminish the productiveness of the land for tithe assessment, which was the reason for which the documentation was drawn up.
44. The Grendon Underwood tithe map shows the Order route, part of the road to west and the track running east to and past Lawn Farm coloured in the same way as other routes, both public and private. This shows the existence of the route, apparently not subject to a tithe payment and suggests that the use of it was sufficient to ensure that no productive crop could be taken. Although not marked as being private, as is the track from the south, it is also not marked as being "From" anywhere, as the now public roads are shown.
45. On balance, the tithe map is neutral with regard to showing any public status on the Order route.

Finance (1909 - 1910) Act

46. The Finance (1909 - 1910) Act ("the Finance Act") provided for the levying of tax on the increase in site value of land between its valuation as at 30 April

1909 and its subsequent sale or transfer. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book.

47. The Order route and the road to the west were excluded from the numbered hereditaments on either side, as was the case with other public roads. Where a route is so shown there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the Field Books. However, there can be other reasons for such exclusion.

The Definitive Map and Statement

48. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out the legal procedure to be followed in their production. In this county, as in many, the Parish Councils were asked to identify the public rights of way in their area. FP11 was claimed at this time and subsequently recorded on the DMS.
49. It was described as "*Commencing at the Rookery via Edgcott Lane*". The lack of connection to the public highway to the west was raised with Edgcott Parish Council at the time but no explanation was provided for the way in which the route was recorded and so the gap between highways remained.

Highways records

50. The section of route running west from point A to Grendon Road was not recorded on the older Highway Authority records. It is recorded on the current records, not maintainable at public expense, although there appears to be no agreement by the County Council, in their role as the Highway Authority, as to what this means. It is clear from correspondence that the question of maintenance, rather than rights, has been an issue over many years.
51. The unclarified highways records do not add any weight of evidence to the issue of status of the Order route.

Summary

52. There are no documents showing that the Order route as a public highway but there are also none showing that it is not. The question is whether the documents, taken together show, on the balance of probabilities, that this is a public highway. I consider that they show a longstanding physical feature, which has been more used, and so more obvious, at the western end. On the balance of probabilities, the documentary evidence alone tends towards private use in association with the properties, but this does not exclude the possibility that public rights might co-exist over that route.

User evidence

53. I am satisfied that there has been some use of the Order route, some of which has been as of right, as would be required to show the existence of public rights. However, there remains a strong element of permissive use and the volume of user is small, even taking account that this is a rural area.
54. I agree with the parties that the use is insufficient on its own to show dedication of a public highway at common law. The question is whether it is sufficient in combination with the documentary evidence.

Conclusion at common law

55. I am satisfied that public rights can be reasonably alleged to subsist over the Order route, which in effect is a gap between two public highways, whether the highway is taken to be the western end of Lawn House Lane or Grendon Road. By reference to *Eyre v New Forest Highway Board (1892)*⁷ such a cul-de-sac may seem unlikely but this can only provide so much weight to the evidence.
56. There has been a physical feature here from at least the eighteenth century and the land is not registered to any adjacent owner. The strongest suggestion of public rights arises from the Finance Act records but the user evidence is connected quite strongly to private rights in connection with land and property to the east. Even when asked to clarify the matters in the mid-twentieth century the Parish Council provided no further information, although this was perhaps complicated by jurisdiction matters, given that the Parish boundary runs along the centre of the route.
57. This is a case where there are a lot of small pieces of evidence, but I consider that even taken as a whole, on the balance of probabilities, it is insufficient to show that a public right of way subsists over the Order route. The burden of proof in a common law case lies with the person making the claim and, in this case, I consider it has not been met.

Other matters

58. The law does not allow me to consider such matters as the desirability or otherwise of the route in question, privacy or security concerns. I would also note that I am unable to take account of the way in which the Council are said to have acted in relation to the consultation and Committee processes prior to the making of the Order.
59. I understand that these are the issues of most importance to those living, working and walking in the area. However, my decision must be taken on the basis of whether or not public rights exist as a result of what has occurred historically and so I been unable to take these points into account.

Conclusions

60. Looking at the evidence as a whole I am not satisfied that there was sufficient available evidence of use of the Order route over any twenty-year period, prior to that use being called into question, to give rise to a presumption of dedication under the statute.
61. I am not satisfied that, taking all the evidence together, it has been demonstrated on the balance of probabilities that there has been a dedication and acceptance of a public right of way at common law.
62. Having regard to these and all other matters raised at the Inquiry and in the written representations I conclude that the Order should not be confirmed.

Formal Decision

63. I have not confirmed the Order.

Heidi Cruickshank

Inspector

⁷ [1892] JP 517

APPEARANCES

For the Order Making Authority:

Mr D Stedman-Jones *of Counsel*
who called:
Mr R Carr

Ms M Downs

Ms S Read

In Support of the Order:

Mr P Jackman

In Objection to the Order:

Mr J Wills *of Counsel*
who called:
Professor N Athanasou

Mr J Benfield

George Miles Hobart-Hampden the Rt Hon the Earl of Buckinghamshire

INQUIRY DOCUMENTS

- 1 The Order
- 2 Closing Submissions of the Order Making Authority
- 3 Further Submissions of the Order Making Authority
- 4 Closing Submissions on behalf of Professor Athanasou
- 5 Further Submissions on behalf of Professor Athanasou

Wildlife and Countryside
Act 1981
Section 53
Claimed Public Footpath
Edgcott

Public Rights of Way

Claimed
Public
Footpath

A - B - C

Unaffected
Public
Footpaths

Parish
Boundary

Grid References

Point A : SP6795-2221
Point B : SP6799-2221
Point C : SP6806-2224

This is not the Definitive Map but a working copy. While every effort has been made to ensure the accuracy of the data presented, we cannot guarantee that the data will always be accurate and complete. The data is intended to be viewed at a scale of 1:2,500 or smaller.

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