
Order Decision

Inquiry held on 15 August 2017

Site visit made on 15 August 2017

by Martin Elliott BSc FIPROW

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

Decision date: 10 October 2017

Order Ref: FPS/Y2003/7/28

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Definitive Map Modification (Melton Ross FP 256A) Order 2015.
- The Order is dated 16 January 2015 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 were 38 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry at Barnetby Village Hall, Barnetby-le-Wold on 15 August 2017. I carried out an unaccompanied inspection of the Order route and surrounding area on the evening of 14 August. This excluded the section A to D¹ although I observed the section A to B from FP256 and the section D to C from Shop Lane. I carried out a further unaccompanied site inspection following the close of the inquiry when I viewed the section of Order route D to B.
2. The Order arises from an application made by Mr Leaning under section 53(5) and Schedule 14 of the 1981 Act. Whilst the Council made the Order the Council resolved to take a neutral stance in referring the Order to the Secretary of State; the Council took a neutral stance at the inquiry. None of the supporters of the Order took a lead at the inquiry in presenting a case in support of confirmation of the Order. However the supporters sought confirmation of the Order. In post inquiry correspondence from the objectors it is suggested that as no-one volunteered at the inquiry as applicant to the Order the process of determining the Order is 'null and void'. Whilst I note this suggestion I have been appointed to determine the Order before me, the absence of anyone promoting confirmation of the Order does not preclude its consideration. In reaching my decision I have had regard to the evidence of use forms submitted by the Council and the evidence and submissions of both the supporters and objectors.
3. The Order has been made under section 53(2)(a) of the 1981 Act. The Council accepted that the Order should have been made under section 53(2)(b) given that the Order arises from an event after the commencement date of the 1981

¹ Letters A to E referred to in this decision relate to points shown on the Order map.

Act. Although the Order should have been made under the latter section the intentions of the Order are clear and there is nothing to indicate that anyone will have been misled or prejudiced. The Order if confirmed will be modified accordingly.

4. The Order does not include a width for the route to be added. Defra² Circular 1/09, states that the width of a path should be included in the order schedule. This is in accordance with the Wildlife and Countryside Act (Definitive Maps and Statements) Regulations 1993. Should the criteria set out below at paragraphs 8 to 11 be satisfied then it will be necessary for me to consider the issue of the width of the Order route.
5. Mr and Mrs Kuc made representations as to the wording of the Schedules to the Order in respect of the ownership of the land crossed by the Order route. In my view it is not necessary to describe the location of the Order route by reference to ownership. Again, should the Order be confirmed, I propose to modify it accordingly.
6. Reference has been made to the Human Rights Act 1998. I am required to take account of the conditions provided for by law, the 1981 Act does not permit personal considerations to be taken into account. A decision to confirm the Order would therefore be lawful as provided by s6(2) of the Human Rights Act 1998.
7. Following the close of the inquiry I received correspondence from a Mr Parker on behalf of The Ramblers. I considered that the correspondence was material to my decision and was circulated for comment. The additional submissions were circulated but Mr Parker subsequently withdrew the submissions as he considered them to be misleading and not as accurate as they should have been. I also received a copy of the statement read out by Mrs Nawrockyi at the inquiry. This was circulated for information only.

The Main Issues

8. Noting my observations at paragraph 3 above the Order has been made under section 53(2)(a) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(b). The main issue is whether the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during the period raises a presumption that the way has been dedicated as a public path.
9. The test to be applied to the evidence is on the balance of probabilities.
10. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
11. Should the case for a statutory dedication fail then it may be appropriate to consider dedication at common law. This requires consideration of three

² Department for Environment, Food and Rural Affairs

issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.

Reasons

Background information/issues

12. It is contended by supporters of the Order that footpath 163, passing to the south of Shop Lane before turning northwards to the west of Honeysuckle Cottage, was incorrectly recorded on the definitive map and that the correct route is the Order route. Whilst I note this contention the Order has been made under the 1981 Act with the relevant criteria being set out at paragraph 8. My decision must be based on the evidence before me measured against the relevant tests. The recording and subsequent extinguishment of footpath 163 is not a matter for my consideration.
13. Evidence suggests that in 1996 the Order route was waymarked around Honeysuckle Cottage. This was carried out by the former Humberside County Council. However, there is no evidence as to the reasons why the route was waymarked bearing in mind that the route was not recorded on the definitive map. It may be the case that the route was erroneously considered to be footpath 163. Although the route was waymarked this does not support a contention that a statutory dedication or dedication at common law has arisen. It remains necessary to show that the relevant criteria have been satisfied.
14. Reference was made to the 1910 Finance Act records. The field book entry for hereditament 377, known today as Allison's Cottage, records a deduction for a public footpath. However, in the absence of information as to whether this entry was based on evidence from the landowner, and other supportive evidence, it is not sufficient to demonstrate the existence of public rights. Shop Lane is also uncoloured and excluded from the adjacent hereditaments. Whilst the exclusion may be indicative of a public highway there may be other reasons for its exclusion. In the absence of supportive evidence it cannot be concluded that the route was considered to be public.
15. The Order route is shown on the 1887 and 1908 Ordnance Survey maps. The route is also shown on the Ordnance Survey maps used by the HM Land Registry. However, Ordnance Survey maps were not produced with a view to recording public rights. The maps show the topographical features but provide no evidence as to status.

Statutory Dedication – Section 31 Highways Act 1980

When the right to use the way was brought into question

16. The evidence of use forms indicate that a locked gate was erected on the route in the week commencing 15 April 2013 and a kissing gate was also obstructed during the same period. On 29 April 2013 an application was made to add the Order route to the definitive map. The locking of the gate and the obstruction of the kissing gate would have brought the right to use the way into question

and sets a relevant twenty year period of 1993 to 2013. No other evidence has been put before me of any earlier event which would have brought the right to use the way into question.

Evidence of use 1993 to 2013

17. The Council indicate that 16 user evidence forms and letters of support were received from the applicant although two individuals subsequently withdrew support for the claimed path. I have examined the evidence of use forms submitted by the Council which indicate use of the Order route by four individuals, including Mrs Nawrockyi, for the full twenty year period. A further nine individuals, including Mr Leaning, have used the way for part of the twenty year period. With the exception of one individual this use is largely towards the end of the relevant period. Use was on foot varying in frequency from several times a year to a few times a week. The evidence of use form of Mr Allison indicates that his father owned the land over which the disputed right of way passes; I understand this to be land associated with Allison's Cottage. The form indicates that the route was used prior to the purchase of the land and that during Mr Allison's lifetime the route has been in regular use. A Mr Sykes, using the route between 1948 and 1974 and 1986 to 2013, states that the route has been well used for the past 60 years.
18. A statutory declaration of Mr Robinson indicates use of the way for 6 years although the years of his use are not specified. Correspondence, from Mr Robinson, submitted in connection with the inquiry, states that he moved into his current home on Shop Lane in December 2005 and used the path to walk his dog once a week. At the inquiry Mr Robinson stated that he walked his dog on the Order route from 2007 to 2013.
19. Correspondence from The Ramblers indicates that since the formation of the Scunthorpe and District group in 1971 the group has used the Order route probably every six to eight weeks. In their Statement of Grounds the Council suggest that The Ramblers have withdrawn their support for the claim although I have seen no evidence to support this. However, whilst The Ramblers make a similar point in the post inquiry submissions these have now been withdrawn. In view of the above it is difficult to place any reliance on the submissions from The Ramblers and I can give them no weight.
20. In addition to the evidence contained in the evidence of use forms Mr Leaning said that he used the route twice a week from 2010 and saw Mrs Nawrockyi using the route. The route was said to be occasionally used by ramblers.
21. Mrs Nawrockyi referred to a constant flow of walkers; she could see the route from her kitchen window. Mrs Nawrockyi moved to New Barnetby in 1996 but before then she used the route a couple of times. Mrs Nawrockyi said that the route was cleared by Bill Allison and North Lincolnshire Council. She once asked the Footpaths Officer for the grass to be cut and was advised that despite the grass being long the route was accessible. Mrs Nawrockyi observed neighbours using the route to carry out maintenance on Welbeck stream and said that the route was used in bad weather as the only safe route. She considered that the owners of Nord Valley/Honeysuckle Cottage had sought, since 1996, to close the footpath by neglect. In her view the Order route has been used for decades.

22. Mr Nawrockyi outlined that he lived in the village between 1996 and 2007 and used the Order route to walk his dogs on a daily basis. He saw other users and there was never an issue with access. Mr Nawrockyi accepted that he worked in London up to 2001 and was not at home during the week. As such use would have been more limited. From 2007 to 2013 he did not live in the village but was a regular and occasional visitor for a month each year. On these visits he used the route once a week and last used the route in 2012. Mr Nawrockyi submitted photographs of one of their dogs adjacent to the railway line. Mr Nawrockyi accepted that the location was not on the Order route and in my view the photograph is not evidence of the use of the route.
23. In opposition Mrs Ross-Johnson, who moved to Shop Lane in 1998, only witnessed a handful of people attempting to use the route who did not appear to live on Shop Lane. On every occasion she informed them that the route was a private road with no public access. For around 9 months between 2003 and 2004 Mrs Ross Johnson was undergoing medical treatment. Her husband thought it would be beneficial for her to walk around Honeysuckle Cottage and made attempts to clear the route but, despite a couple of attempts to clear the route, was unable to do so. Mrs Ross-Johnson questioned how the route could have been used on a regular basis if it was so overgrown.
24. Mrs Hewitt, moving to Shop Lane in 2011, said that she could see along Shop Lane in both directions, the entrance to the Order route and footpath 256. She said that she had not seen any of supporters using the route between points A and D. In 2011 she was invited by the Kuc family to view their garden and grounds. The section of Order route B to C had been discovered by the family by clearing the brambles from the back of the bungalow.
25. Mr and Mrs Kuc purchased Honeysuckle Cottage in December 2006. Mr Kuc visited the property in August 2006 and remembers how overgrown the route was between points D and C. In 2007 Mr Kuc started working on his driveway; this continued until 2008. He never witnessed anyone using the Order route which was still overgrown at point C. In early 2009 Mr Kuc employed a builder to carry out works on the north side of the property. At no time during the works was anyone seen using the route and no complaints were made regarding the blockages on the route arising from the building works.
26. In 2011 Mr Kuc was advised by the Council that the route of footpath 163 appeared to run down Shop Lane and around the garden of Honeysuckle Cottage but that the legal route was to the south of Shop Lane. Mr Kuc took the view that the waymarks on the Order route were therefore 'illegal' and further advice from the Council was that the route was not a public right of way.
27. Mrs Kuc accepted that she had no knowledge of the route before 2006 but did not see use of the way. She pointed out that she was a keen gardener, out in most weathers, and would have seen if anyone did walk the route. She had presumed that the route was a public right of way because of the signage. However, she did not pay that a lot of attention because she saw no one.
28. Miss O Kuc moved to Honeysuckle Cottage with her parents in 2006. At that time the section B to C was overgrown. Although she understood that the route B to D was a public right of way she was not reminded of that fact because she saw no one use the route other than those who lived at Honeysuckle Cottage and their guests. Miss Kuc noted that in 2013 it became

apparent that the Council did not know why waymarkers had been erected on the route. She advised that when her parents found out that the route was not a right of way they blocked the route. Had her parents not been misled by the waymarking then they would have blocked the route sooner.

29. Miss S Kuc lived at Honeysuckle Cottage from 2009 to 2016. Her room was at the rear of the property and whilst she saw that footpath 256 was well used she never saw use of the Order route.
30. Mr Whitley, living at Welbeck Cottage for 31 years, has a full view of the original entrance to Honeysuckle Cottage which was the only entrance to the property until 2007 when an easement was granted for vehicular access. He rarely saw use of the Order route and such use was by an elderly couple visiting Honeysuckle Cottage. He did not see any use of the section A to B but acknowledged that he could not see the section B to C. As a parish councillor between 1988 and 1992 he met with the Council to discuss the maintenance of the land leading to what was at the time Nord Valley as the residents of that property were having difficulty gaining access. Mr Whitley was advised that it was not the responsibility of the Council but that as a gesture of goodwill the Council would cut back the land when next in the area.
31. Mrs Whitley-Beal has lived at Welbeck Cottage for six years and before that time was a frequent visitor. She was not aware of a path to the north of Honeysuckle Cottage but was aware that the route D to C had been used by previous residents of the property. Although her property overlooks the Order route she had not seen people make use of the land; the section A to B was regularly overgrown.
32. I was asked by Mrs Hewitt to have regard to other statements submitted in connection with the objections to the Order. As outlined in my opening to the inquiry, and at paragraph 2 above, I will have regard to all submissions and written representations into account in reaching my decision. The signed statements should be accorded some weight although the weight which can be given to evidence is lessened due to it not being tested at the public inquiry. Whilst many of the statements raise issues which I am unable to take into account (see paragraph 44 below) some statements refer to the overgrown and impassable nature of the Order route. The statement from the previous occupiers of Nord Valley (now Honeysuckle Cottage), Mr and Mrs Stocks, states that when they moved to the property in 1997 the route D to C was overgrown and not used. The Statement records challenges in 2002 by the occupier to a Council employee who was attempting to cut the Order route. It is stated that neither M Nawrockyi nor an S Allison were seen walking the route. Mr P Whitley, who was present at the inquiry but did not give evidence from the witness table as none of the supporters intended to cross examine the witness, was friendly with Mr Bower, who lived at Nord View before Mr and Mrs Stocks. He says that he never saw anyone walking down the side of Nord Valley and that there was no indication of a footpath until Mr and Mrs Bower passed away and a sign appeared.
33. Having regard to all of the above and the evidence before me, the use of the way during the first part of the twenty year period is limited to a few individuals. Whilst the evidence of use forms suggests that use of the way increased towards the end of the twenty year period this is not borne out in the evidence in opposition to the Order which suggests that the route at

Honeysuckle Cottage was overgrown and not used. I have no reason to doubt that those who claim to have used the route did so and it is possible that this use was not observed by the owners of Honeysuckle Cottage and others. The fact that use was not observed suggests that use was not on a regular and frequent basis. I am aware of the evidence in support of the Order that others were observed using the route and that the route has been used for decades but the public use of the way is not supported by the evidence of use forms.

34. As regards overgrowth I accept that the photograph taken in 2004 and submitted by Mrs Nawrockyi does not show the route at point D northwards as being overgrown. I am also aware of other photographs which show the route as being free from overgrowth. This contrasts with evidence from the objectors that the way was overgrown. However, the issue to be considered is whether use was sufficient to raise a presumption of dedication.
35. I note Mrs Nawrockyi's evidence that the Order route was used to maintain Welbeck Stream however, the basis of this maintenance is not known and it is not clear that any such use would be as of right. It should also be noted that in respect of use by those who own or occupy properties on Shop Lane that any use to gain access to those properties from Caistor Road is in consequence of an easement providing access to those properties and therefore by right. This diminishes further the use as of right over part of the Order route although use to the west of the various properties would be as of right.
36. As noted above, the issue to be considered is whether the use by the public was sufficient throughout the relevant twenty year period to raise the presumption that the way has been dedicated as a public footpath. Use must be sufficient to carry to the mind of a reasonable person that a right of way is being asserted. Notwithstanding the fact that use was not observed by the owners of Honeysuckle Cottage there is insufficient evidence of use before me to raise a presumption of dedication. In view of this it is not necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way as a public footpath.

Dedication at common law

37. In view of my findings it is necessary to consider dedication at common law; the relevant criteria is set out at paragraph 11 above. I have concluded above that the evidence of use during the twenty year period is insufficient to raise a presumption of dedication. The evidence of use prior to the twenty year period is even more limited although extending from 1960.
38. The supporters provided a copy of a photograph taken in 1907 showing a child standing at point D. However, the fact that someone is shown on the route does not necessarily demonstrate that the way is public. The photograph only serves to show a child on what is the Order route, no inference can be drawn as to the status of the route. The aerial photograph from 1980 shows the physical existence of a track. However, as with the 1907 photograph it does not provide evidence that the route is public, only that at the time of the photograph there was an identifiable route.
39. Mrs Nawrockyi had been told by senior residents that the Order route was used by the public to access a Wesleyan chapel in the garden of what is now Honeysuckle Cottage and had been used by John Wesley himself. Although the objectors dispute the existence of a chapel, and Mrs Nawrockyi has not

provided evidence of the same, it does not necessarily follow that access to any chapel was in consequence of a public right. In the absence of further evidence I am unable to give this contention any weight.

40. The evidence of a Steve Allison is that his parents owned the land past Honeysuckle Cottage over which the Order route passes; this was from 1955 to 2002. His evidence of use form states that in his knowledge the route has been in regular use all of his lifetime and his family was happy with the access.
41. It is noted that Mr Kuc contends that the land over which the Order route passes between points D and B belongs to Honeysuckle Cottage. Although Mr Kuc claims that the Land Registry plans do not show the correct boundary the plans do not support this contention. Furthermore other title plans do not show the land as belonging to the property owned previously by the Allison family; there is nothing to indicate that the land is registered in title. It may be the case that the boundaries have changed since the ownership of the land by the Allison family. However in the absence of direct evidence to the inquiry from Mr Allison it is difficult to reconcile this evidence. As such the weight which can be given to the evidence of Mr Allison is significantly diminished.
42. As noted above, the burden of proving the landowners intentions in asserting any dedication at common law rests with the claimant. This is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. Looking at the evidence as a whole it is in my view insufficient to raise an inference of dedication at common law.

Other Matters

43. Bearing in mind my conclusions in respect of a statutory dedication and dedication at common law it is not necessary for me to consider further the wording of the Order Schedules or the issue of width.
44. Issues have been raised including those relating to security, privacy, maintenance, safety, liabilities, the need for the route, the existence of an alternative route and the adverse possession of land. Whilst I can appreciate the various concerns they are not matters which I can take into account in considering an Order under the 1981 Act. The issue is whether or not public rights on foot have been acquired on the Order route. My decision must be based on the evidence before me measured against the relevant tests which are set out at paragraphs 8 to 11 above.

Conclusions

45. 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

46. I do not confirm the Order.

Martin Elliott

Inspector

APPEARANCES

For North Lincolnshire Council:

Colin Wilkinson

Senior Public Rights of Way Officer

In support of the Order:

Mr M Leaning

Applicant

Mrs M Nawrockyi

Mr J Nawrockyi

Interested parties:

Mr R Robinson

Mr Leach

Chair, Melton Ross Parish Council

In opposition to the Order:

Mrs B Hewitt

who also called

Mrs S Ross-Johnson

Ms O Kuc

Mr K Kuc

Ms S Kuc

Mrs J Kuc

Mr B Whitley

Mrs L Whitley-Beal

Documents handed in at the inquiry

- 1 Opening statement of North Lincolnshire Council
- 2 H.M. Land Registry plans
- 3 Opening and closing statement on behalf of the objectors
- 4 Melton Ross Parish Council, minutes of public meeting held to discuss closure of MEL 163, 21 May 2013

MAP NOT TO
ORIGINAL SCALE

Existing FP256
Route to be added

FP256

SL

Honeysuckle Cottage

Allison's Cottage

Rose Cottage

The Cottage

Mount Villas

White Coomb

Letter Box

W. Welbeck
Authorised
Signatory

Welbeck

Scale 1:1320

Title: FP256A

Drawing No:

Drawn by: Naomi Boyd

Scale @A4 1:1320

Version: 1

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