



Order Decision

Inquiry held on 31 May 2017

by Mark Yates BA(Hons) MIPROW

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

Decision date: 04 July 2017

Order Ref: FPS/P2745/7/52

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as "Footpath No 30.23/40, Tin Ghaut Car Park, Whitby Modification Order 2008".
- The Order was made by the North Yorkshire County Council on 9 October 2008 and proposes to add a footpath ("the claimed route") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There were nine objections and one representation outstanding at the commencement of the inquiry.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.

Procedural Matters

1. I held a public inquiry into the Order on 31 May 2017 at the Scoresby site of Caedmon College, Whitby. I made an unaccompanied visit to the site of the claimed route the previous day and revisited the site accompanied by the interested parties prior to closing the inquiry.
2. The case in support was made on behalf of North Yorkshire County Council, as the Order making authority ("OMA"), by Ms Sargent and she called one witness (Mr Varley). Scarborough Borough Council ("SBC") owns the land crossed by the claimed route and objects to the Order. SBC was represented at the inquiry by Mr Marwick and he called Mr Woodhead as a witness. Additional people spoke at the inquiry in opposition to the Order.
3. All of the points referred to below correspond to those delineated on the Order Map. The claimed route is predominantly located within a car park for use by permit holders. It commences at point A on Church Street and follows a triangular alignment between points D, B, C and D. It connects with Grape Lane at point C and the harbour wall is located at point B. The references below in square brackets relate to the relevant pages within the inquiry bundle.
4. The OMA accepts that the preamble in the Order should specify Section 53(2)(b) of the 1981 Act rather than Section 53(2)(a) of the Act. No prejudice is alleged to arise out of this error and it is clearly the case that the OMA relies upon evidence of relatively recent use by the public. Therefore, I accept that, if confirmed, the Order should be modified on this issue.
5. I shall address the other potential modifications following consideration of the evidence. In relation to the additional map provided by the OMA, I reiterate the view I gave at the inquiry, namely that it would not be appropriate to insert a revised map in the Order to remedy an error with the original map. However, an additional map may be appended to an Order to provide greater clarity in terms of the extent of the right of way. It may also be possible to

modify the original Order Map if the evidence suggests that the route should run over a different alignment.

Main Issues

6. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the definitive map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
7. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
8. The OMA do not consider that a case can be made for the dedication of the claimed route at common law.

Reasons

When the status of the claimed route was brought into question

9. The OMA and SBC generally agree that this occurred when a gap was closed at point D in around April 2004. Whilst people are able to step over the low level rail around the car park, it was the closure of the gap that prompted the application to add the route to the definitive map and statement later in 2004.
10. I accept that the status of the claimed route was brought into question when the gap was closed in 2004. It follows that the relevant twenty year period to be considered for the purpose of statutory dedication is 1984-2004 ("the relevant period").

The evidence of use by the public

11. Eleven user evidence forms ("UEFs") were initially provided in support of the application. A further form was submitted prior to the inquiry. It is apparent that no follow up interviews were undertaken with these users when the application was determined and none of them gave evidence at the inquiry. This means that it has not been possible to clarify matters arising out of the claimed use set out in the forms. Whilst outside of my control, the length of time taken for the matter to come to the inquiry may have impacted upon the availability of potential witnesses.
12. In light of the above, I agree with the concerns raised by Mr Marwick regarding the lack of opportunity to cross-examine people who claim to have used the route. For instance, he highlights that it was not possible to determine whether there was any collusion between the users. Further, it is Mr Varley's view that the UEFs when taken in isolation are not sufficient to infer the dedication of a public footpath under statute. In this respect, reliance is placed on a number of photographs supplied by the applicant (Mr Waters).
13. Whilst most of the users have marked a triangular route within the car park on the map attached to their UEF, it is not possible to determine to what extent the different sections were used. Nor is it clear whether people went through

- the gap at point D or traversed the chain and subsequent barriers in order to continue through to point B. The majority of the users only state that they used the claimed route as a short cut. In this respect, it appears that the most obvious route to use would be A-D-C. I note that the UEFs indicate that a number of the users were living on the other side of Whitby or some distance from the town by 2004. However, I am mindful that the claimed route could have been used by these people when they were in this part of Whitby. Mr Varley says there is no evidence to support the existence of the public footpath sign mentioned in the UEF completed by Mr Hunter.
14. When taken at face value, the UEFs provide evidence of use throughout the relevant period which in some circumstances could be sufficient to raise a presumption of dedication under statute. However, the nature of the UEFs and the lack of opportunity to clarify information contained in them means that I concur with the Council's view that they cannot be relied upon in isolation to raise a presumption of dedication.
 15. Mr Varley accepts that a number of the photographs provide no evidence of pedestrian use through the car park. Two people are shown stepping over the rail at point D [153] and two other people are evident on the D-C section [154 & 158]. There are additional photographs that show people gathered at the harbour wall [159 & 161]. The latter is stated to relate to a visit by HMS Endeavour, which Ms Pearson says occurred on only one occasion. Both she and Mrs Anderson do not consider that the harbour wall in this locality provides a good view of the events that take place on the water.
 16. The photographs only show people passing through the car park on a few occasions. There will also be some doubt regarding whether they were walking over a particular route as of right or in connection with authorised use of the car park. In terms of the people gathered at the harbour wall, it cannot be determined how they reached this point. For instance, I note that an additional photograph shows a person stepping over the rail to the south of the claimed route [154]. It is also apparent that some of the photographs were taken after the end of the relevant period. Overall, I consider that little weight can be placed on the photographs provided.
 17. The objectors acknowledge that people walk through the car park but Mr Anderson and Mr Smith do not consider that this occurs on a frequent basis. Mrs Anderson and Mrs Clegg mention people sitting and eating food at the harbour wall. The evidence of Ms Pearson and Mrs Clegg is supportive of people wandering through the car park between the parking bays.
 18. Mr Woodhead accepts that people have walked through the car park, for instance to avoid the congestion that can build up around the bus stop located on Church Street. In particular, I note his acceptance that a route between points A-D-C has been used as a short cut. This is based on his observations during visits to the locality on a weekly basis over the last 32 years. In this respect, his responsibility for the car park spans almost all of the relevant period. The objection letter from Mr Boocock provides further support for public use of a short cut through the car park.
 19. Whilst the UEFs are supportive of use of the claimed route, I have expressed my reservations regarding the quality of this evidence when taken in isolation. Further, I am not satisfied that much can be gleaned from the photographs provided. There is an acceptance by the objectors that people have walked through the car park but doubts may exist over the consistent use of a

particular route or routes. However, the evidence of Mr Woodhead is supportive of use of a route between points A-D-C during his regular visits to the site. This observed use of a particular section of the claimed route points to use by pedestrians as a short cut rather than by authorised users of the car park. Further, the route used would have been constrained to a certain degree by parked cars.

20. I consider that Mr Woodhead's evidence tips the balance in favour of a finding that the use was sufficient to raise a presumption of the dedication of a public footpath over the A-D-C section and that this use did not generally encompass any of the parking bays. There is no evidence to suggest that the use by pedestrians of this section during the relevant period was not as of right or was interrupted. In light of my conclusions regarding the evidence, I do not consider that a presumption of dedication under statute arises in relation to the remainder of the claimed route.

Whether the landowner demonstrated a lack of intention to dedicate a footpath

21. Having regard to the above, this issue needs to be considered by reference to the A-D-C section. The parking of vehicles in the bays would not have impacted upon the direct route between the original gaps at points C and D. No evidence has been provided of action being taken by SBC during the relevant period to clearly demonstrate to the public that there was a lack of intention to dedicate a footpath over this section of the claimed route.

Conclusions

22. For these reasons I find on the balance of probabilities that the A-D-C section of the claimed route has been dedicated in accordance with Section 31 of the Highways Act 1980 and the test set out in paragraph 6 above is satisfied. It follows that I do not consider that this is applicable to the remainder of the route. Further, in respect of the D-B-C section, I agree with the Council that the evidence is not sufficient to infer the dedication of a footpath at common law.

Modifications to the Order

23. In addition to the modification outlined in paragraph 4 above, the Order will need to be modified in relation to the extent of the route. The Order should record a footpath between points A-D-C.
24. It is clear that gaps with a limited width were available at points C and D during the relevant period. The measurements taken during the accompanied site visit revealed that a width of 38 centimetres is available at point C and that there used to be a gap of 70 centimetres at point D. This means that the public's use was subject to the limited widths at these points. I therefore accept that the Order should be modified so that it records the gaps with these widths as limitations. In the circumstances, a width of 1.2 metres should be sufficient to enable two people to pass over the remainder of the route and I propose to modify the Order accordingly.
25. In terms of the additional map provided, I have some concerns about its accuracy given that the gap at point C on site is adjacent to the parking bay numbered 39. I do not consider that the Order Map is incorrect in relation to the general depiction of the A-D-C section. However, this would not prevent a larger scale map from being submitted by the Council to provide further clarity

and taking into account the proposed modification to the extent of the claimed route. It nonetheless appears to me appropriate to modify the Order to specify that the route runs between the numbered bays.

Other Matters

26. Issues relating to whether it is suitable or desirable for the claimed route to be recorded as a public right of way are not relevant to my decision.

Overall Conclusion

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

Formal Decision

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

- Delete from the first line of the preamble in the Order, "*Section 53(2)(a)*" and insert "*Section 53(2)(b)*".
- Delete the text within the first column in Part 1 of the Order Schedule and insert "*Marked by a bold broken black line and shown as A-D-C*".
- Delete the text within the second column in Part 1 of the Order Schedule and insert "*Commences off Church Street at the entrance to Tin Ghaut Car Park at Grid Reference 49006 51102 (Point A) and proceeds in a generally westerly direction to Grid Reference 49005 51102 (Point D) and then in a north north westerly direction between the numbered parking bays to Grid Reference 49004 51104 (Point C) at Grape Lane and having a total length of approximately 30 metres*".
- Delete the text within the second column in Part 2 of the Order Schedule and insert "*49006 51102 (Start) to 49004 51104 (End)*".
- Delete the text within the third column in Part 2 of the Order Schedule and insert "*Commences off Church Street at the entrance to Tin Ghaut Car Park and proceeds in a generally westerly direction to Grid Reference 49005 51102 and then in a north north westerly direction between the numbered parking bays to Grape Lane*".
- Delete the text within the fifth column in Part 2 of the Order Schedule and insert "*0.030km*".
- Delete the text within the sixth column in Part 2 of the Order Schedule and insert "*1.2m*".
- Delete the text within the seventh column in Part 2 of the Order Schedule and insert "*Limitations comprising of a 0.70m wide gap at Grid Reference 49005 51102 and a 0.38m wide gap at Grid Reference 49004 51104*".

- Delete from the Order Map the section of the route shown between points D-B-C.

29. Since the confirmed Order would not show part of the way shown in the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

APPEARANCES

For North Yorkshire County Council:

Ms H. Sargent Counsel instructed by the authority

She called:

Mr R. Varley Definitive Map Officer

For Scarborough Borough Council:

Mr J. Marwick Counsel instructed by the authority

He called:

Mr J. Woodhead Northern Area Engineer

Other Objectors:

Mr J. Anderson
Mrs D. Clegg
Mr S. Smith
Ms P. Pearson
Mrs L. Anderson

DOCUMENTS

1. Opening statement on behalf of North Yorkshire County Council
2. Closing statement on behalf of North Yorkshire County Council

MAP NOT TO
ORIGINAL SCALE

**North Yorkshire County Council
Wildlife & Countryside Act 1981**

**Footpath No.30.23/40, Church Street Car Park (Tin Ghaut),
Whitby
Modification Order 2008**

Key
Footpath to be Added ————
Other Footpaths
Connecting Maintained Highways + + + +

Drawn By N Atkinson on 26 September 2008

Scale 1:1250

Plan Number 30.23/40

**OS Sheet
NZ91**