



Order Decision

Hearing held on 14 November 2017 and 27 February 2018

by Sue M Arnott FIPROW

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

Decision date: 14 March 2018

Order Ref: ROW/3171684

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Tameside Metropolitan Borough Council (Elizabeth Street/Turner Lane, Ashton under Lyne) Modification Order 2016.
- The Order is dated 3 November 2016. It proposes to modify the definitive map and statement for the area by adding a footpath between Elizabeth Street and Turner Lane in Ashton-under-Lyne, as shown on the Order map and described in the Order schedule.
- There were 4 objections¹ outstanding, together with one representation in support, when Tameside Metropolitan Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

Procedural matters

1. On 14 November 2017 I opened the hearing at the Guardsman Tony Downes House in Droylsden. However both the applicant, Miss Greenwood, and her representative, Mrs Pinder, were unable to be present due to unforeseen circumstances. Consequently I adjourned the proceedings until a later date, this being confirmed as 27 February 2018 at the Town Hall in Dukinfield.
2. I visited the site of the claimed public footpath during the afternoon of 13 November 2017 prior to opening the hearing, and again during the afternoon of 26 February 2018 before it resumed. At the close of the event, none of the parties present requested that I make a further visit.

The Main Issues

3. 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 can be presumed to have been established.
4. Tameside Metropolitan Borough Council (TMBC) made the Order on the direction of the Secretary of State following a successful appeal² by Miss Greenwood. Having previously concluded that the evidence was not sufficient to justify the Order, at the hearing TMBC opposed its confirmation whilst Mrs Pinder presented the case in support on behalf of Miss Greenwood.
5. 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

¹ One objection, to which was attached a petition, has since been withdrawn.

² Decision reference FPS/G4240/14A/1 issued on 23 August 2011

must be satisfied that, on a balance of probability, the evidence shows that a public right of way subsists along the Order route.

6. The case in support of the Order is based primarily on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
7. Whilst the evidence need only be sufficient to *reasonable allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. In this case and at this stage, evidence is required which shows, *on the balance of probability*, that a right of way subsists along the Order route.

Reasons

8. On receipt of the application by Miss Greenwood on 9 June 2009, TMBC compiled a report which was considered by the Ashton-under-Lyne District Assembly on 25 January 2011. The application was refused and Miss Greenwood appealed against that decision to the Secretary of State. As a result, on 23 August 2011 TMBC was directed to make the Order which is now before me for determination.

Historical context

9. The applicant submitted copies of four Ordnance Survey (OS) maps, two of which show the Order route as a well-defined passage and two which do not. The two earliest maps dated 1863³ and 1922 are helpful insofar as they show the layout of the land before the bungalows were built (which is believed to have been in 1953-54 although no evidence was produced to confirm this⁴.)
10. By the time of the 1964 edition of the 1:2,500 OS map, the bungalows can be clearly seen in situ. On both this map and the later 1993 edition, the southernmost bungalow and No. 166 Turner Lane are shown separated by an alleyway that appears open at both ends. [This route is now shown between points A and B on the Order map.] Although Cllr Bray recalled there always having been a gate near point A, this is not substantiated by any documentary source.
11. It is the applicant's submission that this path has been public ever since the bungalows were built.
12. However, these old maps do not provide direct evidence that the way now in question was a public right of way but they do confirm that an open passage has physically existed from at least 1964 onwards. Indeed it still exists today although it is now blocked at both ends and cannot be walked.

³ There is a line of dashes on this map that appear to follow the line of the Order route. I interpret this to be the Parliamentary boundary line, not a footpath as suggested by supporters of the Order.

⁴ Mr Booth, representing the New Charter Housing Trust Ltd (present owners of the bungalows), concurred with these approximate dates

Evidence of use by the public

13. When considering the evidence of use of the path in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.

Bringing into question

14. TMBC accepted that the status of the Order route was challenged in 2009 when blockages at points A (in Turner Lane) and B (in Elizabeth Street) were made permanent by the owner of the adjacent property, No. 166 Turner Street. Indeed it was this incident which prompted Miss Greenwood to submit her application to record what she considered to be a public right of way.
15. The applicant recalls being told, in March or April 2009, that the path would be closed for one month to facilitate works to the property. Initially there were temporary barriers put in place at both ends but later these were replaced by more permanent blockages. However the path was never re-opened and remains closed to this day.
16. Speaking for the landowners, Mr Booth explained that around this time the New Charter Housing Trust Ltd (NCHT) had been contacted by TMBC by letter requesting that it remove the obstructions from its land. The Trust had subsequently dealt with a part of the obstruction that appeared to be causing a danger to the public at the Turner Lane end, but the neighbouring owner at No. 166 had responded by installing a more permanent blockage⁵.
17. TMBC has no record of any correspondence with NCHT and Mr McCaughley was unable to shed any light on the Council's involvement with the obstruction.
18. Some of the people who completed evidence forms refer to earlier blockages in 2007 and 2008. Miss Greenwood mentioned low fencing put across the path in February 2007 by the owner of No. 166 Turner Lane, again whilst works were carried out, but on this occasion people climbed over and continued using the footpath. Another claimant mentions being told by the owner of No. 166, in 2008, that he owned the land over which the path runs⁶ and that there was no right of way. Both these incidents raised questions over the rights of the public.
19. Although ownership of the alleyway lies with the owners of the bungalows, not No. 166 Turner Lane, it is not a requirement that the way is brought into question through a challenge by or on behalf of the owner. From the somewhat sketchy evidence available here, it would appear the public's right to walk along the Order route was brought into question by the actions of the adjacent landowner on three identifiable occasions: in February 2007, in 2008 and in March/April 2009. I therefore need to examine more closely the periods 1987-2007, 1988-2008 and 1989-2009.

Claimed use by the public

20. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years immediately prior to being brought into question. Use 'as of right' is interpreted

⁵ I understand this to be the metal grill/gate which is at present attached to the north-west corner of No. 166 and was initially locked.

⁶ Which has proved to be untrue

as being use by the public that is not by force, does not take place in secret and is not on the basis of 'permission'.

21. Miss Greenwood submitted user evidence forms from 12 people⁷ claiming to have used the Order route for periods varying between 5 and 50 years. By my calculations, during the earliest twenty years (1987-2007) 5 people used the path during the whole period and of the remaining 7, 4 had each used it for well over 10 years. Between 1988 and 2008, 6 people had walked there throughout the full period and 3 for over 10 years. For the period 1989-2009 the figures are 8 throughout all 20 years and 3 for more than 10 years.
22. At the hearing, both Miss Greenwood and Mrs Pinder spoke about their own use of the route before it was blocked: Miss Greenwood often used it to reach the bus stop on Turner Lane or to take her grandchildren to school, while Mrs Pinder recalled walking her dogs along the path and taking her daughter to school that way.
23. It has not been suggested that use of the Order route by the claimants was anything other than 'as of right'. Whilst I note the incidents in 2007 and 2008 described above, in neither case did the public actually cease to use the route so that there seems little doubt that the claimed use was not actually interrupted, despite the temporary inconvenience.
24. On this basis, and given the nature of the route itself as a well-defined alleyway that has been in existence for at least 50 years, I would not hesitate to conclude that the claimed use by the public was sufficient to raise a presumption that the way had been dedicated for public use during any of the three 20 year periods. However local councillor Mr Bray submitted evidence in which he states that, with his knowledge of the area since 1982 and having represented this Ward for over 30 years, he has never known the Order route to have been in use by the public as a footpath.
25. Whilst I accept that may be his true recollection, I must take into account that he lives some 1-1½ miles from Elizabeth Street and Turner Lane and estimated the occasions on which he would have been in a position to directly observe use of the claimed route to have been around 3-4 times a year.
26. Further, Cllr Bray was firmly of the view that the footpath had been blocked and ceased to be available many years earlier than 2007, 2008 or 2009. He recalled a gate near point A and fencing panels across the route at point B for many years although he could not be specific about when these had been installed.
27. In particular he spoke of being involved with a project to address anti-social behaviour in the area, involving residents, the Police, local Councillors and Community Safety Officers. An audit was carried out of every alley in the neighbourhood sometime after 2005. This resulted in a gating scheme covering several paths in the area. However he said that at no point was the Order route considered because it was already closed off to the general public.
28. Unfortunately, despite attempting to do so, Cllr Bray had been unable to locate details of the scheme or the relevant Council files. He submitted that the

⁷ I note that the form completed by Mr and Mrs Jones was signed only by Mrs Jones. I must therefore give slightly less weight to the evidence of Mr Jones.

- applicant could not explain how this path had been omitted from the alley-gating scheme when others in the area had been included.
29. In response both Miss Greenwood and Mrs Pinder were adamant that the path was not blocked until 2009. There had been a panelled fence alongside the path previously and these panels were then moved along the Elizabeth Street boundary at the rear of No. 166, thereby blocking off the footpath.
30. Without additional hard evidence it is difficult to be certain why the Order route was not included in the alley-gating scheme. It may have been, as Cllr Bray recalls, because it was already blocked and therefore presented no security risk. Alternatively, it might have been because it was recognised to be a *public* right of way whereas all others were clearly alleyways where only residents had a right to walk and were subsequently given keys to the gates. In the absence of evidence to the contrary, various explanations are possible.
31. Whilst I respect the integrity of all parties at the hearing, I am unable to give significant weight to Cllr Bray's submission that the path was already blocked, at least by 2007 if not before that, without further evidence to support this claim.
32. Both Mrs Pinder and Miss Greenwood were able to respond to questions about their own experience of using the footpath; however the remaining 10 claimants were obviously not in a position to do so. Consequently it was not possible to seek further information from these people so as to investigate further accessibility along the route prior to 2007. However their individual statements were not challenged at the hearing, beyond the general point made by TMBC and Cllr Bray concerning conflict with the gating scheme survey.
33. There is no fixed number of claimants, nor frequency of use, regarded as the minimum necessary to demonstrate use by the public. In simple terms it must be sufficient to alert a landowner to the possibility that the public may be establishing a right of way over his or her land. That can depend on the context. Where, as here, the character of the way is such that, since inception, its prime use appears only to have been to allow access for pedestrians, the level of use required to establish the way as a public footpath is, in my view, sufficiently met by the twelve claimants providing evidence of their long usage.

Actions of the landowner

34. Despite actions deterring public use being carried out by the owner of the adjacent property (No. 166), it seems clear that the path itself is part of the land owned by the New Charter Housing Trust Ltd. Mr Booth confirmed that the Trust had acquired ownership by transfer from the local authority in 2000. However the path had been closed by the owner of 166 Turner Lane.
35. There is no evidence that the challenges to public use in 2007, 2008 or 2009 were made by or on behalf of the true landowner. Further, there is no evidence of any challenges being made at any time directly by the respective land owners, TMBC pre-2000 or NCHT post-2000.
36. Therefore I have no hesitation in concluding that the presumption the path was dedicated for use by the public on foot is not rebutted.

37. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met; that, on a balance of probability, a public right of way on foot does subsist along the Order route , and consequently that the Order should be confirmed.

Other matters

38. I have noted that amongst the objections and in a petition signed by 16 people there is concern locally over the likely effect of re-opening the Order route in terms of the safety and security of nearby residents, given the anti-social behaviour that occurred here in the past.

39. Although I fully understand the unease amongst some over the recognition of the status of this path as a public right of way, neither the merits nor any possible disadvantages of the Order route are matters that are relevant to my determination of this Order and I have given them no weight.

40. Since I have established that a public right of way exists along the Order route, its reinstatement will be a matter for the highway authority. It is possible that other legal processes may be considered (for example, to gate the path at certain times or to close it permanently) all of which involve consultation with the public. However this raises issues which lie beyond the scope of this Order.

Conclusion

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

Formal Decision

42. I confirm the Order

Sue Arnott

Inspector

APPEARANCES

In support of the Order

Mrs D Pinder Representing Mrs P Greenwood (27 February 2018 only)
Miss P Greenwood Applicant (27 February 2018 only)

Opposing the Order

Mr P McCaughley Principal Solicitor, TMBC (27 February 2018 only)
Mr K Davy Assistant Borough Solicitor, TMBC (14 November 2017 only)
Mr M Hughes Sustainable Travel Officer, TMBC
Mr R McLaughlin Assistant Engineer, TMBC

Cllr Mr W Bray Statutory Objector (27 February 2018 only)

Attending in a neutral capacity

Mr Booth New Charter Housing Trust Ltd

DOCUMENTS

1. Copy of the statutory objections and representation
2. TMBC's statement of case with accompanying background documents
3. Letter dated 29 January 2018 to the Planning Inspectorate from Mrs Pinder together with attachments
4. Letter from Cllr Bray to the Planning Inspectorate dated 7 February 2018 (with attached map) forwarded with a letter from TMBC dated 9 February 2018

Modification Order

Elizabeth Street, Ashton

Scale 1:1000

Compiled by MH on 2 December 2014

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