



Order Decision

Hearing Held on 14 March 2018

Site visit made on 13 March 2018

by Helen Slade MA FIPROW

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

Decision date: 22 March 2018

Order Ref: ROW/3178505

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Wiltshire Council (Parish of Holt) Path No. 73 Definitive Map and Statement Modification Order 2016.
- The Order is dated 5 July 2016 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 was one objection outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. Prior to the Hearing, Mr Tucker, the objector, had not taken part in the procedures for the exchange of documentation set out in the relevant rules,¹ and had not indicated whether or not he was intending to attend the event. On the day, he arrived with a barrister, Mr Peter Wadsley, who requested permission to submit a statement to the Hearing.
2. The Planning Inspectorate guidance on Hearings² regarding who can attend such events advises that formal legal representation is not appropriate for a Hearing. Concern was expressed by the applicant, Mrs Marsha Nicholson, about the presence of legal counsel and, following a short discussion, I declined to accept the statement at the outset of the Hearing but allowed it to be read as a closing submission at the end of the Hearing. It would have been much more helpful to all the parties, including myself, if Mr Tucker had abided by the rules and guidance designed to assist the smooth running of these types of events. I appreciate that Mr Tucker has had health difficulties, but it was open to him to ask someone to represent him much earlier in the process.
3. I carried out an unaccompanied site visit the day before the Hearing when I was able to walk the claimed route. I was not requested to carry out a further site visit, accompanied or otherwise, and I did not consider it necessary to do so.

The Main Issues

4. The Order has been made in consequence of an event set out in Section 53(3)(c)(i) which provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when

¹ The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007

² Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England (January 2018 revision)

considered with all other relevant evidence available, a public right of way which is not currently shown in the map and statement subsists or is reasonably alleged to subsist over the land in question. In this case the Order relates to an alleged public footpath. At the confirmation stage of the Order I must be satisfied that the right of way subsists.

5. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.
6. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
7. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs³ ('Defra') and relevant legal judgements, and the test I must apply is the balance of probabilities.

Reasons

Background

8. In 2014 it was brought to the attention of Wiltshire Council (the Order Making Authority or 'OMA') that the line of a footpath recorded on the Definitive Map and Statement ('DMS') as Footpath 31 in the Parish of Holt was shown running through the gardens of a number of properties and did not reflect the route that was in use on the ground. The OMA deemed that it was not possible either to divert the path to the route that was in use, nor was it feasible to make a concurrent extinguishment and creation order to achieve the same purpose, because one of the landowners would not agree to the proposals. To resolve the problem the OMA decided to make an extinguishment order for the part of the path affected. The Order was made on 15 July 2014 ('the 2014 Order').
9. Holt Parish Council ('the Parish Council') reluctantly agreed to the extinguishment order on the basis that the OMA would accept an application to modify the DMS to record the used route of the path. They collected witness statements from eight people and submitted the application on 23 April 2015. The application was accepted and the Order was made on 5 July 2016 ('the 2016 Order'). This is the Order I am considering.
10. It is not appropriate for me to make any observations on the manner in which the OMA chose to deal with this issue, but it is necessary for me to refer to both order routes in my decision to assist in interpreting the evidence and setting out my decision.

³ Rights of Way Circular 1/09 – Guidance for Local Authorities Version 2 October 2009

Documentary and Historical Evidence

11. None of the historical Ordnance Survey ('OS') maps investigated by the OMA and submitted with their statement show the alleged line of the claimed route. All the maps prior to 1972 appear to reflect the line of the path extinguished by the 2014 Order. An OS map submitted by one of the user witnesses (Mr Gooding) and marked by hand as being a County Series OS map dating from 1972 shows part of the claimed route (A-B on the 2016 Order plan) but a different route further to the west thereafter.

12. During the procedures undertaken in the 1950s to prepare the original DMS, the Parish Council completed survey documents which were submitted to Wiltshire County Council (the responsible Surveying Authority at that time). The original description given by the Parish Council of a path in this location was as follows:

"31. F.P. to BRADFORDLEIGH. Starts in Leigh Rd. from Iron Stile next to two cottages and garden for 50 yards between this garden and the bungalow garden, then wooden stile; 50 yards in open field where it meets path 32."

The record sheet also records that the path was 100 yards long altogether, and that it was *"open after first 50 yards which is between hedge and wire fence"*. The date of the survey was 9 December 1950 and two stiles were recorded as being in good condition. It was claimed that the use of the path had been uninterrupted for at least 80 years.

13. The scale of the OS base map onto which the paths in the parish were marked for the purposes of the survey is not identified but it was sufficiently large to show two properties on the north side of the path, and a fence to the south of the path defining the garden boundary of another property. In their committee report, the OMA officers considered that the map did not show the bungalow, and were of the view that the two cottages mentioned were on the land to the south of the path.⁴ Having heard Mr Tucker's explanation at the Hearing of the nature of the properties to the north of the path, and by reference to the map, I consider that the OMA's interpretation is not necessarily supported, but nevertheless it is clear from the survey that although the map itself did not show the 'corridor' described in the written description, in 1950 there must have been such a delineation. Mr Nibbs was able to confirm at the Hearing that he had always known such a configuration (he first used the path as a young child in the mid-1950s) and Mr Tucker did not demur. He said that the path had been within the orchard garden of the cottages and that the occupiers had kept the grass down, including where the path ran. He indicated that a wire fence had been erected to identify the edge of the path.

14. The description of the path as given in paragraph 12 above was eventually crossed through and substituted by another, more general description, incorporating the route of a path originally numbered 33 on the survey map:

"F.P. from road C224 north west of Holt House leading west to path no. 34"

Mrs Green explained that this was most likely done by an officer at the County Council at the time. The map shows evidence of alterations to path numbers which presumably were made at the same time.

⁴ See paragraph 9.5 on page 118 of Hearing Document 1

15. The altered description was different from the wording which was included on the original definitive statement. This contained the wording above but continued thus:

"with a short spur leading north east⁵ to the Bradford Leigh Road, C224."

The renumbering of the paths to which I have referred in the previous paragraph had clearly left the short path formerly numbered 32 unaccounted for, and it was accommodated by being included within the description for path number 31 as a spur.

16. The point at which the 'spur' so described joined (or departed from) the main part of footpath 31 is the equivalent of Point C on the 2016 Order map. As Mrs Green stated at the Hearing, Point C has remained constant throughout the history of the legal recording of this route. It is shown in the same location in both the 2014 Order (albeit labelled Point B) and the 2016 Order, which corresponds to its location as shown on the parish survey map and on the original DMS.
17. I consider that the anomaly between the description of the path as a whole given in the 1950 survey and the location as shown on the accompanying OS map can be explained by the fact that the OS base maps which were available for the purposes of the survey were not up to date; and the route drawn onto the survey map reflected the route shown historically on earlier OS maps and not the route which, by that time, was actually in use. The significance of this drafting error did not manifest itself until 2014 and resulted in the need for the OMA to try to resolve it.
18. Mr Tucker acknowledged at the Hearing that he did not dispute the existence of the claimed route between Points A and B but all parties agreed that, to the west of Point B, the OS maps are of no assistance in determining the location of the 2016 Order route. However I consider that the documentation as a whole does show that a route between the points represented on the 2016 Order plan by the letters A and C did exist, and that it was considered to be a public right of way.
19. I am satisfied that the claimed route has, since at least 1950, followed a line between Points A and B and that it ran along a narrow corridor defined on either side by property or garden boundaries. The location of Point A has remained constant as evidenced by the existence of the long-standing metal stile referred to in the 1950 survey, and there is also an old metal footpath sign in position. I am also satisfied that the path continued to a point in the field beyond. However, I acknowledge that the documentary evidence does not identify, with sufficient accuracy, the route taken by the public between Points B and C across the open field. I agree with the OMA that it is necessary to look at user evidence to try to establish the line of the path between B and C.

User Evidence

The date on which the use of the path was brought into question

20. The OMA has relied upon the date of the application from the Parish Council as representing the date on which the use of the path was brought into question. I consider that the discussions which went on in connection with the 2014

⁵ west has been crossed out

Order can also be taken to have brought the matter into question, because Mrs Nicholson clearly stated at the Hearing that she stopped using the path at that time because of the doubt about it. Nevertheless, I accept that the application also provides evidence of an appropriate date. I therefore conclude that it is open to me to examine the use of the path for a period of 20 years dating either from 1994 to 2014, or from 1995 to 2015.

Whether the path has been used by the public for a period of 20 years

21. The user evidence is rather insubstantial, having been supplied by only eight witnesses, most of whom have used the path only once or twice a year at most. Two people claim to have used the path slightly more often: Mrs Marsha Nicholson and Mr James Gooding. However, Mr Gooding indicates that he crossed the open field using the route shown on the 1972 OS map which does not accord with the claimed route (or the definitive route extinguished by the 2014 Order). Mrs Nicholson confirmed at the Hearing that she used the claimed route as shown on the Order plan. She moved to the village in 1994 and used the path after that date until 2014. Her usage covers the whole of the 20 year period 1994 to 2014. Only Mr Mizen and Mr Nibbs report usage during 2015: Mr Mizen only once or twice; and Mr Nibbs 'sporadically'.
22. Mr Tucker asserts that the claimed route between points B and C has never been used in his lifetime or that of his parents. However I find this hard to accept in the light of the original claim from the Parish Council in the 1950s. Whilst I accept that the use of the path may have been infrequent, I must also take into account the evidence of other landowners who say that they have seen people using the path. Having accepted that A-B is a public footpath (see paragraph 18 above) the public must have continued across his field, and until 2014 the legally recorded line of the public footpath went to Point C. It is more likely than not that the line followed by the public would be represented by the 2016 Order route between Points B and C.
23. Holt Parish Council has played an active role in surveying local footpaths on an annual basis. The last survey for which I have evidence is 2016, provided by Councillor Mizen in his witness form. I note that Mrs Tucker was on the parish council for a period of about five years between approximately 2007 to 2012 and Mr Tucker states in his objection letter that not all of the paths were surveyed each year. Nevertheless there are reports within the bundle submitted by the OMA which demonstrate that Footpath 31 was surveyed, and that problems of overgrown crops and vegetation were regularly encountered between 2001 and 2007. Mrs Nicholson stated at the Hearing that more records than this exist,⁶ but unfortunately they have not been made available to me. There is also evidence of a complaint from the Ramblers Association representative in October 2005. Due to the nature of the obstructions I assume that the Parish Council inspections were done during the summer months; the only information provided in that respect is that of the worksheet from 28 June 2007 showing the works carried out on that date. It is possible that reports were less frequent during the period when Mrs Tucker was a member of the Parish Council, which might explain her recollections.
24. Apart from Mr Gooding, all the other witnesses have marked a route which equates to the Order route on the plan accompanying their user evidence forms. Mr Nibbs showed an additional route more directly going to the kissing

⁶ Dating from 2012 onwards

gate at the eastern end of the 'spur'. He explained at the Hearing that this was the route he would use if the more direct route to Point C was obstructed by crops. Mr Tucker has previously indicated that he would be prepared to discuss providing a route along that line, but that is not an issue which I can deal with as part of this Order. I am prepared to accept that some people may have used that route for similar reasons to that expressed by Mr Nibbs, but as Mrs Nicholson said, a planted crop will not always be an obstruction to passage. It depends upon the state of its growth and the time of year. None of the witnesses mention on their user evidence forms being prevented from using the path due to crops.

25. Mr Tucker also claimed to have had electric fencing across the claimed route when cows were grazing the field. Whilst Mrs Nicholson recalled seeing cows in the field, she stated that she never encountered any electric fencing, and neither had Mr Nibbs. As the field has been in arable rotation since at least 1999 (according to Mr Tucker) any encounter with stock would have been during the very early part of the relevant 20-year period. Mr Tucker stated that the field had been strip-grazed which would mean that any electric fencing present would have been moved about. It is entirely possible that, on the occasions that the path was used, the electric fencing was not in position across the path. None of the witnesses refer to it at all.
26. Given that the original definitive route, extinguished in 2014, led to the equivalent of Point C in the 2016 Order, I consider that it is more likely than not that at least some of the users of the claimed route would have been making for that same point. As I have already indicated, the most direct route to Point C from Point B would follow the line shown on the 2016 Order plan. I conclude that the claimed route has been subject to infrequent use, by a small number of people, but it was surveyed regularly by the Parish Council as part of its normal programme. Whether or not all the paths in the parish were always surveyed I am not in a position to say, but there is clear evidence that the Order route was included at least between the years of 2001 and 2007. I have no reason to disbelieve Councillor Mrs Nicholson who states that she has copies of reports for later years which, for some reason, the OMA has not retained.
27. The witnesses who have provided evidence of use are a representative selection of the local community and I am satisfied that they constitute a group of people who fulfil the definition of 'the public'. There is no requirement for a particular number of users to satisfy that description.
28. I am also satisfied that the use of the Order route by the public has taken place for at least 20 years during either of the periods I have identified, and that the claimed route is the route that has been in use since at least 1950. Other routes may have been used in addition (to avoid crop obstructions) but that does not negate the use that has been made of the Order route.

Whether the public has used the path as of right

29. For the user to have been as of right it must have been exercised without force, without permission and without secrecy.
30. There is no suggestion that the user has been carried out by force, other than the necessity to push through overgrown vegetation – a normal hazard on public rights of way.

31. Mr Tucker claimed in his objection letter that people wander about all over his land and Mr Wadsley considered that this equates to them having permission to use the claimed route, or alternatively that the public have simply been roaming over the land. No evidence has been provided to me to demonstrate that people have been wandering all over the field in question (Mr Tucker's comments appear to relate to other land that he owned, nearer the river) and no evidence of specific permission to individuals or the public in general has been forthcoming.
32. Mr Wadsley considered that the use of the path was more in the way of covert use, rather than user by permission, but seemed to equate intermittent and sporadic use with secretive use. He implied that use of the way by stealth, for example only at night or at times when the landowner was likely to be away, would fall into this category.⁷ In the light of the user evidence I cannot take this hypothesis seriously, particularly as Mr Tucker acknowledges that a public footpath exists between Points A and B. Persons using that part of the path had to continue across his field, and therefore he cannot have been totally unaware of the possibility of such use.
33. Mr Tucker confirmed to me that he cannot see the path from his domestic property, although he said that either he himself or other members of his family or staff would pass the footpath every day. When I questioned him about this it appears he was referring to driving in tractors along either the main road to Bradford on Avon (where he had another farm) or along Leigh Road. I consider it highly unlikely that anyone driving along either of those roads would easily notice anyone using the claimed route, or even be looking for them. The path itself would only be distinguishable from the adjoining path with extreme difficulty from that sort of distance. Furthermore, the use of the claimed route has been endorsed by other landowners who live in immediate proximity to the path. I do not accept that the use of the path has been secretive in any way.
34. I am satisfied that what use of the claimed route has been exercised by the public has been as of right.

Whether there is sufficient evidence of a lack of intention to dedicate

35. Mr Wadsley stated that evidence of a lack of intention to dedicate can only come into play if the use of the path has come to the attention of the landowner. He relied upon commentary in the same paragraph of Stephen Sauvain's book:

"Low levels of usage of a path in a country area may go unnoticed by the landowner whose failure to take action to prevent it could not then be ascribed to knowledgeable acquiescence. The level of usage was always a factor taken into account at common law in determining whether there is implied consent and sometimes low levels of user were regarded as sufficient in appropriate circumstances. There appears to be no other point in the S.31 [of the Highways Act 1980] where the level of usage would be directly relevant other than to take a view as to whether a way was actually being used by the public rather than a particular class of people or under permission."

⁷ Highway Law – Stephen Sauvain (Fifth Edition) paragraph 2-82

36. I have already concluded that the path was being used by a group of people who were capable of being termed 'the public' and I have also concluded that there is no evidence of specific permission being granted. Since I am examining this matter under Section 31 of the 1980 Act, this commentary would seem to support that the level of usage of the path is not a factor.
37. Section 31(6) of the 1980 Act provides a mechanism for landowners to take pro-active action to protect their land from claims for rights of way. Deposits and statements made under these provisions are designed to protect landowners in situations where use of routes may be taking place of which they are unaware. They can take pre-emptive action to avoid claims arising. No evidence was presented to me to show that Mr Tucker had taken such action, either in respect of his land in general, or this land in particular.
38. Mr Tucker claimed that he had never been asked to clear the crop from the line of the path, implying that this demonstrated that no-one was using the way. I have already concluded that the crop would not always have presented an obstruction to users. Nonetheless, Mr Tucker acknowledged that he had never cleared the line of the path which was on the DMS prior to 2014 (as he was obliged to do under the Rights of Way Act 1990) and I therefore place no weight in terms of a lack of intention to dedicate on the fact that the claimed route was also cropped over.
39. Although Mr Tucker considers that the 2014 Order route was actually closed in the early 1990s, he could provide me with no evidence to support that contention. I have already concluded that Mr Tucker must have been aware that people using the route A-B on the 2016 Order plan (which he acknowledged was a public footpath) must have been continuing onto his land. The Order route is the logical line to take from Point B to Point C. Mr Tucker's objection to the 2016 Order is the first evidence of a lack of intention to dedicate a highway over the Order route, and I am satisfied that, during the relevant 20-year periods that I have identified, there is insufficient evidence of any such behaviour.

Conclusion on Section 31 of the 1980 Act

40. Although the level of usage is light and the frequency also low, I am nevertheless satisfied that the Order route has been used by the public for an uninterrupted period of 20-years between 1994 and 2014. I am also satisfied that the same applies to the 20 years between 1995 and 2015. During both of those periods, insufficient evidence has been provided to demonstrate that there was a lack of intention to dedicate the route on the part of the landowner. I therefore conclude that the Order route is deemed to have been dedicated as a highway.

Overall conclusion on the evidence

41. Although I have concluded that the user evidence is sufficient to demonstrate that a statutory dedication of the route has taken place, I consider that the documentary evidence is sufficient on its own to demonstrate that a public right of way subsisted between Points A and C at the time when the DMS was first produced. The user evidence provides confirmation of the line of the path within the field (i.e. between Points B and C). The line of the route between Points A and B has not been contested. I am satisfied that on the balance of probabilities the legal line of the path has remained constant since at least

1950 when the Parish Survey was undertaken, and that the 2016 Order reflects that route.

Conclusions

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

Formal Decision

43. I confirm the Order.

Helen Slade

Inspector

