



Order Decision

Inquiry opened on 6 September 2017

Site visit made on 5 September 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 29 AUG 2018

Order Ref: ROW/3167813

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Norfolk County Council (East Winch) Modification Order 2016.
- The Order is dated 12 October 2016 and proposes to modify the Definitive Map and Statement for the area by adding five public footpaths as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed

Procedural Matters

1. This case concerns the addition of five public footpaths forming a network of routes on land at Manor Farm between Common Road and Church Lane, and is based on evidence of claimed use by the public. For ease of reference, the five footpaths shown on the Order plan and described in the Order Schedules are:
 - Path 1, points A-B-C-D-E-F-G-H
 - Path 2, points C-I-J-K
 - Path 3, points F-K-L
 - Path 4, points O-P-R-S-T-U-V
 - Path 5, points T-N-M-B

Between O-P-R, Path 4 passes through East Winch Common which, as registered common land, confers a public right of access for recreation. Until 1993 when combined, land to the north of the Trout Stream (approximately mid-way between T and N) formed part of Manor Farm and land to the south, part of Home Farm. Path 2 passes through a pit (or quarry) which did not become part of Manor Farm until 2012.

2. At the Inquiry, Norfolk County Council ('the Council') adopted a neutral stance. The case in support of the Order was made by Mrs Steele (the Applicant) and Mrs Paton. The landowner/tenant, A R Wilson Ltd, objecting to the Order, was represented by Mr Farthing. Mr Witham's objection, on behalf of the Open Spaces Society ('the OSS'), concerned the omission from the Order of a reference to 'Limitations and Conditions'. I address this below at paragraph 39. In addition, the OSS submitted there is evidence of use to suggest higher rights may subsist. I consider this below at paragraph 30.

3. I carried out an unaccompanied visit of the Order routes on the afternoon of Tuesday 5 September 2017. I adjourned the Inquiry on 6 September and resumed again on 17 July 2018. I made a further unaccompanied visit to points B and R after closing the Inquiry.
4. At the Inquiry, the Applicant conceded that a right of way had not become established over the route F-G-H. Accordingly, I have not considered the evidence further in this regard.

The Main Issues

5. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981 Act') which requires me to consider whether, on a balance of probabilities, the evidence shows that footpaths subsist over the Order routes, or as suggested whether higher rights subsist.
6. I shall consider whether dedication of the ways has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication under common law.
7. Section 31 of the 1980 Act requires me to establish the date when the public's right to use the Order routes was brought into question. The evidence can then be examined to determine whether use by the public has been as of right (without force, secrecy or permission) and without interruption for a period of not less than 20 years ending on that date. If the tests are met, then a presumption of dedication arises, but this can be rebutted through actions sufficient to demonstrate a lack of intention to dedicate on behalf of the landowners during the 20 year period.
8. The evidence may also be considered under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowners, who must have the capacity to dedicate, intended to dedicate public rights of way; or that public use has gone on for so long that it could be inferred; or that the landowners were aware of and acquiesced in public use. Use of the claimed ways by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

Reasons

Presumed dedication under Section 31 of the 1980 Act

When use of the Order routes was brought into question

9. It is not disputed that claimed use was brought into question in October 2004 when the landowner entered into a Countryside Stewardship Scheme affecting most of the Order routes. From this date (until September 2014) access over these routes was on a permissive basis. However, this would not apply to the pit (crossed by Path 2) which was not in the Objector's ownership at that time. Alternative dates put forward when the public's right to use the routes was challenged include the 1980s when a gate and fencing were installed at B; between the late 1960s and mid-1970s when 'Private Road' notices were put up and a gate at R locked on occasion and annually over the Christmas period;

- the blocking of a bridge at the Trout Stream until it was replaced in 1994; challenges to users; and the date of the Application itself (March 2015).
10. A 'bringing into question' arises when at least some of the users are made aware that their right to use a way as a highway has been challenged by the landowner, or someone acting on their behalf, such that they have a reasonable opportunity to meet that challenge.
 11. Users did not regard their right to use the ways as having been challenged until the implementation of the Countryside Stewardship Scheme, and its eventual cessation when the routes were gated and then locked. Although many had previously encountered gates at B and R, most had found them to be open. They had been able to cross the Trout Stream prior to replacement of the bridge in 1994. The Applicant had been challenged in the pit in 2012, but was not aware if anyone else had been; and others did not recall being asked to leave any of the claimed routes, or having been told they should not be there. None regarded the notices at R and V as challenging users on foot.
 12. I conclude that 2004, when the landowner entered into the Countryside Stewardship Scheme, is the date of bringing into question for Paths 1, 3, 4 and 5, providing a 20 year period of 1984 to 2004. Where not subject to the Scheme, I do not consider 2012 appropriate as only one person referred to being challenged then. The application provides an alternative date. However, I consider the end of the Countryside Stewardship Scheme a more likely date to have brought the public's right into question, as most users would have accessed from one of the other routes where gates were locked at this time. I find that the second 20 year period is 1994 to 2014.

Use by the public

13. Evidence is provided in some 31 user evidence forms (UEFs) from 21 individuals. Additional evidence has become available since the date of the application. Eight users gave evidence to the Inquiry and a further two witnesses, who had not completed UEFs, also spoke. In considering the evidence as a whole, I attach greater weight where it has been tested through cross examination. However, I attach limited weight to that of one user whose evidence was confused.
14. East Winch and West Bilney, comprising some 400 households, lie in a rural location. Claimed use is largely by residents living immediately adjacent or near to the routes. Nevertheless, a right of way may arise where use is confined mainly to, or entirely by local people. This is the case here, although I agree with the Objector insofar as use by one family and their friends alone would be unlikely to suffice, as this would not be representative of 'the public'.
15. Whilst most users claimed to have walked all or many of the Order routes, those giving oral evidence clarified that, depending on where they lived, they mainly used routes to the north of the Trout Stream (including some not forming part of the Order), to the south of the Trout Stream, and around and through the pit. Use was for recreational purposes including dog walking, taking children to and from school, walking with friends (some use taking place prior to and in the early years of the 20 year period ending in 2004), and cycling for example to school.

16. Frequency of use varied. Some, for example dog walking was daily, or often during school term time, sometimes weekly, whilst other recreational use was less frequent, perhaps monthly or a few times a year. Some use was more frequent in the earlier part of the period 1984 to 2004 and became infrequent in later years, for example for one user of Path 4. Two used A to O most often and T to V infrequently. One used A to V, and 2 went from O to the Trout Stream and then followed a different route to V, with infrequent use of paths to the south. Four followed the loop around the pit, A to L, with use of the path through the pit occasional or infrequent. Some users walked alone, whilst others went as family groups, or with friends from the village, for example, mums with pushchairs. Witnesses spoke of seeing other users from time to time, although it is not clear if those observed were using the routes with or without permission. Overall, the picture is of use of only some of the routes, or parts of them in conjunction with other paths, for varying lengths of time and frequency during the 20 year periods under consideration.

'Permission'

17. There is nothing to suggest that use was not open. It took place on weekdays and at weekends during daylight hours. Several witnesses spoke of waving to or chatting with the landowner and others working on the land, and this is confirmed in the evidence of the Objector's witnesses.
18. Permission was granted to some individuals to ride horses, notably between Common Road and Church Lane along Path 4, and to one user to ride a bicycle to get to the Church. In addition, permission had been granted for one person to drive a car on the tracks and to others for fishing, shooting and hunting over the land. There is nothing to suggest that permission was expressly granted for use of the Order routes on foot, although an implied permission was suggested for those known to the landowner.

'Force' and 'without interruption'

19. There was conflicting evidence about barriers. The existence or otherwise of a gate between K and L and its position during the period 1984 to 2004 is unclear. It seems likely there was a gate in the 1970s when cattle were kept on the land, but it was removed when the land changed ownership. A gate was installed when the permissive paths were established, although some witnesses believed there was a locked gate beforehand.
20. A gate at B is thought to have been put in when a previous owner of Manor Farm bought the land, but only one witness recalled it having been locked and others that it was closed some of the time but did not prevent use by walkers.
21. A double metal gate attached to concrete posts at R has been present from the late 1960s and/or prior to 1974. Most users of Path 4 did not recall it, possibly because it was open and not noticed, and some, it seems, may have confused it with a wooden gate that was previously in place at P. The Applicant believed that whilst the gate at R was rarely shut, it was almost never locked. Recollections differed as to whether it was closed at night when fewer users would have encountered it, or at weekends. Farmworkers spoke of having to open and close it when passing through with agricultural machinery. One found it locked once when he went that way as a child. The Objector claimed it was locked annually for two weeks over the Christmas period, and whilst none of the users had encountered this, a witness for the landowner had found it

locked then, and at other times when visiting. However, a user finding it locked once continued by passing around the side of the gate, and another referred to it being locked in the 1980s.

22. Prior to 1994 when replaced with a culvert, the bridge across the Trout Stream had been in poor repair. It had been blocked by a padlocked chain and from time to time large items of agricultural equipment. This, I find, prevented unwanted use by vehicles, but presented no impediment to users on foot. Most users had no recollection of the chain, but recalled farm equipment at one time or another. I heard that parents with pushchairs and children on bicycles were able to negotiate the bridge, and those who recalled the chain were able to step over and walk alongside the machinery with sufficient room.

Challenges

23. Several employees and others working on the land had been instructed by the landowners (including previous ones) to challenge people and to ask them to leave, in particular people that they did not know. Some had met those giving oral evidence to the Inquiry, whom they said had been asked to leave. The recollection of users, however, was that they were asked to keep their dog(s) on a lead but had not been told they should not be on the Order routes. It seems that use by some locals, in particular those who were known to the landowners and their employees, even as a nodding acquaintance, was tolerated, so long as they behaved responsibly, but that use by strangers or trespassers was not, and was discouraged. As stated above, witnesses for both parties referred to having 'passed the time of day' with each other without incident. I note the landowner's view was that few people were seen on the Order routes and that use was infrequent, in contrast to the level of use claimed.

The Pit

24. After quarrying operations ceased the pit was used by a motocross club, archery club and a shooting club, with most activities taking place at weekends or on a weekday evening. When in use, witnesses did not walk Path 2 but followed the route around the edge of the quarry (C-F-L). The Applicant agreed that such activities constituted an impediment to the use of Path 2.

Alignment

25. The alignment of Path 5 altered between N and B, arguably within the 20 year period ending in 2004. The Applicant acknowledged that a change had taken place, but could not say when. If within the 20 year period, then no full period of use to satisfy the test could be made out for Path 5.

The evidence and actions of the landowners

26. The landowners regarded the Order routes as farm tracks associated with agricultural activities on the adjoining land. They had evolved since the 1940s, becoming the network seen today only in more recent times. When Manor Farm entered into the Countryside Stewardship Scheme in 2004, none of the routes had been regarded by the landowner as enjoying public rights.
27. 'Private Road' signs had been in place at R and V for many years. However, I agree with the Applicant that they were directed towards users in vehicles. Many public rights of way coincide with private roads.

28. I do, however, regard the locking of gates as evidence of a lack of intention to dedicate. No separate access was provided for walkers when the gate at R was on occasion locked, which might have been expected otherwise.
29. The evidence regarding challenges is less clear. As described above, I heard that employees were instructed to challenge users and turn them away. Another landowner said he had challenged people on numerous occasions since the 1980s, but this is not supported by the user evidence. In contrast, users waved to and chatted with the Objector and his employees and contractors. It seems that most users were known as 'locals'. Some may have had connections or loose ties with the Farm through having worked there on a temporary basis, or known or been related to others who did, and therefore their use was not challenged.

The evidence for higher rights

30. There is evidence of use of the Order routes by horse riders and cyclists. It points largely to permissive use by horse riders, and in any event is limited in volume and frequency. One person had been given permission to ride a bicycle. Other use was mostly by children who had learnt to ride on these routes and sometimes cycled to school. Again, I find the use (without permission) to be limited in volume and frequency. Furthermore, there is insufficient evidence that claimed use (without permission) on horseback or with bicycles took place throughout the 20 year period(s) such that I consider the evidence falls short of a finding that higher rights subsist.

Conclusions on presumed dedication

31. I conclude that there has been use during the 20 year periods under consideration and that there has been use to varying degrees. On closer analysis of the user evidence I find overall that use is low in volume for the routes individually and low in frequency over the relevant time periods. Greater use appears to have occurred on some routes at times, but then reduced to occasional and sporadic use. Some routes have been used only in part, and use of the path through the pit has been very limited. I acknowledge that the landowner was aware that local people were using the routes. Nevertheless, overall, I am not satisfied that there has been sufficient use of any of the routes by the public throughout the 20 year periods under consideration.
32. In addition, I consider that both the locked chain at the bridge until the early 1990s and the gate at R locked on occasion were intended to prevent access, although I acknowledge that for the bridge the likely main concern was to prevent vehicular use. Although the evidence does not indicate the gate was regularly locked over the Christmas period as claimed, I nevertheless heard from one user who on finding it locked passed around it. Also there is no full 20 year period of use for the route between B and N due to a change in alignment; and use of Path 2 through the pit was interrupted. On balance, therefore, I find the evidence points to use not being as of right.
33. It follows in my view that that no presumption of dedication arises under the tests set out in the 1980 Act. I turn next to consider the evidence at common law.

Common Law

34. I have considered a range of documentary sources researched by the Council. Two early County maps in particular are drawn to my attention in support of the Order: Fayden's Map of 1797 and Bryant's Map of 1826 which show a route named Appleton's Lane in the vicinity. It is suggested this shows a long-standing short cut between the main road at East Winch, West Bilney Hall and beyond. However, whilst these maps indicate the existence of routes here, they do not align with any of the Order routes themselves. I conclude that in itself the documentary evidence does not assist in determining the existence, or otherwise, of public rights over the Order routes. Later maps and aerial photographs do, however, go some way to confirming the physical existence of the Order routes.
35. Use is claimed from the late 1960s to 2004/2014. It is evident, though, that not all the routes were available throughout this time, for example the pit was an active quarry, and there was no connecting route south of the Trout Stream during part of this period. I do not doubt that use has taken place for many years. However, there is no evidence that any of the landowners intended to dedicate any public rights of way over the farm tracks. Indeed, the evidence is that landowners resisted public use through instructing employees to challenge people. In addition I note the locked gate at R and locked chain at the bridge. As concluded above, use of the individual routes has been low in volume and frequency and insufficient in my view to demonstrate an inference of dedication at common law.
36. On balance I find that a case at common law is not made out.

Other matters

37. The suitability or desirability of a network of paths here for users as an alternative to using the roads is not a relevant consideration in my determination of the Order under the 1981 Act, and accordingly I have attached no weight to it.

Modifications to the Order

38. The OSS maintained it was usual practice for an Order to specify 'Limitations or Conditions' to which the public's use of a way was subject, even if no such features existed¹. However, as I have decided that a case has not been made out under Section 31 of the 1980 Act or at common law, this matter does not fall to be considered.

Conclusions

39. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should not be confirmed.

Formal Decision

40. I do not confirm the Order.

S Doran

Inspector

¹ Section 53(4) of the 1981 Act

APPEARANCES

For the Order Making Authority

Marcia Grice
& Ian Sharman

Community and Environmental Services, Norfolk
County Council

Supporters

Helen Steele
& Charlotte Paton

Applicant

who called

Susan Hunt

Brian Paton

Charlotte Paton

Sam Paton

Horace Reeve

Derek Steele

Helen Steele

Objectors

Nigel Farthing, Solicitor

Birketts LLP, *representing* A R Wilson Ltd, Manor
Farm

who called

Anthony Buttle

Adam Carter

Ross Haddow

David Reed

Nathan Reed

Robert Wilson

Alan Yarham

Others who spoke

Robert Taylor

Linda Taylor

Valerie Robins

Melvin Place

DOCUMENTS

Documents submitted on 6 September 2017

1. Opening statement of Norfolk County Council and bundle of Statements of Case and appendices submitted for the Inquiry
2. Statement of Horace Reeve; email and letter from Tyvian Stabler, submitted in support of the Order

Document circulated during the adjournment

3. Statement of Valerie Robins

Documents submitted on 17 July 2018

4. Additional statement of Valerie Robins
5. Email dated 16 July 2018 from Patricia Blakesley, submitted by Helen Steele
6. Closing submissions on behalf of A R Wilson Ltd
7. Closing submissions for the Applicant

Modification of the Definitive Map and Statement in the Parish of East Winch

Norfolk County Council
County Hall
Martineau Lane
Norwich
NR1 2SG



FOOTPATHS - - - - -

Scale 1:5,500

MAP NOT TO ORIGINAL SCALE



authorised sign
on behalf of HEAD OF LAW

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County Council