
Order Decision

Inquiry held on 16 January 2019

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 06 February 2019

Order Ref: ROW/3199994

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Norfolk County Council (Great Witchingham) Modification Order 2017.
- The Order is dated 2 August 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between Footpath 2 and Marriott's Way, Great Witchingham, as shown on the Order Map and described in the Order Schedule.
- There was 1 objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public inquiry into this Order on Wednesday 16 January 2019 at Great Witchingham Village Hall. I made an unaccompanied site inspection on Tuesday 15 January when I was able to walk most of the Order route. I made a further inspection during the inquiry when I was accompanied by parties who appeared at the inquiry.
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.
3. The Order Making Authority, Norfolk County Council, chose to adopt a neutral stance at the inquiry. The case for confirmation of the Order was therefore led by Mr Mike Lockwood, acting on behalf of the applicants for the modification of the definitive map and supporters of the Order.

The Main Issues

4. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
5. Much of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the 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 was brought into question.

6. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

Documentary Evidence

7. A route similar to the Order route would appear to have existed since before 1797 when it was shown on Faden's Map of Norfolk. However, the route was stopped up as a public footpath as a result of the 1809 Great Witchingham Inclosure Act.
8. After this time the route was consistently shown on various maps and referred to in documents. Bryant's Map (1826) shows the route leading to Old Hall (now the location of Englands Farm) and the 1843 Tithe Apportionment and Map refer to the route as a 'drift' in the ownership of New College, Oxford. These documents do not provide evidence of any public status the route might have had and are consistent with the route having been regarded as a private accommodation road.
9. Ordnance Survey (OS) maps of 1886 and 1905 also show the route leading to Englands Farm but do not indicate any public rights. By 1905, a railway had been constructed across the route and, at a Hearing in 1960, at which the possible inclusion of the route in the definitive map was considered, evidence was given on behalf of British Railways (BR) that at the time of construction of the railway the route was recorded as an occupation road with no indication of any public rights over it. I have not seen documents relating to the construction of the railway but have no reason to doubt the evidence reported.
10. It would appear that when the first definitive map was being prepared, Great Witchingham Parish Council claimed the Order route as a public footpath, but its inclusion attracted objections leading to the Hearing referred to above. At that Hearing, landowners stated that they regarded the route as a private occupation road and an employee of BR stated that the route was gated on either side of the railway and the gates were kept locked with land owners/occupiers holding keys. This evidence was accepted by the inspector as proof that the route was not a public right of way and this was apparently also admitted by 3 parish council witnesses. However, subsequent minutes of the parish council show that the council appealed against the decision not to include the route but to no avail and in 1963 it was recorded that "*...the deletion of this footpath must be accepted*" and in February 1964 the council withdrew its objection to the omission of the route.
11. At the inquiry, two witnesses stated that they knew the route before 1960 and did not recall gates being locked. However, it would not be appropriate to give greater weight to recollections 60 years later than to evidence given at the time. In any event, it is possible that gates were sometimes left unlocked by landowners on occasion, but this would not mean that public rights subsisted.
12. Minutes of the parish council from 1982 record the fact that the path had been closed since around 1963 and in 1987 it was recorded that the path had been lost forever. Later minutes from 1990, 1995 and 1997 appear to show that it

was accepted that the route was not a public right of way and that use of it was by permission of the landowner.

Conclusions regarding Documentary Evidence

13. The available evidence shows that the Order route has existed for a long time but does not indicate the establishment of public rights over it between 1809 when it was stopped up as a public footpath and the early 1960s when the first definitive map was being prepared.
14. Accordingly, the determination of this Order depends entirely on the evidence of more recent public use of the claimed route that is available and whether this indicates that a public footpath can be presumed to have been dedicated since the early 1960s in accordance with the provisions of the 1980 Act (statutory dedication) or inferred at common law.

Statutory Dedication

Date when public use was brought into question

15. In February 2015 the owner of the land between Points C and E erected fences preventing access to this section of the Order route. He also erected signs stating that public access was not allowed and in May 2015 he made a statement and declaration in accordance with section 31(6) of the 1980 Act indicating that he did not accept the route as a public right of way. These actions clearly brought public use of the route into question at that time.
16. In 1985, the owner of the land between Points A and C also deposited a statement under section 31(6) of the 1980 Act indicating that this section of the Order route was not accepted as a public right of way. This statement was not followed up by a declaration within the 6-year period then allowed to indicate that no additional right of way had been dedicated subsequently but, nevertheless, it is my view that the lodging of the deposit in 1985 was sufficient to bring public use of the route into question at that time.
17. As already mentioned, it was specifically determined in 1960 that the route was not a public right of way.
18. There is evidence of signs indicating that the route was not a public right of way having been in place since around 1984 or earlier and very specific signs stating that the route was permissive only were put in place in around 2001.
19. Public use of the Order route has thus been brought into question on at least three occasions, in 1985, 2001 and 2015.

Evidence of Users

20. Twenty User Evidence Forms (UEFs) were submitted in support of the Order which described use of the Order route from the 1940s until 2015. Five people who had completed UEFs also appeared at the inquiry to give evidence in person.
21. The frequency of use claimed varied between daily and only occasional but most of those providing evidence claimed to have used the route weekly or more frequently for at least some of their period of use. The UEFs and the verbal evidence of witnesses indicated that use of the route had increased

since the opening of Marriott's Way trail along the route of the former railway line in the early 1990s.

22. Seven people claimed to have used the route throughout the 20-year period from 1965 to 1985 and six people for part of that period. Twelve people claimed to have used the route throughout the period from 1981 to 2001 and seven for part of it and fifteen people claimed to have used the route throughout the period from 1995 to 2015 and four for part of that period.
23. Users generally stated that they had not been challenged or encountered any obstruction when using the route and had not received permission to use it. However, a few users had at times been employed by landowners and some of their use might be regarded as by permission rather than 'as of right'.

Actions of landowners

24. The railway remained in operation until around 1982 but it is not known for how long after 1960 gates continued to be locked at either side restricting access to the Order route.
25. Before 1986 the land crossed by the Order route is believed to have been owned by Mr J Comer. A member of his family provided a written statement that there was not a public right of way over the land. However, it is known that Mr Comer allowed local people to have access.
26. Since 1984 there has been a gate in place across the route at Point B but, although this seems to have prevented unauthorised vehicular access, walkers could use a stile or pedestrian gate alongside it.
27. From 1986 until 2007 the land between Points A and C was owned by Whitwell Hall Country Centre (WHCC), having been gifted to them following the death Mr Comer. Mr Ivins, a trustee of WHCC gave evidence that during the period of WHCC's ownership, the Order route was not subject to public rights. It was understood that the previous owner had permitted access to the area by parishioners and WHCC had continued the practice. However, the land was occupied by a tenant, the City of Norwich Angling Club (CNAC) and it appears that by 1997 CNAC members had sought to restrict access as dog walkers had been causing some problems for anglers. As a result, there was some correspondence between the parish council and WHCC in which it was made clear that there was no public right of access to the area, but that access was permitted subject to certain conditions. The parish council also agreed to publicise a plan showing the correct route around the lakes which was not the Order route. The parish clerk then confirmed that the relevant details had been placed on the parish notice board and would also appear in a forthcoming issue of the Wensum Diary.
28. Mr Ivins also stated that during the entire period of WHCCs ownership, the Order route was overgrown and impassable and that walkers used a parallel path known as the 'fisherman's track'. A subsequent co-owner of the land confirmed that this was the situation in 2007 and that the Order route was cleared by him and his partner after they acquired the land. Some users suggested that although the route had been overgrown it might have been passable with difficulty, but they agreed that walkers generally used the 'fisherman's track'.

29. Written evidence was provided on behalf of CNAC, tenant of the land between Points A and C from 1984 until 2007, that signs had been in place during this period close to Point B and at other points which stated that the land was private and access was restricted to CNAC members only. One of these signs was still in place when I visited.
30. The tenancy Agreement entered into by CNAC in 1984 specifically granted a right of way "...with or without vehicles and on foot only" over the Order route and an Assent in 1987 following the gift of the land to WHCC specifically reserved a right of way over the route. It was argued on behalf of objectors that these provisions would have been unnecessary if public rights existed over the route.
31. In 2001, it was agreed between WHCC and the Wensum Valley Project that permissive access would be allowed. A 'squeeze stile' was erected at Point B to facilitate the permitted access and signs were attached to it which made clear that the route was permissive and not a public right of way. Waymark posts were also erected along the route which followed the 'fisherman's track' and not the Order route.
32. One of the co-owners of the land between Points A and C from 2007 until 2013 confirmed that the route was permissive during this period and that in addition to signage making this clear the route was closed annually on Boxing Day. Stiles at B and C were replaced by pedestrian gates during this time to prevent access by otters, but the permissive path signs were transferred from the stiles to the gates.

Conclusions regarding Statutory Dedication

33. A route similar to the Order route has existed for a long time. However, the 1809 Inclosure Act took away public rights over the route and documentary evidence since 1809 does not indicate the re-establishment of any public rights. In 1960 the possibility of public rights was specifically considered and it was determined that none subsisted.
34. Since 1960, it is clear that a route has been used by the public but there is also evidence that this use took place on a permissive basis rather than having been 'as of right' as required under the 1980 Act.
35. Evidence of use in the period before 1985 is understandably somewhat limited and, since then, although there is more user evidence available, there would appear to be no continuous 20-year period during which public use was not brought into question. There is also evidence that successive landowners made clear their lack of intent to dedicate a public right of way despite being prepared to permit some access.
36. In addition, it would also appear that for a considerable period most if not all users did not follow the Order route but used the so-called 'fisherman's track'.
37. On balance it is my view that throughout the period since 1960 public use of the Order route has been specifically brought into question on a number of occasions and successive landowners have indicated a lack of intent to dedicate a right of way. In these circumstances it cannot be presumed that a public footpath has been dedicated in accordance with the provisions of the 1980 Act.

Common Law

38. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
39. In this case, there is evidence that members of the public have used the Order route over a considerable period but there is also significant evidence to the effect that successive landowners have not intended to dedicate a public right of way but have allowed permissive use of the route. In these circumstances it would not be appropriate to infer that the Order route has been dedicated as a public footpath at common law.

Conclusions

40. Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

Formal Decision

41. I do not confirm the Order.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Lawrence Malyon Case Officer, Norfolk County Council

Supporters

Mike Lockwood Local resident

Who called:

Geoffrey Arthurton Path user

John Wright Path user

Richard Sarsby Path user

Dorothy Cushing Path user

David Cushing Path user

Objectors

Nigel Farthing Solicitor, Birketts, representing Mr and Mrs Mack and Mr Swatman, landowners

Who called:

Anthony Morrish Former landowner

Hugh Ivins Trustee of former landowner

Richard wells Local resident and bailiff

DOCUMENTS

1. Bundle of documents (2 files) compiled by NCC.
2. Additional bundle of documents, NCC.
3. Statement of Case on behalf of applicants and bundle of supporting documents.
4. Statements of Richard Sarsby, John Wright, Dorothy Cushing, David Cushing and Geoffrey Arthurton.
5. Statement on behalf of objectors with supporting documents.
6. Closing submission on behalf of objectors.

