The Planning Inspectorate

Order Decision

Site visit made on 18 January 2019

by K R Saward Solicitor

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

Decision date: 05 February 2019

Order Ref: ROW/3203730

- 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 (Hethersett) Modification Order 2017.
- The Order is dated 5 July 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. The original sealed Orders were not received by The Planning Inspectorate. Certified copies of the Order have been provided.

2. I have found it convenient to refer to points along the claimed route and so a copy of the Order Map is attached for reference purposes.

3. Part of the route between C-D is unregistered land and despite extensive enquiries its ownership could not be ascertained. Dispensation was therefore granted by The Planning Inspectorate on behalf of the Secretary of State to the County Council to the effect that notice of the Order need not be served on the owner/occupier of the land affected by this part of the route.

4. The Order has been made under Section 53(3)(2)(b) of the Wildlife and Countryside Act 1981 in consequence of the occurrence of an event specified in Section 53(3)(c)(i). In particular, the discovery by the authority of evidence which it considered to be sufficient to show that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

Main Issue

5. No issues are raised with regard to the existence of a public footpath along the Order route. The only point in dispute concerns the width of the path to be recorded in the statement accompanying the definitive map. Pursuant to Section 53(4) of the 1981 Act, the modifications which may be made by an Order shall include the addition to the statement of particulars as to the position *and* width of any public path.

6. Therefore, the main issue is whether or not the Order should be confirmed with

the width of the path as currently described or if the Order requires modification to specify a revised width.

Reasons

7. The application seeks the addition of the route as a public footpath. It was supported by 159 user evidence forms and photographic evidence. No specific width for the path is claimed in the application.

8. As made, the Order identifies the path as 6.3m wide at the start of the route at the junction of Cedar Road with Grove Road where there is a field gate and kissing gate. The remainder of the route is described as proceeding at a width of 2.5m.

9. Objection has been made on behalf of The Ramblers' Association for the Norfolk Area to the width selected for the path as specified in the Order. It is argued that the footpath should be recorded at widths varying between 3.8m to 6.3m. The applicants do not support The Ramblers objection over the width.

10. The length of path between points B-C on the Order Map falls within the ownership of The Nicholas Evans-Loombes 1997 Children's Settlement. The landowner fully supports a width of 2.5m on the basis that it reflects the user evidence on the ground. Any greater width is opposed.

11. The southern end of the route between points A-B is owned by Taylor Wimpey who accepts the route to be public. It raises no issue over the width.

12. South Norfolk District Council owns what is known locally as the 'Parish Pit' which is located to the north of point D. The District Council indicates that it has a right of way over the track and needs vehicular access along the whole route for maintenance purposes. This has no bearing on the point of dispute. Any private rights are unaffected by the exercise of a public right of way.

13. The Ramblers say that the farmer of the land west of A-B-C has cut back some of the vegetation on the northern side of B-C, presumably with a tractor mounted cutter. The question is raised as to where pedestrians would go when confronted by a vehicle. It is suggested that the logical conclusion is that the public right of way should be wider than 2.5m to enable safe passage by both pedestrian and vehicular traffic.

14. That may be a practical suggestion, but it has no foundation in law. The crux of the matter is the extent of the path dedicated as a public right of way.

15. The Order was made on the basis of user evidence as the County Council considered there to be insufficient archive and documentary evidence to determine the status of the route as public. It now takes a neutral stance.

16. The Ramblers do rely on documentary evidence and it is appropriate that it is considered first.

Documentary evidence

17. The claimed route is shown coloured the same as routes known to be public in the Tithe Map and Apportionment 1846-1847. Its physical presence is apparent in various Ordnance Survey ('OS') maps from 1886 onwards and the Finance Act map 1910. However, the only document produced containing specific mention of width is the Hethersett Enclosure Map and Award 1799,1800. The

entirety of the route is shown on the map. Between A-B-C it is coloured in the same manner as other routes now used by the public. At the start of the section of route between C-D the map is annotated with the number 9 for the ninth private road. I understand that it is described in the Award as:

"Ninth one other Private Road of the breadth of twenty feet branching out of an old Inclosure belonging to the said Jehosaphat Postle and an old Inclosure called Nixon's Meadow belonging to William Bailey and proceeding from thence in a North Direction between the two last mentioned Inclosures and across an old Inclosure called Carter's Meadow to the third described public Gravel Pit."

18. The Ramblers point out that 20 feet converts to 6.1m. They measured the width north of point C in 2017 as being 5.9m and 5.0m at two points between the ditch edges on both sides and 6.6m between a tree and hedge further towards D. They say this supports a width more like 6m than 2.5m.

19. It is evident that the northern end of the route between C-D was described as a private road in 1799. My attention is drawn by The Ramblers to the description of the tenth private road which is quoted as follows:

"*Tenth one other private road being the same as hath been heretofore used by the inhabitants of the said Parish of Hethersett in carting to and from the first described Gravel Pit which two last mentioned Private Roads we do set out and appoint for the use and convenience of all the Owners and Proprietors of Lands and Tenements within the said Parish of Hethersett and their several Heirs and Tenants respectively*".

20. As all adult residents would fall into the category of an owner or tenant, The Ramblers submit that, in effect, the whole parish had use of the road albeit that it is unclear if such use was on foot only.

21. The Enclosure Award indicates that the remainder of the route was an 'old road', but no mention is made of its status or width.

22. The Ramblers refer to a declaration contained within the Enclosure Award to the effect that land comprised in four Allotments is set out and allotted as public sand gravel stone and clay pits. This appears to include the pit north of point D. The transcript provided refers to the pits being allotted for "*use by the Surveyors of the Highways and by the Proprietors of Lands and Estates within the said Parish of Hethersett and their Tenants…"*

23. The transcript goes on to cite references to other pieces of land bounded by an 'old road'. It is submitted by The Ramblers that the same people who had rights to use the ninth private road would of necessity have had the same rights to use the old roads from A-B-C to reach the private road at C-D. Furthermore, it is contended that the old roads would have been of similar width to the ninth private road.

24. A sign affixed to the field gate at point A by the Parish Council refers to the Parish Pit as an amenity for the residents of Hethersett. It states that the track leading to the pit is private land over which residents have the right of access to the pit on foot only. The sign corresponds with the entry in the Enclosure Award to the effect that residents have access over private land to the pit.

25. The Award does not confirm rights more generally to the public at large. It laid out a private route only and to that extent it is not relevant to the width.

26. The Ramblers have scaled off the 1:2500 OS map of 1906 to conclude that the average width was 7.2m. However, the accuracy and reliability of that measurement is uncertain. The Council's archival research has produced an extract of a later OS map surveyed 1954-1979 and revised for significant changes in 1983. It shows the route as an 'Other road, drive or track' of similar width to other nearby roads, but it does not clarify matters further. A worn track along much of the route is apparent in aerial photographs of 1946 and 1988, but on the face of it the width is not discernible with any level of clarity.

27. Therefore, the documentary evidence is not sufficiently clear to identify the width of the path utilised as a public right of way. Without the assistance of documentary evidence, it is necessary to rely on what users say in their evidence forms taking into account the physical features on the ground.

User evidence

28. Under Section 31 of the 1980 Act, there must have been use of the claimed route by the public as a footpath 'as of right' and without interruption, over a 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. The Council has not explicitly said what date it identified for when the public's rights were brought into question.

29. I note that the application was not processed when it was first submitted on 5 June 2013 because the County Council sought to enter into negotiations with the landowners to dedicate the route as a public footpath. It was only when it emerged that an agreement could not be achieved through those negotiations that the application for a modification order was processed.

30. There are gates erected at the entry point, but they do not prevent public access. Indeed, an unlocked kissing gate is in place to facilitate access. The covering letter to the application refers to the "loss of this right of way due to ill-considered 'development'…". This could suggest that concerns over the possible impacts of development may have prompted the application.

31. I shall take it that the route was called into question on the date of the application in June 2013. As at that date 58 of the 159 users claimed use for 20 years or more and it was on this basis that the Order was made. The earliest claimed use was 1949.

32. The width of a public path is not necessarily confined to the trodden line. Much depends on the space that would have been available over the relevant period and how much of it was used. Thus, the path may have become established over the same land as the private route and 'old road', but the issue for determination is what width of path was used by the public.

33. Notably, a number of users say that the path varies in width. This is consistent with The Ramblers argument that the path is not one width.

34. Some users suggest that the available width changes with the seasons and the growth of adjoining vegetation. That is to be expected. It is also indicated by some longer term users that the path has narrowed over the years. At one time it is suggested that the path was wide enough for a tractor to pass over it.

35. The greatest width claimed is around 5m and the narrowest is 0.5-1m with some reference also to 2ft. It is possible that some users identified the width of

the trodden path whereas others may have meant the full width that was available to walk.

36. Whilst there is space beside the trodden line, the evidence needs to be examined to ascertain the extent of the route actually used by the public.

37. The path follows a clearly defined line formed of compacted soil. At the time of my visit, the field to the north western side of the path between A-B had been ploughed close up to the narrow trodden line. On the opposite side there is a green strip which varies in level and width. It separates the trodden path from bushes and trees lining each side of a ditch. The Ramblers measured the width between A-B as 6.3m and 6.1m at midway points and 3.8m nearer to point B. Clearly physical conditions can change, but there was no indication on my site visit that a path anywhere near those measurements has been walked.

38. There is no physical boundary separating the path from the cultivated land between points B-C on the south-western side. There is a ditch on the north-eastern side behind dense hedgerow that runs parallel with the path. The Ramblers took one measurement of 5.3m along this stretch. I observed parallel dirt track lines in the mostly grassed strip leaving more space to walk than A-B. Nevertheless, the presence of the hedgerow confined the available space to well below the width claimed by the objector.

39. As set out earlier, the route between C-D was measured by The Ramblers at between 5.0m to 6.6m in width. It is largely bounded by ditches and hedgerow with coarse thicket also beside the worn and muddied surface. In consequence, I found the available path to be far more limited than the measurements taken.

40. When looking at the route as a whole there may be a corridor greater than 2.5m if the width of the route is measured between certain land features, such as ditches. However, there are no present day signs that the full width was used. Indeed, it is inhibited by trees and other forms of growth. Of course, landscapes change and hedgerow can grow rapidly to alter the width of a path. Indeed, there is some evidence that vegetation has narrowed the path during the relevant period. In the circumstances it is reasonable to reach a conclusion based upon analysis of the user evidence.

41. Not all users have specified a width. Of those who have, less than a third claim that the path is over 2.5m wide. Many people have estimated a range for the width. In those cases, if the midway point is applied then by my calculations the average claimed width is just over 2.5m. It is only when the maximum figure in the range is taken that the average width specified by all users becomes closer to 3.5m. On the other hand, if the lowest figure is taken then the width drops below 2m.

    In the absence of any other more compelling evidence, the width of 2.5m specified in the Order represents a fair reflection of the evidence as a whole. It also constitutes a reasonable width sufficient to allow two people to pass.

42. There is insufficient evidence before me to support a path of a width greater than 2.5m. On the balance of probabilities, I find that the route should be added to the definitive map and statement as a public footpath at a width of 2.5m as currently set out in the Order.

Other Matters

43. Whilst the original application was for a footpath, The Ramblers note in their statement of case that 15 users say they have cycled along the route. An objection on the ground that the route should be recorded as a bridleway is not explicitly advanced or made in any detail. It is suggested that adults may be accompanied by small children cycling. It is also mooted that there is the possibility of teenagers who cycle the route being missed in the survey of users. These matters are speculation only. The statement goes on to say that mountain bike prints were spotted in the mud along part of the route in 2017, but that post-dates the application and does not of itself indicate public use.

44. As things stand, there is not enough information for me to conclude that the route should be recorded as anything other than a public footpath.

Conclusion

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

Formal Decision

46. I confirm the Order.

KR Saward

INSPECTOR

Norfolk County Council (Hethersett) Modification Order 2017

Footpath (A-B-C-D) — — — — — —

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