



Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 18 March 2019

Appeal Ref: FPS/D3450/14A/4

- This Appeal, dated 14 November 2018, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Staffordshire County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 2 November 1999 was refused by the Council and the applicant was notified by letter dated 29 October 2018.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the Appeal route as a Public Footpath.

Summary of Decision: The Appeal is allowed in part.

Procedural Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this Appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
 2. Submissions in support of the Appeal have been made by the Appellant (Mr Martin Reay) and Mr David Rice. Staffordshire County Council ('the Council') has made submissions in opposition to the appeal and other objections have been made by Knights plc on behalf of one of the landowners involved, Mr Carl Pointon.
 3. The Council's Countryside and Rights of Way Panel has considered Mr Reay's original application twice at two separate committee meetings: once on 10 August 2018 and again on 19 October 2018. On the first occasion the officer recommendation was that an Order should be made, and on the second occasion the recommendation was not to make an Order. On both occasions the Panel determined not to make the Order for which the application had been made.
 4. For procedural reasons, the Council decided that the matter should be reheard after the decision of the August Panel had been made, but Mr Reay nevertheless appealed both the decision made at the August meeting (and conveyed to him by a notice dated 10 August 2018) and the decision of the October meeting (for which the notice is dated 29 October 2019). Both appeals were submitted within the specified time and were validly made.
 5. I note that the decision of the August Panel meeting does not appear to have been formally rescinded and I therefore consider that there are two 'live appeals' in respect of this application, both of which need to be determined.
 6. Notwithstanding this state of affairs, both appeals are based on the same information (or an expansion of it) although the Council has made its submissions on
-

the basis of the second Panel report. For simplicity I have decided to treat both appeals as one and the same, and to issue one decision, but for the avoidance of doubt my decision covers both appeals.

7. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

The Legal Criteria

8. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the County Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify it upon the occurrence of specific events, cited in Section 53(3).
9. The relevant event is set out in Section 53(3)(c)(i) of the 1981 Act, which provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] 68 P & CR 402, and upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064:
- Test A: Does a right of way subsist on the balance of probabilities?
 - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

10. Section 32 of the Highways 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.

The Main Issues

11. The principal piece of evidence on which Mr Reay relies is a copy of an Order made by the Quarter Sessions in 1807 ('the 1807 Order'), diverting a public footpath and setting out a new route. This is supported by copies of other mapping evidence.
12. Whilst the Council has accepted that the evidence is sufficient to show that a Public Footpath from Cheadle Road to Public Footpath No. 39 Cheddleton Parish at Woodlands Hall, Cheddleton subsists, the Order was refused on the basis that the evidence was insufficient to show that the alleged Public Footpath either terminated or commenced at a Public Highway and because the line of the claimed route could not be established.¹

¹ See the Resolutions of the Panel at Item 55 in the Minutes of the August meeting and Item 64 of the minutes of the Panel Meeting held on 19 October 2018.

Reasons

Background

13. The Appeal route is described by Mr Reay as running from Cheadle Road to Footpath 39 at Woodlands, Cheddleton. The Cheadle Road has been re-aligned at the relevant location and the appeal route actually joins the line of the former route which is now part of a lay-by off the A520 road.
14. Since Mr Reay's application was based on the information contained in the 1807 Order I think it would be helpful to include the actual description of the route as contained in that document.

"...that a certain part of a publick Footway within the Parish of Cheddleton, in the said Hundred and County lying between the Porters=flatts Gate adjoining the Turnpike Road from Leek to London, in the Parish of Cheddleton and County aforesaid, and Felthouses, in the same Parish for the Length of 1100 yards, or thereabouts, and particularly described in the plan here unto annexed, may be diverted or turned so as to make the same nearer or more commodious to the publick and having viewed a course, proper for the new Footway in lieu thereof through the Lands and Grounds of William Sneyd Esq. of the length of 1307 yards or thereabouts, and of the Breadth of five feet or thereabouts particularly described in the Plan hereunto annexed..."

15. It is therefore necessary to examine the annexed plan to determine the location of the routes mentioned and to identify the line of the new footpath.

Documentary Evidence

1807 Quarter Sessions Orders

16. The Appellant submitted a copy of an Order made by two Justices of the Peace (JPs) and dated 23 March 1807, together with a copy of the certification, signed on the same day, that the new path was "*fit for the reception of Travellers*". The names of the JPs were J Sneyd and Walter Hill Poyntsey.
17. The Council, during their investigations, had identified another Order made in similar terms on the same day, by the same two JPs, which apparently diverts a bridleway in the vicinity onto the identical route as the footpath. The length of the new bridleway is also given as "*1307 yards or thereabouts*", but the width of the bridleway is given as "*eight feet or thereabouts*". Whether the footpath and the bridleway were effectively "side by side", or whether the bridleway was intended to subsume the footpath is not clear.
18. The distance of 1307 yards is made up of two measurements as shown on the 1807 Order plan: "*994 yds from Felthouses to the (undecipherable word²) of Road*" and "*313 yards to Porters-Flatts Gate*" which is written alongside the representation of the Turnpike Road on the plan, returning the diverted route to the commencement point of the original route. It must be remembered that Turnpike Routes were not public highways, and it would therefore have been necessary to provide for a highway route either alongside or over the Turnpike route within the Order.
19. There appears to be no dispute between the appellant and the Council that a public right of way legally exists between a point on what is now Cheadle Road and a point

² Interpreted by the appellant as Turnpike, but I am unable to decipher that from the photocopied plan available to me

on Public Footpath 39 Cheadle in the vicinity of a property called Felthouses.³ However the application was for a footpath and I am only empowered to determine the appeal in relation to the terms of the application. Thus for the purposes of this appeal I can only determine whether or not an Order should be made to show a footpath over the alleged route, and not a bridleway.

20. Both the Council and the appellant (and his supporter Mr Rice) have attempted to clarify the alignment and the extent of the claimed route by using modern technology to measure it. They have arrived at different figures. The section in dispute is the part running between the Cheadle Road in the west and Public Footpath 39 at Woodlands (or formerly Felthouses) in the east.
21. The appellant asserts that his measurements demonstrate that the line shown on the modern application plan⁴ measures a total of 2,981.928 feet which equates to 993.976 yards, matching almost entirely the figure given in the 1807 Order of 994 yards. The process used by Mr Rice to measure the distance was described in his submission with copies of the relevant screen-shots. The Council has asserted (and has now provided details of their methodology) that the same distance on the ground measures 3035 feet or 1012 yards. Consequently, The Council's view is that if the route created by the 1807 Order was only 994 yards long it must have fallen short of linking to the highway, either at one end or both ends, by a total of 18 yards or 54 feet.
22. On behalf of Mr Pointon it is asserted by Knights plc that the quality of the map annexed to the 1807 Order is such that it cannot be relied upon to show accurately the alignment or extent of any of the routes referred to because it lacks geographical and topographical accuracy. It has neither a scale nor an indication of compass direction, and it is merely a generic representation of the local landscape. Mr R Pattinson, on behalf of Knights plc, considers it insufficiently accurate to rely upon as justification for making a Definitive Map Modification Order ('DMMO'), and he does not place significant weight on the depiction of a route along a similar line on later Ordnance Survey ('OS') maps as support for the line of the claimed highway.
23. I accept that by modern (or even 19th Century OS) mapping standards the 1807 plan only provides a rather generalised representation of the situation, but the fact is that the map is part of a legal document which is sufficient, in itself, of providing evidence of the existence of a highway. The accuracy and quality of the map is not unusual for that time, and does not affect the legality of the Order. It is reasonable to use other, perhaps more accurate, mapping to interpret the earlier plan; the later mapping having the ability to give a clearer picture of the manifestation of the 1807 Order. It is incumbent upon the decision maker to form an opinion on the basis of all the relevant evidence available, taking an holistic approach.
24. Clearly any mapping which pre-dates the 1807 Order is not helpful in identifying the diverted line of the footpath, and neither is any small scale mapping from any period. This rules out most of the mapping evidence submitted from being of any assistance, other than to show the existence of a route along a line in the vicinity, both before and after 1807.
25. My examination of the documents as a whole suggests that, at the time of the 1807 Order, the public highway in the vicinity of Felthouses⁵ ran on a somewhat different

³ See wording of the Resolutions referred to in footnote 1 above

⁴ Appendix B to the initial Officer's report prepared for the August Panel meeting

⁵ whether that refers to a group of dwellings or an individual property is irrelevant

line to the present route of Footpath 39. The line of that route is suggested on the 1807 plan as being a widened area adjacent to property, and the vestige of that line is still apparent on the 1880 OS map used as the comparison base map in Mr Reay's submission. It is even visible on the relatively modern map used as the base for the facsimile extract of the 1999 DMS, submitted by the Council. The 1807 plan appears to show the line of the former footpath joining the highway in virtually the same location as the proposed diverted route, which strengthens my view that this was where the highway ran at Felthouses at that time. It would not have been usual to have a public right of way which did not link into the highway network at both ends, in the same way that it would not be common now for that to be the case.

26. The evidence of the OS map of 1880 suggests that the link between the route created by the 1807 Order and the adjoining highway at Felthouses may have been altered at some time after 1807, and by some means as yet unidentified, turning it to the south east in order to maintain continuity of the highway network. In the absence of any evidence explaining that alteration I agree with the Council that the route created by the 1807 Order, on which Mr Reay relies, would not appear to connect to the present-day line of Footpath 39, despite his attempts to demonstrate such a link through his measurements.
27. At this distance of time it is not possible to be absolutely sure where the JPs measured their distances to and from, and I cannot explain why the measurements obtained by the Council do not match those of the Appellant despite apparently measuring the same route between the same co-ordinates. Whether it is down to the different technology used, or the different software, is open to conjecture, but I am satisfied that the 1807 Order as represented on the 1807 plan does not follow the application route to its eastern terminus.
28. That is not to say that the public footpath created by the 1807 Order does not exist; it is merely not the full picture. The Council itself determined that the evidence does show that a footpath subsisted. I agree, and that should be sufficient to justify the making of a DMMO. I consider that the most likely route is that shown (with more accuracy) on the 1880 OS map, but only so far as the point I have identified as 'X' on the plan attached to this decision as Appendix 1.
29. With regard to the route shown on the 1807 Order plan running along (or perhaps alongside) the Turnpike Road northwards to Porters-Flatts Gate, since the lay-by now forms part of the adopted highway, it is unlikely to be necessary to determine the exact location of that part of the footpath. Nevertheless, the 1880 OS map clearly indicates that the route simply joined the road at that point, and I consider that much the most likely situation was that in 1807 it ran north along the Turnpike. Since that is now part of the general highway (it having been dis-turnpiked at some point) there is no necessity to include it in any DMMO.
30. Having been satisfied that a public right of way subsisted, the means of connecting the 1807 route to a highway at the eastern end would be a matter for the Council to consider separately from this application and appeal. There may be other evidence available which has not been discovered or examined which will assist in resolving that issue, but it has not been submitted as part of this application or appeal, and I cannot presume to conjecture on the matter.

Other Matters

31. The landowners who have provided anecdotal evidence of their attitude to the application and their behaviour towards anyone found using the route are not relevant to my consideration of the legal effect of the Quarter Sessions Order. If a highway has been established, it can only be extinguished or diverted by a subsequent legal order. No evidence of such a procedure post-dating the 1807 Order has been submitted. The public right of way is therefore unaltered from the position on which it was set out in the 1807 Order.

Conclusions

32. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the 1807 Order provides sufficient evidence to show that a public right of way subsists over the route shown in it and the appeal should therefore be allowed insofar as it reflects that Order.

Formal Decision

33. The Appeal is allowed in part.

34. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Staffordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the Definitive Map and Statement for the area to show as a Public Footpaths the following route:

- The appeal route between the junction with the lay-by off the A520 Road in the west, and Point **X** as shown on the map at Appendix 1 to this decision.

35. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Helen Slade

Inspector

APPENDIX 1

APPENDIX 1

