



Order Decision

On Papers on File

by Paul Freer BA(Hons) LLM PhD MRTPI

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

Decision date: 26 September 2019

Order Ref: ROW/3208045

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Essex County Council Definitive Map Modification No 633 Restricted Byway 244 Colchester Borough Order 2017.
- The Order is dated 2 October 2017. It proposes to modify the definitive map and statement for the area by adding a length of restricted byway from Norman Way North in a generally southerly direction for a distance of approximately 620 metres to join Footpath 206, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Essex County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is proposed for confirmation subject to a modification, as set out in the Formal Decision below.

Procedural Matters

1. The objection is made on behalf of the three schools that adjoin the Order route: Colchester High School For Girls; St Benedicts Catholic College; and Philip Morant School and College (the objector). Although I have described it as an objection, the submission dated 22 November 2017 made it clear that the schools have no objection in principle to the Order route but did have concerns relating to the uniform width of 5m cited in the Order.
2. In response to that objection, Essex County Council (ECC) prepared a Supplementary Plan which shows a more detailed depiction of the width along various sections of the Order route. The objector has subsequently confirmed that the dimensions set out on the Supplementary Plan are agreed. I have therefore proceeded on the basis that the Order, if confirmed, would be modified to cite the dimensions recorded on that Supplementary Plan.

Main Issue

3. The main issue here is whether the evidence is sufficient to show that in the past the Order route has been used in such a way that a restricted byway can be presumed to have been established.
 4. The Order was made under the Wildlife and Countryside Act 1981 on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows a public right of way on foot, to ride or lead a horse, and use by non-mechanically propelled vehicle subsists along the route described in the Order.
-

5. The case in support is based primarily on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public as of right and without interruption, over the period of 20 years immediately prior to the right to use the route being brought into question, thereby raising a presumption that the route had been dedicated as a restricted byway. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a restricted byway will be deemed to subsist.

Reasons

6. ECC made this Order in response to an application dated 16 May 2016 from Councillor Sue Lissimore, supported by forms giving evidence of use. The application as originally made sought the addition of a footpath but analysis by ECC of the evidence user forms revealed the possibility that higher rights subsisted along the route.

Bringing into question

7. The application arose from complaints about the poor condition of some unsurfaced sections of the path. The investigation of that complaint revealed a number of events that could potentially be considered as bringing into question.
8. One of these events is the erection by Philip Morant School and College of a gate across the Order route in or around January 2009. There is reference in several of the user evidence forms of this gate occasionally being locked although there is no consensus in the user evidence forms as to when and how often the gate was locked, or for how long it remained locked when it was. In the absence of any consensus on the date(s) on which the gate was erected and then locked, I consider that this event can not be relied upon as providing a date on which the public right to use the Order route was brought into question.
9. There is then a sign sited in the car park adjacent to St Benedicts Catholic College that says in terms that "Notice is hereby given under Section 31 (3) of the Highways Act 1990 that this path (or way) has not been dedicated as a public right of way". The sign, dated January 1997, is signed by the 'Chairman of The Governors Of St. Benedict s College'.
10. It seems to me that this sign must be read in context. The sign is located on the same pole as a larger sign warning that unauthorised vehicles may be wheel clamped and, above that, a further sign above that advising that the land is private property. Below it is a smaller sign advising that CCTV is in operation. It therefore seems to me that this group of signs could all be read as relating to the car park rather than the Order route. I will come back to this sign below in the context of lack of intention to dedicate but, in the present context, I do not consider that the sign dated January 2009 can be properly said to bring home to the public that their right to use the Order route was being challenged. Indeed, there is no specific reference to this sign on any of the evidence user forms which implies that, far from bringing home to the public that their right to use the Order route was under threat, the sign appears to have had little resonance with those using the route.

11. Close to the above sign is a gate erected by St Benedicts Catholic College which may or may not have been erected contemporaneously with the sign. However, none of the user evidence forms refer to this gate ever being locked. I therefore do not consider that the erection of this gate can be considered to bring into question the public right to use the Order route.
12. A further event in relation to a date for bringing into question the right of the public to use the Order route is the submission by Philip Morant School and College in January 1997 of a planning application for a new access road. Planning permission was granted on appeal in December 1999. In his Decision, the Inspector describes the Order route as being a continuation northwards of an informal footpath link leading from Norman Way (now Footpath 204). The planning permission granted on appeal was subject to conditions including a condition (Condition 12) that the access road thereby permitted shall be gated and closed outside the hours of use of the school premises.
13. Insofar as the gating and closure of the new access road would, had the planning permission been implemented, prevented use of the continuation northwards of the informal footpath (i.e. the Order route), then I accept that the granting of that planning permission could be regarded as bringing into question the right of the public to use that route. It does not matter in this context that the planning permission does not appear to have been implemented and that condition 12 did not come into effect: it is sufficient in this context that the spectre of losing the use of footpath was enough to bring home to the public that their right to use the Order was being challenged. I am given to understand that the planning application subject to that appeal was controversial at the time, such that a significant proportion of local residents (and who therefore may have used the route) would have been aware of its continued use being under threat.
14. Accordingly, I concur with ECC that January 1997 should be taken as the date on which the right of the public to use the Order route was brought into question. Consequently I need to examine use by the public during the twenty-year period between 1977 and 1997 (the relevant period).

Assessment of the evidence

15. A total of fifty-six individuals have provided evidence of their use of the route. The earliest use of the route dates back to 1954, and some record use only after the end of the relevant period. Of the remainder, a significant proportion recall using the Order route over the whole or part of the relevant period, and on a significant number of occasions in any one year: for example, a number of responders state that they used the Order route on a daily or almost daily basis during that period. The evidence refers predominantly to use on foot but there is also reference to use by bicycle. There is no specific reference to riding or leading horses.
16. Although I have read all of the user evidence forms that have been submitted, I do not propose to rehearse them individually here. I did note, however, that a significant proportion of the witnesses whose response covers the whole of the relevant period state that there was a well defined track that they adhered to, and that they often encountered others using the Order route. It appears to me that some of the use recorded in the user evidence forms relates to times when the author attended one of the three schools that adjoin the route or were employed as staff there, such that the use on those occasions should

not be regarded as being use by the public. Nevertheless, the majority of the use recorded was for a variety of other purposes, including walking dogs, jogging, for commuting to work and for accessing the town centre or the railway station. This leads me to conclude that the Order route has been consistently used by the public over the whole of the relevant period.

17. Aside from the gate erected by Philip Morant School and College being locked on occasions, and this outside the relevant period, there is no tangible evidence of users being turned back from using the route. Consequently, there is no evidence of the Order route being used by force or by stealth. Similarly, even though the land was in public ownership over part of the relevant period, there is no compelling evidence to show that there was permission, implied or otherwise, to use the Order route. In that context, I accept that use by those attending one of the three schools that adjoin the Order route and those who were employed there could be deemed to be use by implied permission. However, that needs to be weighed against the use by a greater number of responders who used the Order route whilst having no connection with those schools. I therefore conclude that, as matter of fact and degree, the use of Order route that has taken place has been as of right rather than by right.
18. I am satisfied that this user evidence is, when taken as a whole, sufficient to show that a restricted byway can be presumed to have been dedicated. There is nothing in the documentary evidence produced by ECC that leads me to a different conclusion.

Intentions of the landowner

19. A number of events referred to in the user evidence forms could be interpreted as showing that there was no intention on the part of the relevant landowner(s) to dedicate the way for use by the public: for example, the occasional locking of the gate erected by Philip Morant School and College. However, all of these fall outside the relevant period from when use of the Order route was brought into question.
20. I must, nevertheless, return briefly to the sign sited in the car park adjacent to St Benedicts Catholic College giving notice that path has not been dedicated as a public right of way. On the face of it, that sign could be interpreted as being a clear indication of a lack of intention to dedicate the route for public use.
21. Two considerations lead me to the conclusion that this is not the case. Firstly, the location of the sign in an area used for car parking. This, together with the fact the sign is surrounded by other signs that clearly do not relate to the Order route, casts doubt as to whether the sign was intended to relate to the Order route. Secondly, that sign was evidently erected by St Benedicts Catholic College in 1997, and therefore at the very end of the period under consideration. Furthermore, some 22 years later, St Benedicts Catholic College has now declared that it has no in-principle objection to the Order route being confirmed. I am therefore satisfied, on the balance of probability, that the erection of this sign does not constitute a lack of intention on the part of the relevant landowner(s) to dedicate the way for use by the public and that, if it ever did, that position has now been abandoned.
22. That conclusion is reinforced by the fact that there is nothing in the evidence to show that those using the way understood that the sign was disabusing them

of the notion that the way was public. Moreover, it is clear that the use continued notwithstanding the presence of the sign.

Conclusion

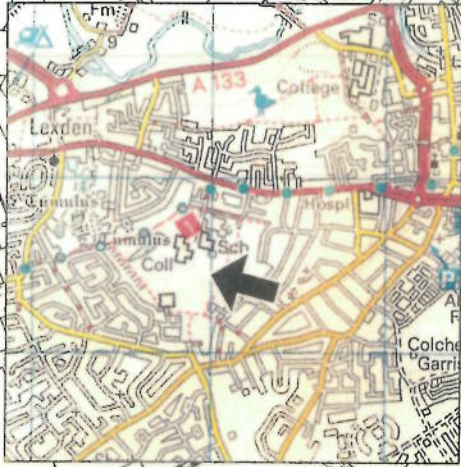
23. I conclude that, on a balance of probability, a restricted byway has been established along this route.
24. As indicated above, in both Part I and Part II of the Schedule to the Order as originally drafted, the width of the route is stated as being 5 metres. It has subsequently been agreed with the objectors that the width of the route varies throughout its length, as shown on the Supplementary Plan produced by ECC. Because the widths shown on the Supplementary Plan have been agreed in principle, there is nothing to indicate that the modifications in respect of those widths should not be adopted.
25. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed with the modification referred to in paragraph 24 above.

Formal Decision

26. The Order is proposed for confirmation subject to the following modification:
 - In both Part I and Part II of the Schedule to the Order, delete the reference to 'The width of the way is 5 metres' and substitute there 'The width of the way varies between 3.0 metres and 8.8 metres, as shown on the Supplementary Plan to show Width Information'.
27. Since the confirmed Order would affect land not affected by the Order as submitted I am required by reason of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Paul Freer

INSPECTOR



St Benedict's Catholic College

Colchester County High School for Girls

The Philip Morant School & College

MAP NOT TO ORIGINAL SCALE

Key

Restricted Byway 244, Colchester

Add Route A-B-C-D-E

Unaffected Paths

The Essex County Council Definitive Map Modification No.633 (Restricted Byway 244 Colchester, Colchester Borough) Order 2017

Map Sheet TL 92SE Grid Ref TL 979,245 Scale 1:2500 at A3 size



Essex County Council

© Crown copyright and database rights Ordnance Survey Licence No. 100019602