



Order Decision

Inquiry held on 1 October 2019

Site visit made on 30 September 2019

by Susan Doran BA Hons MIPROW

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

Decision date: 16 December 2019

Order Ref: ROW/3218395

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as Public Footpath No 05.5/105, Shakey Bridge, Bentham Modification Order 2010.
- The Order is dated 16 August 2010 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath 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 confirmed subject to the modifications set out in the Formal Decision

Procedural Matters

1. This case concerns the addition of a public footpath running between Footpath No 05.5/93 (point A on the plan attached to the Order) and Footpath No 05.5/38 (point D) on the south side of the railway line, for the most part close to the northern bank of the River Wenning passing through point B to point C where it leaves the River and follows the northern side of a field boundary.
2. I visited the area prior to the Inquiry and walked or viewed the Order route.
3. The Order had been made by North Yorkshire County Council ('the Council') following a direction by the Secretary of State. The Council supported its confirmation. At the Inquiry the Objector attending did not dispute that the public had used the Order route for the relevant 20 years, unchallenged, but relied on Section 55(1) of the British Transport Commission Act 1949 ('the 1949 Act') in that use by the public of land forming part of the railway¹ was by trespass and thus a criminal offence. I consider this below.
4. Following the close of the Inquiry, I accepted a late representation from the Objector on points raised in the Council's closing submission. It was circulated to the parties for comment, and a further exchange followed. In reaching my decision, I have taken the comments received into account together with all previous submissions and the evidence heard at the Inquiry itself.
5. The preamble to the Order refers to Section 53(2)(a) but should refer to Section 53(3)(b), as confirmed by the Council. This is a minor drafting error and no-one has been prejudiced by it, as the Order's purpose is clear. However, if I confirm the Order, I shall modify it to correct this.

¹ From approximately mid-way between points B and C to D on the plan attached to the Order the land is owned by Network Rail. The Objector was particularly concerned about the embankment between points C and D

The Main Issues

6. 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 a public footpath subsists along the Order route.
7. Further to paragraph 3 above, I shall consider the effect of the 1949 Act and if I am satisfied that it does not preclude confirmation of the Order, I shall go on to consider the evidence adduced by the Council.
8. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the way as a public footpath 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. In this case, the Council relies on a presumption of dedication arising further to the tests laid down in Section 31 of the 1980 Act. Although the Objector did not dispute use by the public, I shall, nevertheless, consider the evidence to establish whether the tests are met and a right of way on foot subsists.
9. Accordingly, I must establish the date when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20-year period no intention on the part of the landowners to dedicate public footpath rights over the route.

Reasons

The effect of the British Transport Commission Act

10. Section 55(1) of the 1949 Act makes it an offence to "*trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar works now or hereafter belonging to or leased to or worked by any of the Boards*". Part of the Order route runs along the north side of the River and a fence delineating the land now held by Network Rail², and an embankment rises up towards the railway line.
11. Taking trespass in the context of the 1949 Act to mean entering British Transport Commission land without lawful authority, the question arises whether use of the Order route on land now owned by Network Rail was in effect tolerated and considered lawful or was not capable of being lawful.
12. Section 57 of the 1949 Act states "*...no right of way as against the Board shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Board and forming an access or approach to any station goods-yard wharf garage or depot or any harbour premises of the Board*". The Order route and land over which it passes does not provide access to any of the facilities described. Accordingly, there appears to be nothing in the 1949 Act to prevent the possible acquisition of a public right of way through long-usage and inaction or toleration of use by the landowner, unless such use was incompatible with their statutory functions. There is no

² Network Rail is the successor authority to Railtrack and British Rail

evidence before me that the Order route is incompatible with the operation of the land as a railway; nor that the landowner has taken any action against users, the only issue being fencing installed latterly and which I consider below. Further, Network Rail, as the current landowner, was consulted on the making of the Order but did not object, notwithstanding that it affected their land. They were consulted again by the Council prior to the Order being submitted to the Secretary of State and confirmed they would not be objecting³.

13. I conclude that the effect of the 1949 Act does not preclude confirmation of the Order and that it is open to me to consider the evidence of use to establish whether the tests under Section 31 of the 1980 Act have been met.

When use of the claimed route was brought into question

14. It was not disputed that use of the Order route was brought into question in early spring 2006 when fences and barbed wire were placed across the route thereby preventing access on foot. This provides a 20-year period of 1986 to 2006 for the purposes of the 1980 Act.

Whether the claimed route was used by the public as of right and without interruption

15. Of the 22 user evidence forms submitted, 15 claimed use for the relevant period. I heard evidence of use from witnesses who spoke of evening walks for leisure with the family on a monthly basis, afternoon walks and dog walking 2-3 times a week, use at varying times of the day, and daily use of the Order route for pleasure. Most had seen other users. None had been given permission to use the route⁴, nor been challenged by any of the landowners. None had been members of the Bentham Angling Association. Claimed use by witnesses giving oral evidence began in 1977, 1982/3, around 1989, 1992 and 1999.
16. Witnesses encountered structures having the appearance of a stile which were interpreted as being there to facilitate use. However, the recollection of some users regarding the appearance of, in particular, a post and pinch point on top of the riverside wall were inconsistent with photographic evidence provided by the Objector. Fencing in place here had been provided to keep livestock in rather than to keep walkers out. Notwithstanding the fencing, users were always able to negotiate the route, most using a gap to one side here, and described following a clearly defined path, albeit some sections were more problematic than others. Several described accesses provided for dogs. Some recalled the western end of the route at D having been blocked at times, but the blockage having been removed. However, none had used the route by force, and it appears these fences were erected/replaced after use of the Order route had been brought into question in early 2006.
17. A stile further along a fence line away from the Order route was referred to. However, none of those giving evidence had used it, and I do not attach weight to it as the use described related to a worn route following the river bank.
18. I find that claimed use was without force, without permission and was open throughout the 20-year period and that it was without interruption. A presumption of dedication therefore arises.

³ By email from the Liability Negotiations Adviser

⁴ Three of the user evidence forms referred to use by permission, and I have discounted these in my analysis of the evidence

The evidence and actions of the landowners

19. Users first encountered signs and fencing challenging their use of the route in 2006. There is no evidence that any landowner (including the predecessors of Network Rail) took any action to prevent use of the Order route by the public during the relevant 20-year period. I understand fencing erected twice at D and once at C by Network Rail post-dates 2006. I conclude there is no evidence to demonstrate a lack of intention to dedicate the Order route during the 20 years prior to 2006, and the tests for confirmation are met.

Width

20. Modifications were proposed to clarify the width of the Order route at two locations – the first of these approximately 50 metres west of A, where the width is 1.4 metres for a distance of some 10 metres; and the second between B and C where the path passes around a post and wire fence and the width narrows to 0.7 metres. On the basis of the available evidence, I conclude it is more likely than not the Order route has been dedicated subject to these widths at these locations. Accordingly, I shall modify the Order to reflect this.

Other matters

21. I note the Objector's concerns about safety on the railway land and the river bank along which much of the Order route runs, and about his liability as a landowner. Whilst I appreciate the importance of these issues, they are not matters that I am able to take into account under the 1981 Act.
22. The Order route crosses land held in private ownership. However, the legislation provides a mechanism by which a public right of way may be claimed and this does not preclude such rights being established over land that is privately owned, subject to the necessary tests being met. Indeed, many public rights of way cross land that is privately owned.

Conclusions

23. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should be confirmed with modifications which do not require advertisement.

Formal Decision

24. I confirm the Order subject to the following modifications,
- In line 1 of paragraph 1 of the preamble to the Order, replace "(a)" with "(b)"
 - In Part 2 of the Schedule to the Order, in column 6 under the heading "Width (m)", insert beneath "1.5" the following, "1.4 for a distance of approximately 10 metres from approximately 50 metres west of A on the Order plan", and "0.7 at X on the Order plan"
 - On the plan attached to the Order insert a point "X" where a pinch-point reduces the width of the Order route to 0.7 metres

S Doran

Inspector

APPEARANCES

For the Council:

Piers Riley-Smith *of Counsel* instructed by Simon Evans Legal and Democratic Services, North Yorkshire County Council

who called

Penny Noake Principal Definitive Map Officer, North Yorkshire County Council

David Clough

Christopher Hall

Adrian Horn

Annie Neligan

Kevin Watt

Pamela Woof

Objector:

Peter Kellaway

DOCUMENTS

1. Statements of David Clough, Adrian Horn, Kevin Watt and Pamela Woof, submitted by North Yorkshire County Council
2. Photograph dated March 2006, taken west of A, submitted by Peter Kellaway
3. Submission of Peter Kellaway
4. Copies of email communications between North Yorkshire County Council and Network Rail dated 12 and 21 November 2018

NOT TO ORIGINAL SCALE

