



Appeal Decision

by **S M Arnott FIPROW**

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 12 March 2021

Appeal Ref: **FPS/Q4245/14A/1**

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Trafford Borough Council not to make an order under Section 53(2) of that Act.
- By application dated 28 April 2017 Mrs J Mabon claimed that the route of definitive footpath No 19 (Dunham Massey) north of Sinderland Lane, should instead be shown on the definitive map and statement for the area as a public bridleway.
- The application was refused by Trafford Borough Council on 28 February 2020 under its delegated powers. The appellant was formally notified of the decision by email sent on 30 July 2020.

Summary of Decision: The appeal is allowed.

Preliminary 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 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant requests that the Secretary of State directs Trafford Borough Council (TBC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a public bridleway by upgrading the present footpath 19 (Dunham Massey).
3. In addition to the submissions from the appellant and TBC, I have before me representations made by the Peak and Northern Footpaths Society (PNFS) and Network Rail (NR). I have considered all these documents in forming my conclusions. In this case, I am satisfied I can reach a reliable decision without visiting the site.

Main issues

4. The main issue is whether the available evidence is sufficient to show that, in the past, the Order route has been used in such a way and to such an extent that a public bridleway can be presumed to have been established and therefore be recorded on the definitive map of public rights of way.
 5. Section 53(2) of the 1981 Act requires TBC (as the surveying authority) to make orders to modify its definitive map and statement in consequence of certain events specified in Section 53(3).
 6. Sub-section 53(3)(c)(ii) describes one such event as involving "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... that a highway shown in the map and*
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statement as a highway of a particular description ought to be there shown as a highway of a different description."

7. The claimed bridleway follows the route of a footpath that is already recorded on the definitive map. Therefore, if the evidence supports the existence of higher rights, when considered on the balance of probability, a definitive map modification order should be made to upgrade this footpath to a bridleway.

Reasons

Background

8. Evidence provided by the appellant refers to a notice being erected in 2017 beside the claimed bridleway stating "PRIVATE LAND. NO ACCESS WITHOUT PERMISSION UNLESS USING A PUBLIC RIGHT OF WAY". It was this sign that prompted the application to TBC three months later and which led to this appeal.
9. Following receipt of the application, TBC carried out investigations before compiling a comprehensive report that was considered by the Corporate Director of Place in February 2020. This report concluded that, as the claimed route crosses the line of a railway "*the alleged usage amounted to a criminal offence under s55 of the British Transport Commission Act 1949 and therefore the claimed route cannot have become a bridleway through long usage pursuant to either s31¹ or at common law.*" Consequently it declined to make the requested definitive map modification order.
10. The appellant was informed of that conclusion some months later although no point is taken over the delay. In lodging her appeal against this decision, the appellant's grounds focus on one main issue – the interpretation of Section 55 of the British Transport Commission Act 1949 (the 1949 Act) and its applicability to the user evidence in this case.
11. Whilst both TBC and the appellant have made further submissions in response to this appeal, so too have NR and the PNFS, in each case addressing the main point at issue. Only NR has provided evidence that was not submitted with the appeal papers² but the TBC report indicates that this information was known to the authority when it made its decision.

Presumed dedication under statute

12. The application to TBC was made primarily on the basis that long usage by the public on horseback and bicycles has established a right of way through the presumed dedication of a bridleway.
13. Where evidence of use by the public is concerned, Section 31 of the Highways Act 1980 (the 1980 Act) sets out the requirements for presumed dedication under statute. In short, there must firstly be sufficient evidence of use of the claimed route by the public, as of right and without interruption, over the twenty-year period immediately prior to its status being brought into question in order to raise a presumption of dedication. This presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the landowner during this period to dedicate the route as a public right of way.

¹ Of the Highways Act 1980

² This includes an extract from the Deposited Plan for the Manchester, Sheffield & Lincolnshire Railway 1865 and correspondence from 1988.

14. Thus the first step is to establish when the status of the route was brought into question so that the relevant 20 year period can be calculated.
15. It has not been disputed that this occurred early in 2017. TBC's report acknowledged that the evidence from the claimants is consistent with other evidence of a notice being erected near the junction of Birch Road with Sinderland Road in January 2017. This displayed the wording noted above at paragraph 8. Since this is somewhat ambiguous in its meaning insofar as use by horse riders and cyclists is concerned, TBC considered instead that the challenge occurred on the date of receipt of the application on 4 May 2017.
16. In my view the outcome would be the same whichever date is chosen here but, having studied the evidence, it seems to me that it was the notice that first caused doubt in the minds of the claimants sufficient to trigger the application to record what they believed to be a right of way for horse riders and cyclists. Since this can be dated with some accuracy to January 2017, I would be inclined to accept that this action challenged the extent of the public's rights. However, it appears to make little difference to the result in this case whether the relevant period runs from January to January or from May to May; it concerns the twenty years between 1997 and 2017.
17. With the original application, 19 user evidence forms were submitted from claimants attesting to use of the route at issue as far back as the 1950s. In addition, TBC took statements from 7 users who reported the longest periods of use. Thirteen user evidence forms confirmed regular use of the claimed route by people on horseback and ten for use on bicycles.
18. None of these claimants say they were ever prevented from using the route or challenged whilst doing so; nor were they otherwise made aware that they had no right to use it until the notice in 2017. Indeed TBC concluded that "*the way has actually been enjoyed as a bridleway by the public as of right and without interruption for 20 years, for the statutory presumption in S31(1) of the Highways Act 1980 to be engaged*". However that finding was qualified by recognition that the way in question "*must be of a character that its use could give rise to a presumption of dedication*".³
19. Despite finding little evidence of any substance to demonstrate a lack of intention to dedicate on the part of the relevant landowners during the twenty-year period⁴, TBC took the view that, on account of the character of the way, any use of the claimed route as a bridleway amounted to a criminal offence under Section 55 of the 1949 Act; therefore it could not contribute to the establishment of a public right of way over and above its definitive status as a footpath.
20. NR supports TBC's conclusion. It explained that trains ran along this line until 1994 since which "*the line has been mothballed*" although the company's statutory and contractual obligations to maintain the railway continue.
21. It is clear from the evidence provided that through-trains were operating on the line until passenger services ended in the late 1980s after which only part of the line (including the section at issue) continued to be used for chemical

³ Section 31(1) of the 1980 Act applies to "a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, ..."

⁴ NR provided evidence that notices expressing a lack of intention to dedicate beyond the existing definitive footpath had been posted on site in 1989 but TBC found no evidence from which to conclude these were still on the site in 1997 long after trains had ceased to operate on the line.

- transport. Pedestrians following the public footpath were authorised to cross via a formal level crossing that also provided private vehicular access connected with the adjacent Birch House Farm. The claimed usage by horse riders and cyclists crossed at the same point.
22. Both the appellant and PNFS challenge TBC's conclusion that claimants on horseback or with bicycles were committing a criminal offence by crossing the former line.
 23. PNFS makes three points: that it is for the Courts to determine whether an offence has been committed, not the highway authority, and there is no evidence of a conviction; that lesser (non-criminal) offences were not considered in the alternative; and the very fact NR erected signs in 1989 to rebut claims of further dedication shows that they did not believe they could rely on criminal trespass offences to do so. A sign warning against trespass on the railway would have been more appropriate.
 24. The appellant takes issue with TBC's reliance on the case of *Ramblers' Association v SSEFRA [2017] EWHC 716 (Admin)* as being analogous with the circumstances here when she argues they can very clearly be distinguished.
 25. She submits the tenor of Section 55 is concerned with the prevention of danger, yet there is no evidence that the claimants were in danger, or presented a danger, since the railway was not in operation. For the relevant twenty years the former level crossing no longer existed and any associated signs had fallen into disrepair.
 26. The appellant argues that where the claimed bridleway crosses the former line there are no rails visible within the road surface because these were ramped over many years ago and covered in tarmac. On the line either side of the old crossing mature trees and shrubs now disguise the existence of the former railway and to identify the remaining rails would need closer inspection than would be expected from a normal user of the claimed bridleway. In short, there were no visible signs of a railway line on which to trespass such as to commit an offence.
 27. The appellant submits that it is not settled law that Section 55 of the 1949 Act is engaged here as it was in the *Ramblers'* case which concerned a railway line currently in operation.
 28. Sub-section 55(1) reads: "*Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging to or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty ...*"
 29. I accept there is an element of doubt over the interpretation of Section 55 insofar as it applies to a situation where the railway line has long ceased to operate. Added to that, NR has provided no clear evidence to explain the term 'mothballed', used to describe its view of the status of the line (which I also note appears on current Ordnance Survey maps as "Dismantled").

30. Although I acknowledge the guidance that can be drawn from the *Ramblers'* case, on balance, I do not find it of sufficient applicability to the facts in this case where the railway was no longer operative.

Summary

31. I agree that the evidence of use demonstrated by the claimants during the twenty years prior to the notice erected in 2017 is sufficient to raise a presumption of dedication of the claimed route as a bridleway.

32. I also accept TBC's conclusion that there is little evidence of any substance to show a lack of intention to dedicate the route as a bridleway during relevant 20 years.

33. Given that the available evidence points to the former railway line being non-operational during the whole of that period, I conclude that the weight I should place on the *Ramblers'* case as an indication of the effect of Section 55 of the 1949 Act on the claimed user, is much reduced by the distinguishable facts.

34. In conclusion, and on a balance of probability, it appears to me that the evidence shows a public bridleway has been established as provided by Section 31 of the 1980 Act and that a definitive map modification order should be made to upgrade the present definitive footpath accordingly.

Conclusion

35. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

36. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Trafford Borough Council is directed to make an order under Section 53(2) and Schedule 15 of the Act within 6 months⁵ of the date of this decision so as to modify the definitive map and statement for the area by upgrading definitive footpath No 19 (Dunham Massey) to a bridleway as requested by the application dated 28 April 2017.

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

Sue Arnott

Inspector

⁵ This timescale is intended to take into account any difficulties of working under the restrictions currently in operation as a result of the Covid-19 pandemic.