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| **Order Decision** |
| Site visit made on 19 October 2021 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 03 August 2022** |

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| **Order Ref: ROW/3242932** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Derbyshire County Council (Footpath from Church Street to Public Footpath No.20 – Parish of Denby) Modification Order 2018.
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| * The Order is dated 22 February 2018 and proposes to modify the Definitive Map and Statement for the area by the recording of Public Footpath 104 between Church Street and Public Footpath No.20, Denby, as shown in the Order plan and described in the Order Schedule.
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| * There were two objections outstanding when Derbyshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.
2. Derbyshire County Council is assuming a neutral stance on the Order. As a result, Mr J Harker is taking the matter forward on behalf of the applicant, Denby Parish Council.

The Main Issues

1. Derbyshire County Council made the Definitive Map Modification Order (DMMO) under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates.
2. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist in order to make a DMMO, the standard of proof is higher for it to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists. The burden of proof lies with those who assert the existence of a public footpath.
3. The majority of the evidence in support of this case comprises User Evidence Forms (UEFs). As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
4. If statutory dedication is not applicable I shall consider whether dedication has been shown at common law. Such a dedication requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

Reasons

***Background***

1. The Order route is a track which runs between properties before crossing Bottle Brook to meet Public Footpath No. 20. Documentary, user and landowner evidence has been submitted.

***Documentary Evidence***

*Survey of the estate of Vincent Lowe at Denby, 1728*

1. This depicts land parcels in the area of the Order route, with some annotated descriptions or names. The route is shown as a track and without annotation.

*Sandersons Map, 1835*

1. The approximate Order route is shown between double solid lines, as are other modern-day highways in the vicinity. A line appears across its junction with Church Street.

*Denby Tithe Map, 1845 and* *Title Plan of Denby, 19th century*

1. The network of routes in the village is depicted by a sienna colouring, and includes the Order route, which is shown as open to Church Street and with its termination at the brook. Buildings appear in the field to the south east of the end of the Order route. Land parcels are numbered on the Tithe map, but the Order route is not.

*Plan of an estate the property of William Drury Holden, 1848*

1. This depicts numbered land parcels, with some colouring. The route is shown as an unnumbered track to the Bottle Brook and coloured in the same way as the network of routes in the village. Buildings appear in the field to the south east of the Order route.

*Second Edition Ordnance Survey Map 1900, Ordnance Survey 25” Map 1914, Ordnance Survey 6” Map 1921, Ordnance Survey 6” Map 1949*

1. The Order route is shown as a track between double solid lines. A dashed or solid line crosses it at the point where it meets Church Street. Annotation showing a foot bridge across the brook is present, although its location is unclear. Buildings appear in the field to the south east of the end of the Order route.

***User Evidence***

1. Nine UEFs are submitted in support of the DMMO, showing use of the Order route between the years 1938-2014. The frequency of use recorded is between daily and 3-4 times per year. Reasons given for use include a walk around the village or to Kilburn or Horsley Woodhouse, a walk with a footpath group and to visit a house.

***Landowner Evidence***

1. A statement by Mr D Allen is submitted, together with copies of documentary evidence and statements from a number of people who live or lived locally.

**Reasoning**

***Documentary evidence***

1. The use of colouring on historic maps varies and consequently the use of a sienna colour to depict a network of ways including the Order route on some of the available documents is not compelling evidence, in itself, that public rights were considered to exist along the route at the time. Similarly, whilst the route is depicted without numbering on the Drury Holden estate map in the same way as the wider road network, there could be other explanations for this than a view of the way as public. Roadways were marked on Tithe maps as untitheable pieces of land whether they were public or private. Ordnance Survey maps carried a disclaimer from the late nineteenth century to the effect that the representation of a route on the map was not evidence of the existence of a public right of way.
2. The documentary evidence as a whole consequently shows the physical existence of the Order route as a way at the relevant times, but does not demonstrate the existence of unrecorded public rights over it.

***Statutory dedication***

*When the right of the public was brought into question*

1. Objectors consider that the blocking of an access onto the route from a property which lay along it by the landowner brought the right of the public to use the route into question. However, the date of this incident is unclear and furthermore as the concurrent discussion took place between the landowner and one adjacent occupier it was insufficient to bring home to the public that their right to use the way was challenged. Thus, the incident did not bring the right into question.
2. Objectors consider that the installation of a cattle grid across the brook in approximately 2004 formed a bringing into question of the public’s right to use the route.
3. The evidence varies on the date of the cattle grid’s installation, with an estimated time frame of 2004-2008. The applicant considers that it was installed in approximately 2004. However, in view of the lack of substantive evidence on the matter, this does not form a clear date of potential challenge.
4. Furthermore, the cattle grid was installed following the collapse of a bridge which previously existed over the brook. The objector’s statement confirms that he installed the grid in order to contain cattle without the use of a gate or stile. Therefore the grid was installed for the purposes of stock control rather than to bring home to the public that their right to use the way was being challenged.
5. Thus, the installation of the cattle grid did not bring the right of the public to use the way into question. However, the submission of the DMMO application in 2014 was sufficient to do so. There is no earlier date of challenge to public use and so I consider 1994-2014 to form the relevant twenty-year period.

*Evidence of use: Statutory Dedication*

1. The UEF of one person records use on foot over the whole of the relevant twenty-year period. Use by only one person over the period is not a broad enough use to have been by the public at large. Use is consequently insufficient to have given rise to a statutory inference of dedication.

***Common Law dedication***

1. It is therefore necessary to consider whether use has given rise to an inference of dedication at common law.
2. The most intensive period of use recorded in the UEFs is the twenty four-year period 1987-2011 (the 1987-2011 common law period), over which time six people used the route.
3. One of the users over the 1987-2011 common law period lived along the Order route and states that her access onto it was via a gate in her rear garden fence, until 2001 when she was informed by one of the objectors that he owned the route. She decided to remove the gate at that point, although her use of the Order route continued until 2011. As her property was located halfway along the route her use may therefore have been in exercise of a private right of way until 2001 and consequently I attach only limited weight to her evidence over the period until 2001 in this assessment of potential public use of the route.
4. Of the remaining users, in one case use occurred 3 times per week, in two cases use was weekly and in two cases use was monthly. The average frequencies of use recorded over the period consequently amount to approximately five per week. Reasons given for use include to walk to Kilburn or Horsley Woodhouse and dog walking.
5. The National Coal Board/British Coal owned the Order route land between 1987 and 1996. The owners from that date until 2011 were the Sarah Elizabeth Allen will trusts, a family trust under a strict settlement. The objection of the trustees for the trust states that they are the owners for the purposes of the legislation. The available evidence does not suggest that either owner lacked the capacity to dedicate a public right of way over their land.
6. The bridge across the brook collapsed at some point prior to the installation of the cattle grid by the landowner in approximately 2004. It is suggested in opposition that it was some time until the cattle grid replaced the bridge and hence that this period formed an interruption to the public’s use of the route.
7. The statement of Mr Allen, a trustee of the current owner, sets out that the gap in the provision of an access across the brook arose as “because it was at the end of the season it was not important to me to have access from this track to the field. It was sometime therefore before I did anything to rectify the situation”.
8. In order to be effective, an interruption must be with intent to disabuse users of the route of any belief that there was a public right. The bridge was not removed for such a reason, and access across the brook was reinstated at a time convenient for the management of the land. Any interval during which access was not available over the brook as a result of these events consequently did not arise from an intention to affect any perceived view of the route as available for public use. As a result, the bridge’s removal did not form an interruption to use of the route.
9. Timber boarding and a rail to facilitate pedestrian use were provided across the cattle grid at some point following its installation, by a member of the shoot who used the land beyond the route. They were intended for use by other shoot members. However, these were only present briefly and were removed by Mr Allen. The shoot member’s evidence states that “Mr…Allen told me that he had taken it down because he was not having members of the public trying to cross into his fields when it was not a footpath”. This is supported by the evidence of Mr Allen.
10. Furthermore, one of the people who made use of the route over the full 1987-2011 common law period refers to the cattle grid, stating that the landowner had placed a rail and planks across when it was installed, which they believed had been removed by vandals.
11. User evidence shows the continued use of the Order route following the removal of the rail and boards across the grid. The grid was present at the time of my site visit and appeared to have been in place for some considerable time. It was challenging for pedestrians to cross due to the distance between the rails and the lack of any handrail. The grid would additionally be difficult to cross for those with mobility problems and those accompanied by small children or dogs, such that it would be likely to form a barrier to use of the route by those groups.
12. The landowner’s removal of the structures placed by the shoot member would consequently have rendered use of the grid by pedestrians more difficult and more hazardous. It obstructed any use of the full Order route by at least one person, as a 2015 email states that “as far as I am aware this has always been a footpath but the access has become impossible, because my dogs cannot negotiate the cattle grid”.
13. Although the majority of users over the period 2004 (the approximate date of the cattle grid’s installation) to 2011 state that they have seen other people using the route, it is not possible to say how frequently this occurred or whether the other use may have been in exercise of a private right to access the land or properties along the route. The cattle grid was, however, evidently present as an obstruction to a significant proportion of users for a substantial part of the 1987-2011 common law period. Thus, I consider that the removal of the rail and boards by the landowner is sufficient evidence that he did not intend to dedicate the route as a public footpath.
14. As a result, it is necessary to consider whether a period of common law dedication may have occurred prior to the earliest potential date of the removal of the board and rails, in approximately 2004.
15. Evidence of use over the period 1982-2004 is provided by five people. One of these people used the route infrequently until 1987 and then three times per week, two people used it weekly and two monthly.
16. It is not possible to assess the frequency of use of the person whose use altered from 1987, until that date. As a result, the common law period for consideration of use by all five people is 1987-2004.
17. Turning to whether the actions (or lack of action) of landowners over the period indicate that they intended the Order route to be dedicated as a highway, a former stile lies at approximately point B of the route. The parties agree that it is likely to have been installed by British Coal or its predecessor. If this was the case it would have been constructed prior to the sale of the land in 1996.
18. The supporters consider that the stile was provided to enable the public to pass between the Order route and the path network to the south. Objectors submit that the stile was constructed during restoration works on the former opencast land. They consider that it enabled pedestrian access to the field to the south of the brook by farmworkers, who would leave vehicles on the Order route (which, by 1996, formed the only access to the land).
19. Objectors state that the fields to the south of the Order route were farmed during the coal board’s restoration of the land, which occurred prior to 1996. Thus, whilst I acknowledge that the stile’s design may be similar to others found on public rights of way in the area, I am persuaded that the stile could equally have been installed to facilitate access to the fields by farmworkers for agricultural purposes. As a result, it has not been demonstrated that the stile’s construction indicated an intention by the coal board to dedicate the Order route as a highway.
20. Objectors state that the path (Footpath No. 21) which passes south to Horsley Woodhouse from the Order route was not available for long periods of time in the period prior to the sale of the land concerned in 1996, due to opencast coal mining operations. This is unchallenged by those in support.
21. The submission casts doubt on the availability of the route to Horsley Woodhouse from the Order route over the period prior to 1996. The reasons for use of the route by the five people are to walk to Horsley Woodhouse in three cases, also for access to Kilburn and for dog walking or a short cut.
22. Access to Horsley Woodhouse was consequently one of the main reasons for use of the Order route by the five people concerned. Nevertheless, this would not have been possible for significant periods due to the unavailability of that route. Their use over the period until 1987-1996 is therefore unlikely to have occurred as frequently as recorded. As a result, it is not possible to assess their frequency of use over that period. Thus, I attach only minimal weight to the evidence of use prior to 1996 in assessing the potential period of common law use.
23. Eight people used the route over the eight year period 1996 to 2004 (the 1996 common law period), although I attach only limited weight to the evidence of use of one person until the year 2001, for the reasons given above. Their frequency of use was 5-6 times per year, so that it formed relatively infrequent use between the years 2001 and 2004.
24. Of the remaining seven, one person used the route three times per week, two people used it weekly, two monthly, one less than monthly and one a minimum of three-four times per year.
25. There is no evidence before me to suggest the occurrence of any acts to show dedication by the landowner over the 1996 common law period. Furthermore, use over the period was not so intensive as to support the inference of dedication in the absence of any substantive evidence of knowledge of and acquiescence in such use by the landowner at the time.
26. Overall, the available evidence does not demonstrate that the landowner intended to dedicate the Order route as a public footpath, and that this was accepted by the public. Accordingly, it cannot be inferred that the route has in fact been so dedicated at common law.

Conclusion

1. The discovery of evidence (when considered with all other evidence available) is insufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates. Thus, having regard to all the evidence before me, I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

C Beeby

INSPECTOR

COPY – NOT TO ORIGINAL SCALE

