



Order Decision

Site visit made on 1 October 2018

by **D. M. Young BSc (Hons) MA MRTPI MIHE**

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

Decision date: 16 May 2019

Order Ref: ROW/3195833

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lincolnshire County Council (Amendment of Kesteven County Council (Rural District of South Kesteven) Definitive Map and Statement – Evidential Events) (No. 1) Modification Order 1992.
- The Order is dated 26 February 1992 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Lincolnshire County Council [the OMA] submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.

Procedural Matters

1. None of the parties requested to be heard, I have therefore considered the case on the basis of the written representations received.
2. I carried out an accompanied site inspection of the Order route on the morning of 1 October 2018. Only two sections of the Order Route were readily passable. Firstly, a section alongside the river to the east of point B terminating at the electricity pylon. Secondly, the section between points C and D from Priory Road through the allotments to the river bank. The remaining sections of the route were obstructed by either fences and/or overgrown vegetation. I am however, satisfied that I am able to reach my decision based on my site visit having regard to the evidence before me.
3. The case for the Order was originally made by Mr B Riley and more recently, Mr Peter Honniball, on behalf of the Stamford Group of the Ramblers' Association (the Ramblers). The objector is Ms D Dunseath of Cherryholt Holdings Limited who are the successors to Trade Services Information Limited who lodged the original objection against the Order and who own land at the bottom of Cherryholt Road.
4. The map attached to the Order dated 15 September 1987 does not correspond to that referenced in Part I of the Order schedule. The OMA has confirmed this is an error and that the correct Order map is the version dated 17 February 1992. This has been submitted with the Statement of Reasons and is more detailed than that submitted with the Order. The reference points referred to throughout this decision are hence taken from the 1992 map. The OMA has also recommended a number of other minor modifications to the Order schedule which stem from the availability of more accurate mapping tools in

recent years. As such, should I be minded to confirm the Order, it would be necessary to modify the map and schedule.

5. According to the OMA the Auto-Cycle Union, British Horse Society and the Byways and Bridleways Trust were not served with necessary notices when the Order was made in 1987. I therefore wrote to the OMA requesting that these parties were notified of the Order. That process has now been completed but no further representations have been received.
6. Finally, in the interests of fairness I wrote out to all interested parties on 8 February 2019 informing them that I was minded to confirm the Order as made. I have taken the responses into account in my decision.

The Main Issues

7. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. This section requires me to consider whether the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show, on the balance of probabilities, that the right of way described in the Order subsists and that the Definitive Map and Statement therefore require modification.
8. The case for the Order relies on user evidence to demonstrate that the route could be presumed to have been dedicated as a public highway under the statute of section 31 of the 1980 Act. This provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. As of right is set out in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council (1999)* as being without force, secrecy or permission. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
9. The main issue is therefore whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown on the Definitive Map and Statement (DMS) subsists over the land in the area to which the map relates.

Reasons

Background

10. The Order is dated 26 February 1992 following an application dated 3 April 1987. The grounds for the application were that the right of a way has been created as a result of public use over a period of time, and is not shown on the on the DMS.
11. The application was supported by 10 user evidence forms (UEFs). Two consultations were carried out by the OMA in July and September 1987. 7 further UEFs were then submitted in response to the second consultation. The OMA resolved to make the Order on 10 January 1990. A final 8 UEFs were then submitted in 1992. Given the age of many of the witnesses and the passage of time, it would appear that few would still be alive today.

12. Although the Order was made in 1992, it has been held in abeyance by the OMA for many years until it accrued sufficient priority. The OMA now believes that the evidence does not demonstrate that a public right of way exists over the Order route and takes a neutral stance.

Description of route

13. The Order route commences at point A towards the end of Cherryholt Road, a cul-de-sac. From here it proceeds southwards towards the river along the edge of what was once a field but has since been turned into a large gated car park constructed by the landowner, Trade Service Information Ltd, in early 1992. The line of the Order route is currently obstructed by a metal palisade fence at the head of the cul-de-sac and so it is not possible to reach the river bank at this point.
14. The route then turns left and travels in a north-easterly direction following the river bank for approximately 0.5km where it then passes through a water meadow. At various points the route is obstructed and one is forced to walk away from the river. At the western boundary to Priory House the route is again obstructed by boundary treatments and vegetation. At this point I was able to see the remnants of one of the stiles erected by the Council. The route continues through the southern section of the Priory House until it emerges into the allotment site whereupon it turns left utilising an existing path to a kissing gate and eventually the surfaced access road leading up to point B at Priory Road close to the Morrisons roundabout.
15. Although there was evidence of some use of parts of the route, it was clear that there has been no use of the whole route by any person for any purpose for some considerable period of time.

Statutory dedication

When the right to use the route was first brought into question

16. The application which was dated 3 April 1987 would have brought the right to use the way into question. However, Mr G Glynn and Mr J Manton's UEFs confirm that they were challenged on the route in 1986. An earlier bringing into question of 1986 can therefore be established and therefore I intend to use 1966-1986 as the relevant 20 year period in this case. Having satisfied myself as to the date of calling into question I will now consider whether the user evidence is sufficient to lead to a presumption of dedication. If satisfied that a presumption arises then I will look at whether there is sufficient evidence of a lack of intention to dedicate on the part of the landowner during the relevant period.

Evidence of use

17. The original application was accompanied by 10 UEFs none of which were accompanied by a map. Although signed by the witnesses, 3 forms were completed entirely by Mr Riley¹. The remaining 7 were partially completed by Mr Riley and have had a description of the path added or amended. This clearly affects the weight I attach to these documents.

¹ Mr Flynn, Mr Bradshaw & Mr Stephenson

18. Save for that submitted by Mr Stephenson, the UEFs indicate use of a route leading from Cherryholt Road to Priory Road via the bank of the River Welland. Mr Flynn describes weekly use of the route for recreation purposes between 1918 and 1986. Mr Bradshaw states he used the route several times a week between 1937 and 1958. Mr Smith says he used the route "*all the time*" from 1938 onwards. Mr Herbert claims to have used the route daily from 1958 onwards, Mr Plant from 1962 to 1986 and Mr Manton from 1966 to 1986. All UEFs confirm that stiles were present on the route. No-one recalls any notices or signage along the route. According to the UEFs none of the original witnesses had permission to use the route and none reported being stopped or challenged until 1986.
19. The OMA states that it is not possible quantify from the UEFs of Mr Croft, Mr Hansell, Mr Manton, Mr Plant or Ms Smith how often they used the route. Whilst that may be so, I find that to be a somewhat unreasonable criticism. When one looks at all the answers provided on these UEFs in their entirety and takes the words in their everyday meaning, it is readily apparent that these witnesses used the route on a regular basis.
20. Overall and notwithstanding the problems I have identified with some of the original UEFs, there is good evidence from the original 10 witnesses to suggest regular use of the route over a significant period encompassing the relevant 20 year period.
21. Although a further 7 UEFs all dated 7 September 1986 were submitted in response to the second consultation, these are from the same respondents. All have been completed by Mr Riley and the evidence contained therein largely replicates that given in the original UEFs. Consequently, these UEFs do not add any significant weight in favour of confirmation.
22. For reasons which have not been made entirely clear, a final 8 UEFs were submitted in March/April 1991 which is before the date of the Order. None of these witnesses had previously completed a UEF. Unlike those from 1986, these were all were accompanied by a map and were completed by the respondents themselves. I have discounted the UEFs from Dr Ludolf and Mr White as the claimed period of use falls outside the relevant 20 year period. I have also discounted the UEFs from Mr Pearson and Mr Fox as the routes shown on their maps do not correspond to the Order route.
23. The 4 remaining UEFs from Mr B Flynn, Mr Oswald, Mr Harley and Ms Kozich and accompanying maps describe and depict a route commencing at the bottom of Cherryholt Road, along the river bank and back up to Priory Road to the Morrisons roundabout. Although some describe also a separate path branching off eastwards through the allotment to Hudds Mill via the disused sewerage works in, the UEFs and maps generally correspond with the Order route. The UEFs record the width of the path as between 3-5 feet. This is consistent with the Order schedule which specifies a width of 1 metres between points A-B and 2 metres between B-C-D.
24. In terms of use Ms Kozich claims use of the route between 1974 and 1991, Mr Harley between 1979 and 1991, Mr Oswald between 1983 and 1991 and Mr B Flynn between 1924 and 1986. Although Mr Flynn states that he was given permission to use the route by the Marquess of Exeter Fishing Club, his UEF confirms that the route was well used. Cllrs Giles and Simpson both of whom

- support the Order commented that the route was well used by walkers, fishermen and local residents.
25. The OMA argues that there are discrepancies between the routes shown on the maps and also the thickness of the lines makes it difficult to establish the exact alignment. However, in my view, that criticism is unduly harsh and misplaced. The witnesses are/were not cartographers and it would be unreasonable to expect them to record the route with absolute precision. They were clearly doing the best they could with the maps they had at their disposal particularly bearing in mind that by 1991 when the forms were completed, the route had been obstructed and diverted away from its original alignment for a number of years.
26. Whilst a second access to the riverside path, further north on Cherryholt Road "*next to Bowman's*" appears to have come into being during the early 1980s, there is no credible evidence to suggest the original alignment of the Order route was ever obstructed during the 20 year period. In fact the sign that was painted on this point merely advised users to revert back to using the "*stile at the riverside*" which is consistent with the Order route. Moreover, the OMA's first photograph in Appendix SOR 2/6 shows that the line of the route has been specifically protected by the then recently erected fencing. It seems highly likely that this is the "*well-used*" path that is referred to by Councillor Giles in her letter dated 17 September 1987. She goes on to describe the rest of the route and this again corresponds with the evidence of local residents provided in their UEFs. Based on foregoing, it seems likely there was a second route across to the riverbank. However there is no cogent evidence to suggest that the number of pedestrians using the Order route between points A-B diminished at that time or that the original alignment was physically obstructed.
27. Overall, the UEFs demonstrate use of the Order route during the 20 year period and weigh in favour of confirmation of the Order. There is no evidence that the use was interrupted or that it was not '*as of right*'. Although the level of use varies between the witnesses, overall it has been demonstrated that it was on a regular basis varying from daily, weekly and monthly depending on the time of year. In view of my conclusions above it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way as a public footpath.

Landowner evidence

28. The user evidence gives rise to a presumption of dedication and therefore the burden shifts to the landowner to demonstrate a lack of intention to dedicate. For there to be sufficient evidence of this there must be evidence of some overt acts on the part of the landowner, during the relevant period, to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public.
29. The letter to Mr Riley from the Director of Recreational Services dated 5 March 1987 is insightful. It states that the OMA's Countryside Officer met and walked the route with a representative of Burghley Estates who, according to the letter, was at that time the sole landowner. Whilst it is made clear that the stiles and path were originally for the use by anglers, the landowner accepted

that "...over many years, members of the public have used it [the Order route] as a recreational footpath..." despite it not being dedicated as public. Despite that knowledge, the landowner did not to have taken any steps to disabuse users of the notion that the route was public during the 20 year period.

30. A second letter from Burghley Estates dated 5 August 1987 contradicts the earlier account given by the OMA's Countryside Officer and states "*I am not aware that the public has been using it as a right of way, or that they used the route to the east of Priory House to join up with Priory Road*". There is nothing in the letter which repudiates evidence of use in the UEFs nor is there any suggestion that the landowner took any meaningful steps to demonstrate a lack of intention to dedicate, such as erecting notices.
31. At some point in 1987, the ownership of the land west of Priory House was transferred to the Cecil Estate Family Trust. The land at the southern end of Cherryholt Road was subsequently bought by Trade Services Information Ltd. Their letter dated 16 April 1987 does not object to the Order per se but points out that the section of the route between points A-B would run between its current site and car park and should be diverted if the Order were to be confirmed.
32. I do not consider that there is any credible evidence demonstrating a lack of intention to dedicate a public right of way over the Order route within the relevant 20 year period.

Documentary Evidence

33. There is no dispute that the documentary evidence supporting the physical existence of the Order route is limited. The route does appear on the 1814 Ordnance Survey Drawing and the 1824 Ordnance Survey 1st Edition one-inch to the mile scale map. However the entire route does not appear on any map after that time and it is not possible to establish the status of the route from these maps.
34. The section of the route between points C-D are shown on various maps and documents dated between 1845 and 1905 and show it forming part of a wider route between Priory Road and Hudd's Mill. The 1845 Plan of the Intended Boston, Stamford and Birmingham Railway and accompanying book of reference record it as an "*occupation road*". It is also recorded on the plan which accompanied the 1875 Inclosure Award as a "*Public Footway*". This is strong evidence that the part of the route between points C-D was considered to be public footpath at that time.
35. Most of the aerial photographs of the area are of poor quality. There is only one aerial photograph from the relevant 20 year period and that is from 1971. Although the resolution is poor, it is just possible to make out a light coloured linear feature running south from the bottom of Cherryholt Rod and along the riverbank between points B and C. Although not conclusive, the 1971 aerial photograph supports the physical existence of a path between points A-B-C. The OMA rightly points out that it is not possible to establish the status of the path from this photograph.

Other Matters

36. Based on a request from one of the landowners, the OMA erected stiles and waymarkers along some of the Order route in November 1999. The route

marked out by the Council was not the same as that shown on the Order plan due to the car park at the southern end of Cherryholt Road. Based on telephone calls to the Council, it appears that fairly soon after the works were completed the route was blocked off at its western end at a point between Cherryholt Road and the first field. There is no record that these obstructions were removed and there is no record of any public funds being spent on the route after 1999. At some unspecified point, the waymarkers were removed. As these events occurred after the relevant date specified in the Order, they have little bearing on my decision.

37. The letter from Burghley Estates dated 5 August 1987 objects to the Order on the grounds that it would be unsuitable and pose a safety risk to pedestrians. An alternative route extending further east along the river bank has also been suggested. However, these are not matters which can be taken into consideration under section 53 of the 1981 Act.
38. The letter dated 16 March 1992 from Trade Services Information Ltd objects to the Order. However the objection is based upon security concerns following the grant of planning permission for the car park and associated boundary treatments. Again the suitability of the route or the availability of alternatives are not matters that I can consider under the 1981 Act.

Conclusions

39. I have found that there is sufficient user evidence to demonstrate use of the Order route between 1966 and 1986. There is no evidence that use was interrupted or that it was not '*as of right*'. I have not identified any evidence to show a lack of intention to dedicate a public right of way over the Order route within the 20 year period. An aerial photograph from 1971 indicates a walked path that generally corresponds with the Order route. Additionally there is strong evidence to suggest that the eastern section of the Order route was considered to be a public footpath during the second half of the 19th century. Therefore, on the balance of probabilities, and considering the evidence as a whole, I am satisfied, that the Order route should be recorded as a public footpath. Having regard to these and all other matters raised I conclude that the Order should be confirmed with modifications.

Formal Decision

40. The Order is confirmed subject to the following modifications:
- (a) At Part I of the Schedule to the Order at line 6 "500" shall be replaced with "463";
 - (b) At line 7 the Grid Ref shall be delete and replaced with "TF03999 07314";
 - (c) At lines 9, 10 and 11 the text starting at "*130 metres*" until "*Grid Ref TF 03945 07418*" shall be deleted and replaced with the following "*124 metres along the east side of a boundary to meet the public highway known as Priory Road at Grid Reference TF 03935 07420*";
 - (d) At line 12 replace "670" with "627";
 - (e) At Part II of the Schedule to the Order, the description of the path to be added shall match the wording used in Part I.

- (f) Points A, B, C and D shall be added to the Order map to reflect the 17 February 1992 map.

D. M. Young

Inspector