



16 October 2013

Agenda Item:

REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)

**CONSIDERATION OF AN APPLICATION UNDER SECTION 53 (2) OF THE
WILDLIFE AND COUNTRYSIDE ACT TO ADD A FOOTPATH TO THE DEFINITIVE
MAP AND STATEMENT IN THE PARISH OF STANTON ON THE WOLDS**

Purpose of the Report

1. To consider an Application made by Stanton on the Wolds Parish Council for the registration of a route as a public footpath in the parish of Stanton on the Wolds. The route being claimed is shown on Plan A.
2. The effect of this Application, should a Modification Order to add the route be made and subsequently confirmed, would be to register a footpath between Stanton on the Wolds Footpath No. 6 and Browns Lane.

Legal Background

3. The Application is made under the provisions of the Wildlife and Countryside Act 1981. Subsection (5) of Section 53 of the Act allows any person to apply to the authority for an order under subsection (2) of the Act, which will make such modifications to the Definitive Map and Statement as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3) of the Act. In this case, the relevant event is the expiration of a period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.
4. The evidence in this case relates to the text in Section 31 of the Highways Act 1980, which states that “where a way over any land, other than a way of such a character that use of it by the public 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 full period of 20 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 20 years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.”

5. In order to accept a right of way claim on the basis of user evidence forms submitted by the public, it is not necessary to be able to show that the claimed right exists beyond all reasonable doubt. The tests to be applied are commonly known within the rights of way profession as 'Test A' and 'Test B.' In 'Test A,' the question to be answered is whether the right of way exists on the balance of probabilities. There must be clear evidence of public rights, with no credible evidence to the contrary. In 'Test B,' the question is merely whether it is reasonable to allege that a right of way exists. If there is a conflict of evidence, but no incontrovertible evidence that a right of way cannot be reasonably alleged to exist, 'Test B' is satisfied, the right of way is reasonably alleged to exist, and the claim should therefore be accepted.

The Current Situation

6. The claimed route initially runs along an embankment (see Plan A) which is a covered section of the Old Dalby linear test track owned by BRB (Residuary) Ltd, formerly known as the British Railways Board. It then continues over a field and an access track also owned by BRB (Residuary) Ltd, and leased to the occupiers of No. 141 Browns Lane in accordance with a tenancy agreement dated 1st February 2011.

The Application

7. The Application is supported by sixteen Public Rights of Way User Evidence Forms. Twelve of the sixteen claimants have used the route for twenty years or more, of whom four used it daily, one used it five days a week, and five used it at least once a week.

Documentary Sources

8. The available documentary evidence for Stanton on the Wolds has been examined at the Nottinghamshire Archives, and nothing was discovered regarding the possible existence of public rights over the route in question.

Aerial Photographs

9. Aerial photographs from 2000, 2004, 2007 and 2009 were examined for evidence of a wear line along the claimed route and any physical features pertinent to the claim. Nothing is discernible along the embankment because of the tree cover, but the photographs do show with varying clarity a wear line between the end of the embankment and Browns Lane, which claimants have confirmed is the route they followed.

Consideration of User Evidence

10. The information contained in the Evidence Forms relates to the presumed dedication of a highway based on uninterrupted use as of right over a full twenty year period. This period has to be calculated retrospectively from the date when the right of the public to use the route was brought into question, by some means sufficient to show to the public that their right to use the route was being challenged.
11. The date of challenge in this case is the summer of 2010, when a post and rail fence were erected in the field behind 141, Browns Lane by a previous tenant. In the absence of any evidence to the contrary, the erection of this fence, which did not incorporate any means to allow the claimants to pass through it and therefore forced them to use a different route to continue their journey, should be taken as the act which brought public use of the claimed route into question.
12. The Evidence Forms suggest use by the public of the claimed route for over forty years prior to the challenge date. In order for this evidence to be valid, it must be demonstrated, in accordance with Jones v Bates (1938) that use was of right and was not exercised by 'compulsion, secrecy or licence.' The Evidence Forms do not indicate that any force was involved in the exercise of the claimed right of way, or that use of the path was secretive in any way. Only one of the Evidence Forms refers to permission being given to use the path, but subsequent correspondence from the individual in question established that he seems to have regarded the lack of objection from previous tenants as implying 'permission' to use the path. In terms of the Jones v Bates case, use in these circumstances would not equate to use by 'licence.'
13. It also has to be considered whether there is sufficient evidence of the landowner's intention not to dedicate a right of way during the twenty year period prior to the challenge date. The land in question was owned throughout this period by BRB (Residuary) Ltd.
14. The standard defence against a right of way claim is for a railway company to assert that the unauthorised use of railway land is criminal trespass, and as such incapable of founding a claim for a public right of way. Trespass on railway land only becomes a criminal act, however, when a trespasser has been warned and does not desist. This offence, of 'Trespass and Refusing to Quit,' can be traced back to the nineteenth century, as can the related 'Trespass After Warning,' which allows railway personnel to physically remove people if they refuse to leave. There is no indication in any of the Evidence Forms that anyone was ever challenged in this way by anyone acting on behalf of BRB (Residuary) Ltd, and therefore there has been no criminal trespass, and therefore no possibility of using this as a defence against presumed dedication.

15. Another relevant consideration is that the House of Lords ruled in the case of Bakewell Management v Brandwood and others (2004) that, provided it would have been lawful for a landowner to dedicate a right of way, there is nothing to prevent the acquisition of a right by long use even if that use was in breach of a statutory prohibition. This judgement makes it clear that the statutory presumption in Section 31 of the Highways Act 1980 applies to land owned by BRB (Residuary) Ltd, as it does to other land. There is no evidence that it would not have been lawful for BRB (Residuary) Ltd or its predecessor British Railways, to dedicate a right of way over the land in question, and therefore it is legally possible for such a dedication to have occurred.
16. There is no evidence of any notices being in position during the relevant period indicating a lack of intention to dedicate a highway over the affected land, and also no evidence of any fences or other structures along the claimed route preventing public access.
17. No Statutory Declaration was received by the County Council from BRB (Residuary) Ltd during the relevant period to indicate their lack of intention to dedicate a highway over the claimed route.

Responses to Consultations

18. Letters were sent out to the standard list of consultees, including Rushcliffe Borough Council and the local member, advising them of the claim and inviting comments. No objections were received to the proposed route.
19. Veale Wasbrough Wizards have objected to the proposed route on behalf of BRB (Residuary) Ltd. The first point raised is that the “earth mound” which the railway runs beneath was not engineered for the purpose of having a footpath routed over the top of it. This, however, is of no relevance to the question of whether public rights exist over the land in question.
20. The second point raised is that the claimed route is not conducive to public access. It is claimed that it is necessary to climb a relatively steep slope to reach the top of the tunnel, that the route is “too overgrown for easy passage,” and that part is obstructed by overhanging vegetation. It is also stated that there appears to be no logical reason for walkers to use the claimed route, and that in places, the wear line is the result of animal rather than human activity. Given that the sixteen people who completed the Evidence Forms seem to have used the path without difficulty and had perfectly valid reasons for using it, namely walking for pleasure either with or without a dog, this part of the objection does not undermine the credibility of the user evidence or the weight to be attached to it.
21. The third point is that “Given the use of the railway line as a test track,” it is difficult to envisage a situation when BRB (Residuary) Ltd staff would have ‘welcomed and greeted’ anyone using the claimed route, as stated by one of the claimants. The section of line in question, however, is entirely underground, so there is no reason why railway staff would have needed to

stop anyone walking the claimed route on the grounds of public safety. It is therefore not inconceivable that railway staff could have exchanged pleasantries with members of the public using the claimed path and not challenged them in any way. This part of the objection again fails to undermine the credibility of the user evidence.

22. The fourth point is that BRB (Residuary) Ltd “generally have not been aware of members of the public walking along the route,” but this lack of awareness could simply reflect the fact that the site is only inspected very infrequently. It does not in itself indicate that the user evidence lacks credibility.
23. The final points raised refer to BRB (Residuary) Ltd’s health and safety concerns and the risk of vandalism to the tunnel air shafts if the public could access the land as of right. Due to the nature of rights of way legislation, these issues are of no legal relevance to the determination of the claim.
24. An objection to the claimed footpath has also been made by Nicholas Matthews of 141 Browns Lane, Stanton on the Wolds, who is the tenant of land owned by BRB (Residuary) Ltd to the rear and to the west of his property. The first point raised is that Mr Matthews was not made aware by BRB (Residuary) Ltd that the land encompassed by his tenancy agreement was subject to a public right of way. This is understandable given that the claimed route is not a registered right of way, but does not affect the weight to be attached to the Evidence Forms.
25. Mr Matthews’ second point is that since he locked the gate at the Browns Lane end of the path he has only seen one person using the path, who was told not to cross the area again and acknowledged that it was not a public footpath. The gate was locked in February 2011, however, and therefore after the date of challenge. This event is not therefore legally pertinent to the determination of the claim.
26. The third point is that nine of the Evidence Forms have identical maps attached, suggesting that these have been photocopied and distributed to the claimants. This has clearly been done for the sake of convenience, as it would be impossible to accurately delineate the route, given the ground conditions, without employing the services of a surveyor. This point does not in itself indicate that the user evidence lacks credibility, as the forms which have been submitted clearly refer to a route running between Stanton on the Wolds Footpath 6 and Browns Lane.
27. The fourth point refers to the steepness of the embankment and the density of the vegetation on top of the tunnel. The Evidence Forms indicate that the path has been used in spite of these factors, and therefore this point does not undermine the credibility of the user evidence. An additional point relating to the impossibility of walking along the top of the tunnel in a straight line should also be discounted in light of the fact that the used line has been accurately mapped by a County Council surveyor, as shown on Plan A.

28. Additional points made by Mr Matthews question the likelihood of the path being used in the manner described by the claimants, but this has to be set against the testimony of use set out in the Evidence Forms. Mr Matthews also doubts the claimed frequency with which the path has been used, although this has to be set against the fact that he only appears to have knowledge of the site from December 2010 onwards, and therefore cannot know how the path was used in the twenty years before the date of challenge. Mr Matthews similarly doubts the accuracy of the Forms on the basis that the claimants have indicated that the gate at Browns Lane was always open or unlocked, and yet he has made sure since February 2011 that the gate has been locked. The claimants, however, are referring to the situation before the date of challenge, and therefore before Mr Matthews' occupancy of 141 Browns Lane.
29. Mr Matthews' final points are that the area is already well served by footpaths, and there is a safe paved road access to Melton Road from Browns Lane; that the route of the proposed footpath is unsafe; that the registration of the proposed footpath would have security implications for his property; and that a footpath would prevent him from using the land adjacent to his house in accordance with the terms of his tenancy agreement. Due to the nature of rights of way legislation, none of these points is relevant to the determination of the claim, as they do not relate to the question of whether public rights exist or not on the balance of probabilities. The tenancy agreement, furthermore, does not require the tenant to take any steps which would indicate a clear intention by BRB (Residuary) Ltd not to dedicate a right of way over the property.

Conclusion

30. In order to proceed to the making of a Modification Order for the route in question, it is necessary to satisfy either 'Test A' or 'Test B', as described above. It is submitted that in this case, there is clear evidence of public rights, with no credible evidence to the contrary, and therefore 'Test A' is satisfied.

Statutory and Policy Implications

31. This report has been compiled after consideration of implications in respect of finance, the public sector equality duty, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment and those using the service and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATION

32. It is RECOMMENDED that the Committee accepts the claim for the route in question and authorises the making of a Modification Order to register it as a public footpath, as for the reasons set out above, the evidence demonstrates that public footpath rights exist on the balance of probabilities.

TIM GREGORY

Corporate Director of Environment and Resources

Comments of the Service Director – Finance (SEM 06/09/2013)

There are no specific financial implications arising directly from this report.

Legal Services' Comments (SJE – 06/09/2013)

This decision falls within the terms of reference of the Rights of Way Committee to whom the exercise of the Authority's powers relating to public rights of way has been delegated.

Background Papers Available for Inspection

Except for previously published documents, which will be available elsewhere, documents listed here will be available for inspection in accordance with Section 100 D of the Local Government Act 1972

Right of way claim at Stanton on the Wolds – case file.

Electoral Division(s) and Member(s) Affected

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