



Order Decision

Site visit made on 16 June 2020

by Alan Beckett BA MSc MIPROW

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

Decision date: 24 July 2020

Order Ref: ROW/3224222

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Nottinghamshire County Council (Mansfield Woodhouse Footpath Nos. 59 & 60 and Clipstone Footpath Nos. 20, 21, 22 & 23) Modification Order 2016.
- The Order is dated 16 September 2016 and proposes to modify the Definitive Map and Statement for the area by adding six public footpaths as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Nottinghamshire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: The order is proposed for confirmation subject to the modifications set out in the Formal Decision

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the paths at issue on Tuesday 16 June 2020.
2. In the Schedule to the Order, footpaths Clipstone FP 22 and 23 are described as being subject to a limitation on use by vehicles for land management purposes. Whereas the routes which the footpaths follow may have been used as forestry access and extraction routes, the use by private vehicles on privately owned land is a fundamental characteristic of land ownership and occupation.
3. As pointed out by Mr Kind in the representation made on this subject, the use of vehicles over land crossed by a public right of way does not present a nuisance to public use of the land as a footpath; such activities are a regular occurrence on many public rights of way with 'give and take' being exercised by both footpath users and land managers when necessary. Whilst forestry operations may, from time to time, require the exclusion of the public from the footpaths, this can be achieved under a temporary traffic regulation order.
4. I do not consider that the limitations specified in the Schedule in relation to footpaths 22 and 23 to be valid; the owner of the land will have a right to use a vehicle on his land as part of the use and management of his land without causing a nuisance to the public exercising a right of way. If I conclude that the Order should be confirmed, I will modify it accordingly.

5. The applicant for the Order, Mr Parkhouse, requested the amendment of part of the route shown in the Order as footpath 20 between points A4 and A5. In Mr Parkhouse's view, the Order route ignored a heavily used path which had been in use for many years.
6. Mr Parkhouse suggests that the route shown as footpath 20 did not reflect that shown on the plan attached to the application made to add the footpaths to the definitive map. The route applied for was a well-used path that avoided the hill to the east of footpath 21 and ran along relatively flat land closer to the river. The route applied for then climbed the hill on a heavily worn path with tree roots exposed above ground level.
7. Mr Parkhouse submits that the majority of the maps attached to the user evidence forms which supported the application showed the application route or a close approximation of it, given the small scale of the maps and the attempts made by respondents to show the route which had been predominantly used. It was acknowledged that some of the user evidence forms described a route further up the hill from the river, but the line of footpath 20 shown in the Order was not that which had been applied for, nor did it represent what had been available on the ground.
8. I have had the opportunity to view both the route claimed by Mr Parkhouse to be that which had originally been applied for and the route shown as footpath 20. Both routes appeared to be well used and followed clear wear lines in the ground. One difference between the two is that having descended the hill above the Maun, Mr Parkhouse's route then gradually descends the sloping ground until its junction with footpath 21 at A4. In contrast, the route shown in the Order plan descends the initial hill midway between A4 and A5 (at a point I shall call AX), crosses an interconnecting route (which is not shown in the Order plan) before rising up a second hill and running at an elevated position above Mr Parkhouse's route and the river.
9. This path follows the boundary fence of a forestry plantation and provides the user with two opportunities to descend towards the river; the first runs downhill to join Mr Parkhouse's application route on an alignment further west and at a steeper gradient to that shown on the Order plan, whereas the second continues along and gradually descends the slope before joining footpath 21 at a point approximately 30 metres south of A4. Neither of these routes leading to the river reflect what is shown as footpath 20 on the Order plan.
10. Mr Parkhouse has plotted the alignment of the two available routes using GPS. This data demonstrates that the route shown on the Order plan as footpath 20 does not correspond with either the path originally claimed, nor the alternative route present on the ground. Although the maps attached to the user evidence forms are of small scale, most of those maps show a route closer to the river than that which is depicted as footpath 20 in the Order plan. I consider that the route depicted by Mr Parkhouse in his submissions to more accurately represent the route claimed to have been used by the supporters of the application prior to 2008 and that the section of footpath 20 at issue should be modified if the Order were to be confirmed.

The Main Issues

11. The main issue in relation to this Order is the requirements of section 53 (3) (c) (i) of the 1981 Act namely, whether the evidence discovered, when

- considered with all other relevant evidence available, shows on the balance of probabilities that public rights of way not shown in the map and statement subsist over the land in question.
12. The land crossed by the Order routes is in three ownerships. Footpath 59 crosses land currently owned by the Forest Town Nature Conservation Group and land owned by Mr Robert Bowring. Footpath 20 (to the west of footpath 21) crosses Mr Bowring's land with the remainder of the footpaths at issue crossing land owned by Mr James Shaw-Browne which is leased to the Forestry Commission under a 999-year lease made in 1952.
 13. Section 327 of the Highways Act 1980 (the 1980 Act) provides that the 1980 Act does not apply to the Crown or land held by a Government department unless there is an agreement to the contrary made between the Highway Authority and the Government department; no evidence has been provided that such an agreement has been entered into. Consequently, for those paths which cross land leased to the Forestry Commission, the question of whether a public right of way subsists is dependant upon dedication having taken place at common law.
 14. The issues that I need to consider in relation to those paths which cross land leased to the Forestry Commission are therefore whether the freehold owners of the land had the capacity to dedicate a public right of way; whether there was express or implied dedication of such a right of way by the owners and whether there is evidence of the acceptance of such a dedication by the public.
 15. With regard to footpath 59 and that part of footpath 20 which crosses Mr Bowring's land, the normal provisions of section 31 of the 1980 Act are applicable. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is 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 is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.

Reasons

User evidence

Section 31 deemed dedication

16. The application to add the Order routes to the definitive map was made in 2008. In the absence of any evidence of another event which may have brought public use of the routes into question, the date of the application can be used to calculate the retrospective period of use. In this case the relevant 20-year period is 1988 to 2008.
17. Forty-four user evidence forms were submitted in support of the application to add the Order routes to the definitive map. Of these respondents, 5 claim use of the paths at issue since the 1940s with the earliest use dating from 1940. Twelve respondents claim use starting in the 1950s, eleven claim use from the 1960s, 11 claim use from the 1970s and 5 commenced use in the 1980s. Except for two users who only claim to have used footpaths 20, 21 and 22, all users claim to have used all the Order routes.

18. Use of the Order routes has taken place for up to 68 years prior to the application being made in 2008 and all respondents claim use of the paths throughout the 20-year period prior to the application being made. The claimed frequency of use varies between respondents with some stating they used the paths daily, others on a weekly or monthly basis and some on an occasional basis.
19. None of the respondents had been prevented from using the claimed paths, nor had they sought or been granted permission and all use was such that it could have been observed by anyone who cared to look. The physical evidence of prominent wear lines on the ground suggest that there has been heavy use of the Order routes for many years.
20. On the face of it, there is a body of evidence of use of the Order routes by the public of sufficient quality that would raise a presumption of dedication under section 31 of the 1980 Act. I understand that Mr Bowring acquired his land from Mr Shaw-Browne in or around 2012. No objection or response to the Order has been received from Mr Bowring.
21. The Forest Town Nature Conservation Group acquired its land from Mr Shaw-Browne in June 2014. No objection to the Order was made by the Forest Town Nature Conservation Group which welcomes the contribution the Order paths would make to the creation of a heritage trail within the area.
22. There is no evidence before me to suggest that prior to 2008, the Shaw-Browne family had taken any steps to communicate to the public that there was no intention to dedicate a public right of way over footpath 59 and that part of footpath 20 to the west of the land leased to the Forestry Commission. It follows that the presumption of dedication raised by the evidence of use throughout the 20-year period to 2008 has not been rebutted.

Common law

Capacity to dedicate

23. Under the common law approach, it is not sufficient for there to have been use of a route or routes by the public for a particular period of time. Where such use has occurred (as in this case) such use may be evidence that the landowner was content for such use to continue and may give rise to a conclusion that dedication could be reasonably implied. However under common law principles, the emphasis has to be upon the landowner and the actions he, she or they have taken in relation to use of the land by the public which must have been at a quantity and quality that would lead a reasonable landowner aware that a public right was being asserted.
24. The land crossed by footpaths 60, 21, 22, 23 and the eastern part of footpath 20 all cross land which is owned by Mr Shaw-Browne and which has been leased to the Forestry Commission since 1952.
25. The Forestry Commission made a statutory objection to the Order but did not subsequently provide a statement of case and no further correspondence has been received from it on this matter. In the statutory objection the Commission states that the 1952 lease prohibits public access on the leased land; that the reserved rights of the freeholder were insufficient for dedication of a highway over the leased land to have been possible, and that it would be unreasonable to conclude that the freeholder intended to dedicate public rights of way.

26. The Commission provided a copy of the lease as part of its objection. Having studied the lease, I find that it is silent as to the subject of public access onto the leased land. The Commission is required to maintain a stock proof fence on land adjacent to the agricultural land retained by the freeholder but does not require the Commission to fence the leased land against trespass. Furthermore, the lease restricts the Commission's use of the land to forestry purposes with mineral rights and the rights to certain trees within the leased lands being retained by the freeholder.
27. As the lease restricts the Commission to the use of the land for forestry purposes and does not provide a power to grant access to the public, the ability to dedicate a public right of way over the land is likely to remain with the freeholder although that state of affairs is not expressly stated within the lease.
28. Consequently, I am satisfied that the capacity to dedicate a public right of way over the leased land remained with the freeholders, the Shaw-Browne family.

The intention of the landowners

29. Whereas the lease makes no reference to the possibility of public access to the leased land being envisaged, the user evidence described above indicates that there had been some use of the claimed routes prior to the lease being signed and that such has continued during the operative term of the lease. It was evident from the number of people walking the various tracks and paths through the woodland during my site visit, that such use is continuing.
30. Evidence of use of the paths within the leased land is contained in the 44 user evidence forms submitted. There is nothing within those forms to suggest that use had been prevented or had been in contravention of prohibitory notices, or that use had been undertaken in secret or with the express permission of the freeholder. The use of the footpaths through the Forestry Commission site appears to have been use 'as of right' in the same way that use of footpath 59 and the western part of footpath 20 had been, and that such use was capable of establishing a public right of way.
31. Mr Parkhouse submits that the freeholder (whose residence was nearby) is likely to have been aware of the extent and duration of the use of the paths by the public, despite the land having been leased to the Forestry Commission. Mr Parkhouse draws attention to the fact that adjacent land (subsequently sold to Mr Bowring) was retained by the freeholder and farmed by him and that 'private keep out' signs had been erected on the freeholder's land to the east of bridleway no 9, without such notices having been erected adjacent to any of the Order routes at any time.
32. Given that the lease provided for the exploitation by the freeholder of mineral rights under the leased land, the agricultural use of adjacent land, and the actions taken by the freeholder in regard to land to the east of bridleway 9, it seems highly likely that the freeholder would have been aware of public use of the Order routes. In contrast to the actions taken in relation to other retained land, no action appears to have been taken by the freeholder to prevent public access, either physically by means of fences or gates or by the erection of prohibitory notices.
33. Mr Shaw-Browne did not respond directly to public notice of the making of the Order. In a letter dated 6 November 1990 responding to a claim for a bridleway

elsewhere on the Clipstone Park Estate, Mr A Shaw-Browne referred to the sensitive management and enhancement of access to the Spa Ponds area as an example of good practice. Although the Spa Ponds are some distance from the Order paths, they are nonetheless immediately adjacent to part of the land leased to the Forestry Commission. On balance, this letter tends to support Mr Parkhouse's contention that the freeholder would have been aware of public access within the land leased to the Forestry Commission.

34. There is no evidence of either the Forestry Commission or the freeholder having taken any steps to prevent public access into the leased land. Whilst there is a barrier at B1 to prevent vehicular access along the access track adjacent to the recreation ground (and over which footpath 58 runs), the gap to one side of the barrier does not prevent access to footpath 58, nor to footpath 60. Similarly, the gap to one side of the gate across bridleway 6 at C1 does not prevent access to footpaths 22 or 23.
35. The quantity and quality of the user evidence submitted in support of the claim that footpaths 20, 21, 22, 23 and 60 are public rights of way is such that it would be unlikely that a reasonable landowner in a position to view the land would have been unaware of the extent and duration of the use by the public; no attempt appears to have been made to prevent or curtail such use. The apparent acquiescence of the freeholder to such use over such an extended period of time is sufficient to infer that dedication was intended.

Acceptance by the public

36. As noted above, there is a body of evidence which demonstrates use of the Order routes by the public over a period of some sixty years prior to the application to record the Order routes being made, and I saw from my site visit that such use is continuing. To my mind, the evidence adequately demonstrates the acceptance by the public of the rights of way which had been dedicated.

Summary

37. I conclude that in relation to footpath 59 and that part of footpath 20 to the west of the leased land, a public right of way can be deemed to have been dedicated through uninterrupted use as of right throughout the 20-year period which ended in 2008. That evidence of use is sufficient to raise a presumption of dedication which has not been rebutted.
38. As regards the remaining footpaths, the freeholder appears to have retained the capacity to dedicate public rights of way over the land leased to the Forestry Commission. Public use during the operation of the lease has been such that the freeholder would have been aware of the use and did nothing to prevent it; the public have accepted the routes such that the dedication of public rights of way on foot can be implied.

Other matters

39. As part of its consideration of the application, the Council had consulted several documentary sources, copies of which have been submitted and which I have considered. Although some of the documents show the existence of parts of the claimed routes at various times, I do not find the documentary evidence to be persuasive in this case. It may be that the public has made use of pre-existing tracks and ways which provided a means of access over and through the land,

but of themselves, the documentary sources do not demonstrate that public rights have historically subsisted over the Order routes.

Conclusions

40. Having regard to these and all other matters raised in the written representations I conclude that the Order should be proposed for confirmation with modifications.

Formal Decision

41. I propose to confirm the Order subject to the following modifications:

in the Order map, between points A4 and AX amend the line to be recorded as footpath 20 to reflect the route claimed to have been walked prior to 2008;

in the Schedule Part I for Clipstone Footpath No. 22 and Footpath No. 23 under 'Limitation' delete 'The footpath is subject to the use of vehicles for land management purposes' and insert 'None';

In the Schedule, Part II for Clipstone Footpath 22 and Footpath 23, under 'Legal Event / Remarks' delete 'The footpath is subject to the use of vehicles for land management purposes' and insert 'None'.

42. Since the Order as proposed to be confirmed would affect land not affected by the Order as submitted and would not show a way shown in the Order as drafted, I am required by virtue of Paragraph 8 (2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Alan Beckett

Inspector