
Order Decisions

Inquiry held on 20 October 2015

Site visit made on 19 October 2015

by Martin Elliott BSc FIPROW

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

Decision date: 10 November 2015

Order Ref: FPS/U1050/7/90

Referred to as Order 'A'

- 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 (Upgrading of Public Footpath No. 18 to Bridleway – Parish of Shirland and Higham) Modification Order 2012.
- The Order is dated 22 March 2012 and proposes to modify the Definitive Map and Statement for the area by upgrading public footpath 18 to a public bridleway as shown in the Order plan and described in the Order Schedule.
- There were eleven objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Order Ref: FPS/U1050/7/91

Referred to as Order 'B'

- 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 (Bridleway from Public Footpath No. 46 (formerly part of Public Footpath No. 18) to Stonebroom Industrial Estate – Parish of Shirland and Higham) Modification Order 2012.
- The Order is dated 22 March 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public bridleway as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to modification.

Order Ref: FPS/U1050/7/92

Referred to as Order 'C'

- 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 (Upgrading to Bridleway of Public Footpath No. 3 – Parish of Morton and Public Footpath No. 46 (formerly part of Public Footpath No. 18) – Parish of Shirland and Higham) Modification Order 2012.
- The Order is dated 22 March 2012 and proposes to modify the Definitive Map and Statement for the area by upgrading public footpaths 3 and 46 to public bridleways as shown in the Order plan and described in the Order Schedule.
- There were fifteen objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to modifications.

Procedural Matters

1. I held a public local inquiry at Stretton Village Hall, Main Road, Stretton on 20 October 2015. I carried out an unaccompanied site inspection of the Order routes and surrounding area on the afternoon of 19 October. I did not carry out a further site visit following the close of the inquiry as there were no new

- issues which required me to do so. None of the parties required me to carry out a further site inspection.
2. The inquiry related to three Orders and, although I have identified these as Orders A, B and C, at the inquiry these were referred to as Orders 1, 2 and 3 respectively. In closing the Council indicated that on the basis of the evidence before the inquiry it no longer supported the confirmation of Order A.
 3. The Orders arise from an application under Section 53(5) of the 1981 Act for the upgrading of two existing footpaths to bridleways (Order routes A and C) and the addition of a bridleway (Order route B). The Council, as Surveying Authority, has a duty to determine such applications and on considering the applications resolved to make the three Orders. The notices of the Orders gave rise to a number of objections and in light of those objections the Orders were submitted to the Secretary of State for confirmation. The purpose of the inquiry was to determine the Orders.
 4. The Council requested that Order C be modified to correct a typographical error at Part II of the Schedule to the Order. Namely the width column, relating to the Parish of Shirland and Higham, had been incorrectly titled as 'Approx. Length'; this should read 'Approx. Width'. There is nothing to indicate that anyone will have been prejudiced by this error and the Order, if confirmed, will be modified accordingly.
 5. Noting paragraph 4 above, all the Orders refer to an approximate width in Part II of the Schedule to the Order although the Council pointed out that this was how it was set out on the definitive statement. However, the use of the word approximate in defining the width of the Order routes could lead to uncertainty as to the position or width. It is nevertheless accepted that the Schedule and the Order map provide detailed information as to width. If the Orders are confirmed then I propose to remove 'Approx.' from the column relating to width at Part II of the Schedule to the Orders. The Council did not object to the proposed modification.
 6. Vanessa Fessey made the point that the supporters of the Order had had time to prepare for an inquiry whereas others had limited time to prepare. She said that she had not seen any notices of the Orders.
 7. The Council confirmed at the Inquiry that the statutory requirements in respect of the Order and Inquiry had been carried out. The Council has also certified that notices for the Orders were posted and maintained in accordance with the regulations¹. The notices of the Order attracted 16 individual objections and those objectors had been advised of the date of the public inquiry and the requirements for submitting evidence. The timetable for submitting evidence provides sufficient time to prepare cases. There is nothing to suggest that the statutory requirements in making the Orders and in respect of the Inquiry have not been complied with such that anyone has been disadvantaged.

The Main Issues

8. Orders A and C have been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(ii). The main issue in respect of these Orders is whether, on the balance of probabilities, the discovery by the authority of evidence, when

¹ Wildlife and Countryside Act (Definitive Maps and Statements) Regulations 1993

- considered with all other relevant evidence, is sufficient to show that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
9. Order B has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i). The main issue is whether, on the balance of probabilities, 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 in the map and statement subsists over land in the area to which the map relates.
 10. In support of confirmation of the Orders the Council rely on the statutory dedication of the Order routes under section 31 of the Highways Act 1980 (the 1980 Act).
 11. Section 31 of the 1980 Act 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. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
 12. Should the test for statutory dedication fail under section 31 of the 1980 Act then it may be appropriate to consider the dedication of the routes at common law. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public.

Reasons

Background issues

13. In opposition the point was made that the route between Morton and Stonebroom (Order routes A and C) was a public footpath and that their use by horses was illegal. No offence is committed by the riding of horses on footpaths but it does amount to trespass against the landowner. Nevertheless public rights may still be established by way of a statutory or common law dedication subject to the relevant tests being met.
14. Although only objecting to Order A Mr Aspinall made representations in respect of the width of this Order route. Reference was made to British Horse Society advice on widths and Schedule 12A of the Rights of Way Act 1990. Whilst I note the identification of widths in these documents, they do not apply where a route is established by a presumption of dedication where the width will be established on the evidence. As regards Schedule 12A the widths relate to the reinstatement of routes following ploughing. It may be the case that Order route A is less than the desirable width identified by the British Horse Society but the width, and therefore the extent of any dedication of the route, will be limited by physical boundaries. It should be noted that the widths identified by

the British Horse Society refer to those in respect of creation and diversion orders under the 1980 Act or for general maintenance purposes where there is no substantive evidence as to width. The width of the Order route may make it difficult for some users to pass but this does not preclude any dedication subject to the appropriate requirements being met as set out at paragraphs 8 to 12 above. I consider the dedication of the Order route below.

Documentary evidence

15. Mr Aspinall submitted an Ordnance Survey plan dated 1899. The plan shows the physical characteristics of the area at the time of the survey and provides no information as to the existence, or otherwise, of public rights. Given the reliance of the Council on the evidence of user the map does not assist in determining the Orders.

Statutory dedication – Section 31 of the Highways Act 1980

When the right to use the ways was brought into question

16. In February 2005 'A' frame barriers were erected on Order routes A and C in response to complaints that the routes were being used unlawfully by motorcycles and quad bikes. Following the installation of the barriers complaints were received by the Council that they prevented use of the routes by equestrians. An application was subsequently made (paragraph 3 above) to record the routes on the definitive map and statement as public bridleways. The application was accompanied by 32 evidence of use forms some of which refer to equestrian access being restricted by barriers erected in 2005.
17. The erection of the barriers would have brought the right to use the ways into question and sets a relevant twenty year period of 1985 to 2005. No other evidence has been put before me of any other event which would have brought the right to use the ways into question.

Evidence of use 1985 to 2005

18. In total there are thirty-five evidence of use forms. From my examination of the forms it is apparent that the ways have been used by the public with horses, bicycles and on foot for the full twenty year period. That use was as of right and without interruption. Use was on a daily, weekly or monthly basis. There is nothing to indicate that those using the way were challenged in their use.
19. Several individuals gave evidence as to their use of the ways with horses and ponies, also on foot, bicycle and with a trap. Reference was made to seeing others with horses on the route. There is nothing to indicate that use was not as of right or that any use was challenged. Although not giving evidence to the inquiry, the statement of Lisa Weston provides information as to her use of the ways. She used the Order routes on a regular basis with a variety of horses from before the industrial estate was developed until December 2004. Some weight should be given to her signed statement.
20. A number of objections refer to the existence of barriers along the route. Whilst it is likely that some of those objections are referring to the barriers erected in 2005, one objector, who subsequently withdrew their objection, referred to a staggered barrier adjacent to St Peter's Church. The barrier was

metal. Mr Greenwood also referred to a simple barrier of the type preventing pedestrians from rushing out onto the highway.

21. At the inquiry Pauline King referred to a staggered barrier at the Church end of Order route A around 1992. She stated that it was possible to get through with a pony but that it was not possible to get a horse through. Rosalind Sowerby said that there was a barrier at the Church end of the path from the mid 1990s. In the 1990s she tended to use a route through the industrial estate because her horse could not get through the barrier. Jane King said that there was a barrier at the same location in around 1993. She also said that, whilst it was possible to squeeze a pony through, it was not possible to get a horse through. Although June Sterland could not recall a barrier Mr Aspinall recalled seeing her leading a pony under the barrier. She then accepted that a Shetland pony could have got through which suggests some awareness of the barrier.
22. The Council conceded that there was a barrier in place by the Church around 1992 and that it was not possible to have a dedication limited by the size of the horse.
23. The evidence before me indicates that during the twenty year period the use of Order route A was interrupted by a staggered barrier which remained in place for a couple of years around 1992. Whilst smaller ponies could get through, albeit seemingly with some difficulty, horses were not able to use the route. Given that use of the route was interrupted then the statutory dedication of Order route A must fail. I have no evidence before me to suggest that the erection of the staggered barriers brought the right to use the way into question such that an earlier twenty year period should be considered. In any event, if I were to consider any earlier period I do not consider that the use would have been sufficient to raise a presumption of dedication of a bridleway.
24. As regards Orders B and C, I note the assertions of the objectors that the ways were not used by equestrians and that some did not see such use. However, the evidence of use forms and the evidence of users to the inquiry indicates that the ways have been so used, reference being made to seeing other equestrians on the ways. David Hill, although challenging use by horse riders, stated that he had seen horse riders from around 1977 to 2005.
25. As to the reliability of the evidence of use, some weight should be given to signed evidence of use forms. It should be noted that a number of those who completed evidence of use indicate their willingness to give evidence to a public inquiry. Furthermore, some considerable weight should be given to the evidence of the various witnesses who spoke in support of the Orders. That evidence, which was consistent with that contained in the evidence of use forms, was open to cross examination and was unchallenged.
26. I note the point made in opposition that the route was used by equestrians for health and safety reasons, so as to avoid using the roads, and that health and safety was not a consideration which could be taken into account under the 1981 Act. Whilst I understand the point, the issue to be considered is whether the evidence of use is sufficient to raise a presumption of dedication. Although it appears that many riders used the route for health and safety reasons I give the purpose of the use no weight in determining the Orders.

27. Taking all of the evidence into consideration there is sufficient use by the public of Order routes B and C, as of right and without interruption, such as to raise the presumption that the ways have been dedicated as bridleways.

Evidence of a lack of intention to dedicate

28. In view of my findings at paragraph 27 it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate Order routes B and C as public bridleways. For there to be sufficient evidence that there was no intention to dedicate the way, other than those specifically provided for in section 31 of the Highways Act 1980, there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the paths, that they had no intention to dedicate the routes as bridleways. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the routes pass, was intending to disabuse the user of the notion that the ways were public bridleways.
29. No evidence has been put before me of any actions by the owner of the land over which the Order routes pass which are sufficient to demonstrate a lack of intention to dedicate the routes as public bridleways. Although David Hill said that he challenged horse riders, and informed a parish councillor, he confirmed that he owned land adjacent to the Order route. In any event, even if Mr Hill was the owner of the land crossed by the Order route, his actions would have been insufficient to disabuse those using the way of the notion that the route was a public bridleway. Use continued throughout the twenty year period and none of those providing evidence as to their use of the way indicated any challenge to their use.
30. Bearing in mind the above, the statutory dedication of Order routes B and C is made out.

Dedication at common law

31. Given my findings at paragraph 23 in respect of Order A it is appropriate to consider the dedication of this route at common law. The Council did not argue that there had been a dedication at common law. Having considered the evidence of use it is in my view insufficient to raise an inference of dedication of the route as a bridleway at common law.

Other Matters

32. The objections raise concerns in respect of the misuse of the Order routes by vehicles in the event that the barriers on the route are removed. Concerns are also raised in respect of the safety of pedestrians, the effect of the use of the routes by horses, the suitability of the routes for equestrian use, the cost of removing barriers on the routes, future maintenance and liabilities for any injuries. A number of objections raise issues as to safety in respect of the proximity, and need to pass through, the industrial estate.
33. I note and can appreciate these genuine concerns. However, the 1981 Act does not allow such considerations to be taken into account. My decisions on the Orders must be based on the evidence before me measured against the considerations set out at paragraphs 8 to 12 above.

Conclusions

34. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that Orders B and C should be confirmed subject to modification. Order A should not be confirmed.

Formal Decisions

Order A

35. The Order is not confirmed.

Order B

36. The Order is confirmed subject to the following modification:

- At Part II of the Schedule to the Order in respect of the column relating to width delete 'Approx'.

Order C

37. The Order is confirmed subject to the following modification:

- At Part II of the Schedule to the Order, in respect of the Parish of Morton and the column relating to width, delete 'Approx.'
- At Part II of the Schedule to the Order, in respect of the Parish of Shirland and Higham and the column identifying widths, delete 'Approx Length' and insert 'Width'.

Martin Elliott

Inspector

APPEARANCES

For Derbyshire County Council:

Julia Gale	Solicitor, Derbyshire County Council
who called	
Peter Shimwell	Legal Assistant, Rights of Way, Derbyshire County Council
Pauline King	
June Sterland	
Rosalind Sowerby	

Also in support of the Order:

Jane King
Marie Chamber

In opposition to the Order:

Eddie Greenwood	Statutory objector
Mr K Aspinall	Statutory objector
David Hill	
Vanessa Fessey	

DOCUMENTS

- 1 Location plans
- 2 Extract of Ordnance Survey map 1899
- 3 Schedule of Rights of Way 29 July 1953
- 4 Extract of British Horse Society advice on widths
- 5 Extract from Rights of Way Act 1990 Schedule 12A