
Order Decision

Inquiry held on 4 November 2014

by Alan Beckett BA MSc MIPROW

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

Decision date: 26 November 2014

Order Ref: FPS/R0660/7/8

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cheshire East Borough Council Definitive Map and Statement (Addition of Public Footpath No 15, Parish of Wybunbury) Modification Order 2013.
- The Order is dated 21 February 2013 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 8 objections outstanding at the commencement of the inquiry.

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

Procedural Matters

1. I held an inquiry into the Order at the Village Hall, Main Street, Wybunbury on Tuesday 4 November 2014, having made an unaccompanied inspection of the Order route on the previous afternoon. I made a further inspection of the route in question in the company of the objectors and the representatives of the Cheshire East Borough Council ('the Council') after the close of the inquiry.
2. It is the Council's case that the evidence demonstrates that the public have habitually used the footpath since at least the 1950s and that during all relevant times a stile had been present at point F on the Order map. The Council requested that the Order be modified to record the presence of the stile at point F as a limitation or condition of use.

The Main Issues

3. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the DM&S subsists over the land in question.
4. The Council relied upon evidence of use by the public of the claimed footpath to demonstrate that dedication of a public right of way could be deemed to have occurred. In a case where there is evidence of claimed use of a way by the public, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. 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, whether by a notice or otherwise.

5. At the inquiry, the objectors did not challenge the duration or frequency of use by the public of the claimed path, nor did they offer any evidence that a lack of intention to dedicate a public right of way had been communicated to the public. The objections made to the Order concerned the width of the path to be recorded between the eastern end of the barn and Point F where a stile formerly stood.
6. Whilst the evidence has to satisfy the statutory tests for the Order to be confirmed, the main issue between the parties was the width of the footpath on that short section between the eastern end of the barn and point F.
7. In addition to considering the user evidence with regard to the provisions of section 31 of the 1980 Act, if the tests found in section 31 are not satisfied, I am also required to consider whether dedication of the claimed routes has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Reasons

The date on which the right of the public to use the way was brought into question

8. Two possible dates for the bringing of public use into question were put forward by the Council, these being 31 December 1990 or 2007¹. The earlier date had been considered as a reference in the diary of the late Mr Colbert for that date noted "*repaired barbed wire closed footpath all day*". The later date was the date at which scaffolding had been erected around the barn to facilitate repairs being made to it; at the same time Mr Colbert had erected notices at the ends of the path which stated "*footpath closed*". The scaffolding had the effect of preventing access along the footpath and it was the erection of the scaffolding and notices which prompted the application to be made to the Council to record the footpath in the DM&S.
9. In addition to the diary entry for 31 December 1990, the objectors had also submitted copies of three further diary entries which all made reference to the footpath having been closed. The entry for 12 January 1996 reads "*hedges – closed footpath*"; the entry for 7 August 2000 reads "*New gates fitted at Hollies. Blocked footpath*"; the entry for 14 January 2006 read "*tiles fell off roof of barn closed footpath*".
10. Mrs Colbert could not assist with an interpretation of the diary entries or a reason as to why the footpath had been closed on the dates identified other than saying that the safety of the public had been a concern which was why the path had been closed in 2007 when the scaffolding had been erected. It was submitted on behalf of the Council that it was likely that the entries reflected the closure of the path whilst maintenance of the Colbert's property was being undertaken.

¹ The user evidence form of Mr G A Worthington records that he found the path obstructed by a notice and fencing on 29 January 2007 and was followed shortly after by scaffolding. This date is not disputed.

11. There is no indication in the diary entries as to the duration of the closures that were recorded, and none of the witnesses I heard from recalled the path being closed other than when the scaffolding was erected. If the late Mr Colbert did not regard the path as being a public path and the diary entries record his attempts to convey that view to the public, those efforts appear to have been largely ineffectual.
12. In the absence of any evidence to the contrary, I find the Council's submissions on this point to be a probable explanation of the reasons for the periodic closure of the path. In order to undertake maintenance of the property adjacent to it, it is likely that the late Mr Colbert found it necessary to temporarily close the path to prevent risk or danger to the public. Given that none of the users recalled the path being blocked, I consider it likely that once those maintenance works had been completed, the path would have been re-opened.
13. As the closures noted in the diaries had little appreciable effect upon the public, I do not consider them to be events which brought the right to use the path into question. In contrast, the physical obstruction of the path in the vicinity of the barn by scaffolding and the erection of prohibitory notices in January 2007 had such an effect. It was the prolonged closure of the path which prompted the application to have it added to the DM&S.
14. It follows that I conclude that for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period is 1987 – 2007.

Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the right to do so was brought into question

15. Thirty-one user evidence forms (UEFs) were submitted in support of the application to add the claimed path to the DM&S. The UEFs demonstrate use of the path from 1944 until it was blocked by scaffolding. The frequency of use varied from daily to weekly use with some respondents noting only occasional use. Use was for recreational or pleasure purposes such as walking a dog or as part of a circular walk around Wybunbury Moss.
16. Of those who completed a UEF, 16 claimed use of the path for periods in excess of 20 years prior to 2007 with a further 8 respondents claiming use for part of that period. A total of 21 users claim use for 20 years or more, although for some respondents the periods of use do not wholly coincide with the 20-year period which ended in 2007.
17. I heard from 6 witnesses at the inquiry. The oral evidence given was of continuous use of the path from the 1950s as a way to St Chad's Church, to The Swan, to Wybunbury Moss or for other recreational purposes. A number of witnesses said that the path had been used as an alternative to walking along Main Street as the pavement was very narrow in places. Frequency of use ranged from daily or weekly use to once or twice per year.
18. None of the user witnesses recalled being challenged by the owners of the land and, prior to 2007, none had seen any notices on site prohibiting use of the path. No force had been used in order to walk the path; a stile had always been present at point F, and when two wicket gates were present near the barn they had never been locked. None of the witnesses had sought or been given

permission to use the path and use had been at all times of the day. The oral evidence given by the witnesses was not challenged by the objectors.

19. The evidence of use presented at the inquiry reflects and supports the evidence found in the UEFs. I consider that the user evidence, when taken as a whole, is sufficient to demonstrate that the public has used the claimed path as of right throughout the whole of the 20-year period in question. The only suggestion of a possible interruption to use is to be found in the diary entries for 1990, 1996, 2000 and 2006. However as these temporary closures were made for the safety of the public whilst works were carried out adjacent to the path, they are not interruptions which were designed to permanently deprive the public of use of it. It follows that I conclude that the use of the path during the relevant 20-year period was also use without interruption.
20. I conclude that the user evidence is sufficient to raise a presumption that the path at issue has been dedicated as a public right of way.

Whether there is sufficient evidence of a lack of intention to dedicate

21. The objectors acknowledged that they had not taken any steps to prevent the public from walking along the path or to communicate to the public that there was no intention on their part to dedicate a public right of way.
22. I conclude that there is insufficient evidence of a lack of intention to dedicate for the owners of the land to be able to take advantage of the proviso found in section 31 (1) and to rebut the presumption of dedication raised by the user evidence.

Width

23. There is no dispute between the parties regarding the width proposed to be recorded for the path adjacent to and west of Mrs Colbert's barn, or to the width proposed to be recorded for the path to the east of point F. Mrs Colbert disputes that the width of the path between these two points has been 2.3 metres and contends that the path should be recorded as being between 1.3 metres and the maximum width suggested by the evidence.
24. The Council had derived the proposed width from a measurement taken on site between a holly tree on the southern side of the path and a Sycamore found on the northern side. Mrs Colbert acknowledged that at this point the path could be described as being 2.3 metres wide but that the path had been narrower in other parts due to the hedges. The Council had also measured Ordnance Survey maps of the area which showed the width between hedges to be a uniform 2.3 metres.
25. Advice Note No. 16 published by the Planning Inspectorate on the subject of width states at paragraph 9 "*Determination of the width will, if not defined by any inclosure award, physical boundary or statute, be based on evidence provided during the confirmation process, or, where there is no such clear evidence, the type of user and what is reasonable. Circumstances, such as the nature of the surface and other physical features, may dictate what may be considered reasonable. In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occasional pinch points excepted. This width may well be greater than the width of the "trodden path". Apart from specific instances such as the*

reinstatement of a right of way after ploughing under Schedule 12A to the Highways Act 1980, there are no statutory widths for rights of way."

26. Ordnance Survey mapping has consistently shown the path as being bounded to the north and south by hedges or fences. I heard from the former owner of the property that the path had been hedged on both sides. The witnesses also recalled that the path had run between hedges. Mr Charlesworth recalled a path which was 1.22 metres or wider; Mr Green said the path was at least 1.22 metres in width and wide enough for two people to walk side by side; Mr Allcock recalled the path being wide enough between the hedges for a courting couple to walk along hand in hand. These responses indicate that the path had been between 1.22 metres and at least 2.00 metres in width along this section.
27. In their written representations, some of the objectors contend that the path was only wide enough for single file traffic. I do not doubt that if the hedges had been left unmanaged then over time the useable width of the path may have become less and that the worn line in the ground may have been less than the full width between the hedges. However, the recollection of other witnesses was that the path was wide enough to allow two persons to walk along together. The recollections of this latter group accord with the evidence derived from Ordnance Survey mapping and with the Council's measurements of the width between what remained of the hedges.
28. The hedges described by Mr Robinson and others as bounding the path have been removed over a period of time and all that marks the place where the northern hedge would have run is three mature Sycamore trees. Although Mr Colbert may well be correct in stating that the field boundary is the post and wire fence on the north side of the trees, to measure the width of the path from the post and wire fence would result in the trees standing in the usable width of the path. This would be contrary to the available evidence which shows that users had walked a path which is to the south of the trees.
29. In my view it was not unreasonable for the Council to have measured the width between one of the Sycamores and the Holly tree opposite it. It is highly likely that the line of trees and the hedge between the trees was recorded by Ordnance Survey as the representing the field boundary.
30. Mrs Colbert stated that some small wooden buildings which she had demolished around 1988 had formed part of the southern boundary of the path and these had narrowed the path. Even if the buildings had formed part of the southern boundary, the Ordnance Survey map evidence shows that the boundary was of a uniform width and that the buildings did not unduly constrain that width. The photographs submitted of the demolition of those buildings do not assist with a determination of the width of the path. The photographs were taken from within the garden of the property and do not show the path; consequently they do not allow the width of the path at the time to be estimated.
31. It was also submitted that where the path dog-legged around the eastern end of the barn the path would not have been 2.3 metres as a field gate had stood in the centre of the end of the barn to control the movement of livestock. On the site visit the width from the centre of the barn where the gate had stood to the field boundary to the north was measured and found to be 3.6 metres. From this I conclude that there would have been sufficient width for the path to have been 2.3 metres by the end of the barn.

32. In 1988 Mrs Colbert erected a wicket gate to the east of the gable end of the barn to prevent her geese from making their way along the footpath. This gate was 0.90 metres in width and was said to constrain the width of the path. This may well have been the case, but as the gate was erected after the commencement of the relevant 20-year period² it has no effect upon the width of the path that would have been available at the start of that period. The width of the path at the point where the gate would have hung and the field boundary was measured on the site visit and found to be 3.4 metres. Again I conclude that there would have been sufficient width for the path to have been 2.3 metres at this point.
33. Ordnance Survey mapping shows the path to have run between boundaries which were 2.3 metres apart. The Council's measurement on site showed that such a width had been available between the remnants of the hedges that once lined the path. The witnesses recalled a path which was between 1.22 and 2.0 metres in width. The available evidence is not inconsistent with the width which the Order proposes to record between the eastern gable of the barn and point F. It follows that I do not consider it necessary to propose any modification to the width to be recorded for footpath no. 15 Wybunbury.

Other matter

34. The use by the public of an alternative path to Wybunbury Moss from point F was raised by a number of objectors to the order. Although there was some evidence of such use presented at the inquiry, I do not consider that evidence to be sufficient to warrant the modification of the order to include the suggested alternative path.

Conclusions

35. Having examined all the available information with regard to the presumed dedication of the Order route as a public footpath, I conclude that the evidence is sufficient to show use of the way on foot by the public as of right and without interruption throughout the period between 1987 and 2007. The evidence is therefore sufficient to raise an initial presumption that the way has been dedicated as a public footpath.
36. There is no evidence to suggest that prohibitive notices directed at pedestrian users had been erected on the land at any time during the relevant period. There is insufficient evidence that an intention not to dedicate had been brought to the attention of the pedestrians using the path.
37. It follows that I am satisfied that the evidence before me is sufficient to show that, on a balance of probabilities, a public footpath subsists over the Order route.

Overall conclusion

38. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

² The commencement of the 20-year period is the date at which the path is deemed to have been dedicated

Formal Decision

39. I confirm the Order subject to the following modification: in the Schedule Part II under the heading Limitations or Conditions of Use, delete 'none' and insert 'Stile at SJ 6991 4995'.

Alan Beckett

Inspector

APPEARANCES

For Cheshire East Borough Council:

Miss R Stockley	of Counsel instructed by Iolando Puzio, Head of Legal Services, Cheshire East Borough Council, Westfields, Middlewich Road, Sandbach, CW11 1HZ.
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Who called:

Mrs J Tench	Definitive Map Officer, Public Rights of way Team, 2 nd Floor, Old Building, Municipal Buildings, Earle street, Crewe, CW1 2BJ.
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Mr P Allcock	Wybunbury
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Mrs S Bailey	Wybunbury
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Mr A Charlesworth	Wybunbury
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Mr A T Green	Wybunbury
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Mr S Robinson	Wybunbury
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Mr G A Worthington	Wybunbury
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In objection:

Mrs B M Colbert	Wybunbury
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Mr P J Colbert	Gateshead
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Inquiry documents

1. Photograph taken from Mrs Colbert's house looking toward the claimed footpath.