



Order Decision

Site visit made on 10 February 2009

by Heidi Cruickshank BSc MSc MIPROW

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

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Decision date:
06 March 2009

Order Ref: FPS/B0800/7/210

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The County of Cornwall (Addition of Bridleway from the A394 to Higher Lane, Ashton in Parishes of Germoe and Breage) Modification Order 2007.
- The Order is dated 26 November 2007 and proposes to add a public bridleway to the Definitive Map and Statement for the Parishes of Germoe and Breage. Full details of the route are set out in the Order Plan and Schedule.
- There were three representations and objections outstanding when Cornwall County Council 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. No-one requested to be heard with respect to this Order and so I made an unaccompanied site inspection and dealt with the matter by way of the written representations procedure.

Main issues

2. The Order arose as a result of an application to record the Order route, known locally as Whippers Lane, in November 2002 from Germoe Parish Council ("the Parish Council") to Cornwall County Council, the order-making authority ("the OMA"), under Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). The OMA rejected the application but, following an appeal to the Secretary of State for Environment, Food and Rural Affairs, they were directed to make the Order.
3. The Order was made under Section 53(2)(b) of the 1981 Act relying on the occurrence of an event under section 53(3)(c)(i). The objection related to whether the width was sufficient and accurately described, however, I need to be satisfied that the criteria set out in that part of the 1981 Act have been met. The relevant section refers to whether a right of way which is not shown in the Map and Statement subsists over land in the area to which the map relates.
4. The representations were either in support of the Order or raised no matters relevant to my determination.
5. The OMA looked at the matter against the tests for statutory deemed dedication set out in Section 31 of the Highways Act 1980 ("the 1980 Act") and the main issues arising from this are:

- i. when the status of the claimed route was called into question;
 - ii. the extent and nature of the claimed use;
 - iii. whether there is evidence of a lack of intention to dedicate a public right of way.
6. Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'called into question'. The use during that period must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years.
 7. In the alternative I can consider whether a presumption of common law dedication arises, the intention of the landowner to dedicate a right of way, and the acceptance by the public of such a dedication, being implied from use of the way by the public and documentary evidence.
 8. In confirming an Order I must be satisfied, on the balance of probabilities, that the route 'subsists'.
 9. I should note that the OMA submission included copies of 20 judgements but with no comment as to why these were submitted or what they intended me to take from them. I have read all the judgements.

Reasons

Section 31 of the Highways Act 1980

When the status of the claimed route was brought into question

10. There is no indication in the user evidence forms ("UEFs") that use of the Order route has ever been prevented. Taking account of the provisions of the Natural Environment and Rural Communities Act 2006 I consider that the date of the application to record the route is the appropriate date to take as date that the status was brought into question; this means that the relevant twenty-year period is 1982 - 2002.

Evidence of use

11. The Parish Council application was accompanied by seventeen UEFs. Although the application had been submitted in November 2002 the UEFs had been collected in stages with 3 dating from November 2000, 7 from January and February 2001 and the final 7 from January – March 2002. It is unclear how this arose but, as a result, there is little user evidence relating to the period towards the end of the relevant twenty-year period; however, on the balance of probabilities, use by individuals did not stop on the date that they completed their UEF. Despite undertaking my site visit on a wet winter day, following very heavy rain, there was evidence on the ground of use of the Order route on horseback and on foot and I think it is reasonable to assume that some of that use was might be by people who had completed UEFs up to nine years previously.
12. The majority of people had used the route on horseback, some of these also walking the route. A number of people only walked the route and one person had used it with a bicycle. The earliest personally reported use dates from

1930, however, one person, whose own use is reported from 1934, referred to use by his father and grandfather. There were a maximum of 13 and a minimum of 4 people who claimed to have used the Order route in any one year within the relevant twenty-year period. The use was not extensive, ranging from 2 – 3 times a year through to daily, although this frequent use seemed to be in connection with farming use.

13. One person indicated that she had been given permission to use the route by Mr Cook, and was sometimes using it to get to land he owned. However, she also says that he told her it was a bridleway and he was not identified by either the Parish Council or the OMA as a relevant landowner; as a result I do not consider that her use was anything other than 'as of right'. Another person said that she was given permission by the landowner, although not identifying who that was.
14. Four people living at Greenbank Farm completed UEFs and were served notice by the Parish Council and the OMA, however, it is not clear whether this farm actually owns any of the land crossed by the claimed route, although they do own adjacent fields and use the Order route to reach these. The OMA sought dispensation to serve notice of the Order to unknown landowners on site and the Parish Council commented that the landowner of the lane was unknown. I note that the two older members of the family answered yes in relation to the questions as to whether they were told the route was not public, but no further information was given, and said they owned the land. On the other hand the younger family members answered no, said that they were not related to the landowner and that it had always been a public right of way.
15. From the evidence as a whole I do not consider that there is evidence to show, on the balance of probabilities, that use of the Order route was by permission. Neither is there clear evidence that the use by the residents of Greenbank Farm was by private right, although some of it may be.
16. There is no minimum level of user required in relation to statutory dedication and the matter does not appear to have been tested in the courts, however, I need to be satisfied that there was a sufficient level of use for the landowner to have been aware of it, and have had the opportunity to resist it if he chose. I am satisfied that there is evidence of use as of right over the relevant twenty-year period, however, despite my acceptance that use probably continued after the completion of UEFs, I consider that the recorded use in the last two years of the relevant twenty-year period is not sufficient to raise a presumption of dedication either as a bridleway or as a footpath.

Whether there is evidence of a lack of intention to dedicate a public right of way within the relevant twenty-year period

17. No evidence was provided of any lack of intention to dedicate a public right of way.

Conclusion

18. I consider, on the balance of probabilities, that the evidence provided falls short of the statutory requirements and so I will go on to consider the matter at common law.

Documentary evidence

Small-scale mapping

19. A map of Thomas Martyn, apparently from 1748/9, appeared to show the Order route. Whilst I agree with the OMA comment, in their Committee report, that this provides no evidence of public rights I consider that the indication on such a small-scale map is suggestive that it was an important route and confirms the physical existence of the route on the ground over a long period.
20. I consider that small-scale commercial maps can be helpful in determining the status of a route in conjunction with other information and give this a small amount of weight in showing that the route was a highway.

Tithe: Germoe, 1841 and Breage 1842

21. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land and consist of the apportionment, the map and the file. Generally they can give no more than an indication as to whether any way is public or private, because a private right of way can also diminish the productiveness of the land for tithe assessment.
22. The Parish boundary between Germoe and Breage runs along the centre of the Order route and so the route was indicated on both maps. The Germoe map shows an enclosed route, with no gates, coloured as other roads and tracks with a pale yellow wash. It was numbered 1082, whilst the A394 was numbered 1070. The Tithe Apportionment Book had a section headed "*Roads in the Parish of Germoe*" which included both references, the Order route described as "*Chycarne & Tresowes Lane*", with no tithe payable.
23. The Breage map shows the Order route as a separate enclosed, ungated route and the OMA said that the relevant apportionment number of 3670A was included in the section "*Commons, Roads & Wastes at Hendra*", with no tithe payable.
24. Both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe, however, I do note that the Order route was treated in the same way as other highways in two separate parishes and I consider, on the balance of probabilities, that the tithe documentation is supportive of public status for the Order route.

Ordnance Survey mapping

25. The Ordnance Survey ("OS") mapping has consistently indicated the Order route as a physical feature on the ground since the map dated 1875 – 1901 up to the base map used for the Order map itself. It has been shown as an enclosed route with no gates across it. The inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status, particularly in conjunction with other evidence

Finance Act, 1910

26. The Finance (1909 - 1910) Act, 1910 provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and,

broadly speaking, its subsequent sale or transfer. There was a complex system for calculating the 'assessable site value', which allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or public rights of user and to the right of common and any easements affecting the land. Individual landholdings were recorded as 'hereditaments'.

27. The Order route was uncoloured and unnumbered, being excluded from the surrounding hereditaments. As noted by the OMA exclusion from adjacent plots was normally indicative of public rights.

The Definitive Map and Statement, 1950s

28. This concept was introduced under the National Parks and Access to the Countryside Act 1949, which set out certain procedures for the recording of rights of way across the country. Each highway authority was required to produce a Definitive Map and Statement and in Cornwall the initial parish survey was carried out by the relevant Parish Councils; this information was then passed on to the County Council as the surveying authority and formed the basis of the current Definitive Map and Statement.
29. The Order route was not included in the original parish surveys by either Parish Council; as noted by the Parish Council it is possible that when the Definitive Map was produced the route was so well used that it was considered part of the highway and so not included. Germoe Parish Council did include Footpath 17 ("FP 17"), which was described as leading "...to Parish Boundary" and can be seen running to point C on the Order map. I consider that this provides a little weight towards an understanding that the Order route was a public highway, as otherwise FP17 would have no sensible termination point.

Aerial photograph, 2005

30. The aerial photograph shows that the route continues as an enclosed route. The slight widening between points A and B can be seen on this photograph.

Claimed use

31. Although I did not find sufficient evidence of use to support the claim under statute I do consider that the user evidence is supportive of the common law position, with use on foot and horseback dating from 1930 and reference to even earlier use.
32. Whilst the use is not extensive I consider that it is typical of the type and level that might be expected in such a rural area.

Other information

33. The Parish Council said that both Parish Councils had taken turns annually to cut the vegetation and this indicates some public maintenance of the route, suggestive of a public right.
34. There is a strong reputation that this is a public route, from the Parish Council, adjacent landowners and the users. I take account that no-one appears to have tried to prevent use or gate the route in any way. I also give weight to

the fact that no-one has objected to the recording of the route on the basis that it was not public.

Conclusion

35. Taking account of the length of time that the order route has existed as a physical feature in the landscape; the consistency of depiction in comparison with other highways; the evidence of use as of right on both foot and horseback; the lack of objection from any local person with a direct interest, whether as a user, landowner or occupier; and, the strong reputation of the route as a public highway, I consider, on the balance of probabilities, that the Order route is a public bridleway.

Width

36. Having satisfied myself on the balance of probabilities that the Order should be confirmed I turn now to the matter raised in objection.

37. The OMA had used widths varying between 1 and 4.6 metres to describe the route and felt that this accurately described the variations along the length of the Order route. The objector did not think that a horse and rider could pass through a one metre width or that two riders could meet and pass in a two metre space. Whilst agreeing that the beaten track on the ground might be only one metre, in his opinion a width of only one metre would mean that part of the user would be outside of, but above, that one metre strip on the ground and a landowner could not dedicate a right that could not lawfully be exercised. The objector provided no evidence of the width he thought should be recorded.

38. Turning first to the evidence provided by the users the minimum width¹ was noted as being between 0.6 metres (2') and 2.43 metres (8'). Written comments were that it was the width of a horse drawn vehicle, it was just passable or was used single file. Clearly there is quite a difference and this may vary depending upon a number of factors, such as when in the year they used the route, their memory, whether they were referring to the beaten track or some other width and how good they were at judging distances in the first instance.

39. The OMA said that the Order widths were taken from a topographical survey carried out in September 2007 and commented that as the route was bounded by Cornish hedges the width was unlikely to have altered.

40. On my site visit I found a very narrow track on the ground, no more than 0.5 metres wide. The narrowest point was 1 metre and there was evidence that a horse had passed along the route, clearly unimpeded by this, however, I do consider that the only reason that section was that narrow was due to overgrowth. The general narrowest width between the stone-walled hedges was 1.5 metres and I consider that this is the narrowest width that should be recorded on the Order route; whilst overgrowth might physically narrow the route in my opinion it does not legally narrow it.

41. In relation to the comment that two horses could not pass each other, that may well be the case. I do not consider that this differs from the situation on

¹ The UEFs only asked users to give the width at the narrowest point.

narrow country lanes where two cars cannot pass; this does not mean that the lane is not a vehicular highway, simply that one user will need to give way.

42. I consider that the dedicated width is that between the hedges, as has been shown on the OS mapping over the last 100+ years.
43. Section A – B appears to have been widened to provide private vehicular access to the property and fields at that end of the route. There is no evidence before me as to when this occurred and there is nothing to suggest that what appears to be additional width has not been dedicated to public use in the same manner as the rest of the Order route.

Conclusion

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

Formal Decision

45. I confirm the Order subject to the following modifications:

- In Part II of the Schedule to the Order:
 - delete the text "*Minimum Width*" and "*Maximum Width*"
 - add text "*Width*"
 - before text "*2 metres (A – B)*" add text "*Varying between...*"
 - between text "*2 metres (A – B)*" and "*4.6 metres (A – B)*" add text "*...and...*"
 - replace text "*1 metre*" with text "*1.5 metres*"
 - before text "*1.5 metres (B – C)*" add text "*Varying between...*"
 - between text "*1.5 metres (B – C)*" and "*3 metres (B – C)*" add text "*...and...*"
 - before text "*1.5 metres (C – D)*" add text "*Varying between...*"
 - between text "*1.5 metres (C – D)*" and "*3 metres (C – D)*" add text "*...and...*"

Heidi Cruickshank

Inspector