



Order Decision

Hearing held on 19 May 2009
Site visit made on 18 May 2009

by **Alan Beckett BA, MSc, MIPROW**

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

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Decision date:
10 Jun 2009

Order Ref: FPS/P0430/7/28

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Buckinghamshire County Council (Byway Open to All Traffic No. 14, Parish of Drayton Parslow) Definitive Map Modification Order 2007.
- Buckinghamshire County Council ("the Council") submitted the Order for confirmation by the Secretary of State for Environment, Food and Rural Affairs. There were 4 objections outstanding at the commencement of the hearing.
- The Order is dated 1 August 2007 and proposes to modify the Definitive Map and Statement for the area by adding to it a Byway Open to All Traffic as shown in the Order plan and described in the Order Schedule.

Summary of Decision: I propose to confirm the Order subject to the modifications set out in the Formal Decision.

Preliminary Matters

1. I held a hearing into the Order at the Greenacre Hall, Main Road, Drayton Parslow on Tuesday 19 May 2009, having viewed the route at issue the evening before. None of the parties to the hearing requested an accompanied site visit following the close of the hearing.

The Main Issues

2. The Council made the order under section 53 (2) (b) of the 1981 Act relying on the occurrence of an event specified in Section 53 (3) (c) (ii) of that Act. The main issue in relation to the Order is whether the evidence discovered by the Council, when considered with all other evidence available shows on a balance of probabilities, that a public vehicular right subsists over bridleway No. 14 such that the definitive map and statement require modification.
3. A second issue arises if public vehicular rights are found to subsist over bridleway 14. This issue is whether mechanically propelled vehicular ("MPV") rights have been extinguished by virtue of the coming into operation of section 67 (1) (b) of the Natural Environment and Rural Communities Act 2006 ("NERC"), or whether the application made by Mr A Gerrard on 12 July 2003 to add the route to the definitive map and statement as a BOAT is a qualifying application under section 67 (6) of NERC, such that MPV rights are retained through the exception found in section 67 (3) (a).

Reasons

Whether the Order route is a public carriageway

4. The Order route was included among the public roads set out and awarded under the Drayton Parslow Inclosure award of 1798. The relevant Inclosure Act

of 1797 empowered the commissioners to set out and appoint public roads at a width of 40 feet (12.2 metres). The Order route is shown on the inclosure award map as Stoke Road and is described in the award as a public carriage road of the breadth of 40 feet. The description in the award of Stoke Road leaves no doubt that the awarded route and the Order route are one and the same. No evidence was submitted from which it could be concluded that the terms of the inclosure award were not carried out in full by the commissioners. I saw on my site visit that the Order route had a width of 12.2 metres between the ditches and hedges which separate the road from adjacent farmland.

5. The Order route was added to the Definitive Map and Statement as a public bridleway following a review carried out by the Council in the late 1970s and early 1980s. It is not known on what evidential basis the bridleway was added as a result of that review. Mrs Burchell submitted that it was likely that the review would have generated suggestions from walkers and riders groups for the inclusion of otherwise unrecorded paths, and the inclusion of bridleway 14 may have arisen from such a suggestion. No evidence has been submitted which demonstrates that the inclosure award documentation was considered as part of that review. In this respect, the Inclosure Act, Award and plan represent new evidence which can be taken into account in determining the status of the Order route.
6. The Finance Act 1910 working and record plans show the Order route as being excluded from claimed ownership. The courts have held such depiction to be strong evidence of the existence public vehicular rights. The inclosure evidence is conclusive as to the existence of public carriageway rights over bridleway 14 and the Finance Act documents are highly persuasive evidence that such rights remained in existence at the beginning of the twentieth century. No evidence was submitted to show that the public carriageway rights awarded in 1798 have been lawfully stopped up in the intervening 211 years.

Conclusion

7. I conclude that the evidence adduced by the Council is sufficient to demonstrate, on a balance of probabilities, that the Order route is a public carriageway. It follows that I also conclude that the definitive map and statement require modification.

Whether MPV rights have been preserved

8. Section 67 (1) (b) of NERC provides for the extinguishment (on 2 May 2006) of any unrecorded MPV rights subsequently discovered to exist over any route already recorded in the definitive map and statement as a footpath, bridleway or restricted byway. The extinguishment is however subject to the exceptions found in section 67 (2) and 67 (3). In this case, none of the exceptions found in section 67 (2) are applicable.
9. Section 67 (3) (a) provides that MPV rights will not have been extinguished over a route if an application under section 53 (5) of the 1981 Act to record the route as a BOAT had been made before 20 January 2005. Section 67 (6) provides that the exception to the extinguishment of MPV rights found in section 67 (3) will apply in those cases where an application has been made in accordance with paragraph 1 of schedule 14 to the 1981 Act.

10. In the case of *R (on the application of Warden and Fellows of Winchester College and Humphrey Feeds Ltd v Hampshire County Council and the Secretary of State for the Environment, Food and Rural Affairs* [2008] EWCA Civ 431 ("*Winchester*"), the Court held that for an application to record a BOAT to be a qualifying application under section 53 (5) of the 1981 Act and thereby provide for an exemption to the extinguishment of MPV rights under section 67 (3) (a), section 67 (6) requires the application to have been made in strict compliance with the provisions of paragraph 1 to schedule 14 of the 1981 Act.
11. Paragraph 1 to schedule 14 reads:

An application shall be made in the prescribed form and shall be accompanied by – (a) a map drawn to the prescribed scale showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.
12. The objectors contended that the application was non-compliant on a number of grounds. One common ground of objection was that the map submitted with the application was not compliant with the requirements of paragraph 1 (a) of schedule 14 in that the map was not at the prescribed scale.
13. Regulation 8 (2) of the Wildlife and Countryside (Definitive Map and Statements) Regulations 1993 (SI No. 12) ("the Regulations") requires that a map accompanying an application is at a scale of not less than 1:25,000. Paragraph 1 (a) of schedule 14 therefore requires an application map to be drawn at a scale not less than 1:25,000.
14. The map submitted with the application was a photocopy extract from the Ordnance Survey ("OS") Landranger 1:50,000 scale map (sheet 165) which had been enlarged photographically to a scale of 1:20,000. Whilst a map drawn at a scale of 1:20,000 would be compliant with the regulations, I agree with the objectors that the map submitted with the application is not drawn at such a scale.
15. Despite the map having been photographically enlarged it remains a map which has been drawn at a scale of 1:50,000 and contains the limited ground detail of a map at that scale; the field boundaries and building detail shown on the OS 1:25,000 Explorer map (sheet 192) are not shown on the application map. If the application map had been drawn at a scale of 1:20,000, it would show the hedges which bound Stoke Road and the pattern of the fields in the immediate vicinity of it.
16. Mr Gerrard was not present at the hearing, and the Council had had little by way of correspondence with him since the submission of his application. It is not known why Mr Gerrard chose to submit an enlarged 1:50,000 scale map with his application instead of submitting an extract from the readily available OS 1:25,000 map for the area. The regulations require that the application map is drawn to a scale of not less than 1:25,000 and the *Winchester* judgement requires strict compliance with that regulation for the exception in section 67 (3) to apply. In this case, the application made in July 2003 was non-compliant with paragraph 1 (a) of schedule 14 as the application was not accompanied by a map drawn at the prescribed scale.

17. It was also submitted that the application was non-compliant as it did not include a list of the documents on which the applicant wished to adduce as evidence. In the objectors view, the application was not in the prescribed form.
18. The application form produced by the Council and used for the application follows the format set out in Regulation 8 (1). The relevant section of the Council's form reads "*I/We attach copies of the documentary evidence [including statements of witnesses] in support of this application. Please attach on a separate sheet a list of documents/statement*". This latter request reflects the heading "List of Documents" found in the format set out in Regulation 8 (1).
19. Although copies of some documentary evidence were submitted, there was no list of those documents set out on a separate sheet as requested on the application form produced by the Council. The correspondence received from the applicant contained the application form, a covering letter, Mr Gerrard's user evidence form and a Land Registry landownership search result.
20. The list of documents performs a number of useful functions in relation to applications made under Section 53 (5). At the simplest level it allows the surveying authority to cross check that copies of all the documents relied upon have been attached. The list also provides a mechanism whereby the applicant can identify the location of any document which it has not been possible to copy due to (for example) the age and fragility of that document. The list also allows other interested parties to understand the extent of the evidence upon which reliance is placed. There are therefore a number of reasons as to why the provision of a list of documents is a requisite part of the application process.
21. Although the copy documents submitted with the application were limited in number, they should have been separately identified in list form. As no such list was provided, the application did not satisfy the requirements of Regulation 8 (1) and was therefore not in the prescribed form. The application was not compliant with the requirements of paragraph 1 to schedule 14 in this respect.

Conclusions

22. I conclude that the application made in July 2003 was not a qualifying application as it was not made in strict compliance with the requirements of paragraph 1 (a) of Schedule 14 and also did not contain a list of the documents and other evidence relied upon by the applicant.
23. As such the application is not a section 53 (5) application for the purposes of section 67 (6). The result is that the public MPV rights which existed over the Order route have not been saved from the operation of section 67 (1) (b) and were extinguished on 2 May 2006.
24. As public MPV rights have been extinguished over the Order route it cannot be recorded in the Definitive Map and Statement as a BOAT, but can be recorded as a Restricted Byway¹.

¹ Section 53 (3) of the 1981 Act as amended by Section 70 of NERC

Overall conclusions

25. I conclude that the Order route is a public carriageway by virtue of the public rights awarded under the Drayton Parslow Inclosure Award of 1798, and that public vehicular rights have not been subsequently stopped up.
26. The application made in July 2003 to add the route to the definitive map and statement as a BOAT is not a qualifying application under section 67 (6); consequently the public right to use the Order route with MPVs was extinguished by virtue of section 67 (1) (b) on 2 May 2006.
27. The character of the Order route is such that it satisfies the definition of a Restricted Byway and should be recorded as such in the Definitive Map and Statement.
28. Having regard to these and all other matters raised at the hearing and in the written representations, I conclude that the Order should be confirmed subject to modifications.

Formal Decision

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

in all parts of the Order, replace "Byway Open to All Traffic" with "Restricted Byway";

in the Order plan, replace the annotation for Byway Open to All Traffic with that for a Restricted Byway (broken line with arrowheads above the line);

in the Order schedule parts I and II, replace "solid brown line" with "a broken line with arrowheads above the line".

30. Since the Order as proposed to be confirmed would show as a highway of one description a way which is shown in the Order as a highway of another description 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 modification. A letter will be sent to interested persons about the advertisement procedure.

Alan Beckett

Inspector

APPEARANCES

For Buckinghamshire County Council:

Mrs S Burchell Senior Rights of Way Officer, Buckinghamshire County Council, County Hall, Aylesbury, Buckinghamshire, HP20 1UA.

Objectors:

Mr M Cunningham QC Hill Farm, Bragenham, Leighton Buzzard, Bedfordshire, LU2 0EF.

Mr G Plumbe Crondall House, Crookham Village, Fleet, Hampshire, GU51 5SY.

Mr D Cotton Stoke Road Farm, Soulbury, Buckinghamshire, LU7 0DP.

Mr N Taylor Carington Estates Ltd, The Courtyard, Manor Farm, Church End, Bledlow, Buckinghamshire, HP27 9PD.

Mrs J Stewart The Cabin, Dorcas Farm, Dorcas Lane, Stoke Hammond, Buckinghamshire, MK17 0EA.

Mrs S Norman The Old Dairy, (Chestnut Farm) 42 Main Road, Drayton Parslow, Buckinghamshire, MK17 0JS.