



Order Decision

Inquiry held on 7 April 2009
Site visit made on 6 April 2009

by **Helen Slade MA FIPROW**

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

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Decision date:
06 May 2009

Order Ref: FPS/B0800/7/211

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as The County of Cornwall (Addition of Byway from Byway No. 48 to Byway No. 49 Perranzabuloe) Modification Order 2008.
- The Cornwall County Council submitted the Order for confirmation by the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 28 January 2008 and there was one objection outstanding at the commencement of the public inquiry.
- The Order proposes to modify the Definitive Map and Statement for the area by adding to it a section of Byway Open to All Traffic as shown in the Order plan and described in the Order Schedule.

Summary of Decision: The Order is confirmed.

Application for costs

1. At the Inquiry an application for costs was made by The Cornwall Council¹ ('the Council') against Mr A R Jayaraj (the objector). This application is the subject of a separate report.

Procedural Matters

2. I carried out an unaccompanied site visit to the area of the Order route on Monday 6 April 2009 when I was able to walk the alleged route. I also walked along the adjoining Byways ('BOATs') except for that part of the Definitive line of BOAT 49 where it is currently overgrown and obscured.
3. I opened the Inquiry, as advertised, at 10.00am on the morning of Tuesday 7 April 2009 at the Perranzabuloe Parish Council Offices. Due to the non-appearance of either the objector or his representative I adjourned the inquiry for a short while and asked the officers of the Council to attempt to contact him on the telephone. This proved unsuccessful as there was no answer.
4. The cases of the parties, together with appendices, have already been submitted in accordance with the process set out in The Rights of Way (Hearings and Inquiry Procedure) (England) Rules 2007. At the inquiry I expressed the view that I had sufficient information on which to base my decision, and that there was no necessity to delay the proceedings by hearing witnesses. In the absence of the objector there could be no cross-examination, and I did not consider that there were any issues on which I required further information. I therefore invited comments on whether or not it was acceptable

¹ Formerly The Cornwall County Council

to those present for me to determine the matter on the previously submitted written evidence.

5. There was understandably some disappointment on the part of the many user witnesses who had made considerable efforts to attend, but it was agreed that all the evidence which they wished to submit was already in my possession. I therefore invited the Council to make a closing submission, and I then closed the inquiry at 11.00am.
6. I was not asked to make a second site visit, and I did not consider that there was any necessity to do so.
7. The views of the objector with regard to my proposal were sought by letter, but no response has been received. I have therefore proceeded to determine the matter by way of on the basis of the material already submitted.

The Main Issues

8. The Order was made in consequence of an event specified in Section 53(3)(c)(i) of the 1981 Act. If I am to confirm the Order I must be satisfied that the evidence which has been discovered by the Council, together with all other relevant evidence available, shows that a BOAT which is currently not shown on the Definitive Map and Statement ought to be shown thereon.
9. With respect to evidence of use, Section 31 of the Highways Act 1980 (' the 1980 Act) states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been 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 is brought into question, either by a notice or otherwise.
10. It is also open to me to consider whether dedication of the way has taken place at common law. This requires me to examine whether the use of the path by the public and the actions of the landowner or previous landowners (whomsoever they may have been) have been of such a nature that dedication by them can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period is required at common law. The length of time required to allow such an inference to be made will depend on all the circumstances.
11. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. A public inquiry is such a tribunal.
12. The test I must apply is the balance of probabilities.

Reasons

Background

13. BOAT 48 runs from Reen Manor, past Higher Reen Farm and on to join the road just to the north of Reen Cross. It links to BOAT 49 at two locations: once at Higher Reen Farm and again about 300 metres further to the south-east; BOAT 49 forming a loop. Both junctions are shown on the Definitive Map and Statement as being more or less at right angles. BOAT 49 also has an extension (as a Public Bridleway) to the north-west, terminating on the county road at Pencrennow Farm.
14. The Order route forms an additional link between BOAT 49 and BOAT 48, effectively cutting across one of the right-angled junctions and thereby forming the third side of a triangle.
15. The Ordnance Survey ('OS') base map on which the Order plan is based shows a building situated within the triangle formed by the BOATs, but this building is no longer extant. The surface of the land within the triangle is uneven and overgrown with a variety of vegetation, including brambles. Furthermore the existing definitive line of BOAT 49, which forms one side of the triangle, is also overgrown and has number of small trees and shrubs growing on it.

Section 31 of the 1980 Act:

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

16. An application was made to the Council on 18 October 2004 by the Higher-Reen Residents Association and received on 20 October 2004. This followed a number of incidents concerning the use of the way, and the published intention of the new owner of the land, Mr Jayaraj, to erect a wall around the piece of land across which the alleged BOAT runs. A letter written by Mr Jayaraj dated 30 September 2004 to one of the respondents to his newspaper advertisement clearly indicates that he considered his land to be private and that it was his intention to secure it against all intruders.
17. Mr Jayaraj purchased a parcel of land (Land Registry Title CL132514) at auction in July 2004. He states that the paperwork provided in connection with the sale of the land indicated that it suited his needs for occasional camping or caravanning. On attending at the site on 4th September that year he encountered one of the neighbours, Mr and Mrs Clarke, attempting to drive across his property. He subsequently challenged some horse-riders who were also attempting to ride along the alleged route across his land.
18. A number of other incidents, all occurring at about the same time, are reported or evidenced amongst the papers I have been provided with. I am satisfied that it was actions taken in 2004 which prompted the application to the Council, and that it is that date (September/October 2004) which is the date on which the right of the public to use the way was brought into question. There is no evidence that prior to that time there had been any incident which prompted such a response.

Whether there has been uninterrupted use of the route by the public for 20 years

19. The Council has analysed the nature of use of the alleged route in its appendices. Eleven people or families claim to have used the route in a vehicle (tractor or car in the main) at varying levels of frequency over a period of time from 1949 to 2004. Some have claimed that they used the route on a daily basis, and others only on an occasional basis. Some users have used the way on foot or on horseback in addition to using it in vehicles. Other users have used it more often on foot only, or on horseback. No evidence has been submitted which significantly contradicts the user evidence, or sheds any doubt on its veracity.
20. Mr Jayaraj is not in a position to challenge the evidence of user directly, having only owned the land since the end of the period of 20 years which I am considering. He implies in his statement that access to the neighbouring properties is possible using the other branch of BOAT 49, and therefore there was no need for anyone to go across his land. He also suggests that recent developments along that alternative stretch of the BOAT may have restricted the access along it, thereby prompting the need for access across his land; I take it that he is implying that vehicular use of the Order route is a relatively recent occurrence.
21. Other available evidence does not support that theory. The Definitive Map and Statement clearly records a BOAT along the definitive line of BOAT 49. This is conclusive evidence that the route exists and that there are public vehicular rights over it. That route is currently obstructed, and appears to be been obstructed for some time. The size of the trees and vegetation growing on it indicate that they are of many years standing. Under these circumstances, the use of an alternative route could be expected.
22. The Royal Air Force Central Photographic Establishment aerial photograph, alleged to have been taken on 13 April 1947, shows a clearly worn line along the line of the alleged route, and not along the line of the definitive route.
23. Subsequent aerial photographs, dated 21 October 1988, 24 July 1995 and 27 July 1999 all support the existence of a route largely corresponding to the Order route; and also show how the access at Point A on the Order plan developed, first as two separate arms and finally into one, broader access.
24. The documents associated with the production of the Definitive Map and Statement in 1951 show the route of the BOAT drawn onto the base maps along the same alignment as shown on the current Definitive Map and Statement, but the Ordnance Survey ('OS') base maps from that time, and even before, do not accord with that. The OS maps show a route running nearer to the alleged route, although not entirely corresponding to it.
25. From my inspection on the ground, there is no obvious difference between the nature of the surface of the track to the south-west of the Order route (i.e. the Definitive line south-west of point C on the plan) and the Order route itself. I accept that the boundary feature (the 'Cornish hedge' or wall) does appear to continue along the side of the obstructed Definitive route, but it seems clear from the evidence that it has been the practice, for one reason or another, to use the Order route in preference to the Definitive route. There does not seem

- to have been any impediment to the use of the Order route, but the evidence strongly suggests that the Definitive line has been indistinct for many years.
26. In the absence of any evidence to show that the claimed use of the Order route did not take place, I conclude that the evidence supports that it did.
27. Furthermore, there is no evidence to suggest that the user witnesses are not representative of the public at large. Although some of them own properties situated alongside the adjoining BOATs, there is no evidence that they benefit from private rights of access.
28. I am satisfied that there has been 20 years of uninterrupted use of the way by the public, and that a significant proportion of that use has been in mechanically propelled (or motorised) vehicles.

Whether the use of the way has been as of right

29. There is no evidence to suggest that use of the way has been by force, by permission or by stealth during the 20 years between 1984 and 2004; or, indeed, prior to that period. All evidence of use by force relates to attempted use after the purchase of the land by Mr Jayaraj, and consequently outside the period I am considering.
30. I have already referred to the fact that there is no evidence of any user witnesses benefiting from permission (as a consequence of private rights) and thus I am satisfied that the user which has taken place has been user as of right.

Whether there is sufficient evidence of a lack of intention to dedicate the way as a BOAT

31. There is no evidence to show that, prior to 2004, any attempt was made by the landowner to prevent the use of the way, or to deny that a public right of way existed. I therefore conclude that, during the relevant period of 20 years, there is insufficient evidence of any lack of intention to dedicate a BOAT over the Order route which might prevent the deemed dedication of the alleged way.

The effect of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act')

32. The purpose of Section 67 of the 2006 Act was to extinguish all previously unrecorded rights for mechanically propelled vehicles, except under certain circumstances. One of those circumstances was where an application for a modification order was made to record any such rights prior to the relevant date (20 January 2005)².
33. The judgement in *R (application of Warden and Fellows of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and SSEFRA* [2008] EWCA Civ 431 determined that any such application had to be made in accordance with the provisions of Paragraph 1 of Schedule 14 to the 1981 Act.
34. Prior to the Inquiry I had indicated to the Council that I would need their view on the effect of this judgement on the Order. A copy of my request was also

² Section 67 (3) (a)

sent to the statutory parties to the Order: Mr Jayaraj and Perranzabuloe Parish Council.

35. The Council considers that the application in the case I am considering was made in accordance with the requirements of Schedule 14 and was made before 20 January 2005³. There has been no evidence submitted to cause me to doubt this and I am consequently satisfied that the mechanically propelled vehicular rights have not been extinguished as a result of the 2006 Act.

Common law

36. In light of my conclusions in respect of Section 31 of the 1980 Act it is not necessary for me to consider a common law dedication. However, should I have needed to do so, my conclusions would have been the same, as there is no evidence to contradict the evidence of use as of right. That user appears to have been exercised for a considerable period of time prior to 2004, well in excess of the 20 years relevant to a statutory dedication. Under the circumstances, I consider it would be justifiable to presume that the way had been dedicated as a vehicular highway at common law.

Other matters

Whether a mistake was made on the original Definitive Map

37. It is suggested in some of the correspondence submitted by supporters of the Order that the route has always been mis-represented on the Definitive Map and Statement, and that it should have been shown on the route now being alleged.
38. The Council addressed this issue in their report, and concluded that there was insufficient evidence to support that such an error was made. The Order as made does not seek to delete the existing Definitive route and I have therefore not addressed the matter.
39. I accept that this will result in two routes being recorded on the Definitive Map; a fact which will no doubt appear to many as either anomalous or unnecessary. However, this is a matter for the Council to address, should it consider it necessary to do so. It is not for me to pre-empt or to prejudice any such decision as may be taken by the Council in the future.

The presence of the barn

40. A number of witnesses refer in their evidence to the existence of a barn or nissen hut adjacent to the Definitive route in which dances were alleged to have been held many years ago. The building is shown on several editions of the OS base map. Mr Jayaraj refers to the fact that this building is no longer there and that it is said to have been removed by local residents as it posed a danger and was an eye-sore. The building would have been on the land that Mr Jayaraj purchased and he alleges that photographs submitted by him show the remains of some of the structure buried beneath the vegetation.
41. The barn, as indicated on the OS base maps, would not have obstructed either the Definitive route of BOAT 49 or the Order route. I do not therefore consider

³ Mistakenly written as 2008 in the Council's statement

that its existence or otherwise affects my decision; although I do acknowledge that its position would tend to support the fact that the existing Definitive line of the BOAT may not be incorrect, since allowance for it seems to have been made when the barn was positioned. This does not detract from the fact that I have found that the Order route has been used in preference to the Definitive line.

Conclusions

42. Having regard to all the evidence submitted in the written cases for the parties, I conclude that the Order should be confirmed.

Formal Decision

43. I confirm the Order.

Helen Slade

Inspector

APPEARANCES

For the Order Making Authority

Mr C Tofts	<i>Assistant Solicitor, The Cornwall Council</i>
Ms C Ward	<i>Legal Assistant, The Cornwall Council</i>

DOCUMENTS

1. Inquiry bundle consisting of Proof of Evidence and appendices, submitted prior to the Inquiry by The Cornwall Council.
2. Inquiry bundle consisting of a Statement of Case and enclosures, submitted prior to the Inquiry by Mr Jayaraj
3. Additional Statement regarding the effect of the Natural Environment and Rural Communities Act 2006, submitted by The Cornwall Council.