

Order Decision

Site visit made 21 May 2013

by **Heidi Cruickshank BSc (Hons), MSc, MIPROW**

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

Decision date: 13 JUN 2013

Order Ref: FPS/M1900/7/74

- This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as The Hertfordshire County Council (Sacombe 24) Modification Order 2010.
- The Order is dated 12 November 2010 and proposes to add a public footpath to the Definitive Map and Statement in the Parish of Sacombe. Full details of the route are set out in the Order Plan and Schedule.
- There were two objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary Matters

1. Hertfordshire County Council, the order-making authority ("the OMA"), requested that a modification be made to the Order. As I have not confirmed the Order, I do not need to consider this, however, it indicates that the OMA have considered the matter under section 53(3)(c)(i) and I shall take this into account in determining the Order.

Procedural Matters

2. No-one requested to be heard with respect to this Order and so I made an unaccompanied site inspection, taking account of the written representations.

Application

3. The Order arose as a result of an application, made to the OMA in October 2006 under Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act"), to record three routes on the Definitive Map and Statement ("the DMS"). The OMA accepted that an Order should be made in respect of this route but no Orders were made with regard to the other two claimed routes.
4. The alignment claimed by the application did not continue north of Footpath 9 ("FP9"), which crosses the Order route, however, the OMA were satisfied that the evidence indicated that the additional area should be recorded. They similarly increased the width from that claimed. This was queried in objection, however, I am satisfied that the OMA are able to modify claimed routes in this way on the basis of the evidence before them.

Main issues

5. Reliance is placed on documentary evidence to show that the route was historically a public highway, but that vehicular rights over it had been

extinguished by the Natural Environment and Rural Communities Act 2006, with no exceptions applying to preserve the vehicular rights. As a result the OMA were satisfied that the appropriate classification was restricted byway and the objector¹ agrees on this point.

6. The objector disputed whether the evidence as a whole was sufficient to show that public rights subsisted over the Order route on the balance of probabilities. It was argued that the evidence could also demonstrate a private accommodation way serving Sacombe Hill Farm.
7. In respect of the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions (2000)*², I agree with the applicant that there are different tests in the making of Orders for adding and deleting routes, however, for confirmation both require proof on the balance of probabilities.
8. In relation to argument of the objector regarding the approach to documentary evidence, I agree with the OMA that it is the evidence as a whole which needs to be considered. The weight to be given to individual documents will be taken into account to see whether, on the balance of probabilities, they indicate, when taken together, that the claimed rights subsist over the route in question.

Reasons

Documentary evidence

Sales plans

9. The sales particulars for Sacombe Park Estate, 1815, show the Order route, which does not appear to be listed as a separate entity within the described lands. A conveyance or transfer is essentially dealing with private rights of property, not with a view to defining public rights and sales particulars should be treated with caution. Whilst a public right of way is not specifically admitted in this case, the affected land appears to be treated as a separate area from the land being sold.
10. The 'crossing route' was previously recorded as a public footpath, however, the public rights were stopped up by an extinguishment order confirmed in 1969. As a result, I am satisfied that references to the Order route being shown in the same way as this highway in this, and other, documents are not irrelevant, as suggested by the objector. However, I find this document no more than suggestive that ownership and use was separate from Sacombe Park Estate, giving it very little weight in showing that the route was a public highway.

Small-scale mapping

11. The applicant for the Order referred me to the Dury & Andrews map, 1766. He fairly admitted that this was a schematic map and so it is difficult to reconcile the network shown with the landscape today. However, I agree with him that there appears to be a link from the Order route, such that it was not a cul-de-sac, as it now appears.

¹ The substantive objection was made by the landowner and, generally, when referring to 'the objector' in this decision I am referring to that party. I have also taken account of the other objection as appropriate.

² Subsequently considered in the Court of Appeal.

12. By the time of the 1822 Bryant map, the Order route was shown, along with a 'track' leading east to Sacombe Pound, which appears to be the route now recorded as FP9. I agree with the OMA that the Order route was identified on the legend under '*Lanes and Bridleways*' and that it was likely to have been thought to be public at that time. The objector fairly agrees that this map was commercially produced and sold for navigational purposes, although pointing out that it also depicted access to isolated properties.
13. This type of map is rarely sufficient in its own right to permit the inference to be drawn that a route is a highway and it needs to be considered alongside the other evidence available.

Estate maps

14. The OMA fairly say that these documents were not prepared to show rights of way, however, they do provide a good indication of the routes existing at the time. The "*Sketch of land received by S. Smith Esq of Mr Edward Mardell in exchange, 1833*" shows the southern part of the route in the same way as other highways known to be public. The area of interest for this map does not cover the full extent of the Order route. I agree with the OMA that the annotation "*To Sacombe Hill Farm*" shows that it continued in that direction. However, I agree with the objector that the purpose of this plan was to identify blocks of land for exchange and not to identify highways. I give very little weight to this map as showing that a public highway existed.
15. The "*Plan & Schedule of Sacombe Bury, Sacombe Green and Sacombe Hill Farms*" indicates the route coloured brown, which is how other now recorded public highways are shown. However, I agree with the objector that there appears to be a difference in its apparent inclusion within the holding boundary. I also agree that the difference in the lack of depiction of the southern section may have related to ownership, rather than rights. I note that other routes shown within the holding are generally now recorded as footpaths and bridleways. Given the anomalies in the way routes are treated in this plan, and taking account that it does not appear to have been the primary purpose to identify highways, I give very little weight to it in this case.

Ordnance Survey mapping

16. The Ordnance Survey ("OS") was formed in the late eighteenth century in response to a military need for accurate maps and over the years has developed a variety of products to meet the need for accurate and up-to-date mapping. Instructions for surveyors laid down that their task was to show what was on the ground at the time of the inspection and the depiction of a way on an OS map is not, of itself, evidence of a highway. Nevertheless, the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly in conjunction with other evidence.
17. The 1880/81 1st edition OS map showed the Order route as a clear landscape feature with what appears to have been a gate south of the farm buildings. I agree with the applicant that there is a continuation from the northern end, as a pecked double line of lesser width than the Order route. The 2nd edition 1898 map continues to show this situation, although with no gates in place. The track identified above was annotated 'FP' on this edition.

18. I agree with the OMA that the OS mapping shows the physical existence of the route but the disclaimer from the late nineteenth century means that they cannot provide evidence as to whether there are public or private rights over it.

Sacombe Tithe Map and Award, 1839

19. The Tithe Commutation Act 1836 (amended 1837) converted tithes to a fixed monetary value. The 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.

20. The Order route is shown coloured sienna in the same way as other highways. The OMA fairly admit that it is not always the case that the convention of colouring public roads in this way is followed and I note that FP9, for which there has been no suggestion of higher rights, and an unrecorded route running from that, are also shown in this way. I agree with the objector that both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe and, given the anomalies within this map, the weight I give to it as demonstrating public rights is very low.

Finance (1909 - 1910) Act

21. The Finance (1909 - 1910) Act ("the 1910 Act") provided for the levying of tax on the increase in value of land between its valuation as at 30 April 1909 and subsequent sale or transfer. The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e. they will be shown uncoloured and unnumbered. If a route excluded from the numbered hereditaments, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion.

22. I consider that the exclusion of the Order route from the adjacent hereditaments provides no more than a strong possibility that this was recognised as a public highway at the time, of vehicular status.

Cul-de-sac

23. The objector places weight upon the route being a cul-de-sac to suggest that there was no obvious legitimate purpose for it to be a highway. I agree with the OMA that there is nothing in law to prevent the existence of a cul-de-sac public right and the case law submitted supports this position.

24. However, I consider the suggestion that the Order route provided access to the pond at the yard to be no more than speculation at this time. I do not read the objection of the tenant as indicating that he agrees, or has knowledge, that there was a dew pond used by the public for horses and carts, as much as it being his understanding that this is the argument for the OMA. I consider it as likely that the route provided private access to the farm, with the pond being for their private use.

Reputation

25. The objector notes that other evidence, such as parish records or highway board minutes, do not mention the route and relies on this to demonstrate that there is no reputation of public rights. Whilst I agree with the OMA that this is not unexpected in a route of such age, it is unsupportive of the claim.

Claimed use

26. During the consultation, a local resident indicated that he and his wife had used the southern section in the 1960s, in conjunction with the crossing route. There was no indication as to frequency of use and no mention of walking the northern extent of the Order route and so I give very little weight to this in relation to this case.

Summary

27. I agree with the OMA that it is the evidence as a whole that needs to be taken into account. In this case the route has physically existed from at least 1815. In general the Order route is shown as cul-de-sac, although the late nineteenth century OS mapping suggests a continuation to the north at a different status. In other mapping it was generally shown in the same way as other routes, which are now known to be public highways, however, there are anomalies and the maps were not primarily concerned with the identification of highways. The strongest evidence of public highway rights arises from the 1910 Act map; however, even this depiction could have arisen for other reasons.
28. I consider that the evidence is suggestive of highway rights and strong enough to raise a reasonable allegation of their subsistence, which was the basis on which the OMA took their decision to make the Order. However, I am not satisfied that they have discharged the burden of proof which lies on them to show, on the balance of probabilities, that this was formerly a public highway.

Other matters

29. Concerns were raised with regard to health and safety, as well as the difficulties that may arise for stock management if the route was recorded, with particular regard to the width within the farmyard area. I do, of course, understand that these are the matters of most concern for those living and working in the area, however, they are not issues which I am able to take into account under the legislation of the 1981 Act and I have not done so.

Conclusion

30. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

31. I do not confirm the Order.

Heidi Cruickshank

Inspector

APPENDIX T

Memorandum for Not Confirmed Orders.

WILDLIFE AND COUNTRYSIDE ACT 1981

Your council's attention is drawn to the requirements of Paragraph 11 (4) of Schedule 15 of the Act namely;

As soon as practicable after a decision not to confirm an Order or, in the case of a decision by the Secretary of State, as soon as practicable after receiving notice of his decision, the authority shall give notice of the decision by serving a copy of it on any person on whom notices were required to be served under paragraph 3 (2)(b) or 4 of Schedule 15 of the Act.

It is our policy to provide free copies of the decision letter to all statutory objector's, everyone given permission to speak at the inquiry (where one was held) and listed under appearances in the Inspector's letter. Also anyone else, who has written to us requesting a copy, before a decision is issued.

