The Planning Inspectorate
Yr Arolygiaeth Gynllunio

ITEM 8

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Mr RN Barnes
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CH5 3DL

Your Ref/*Eich Cyf :*

Our Ref/*Ein Cyf:* 516150

Date/*Dyddiad :* 17 March 2017

Dear Mr Barnes,

WILDLIFE AND COUNTRYSIDE ACT 1981 – FLINTSHIRE COUNTY COUNCIL – (PUBLIC FOOTPATH NO. 112 IN THE COMMUNITY OF HAWARDEN) – DEFINITIVE MAP MODIFICATION ORDER 2014

I enclose the Inspector's decision on the above Order for your information.

Yours sincerely

J Nicholas

Julian Nicholas
Case Officer

The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Penderfyniad ar y Gorchymyn

Ymchwiliad a agorwyd ar 18/05/16

gan Michael R Lowe BSc (Hons)

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 17/03/17

Order Decision

Inquiry opened on 18/05/16

by Michael R Lowe BSc (Hons)

an Inspector appointed by the Welsh Ministers

Date: 17/03/17

Order Ref: A6835/W/15/516150

The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.

- This Order, dated 10 June 2014, is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Flintshire County Council (Public Footpath No. 112 in the Community of Hawarden) Definitive Map Modification Order 2014.
- There were two objections outstanding when Flintshire County Council (the Council) submitted the Order for confirmation to the Welsh Ministers.
- The Order proposes to modify the Definitive Map and Statement for the area by both adding and deleting a footpath near Hollins Grange, Hawarden, Deeside, Flintshire, as shown on the Order plan and described in the Order Schedule.

Decision

1. I do not confirm the Order.

Preliminary Matters

2. I held a Public Inquiry into the Order at the Ewloe Social Club, Ewloe, Flintshire on 18 May 2016 and 12 July 2016. I visited the site on 12 July 2016 accompanied by the parties.

3. At the Inquiry, Mr Hamczyk made an application for costs against Flintshire County Council. This application will be the subject of a separate decision.

Main Issue

4. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i) and (iii). The main issue is therefore whether the discovery of evidence by the Council is sufficient to show, on the balance of probabilities, that a public footpath which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification and that when considered with all other relevant evidence available shows that the definitive map and statement require modification because there is no public right of way over land shown in the map and statement as a highway of any description.

5. Section 32 of the Highways Act 1980 requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Reasons

6. The Order seeks to resolve an alleged error in the 1978 definitive map and statement of public rights of way for the County of Clwyd and thereby resolve a long running dispute over the route of footpath 112 in the vicinity of Hollins Grange, the site of the former Hollins Farm. The 2014 Order seeks both to delete an existing footpath and add a new footpath so as to re-align the route. In the Leicestershire[1] case the Court considered the approach to determine the correct route to be shown on the definitive map. The initial presumption is that the definitive map and statement are correct. The starting point is s53(3)(c)(iii), and only if there is sufficient evidence to show that that was wrong (i.e. on the balance of probabilities the alternative was right) should change take place. The Courts have considered similar cases in which a right of way is considered not to exist at all[2], where the map and statement are in conflict[3] and where a way is recorded on the statement but not shown on the map[4].

7. An Order made under Section 53(3)(c) is dependent upon the 'discovery of evidence' (when considered with all other evidence available). In the case of Mayhew v Secretary of State for the Environment [1992] 65 P & CR 344 the meaning of 'to discover' is to find out or become aware. The phrase implies a mental process of the discoverer applying their mind to something previously unknown to them. In the case of R v. Secretary of State for the Environment, ex parte Burrows and Simms [1991] 2 QB 354 it was recognised that 'discovery' embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time of the definitive map.

8. I am satisfied that some of the evidence submitted by the Council is evidence that was not previously considered when the first definitive map and statement was prepared. Whilst it is not known what evidence was considered at that time, clearly some witness evidence postdates the preparation of the definitive map and statement. I accept that the discovered evidence should be considered together with all other relevant evidence when weighed against the presumption that the definitive map is correct.

9. The current definitive map and statement for the area in question was produced by Clwyd County Council and has a relevant date of 31 October 1978. Flintshire County Council has been the successor authority since 1996. The first draft definitive map and statement for the area was produced by the former Flintshire County Council in 1953. It followed a survey carried out by the parish council in July 1950.

10. The route footpath 112 as shown on the first definitive map is shown on the Order as passing between points C and B as the route to be deleted, whilst the route shown on the parish council survey is shown on the Order as passing between points A and B as the route to be added.

11. The parish council's survey in July 1950 clearly shows footpath 112 along the route A-B on a 1:10,560 scale map and the statement indicates that the path 'leaves lane by means of a stile into the farmyard, then through yard to a stile which requires footboard'. The stiles are marked on the survey map. The 1953 draft definitive map, prepared after the survey,

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[1] Leicestershire County Council v. SSEFRA [2003] EWHC 171 (admin).

[2] John Trevelyan v. SSETR [2001] EWCA Civ 266 and R v. Secretary of State for the Environment, ex parte Burrows and Simms [1991] 2 QB 354.

[3] R v. Secretary of State for Environment, Food and Rural Affairs, ex parte Norfolk County Council [2005] EWHC 119 (Admin).

[4] Kortarski v. Secretary of State for Environment, Food and Rural Affairs and Devon County Council [2010] EWHC 1036 (Admin).

clearly shows a different route in the vicinity of Hollins Farm. It follows a route to the south of the farm, C-B on the Order. No records have been found to indicate whether this discrepancy was intentional or an error. No objections were made to the draft map, and the southerly route (C-B) was duly recorded on the first definitive map and statement published in 1963 and remained unaltered on the 1978 map and statement prepared by Clwyd County Council.

12. Mr John Tudor gave evidence of his use of footpath 112 between about 1939 and 1952. He recalled the route as being A-B, through the farmyard, accessed from Hollins Lane by a gate and adjacent stone stile. He was also familiar with the route of the footpath from his weekend work at farm. His father was involved in the parish survey and was familiar with the area. Mrs Joy Parry gave evidence of the ownership of Hollins Farm by her family and her recollection that the footpath passed from a gate and stile at Hollins Lane, through the farmyard along the route A-B. Mr Allan Parry also gave evidence of the use of route A-B and that it was not possible to use a route through the stack yard, route C-B until about 1960.

13. When the A55 Trunk road was constructed the 1978 Side Roads Order made provision for the stopping-up of Hollins Lane up to point A on the Order plan. The Council submitted that the survey for the Side Roads Order recognised that footpath 112 commenced at point A.

14. In about 1990 Hawarden Community Council produced a walks leaflet and in correspondence with Mr Astbury, the then owner of Hollins Farm, it was acknowledged that the route of footpath 112 was along the route A-B.

15. I have examined the Ordnance Survey maps for the area and an aerial photograph from 1967, but I find these to be of no assistance as to the route of footpath 112.

16. Whilst the evidence outlined above indicates that the route of footpath 112 follows the alignment A-B, that evidence is mainly based upon witnesses' recollections of events going back over 60 years ago. In my view only limited weight can be attached to the witnesses statements due to the reliance upon their memory of events many years ago. There is no clear evidence that the route of the footpath could not have been along C-B. In my view the evidence in favour of the route of footpath 112 along A-B is not of sufficient substance to displace the initial presumption that the definitive map and statement shows the correct alignment along B-C.

17. I have also considered the proposition that the route A-B has become a public footpath by virtue of presumed dedication under section 31 of the Highways Act 1980 or under common law. In my view there is insufficient evidence of public user to give rise to any presumption of dedication.

Conclusion

18. I conclude, on the balance of probabilities, that the evidence that footpath 112 is along the alignment A-B is not of such substance to outweigh the presumption that arises from the showing of route C-B on the definitive map and statement. I also conclude that there is insufficient evidence of any presumed dedication along A-B after the definitive map and statement was first prepared.

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

Michael R Lowe

INSPECTOR

APPEARANCES

Flintshire County Council
represented by
Trefor Lloyd — of Counsel
who called
Stephan Bartley — Senior Rights of Way Officer
Adrian Walls

In support of the Council

Pete Bland — Ramblers Cymru
Julian Williams
John Tudor
Allan Parry
Joy Parry
Allan Botterell
Julia Botterell

The Objectors
Mr & Mrs Hamczyk
represented by
Robin Carr — Robin Carr Associates
who called
Jan Hamczyk

DOCUMENTS (submitted at the inquiry)

1 London Gazette, November 1957. Notice of determinations to draft map
2 Photographs of site 1991 & 1993
3 Notice of 1872 auction
4 Statement of Joy Parry and photographs
5 OS map 1960 72

DOCUMENTS (submitted after the inquiry)

1 E-mail from Robin Carr Associates dated 20.07.2016
2 E-mail from Carol Higgins dated 05.08.2016
3 E-mail from Allan Botterell dated 08.08.2016
4 E-mail from Julian Williams dated 10.08.2016

The Planning Inspectorate
Yr Arolygiaeth Gynllunio

An Executive Agency in the Welsh Assembly Government
and the Department for Communities & Local Government

Challenging the Decision in the High Court

Challenging the decision

Once an Order Decision is issued we have no power to amend or change it. Decisions are therefore final unless successfully challenged in the High Court. We can only reconsider an order if a challenge is successful and the decision is returned to us for re-determination.

Grounds for challenging the decision

A decision cannot be challenged merely because someone disagrees with the Inspector's judgement. For a challenge to be successful, you would have to show that the Inspector misinterpreted the law or that some relevant criteria had not been met. If a mistake has been made and the Court considers that it might have affected the decision, it will either quash the decision and return the case to us for re-determination or it will quash the order completely.

Different order types

The Act under which the Order Decision has been **confirmed** will specify the conditions under which the Order Decision can be challenged, and is thus a statutory right to challenge a confirmed Order. There is no statutory right to challenge where an Order is '**not confirmed**'; in these circumstances a judicial review of the decision not to confirm may be applied for. Both scenarios are set out in more detail below:

Challenges to <u>confirmed</u> orders made under the Wildlife and Countryside Act 1981

Anyone can make an application to the High Court under paragraph 12 of Schedule 15 to the 1981 Act on the grounds i) that the order is not within the power of section 53 or 54 ; or ii) that any of the requirements of the Schedule have not been complied with. If the challenge is successful, the court will quash the order. The Inspectorate will not be asked to re-determine the case.

Challenges must be received by the Administrative Court within 42 days (6 weeks) of the date of publication of the notice of confirmation - this period cannot be extended.

Challenges to <u>confirmed</u> orders made under the Town and Country Planning Act 1990 and the Highways Act 1980

Anyone can make an application to the High Court under paragraph 287, in the case of an order made under the 1990 Act, or paragraph 2 of Schedule 2 in the case of an order made under the 1980 Act, on the grounds that i) the order is not within the powers of the Act; or ii) that any of the requirements of the Act or regulations made under it have not been complied with. If the challenge is successful the court will quash the order.

Challenges must be received by the Administrative Court within 42 days (6 weeks) of the date of publication of the notice of confirmation - this period cannot be extended.

Challenges to orders which are not confirmed

If an order made under any of the Acts is not confirmed, an aggrieved person can only challenge the decision by applying for judicial review by the Courts (the Administrative Court can tell you more about how to do this – see Further Information below). If the challenge is successful, the court will either quash the order, or quash the decision and ask the Inspectorate to re-determine the case.

For applications for judicial review, the Claim form must be filed with the Administrative Court promptly and in any event not later than 3 months after the date of the Order decision, unless the Court extends this period.

Important Note - This leaflet is intended for guidance only. Because High Court challenges can involve complicated legal proceedings, you may wish to consider taking legal advice from a qualified person such as a solicitor if you intend to proceed or are unsure about any of the guidance in this leaflet. Further information is available from the Administrative Court (see overleaf).

Frequently asked questions

"Who can make a challenge?" – In principle, a person must have a sufficient interest (sometimes called standing) in the decision to be able to bring a challenge. This can include statutory objectors, interested parties as well as applicants and Order Making Authorities.

"How much is it likely to cost me?" - A relatively small administrative charge is made by the Court for processing your challenge (the Administrative Court should be able to give you advice on current fees – see 'Further information). The legal costs involved in preparing and presenting your case in Court can be considerable though, and if the challenge fails you will usually have to pay our costs as well as your own. However, if the challenge is successful we will normally meet your reasonable legal costs.

"How long will it take?" - This can vary considerably. Although many challenges are decided within six months, some can take longer.

"Do I need to get legal advice?" - You do not have to be legally represented in Court, but it is advisable to do so, as you may have to deal with complex points of law.

"Will a successful challenge reverse the decision?" - Not necessarily. The Court will either quash the order or quash the decision. Where the decision is quashed, we will be required to re-determine the order. However, an Inspector may come to the same decision again, but for different, or expanded reasons. Where the order is quashed, jurisdiction will pass back to the Order Making Authority. They will need to decide whether to make a new order.

"What can I do if my challenge fails?" - The decision is final. Although it may be possible to take the case to the Court of Appeal, a compelling argument would have to be put to the Court for the judge to grant permission for you to do this.

Contacting us

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Inspection of order documents

We normally keep case files for one year after the Order Decision is issued, after which they are destroyed. You can inspect order documents here at the Welsh Assembly Government building in Cathays Park Cardiff by contacting us on our General Enquiries number to make an appointment (see 'Contacting us'). We will then ensure that the file is obtained from our storage facility and is ready for you to view. Alternatively, if visiting would involve a long or difficult journey, it may be more convenient to arrange to view the documents at the offices of the Order Making Authority.

Further information

Further advice about making a High Court challenge can be obtained from the Administrative Court at Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET, telephone 029 20376400; Website: http://www.justice.gov.uk/

"What happens if the order is quashed?" - Jurisdiction will pass back to the Order Making Authority. They will need to decide whether to make a new order.