



Order Decision

Site visit made on 18 June 2020

by Rory Cridland LLB (Hons), Solicitor

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

Decision date: 29 July 2020

Order Ref: ROW/3233942

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as Herefordshire Council (Addition of Footpath EE49 Eardisley) Modification Order 2018.
- The Order is dated 28 November 2018 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Herefordshire 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.

Procedural Matters

1. The Order was made by the Council following a successful appeal under section 53(5) of the 1981 Act. I have been provided with a copy of that appeal decision¹ and have taken it into account in my reasoning below.
2. One objection was received during the statutory period and the Order was submitted to the Secretary of State for confirmation. Although I note the objection was subsequently withdrawn, there is no mechanism by which the matter could be returned to the Council for the purposes of confirmation.

Main Issues

3. The Order was made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i) and following a successful appeal to the Secretary of State under Schedule 14 of the 1981 Act. However, notwithstanding that decision, I must emphasise that the test to be applied when considering whether or not to make an order differs to that which must be applied at the confirmation stage.
4. In the present case, I must be satisfied on the balance of probabilities that the discovery of evidence (when considered with all other relevant evidence available) is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
5. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.

¹ FPS/W1850/14A/2.

Reasons

6. The Order route first appears in the Ordnance Survey (OS) 2-inch Working Drawings of 1815. It can be seen again on Henry Price's Map of Herefordshire of 1817 as well as on the OS 1-inch First Edition map dated 1831. In addition, part of the route is shown on the 1840 Tithe Map for Eardisley (approximately C-D on the Order plan) (where, I note, it does not appear to link to any connecting public routes). Furthermore, it is clearly shown in the Parliamentary Plans for Hereford and Brecon Railway of 1858/59 (a matter to which I shall return below).
7. The route is also depicted on the 1887 First Edition OS map, the 1904 Second Edition OS map as well as on the 1-inch Popular edition of 1920. While these maps were not produced to record public rights of way, they provide good evidence of topographical features on the ground. Although it does not appear on A. Bryant's map of Herefordshire 1835, there is, in my judgement sufficient evidence of a physical route connecting what is now footpath EE6 to bridleway EE45 and of that route having been in place for a considerable period of time. However, few of these documents provide any meaningful information on the status of the route or whether it was used by the public.
8. The earliest indication of its possible status can be found in the 1858/59 parliamentary plans relating to the construction of the Hereford and Brecon Railway ("the railway plans"). Here it is described between points C and D as an 'Occupation Road' and identified in the accompanying Book of Reference (BoR) as being in private ownership. Between Points B and C, the route is shown as a pecked line on the plan and is not numbered separately from the field (No. 28). The BoR describes field No. 28 as 'pasture field and cartway'. However, whereas public footpaths in neighbouring fields (Nos 26 and 31 in the BoR) are noted as being occupied by the public, field no 28 and the occupation road itself (No. 30) are identified as being in private ownership and occupation.
9. These deposited documents were in the public domain and the BoRs were generally of a high standard. Furthermore, the process for the authorisation of railway schemes provided for scrutiny of the documents by those affected. As such, I consider that the recording of the route as being in private occupation is good evidence of its likely status at that time.
10. While I note the suggestion that route No. 26 on the railway plans is effectively the Order route and that the rights were later transferred to the cartway, there is not sufficient evidence for me to conclude, on the balance of probabilities, that this was the case. As such, while the railway plans support the existence of a physical route at that time, they provide little support in favour of that route being in use by the public.
11. Turning then to the Finance Act 1910 documentation, the field book entry for plot 74 includes a deduction for what appears to be the presence of public footpaths. However, plot 74 covers an extensive area and there are a number of paths shown over that plot in the accompanying map. While I acknowledge the arguments advanced by a number of supporters of the Order, there is nothing which would indicate that the deductions related to the Order route.
12. Nevertheless, the extracts provided from the 1951 Eardisley Parish submission map show the Order route as part of a continuation of what is now registered footpath EE5 and indicate that, at that time, Eardisley Parish Council may have

considered the route to be a public one. However, while I accept that this provides some support in favour of a right of way over the Order route, it must be seen in the context that, for whatever reason, the route was not subsequently included in the Draft and Provisional Definitive Maps.

Summary

13. Drawing the above threads together, I consider there is good evidence that there was a physical route in place for a considerable period of time prior to the compilation of the Definitive Map and Statement and that this route connected with other highways.
14. Furthermore, the Eardisley Parish submission maps indicate that at the time of the parish survey, the Parish Council may have considered the route to be a public one. However, for whatever reason, the Parish Council did not challenge the route's deletion or its omission from the Draft and Provisional Definitive Maps. As such, while I accept that it provides some support in favour of public rights over the Order route, in view of the ambiguity surrounding its removal, I afford it only limited weight.
15. In considering whether or not a path or way subsists, there needs to be sufficient positive evidence of a public right of way over the route claimed, and not just a lack of negative evidence. In the present case, while I acknowledge that there is some circumstantial evidence to indicate that the route may be a 'lost' path as claimed, in the absence of more evidence, I am not persuaded that, on the balance of probabilities, a public right of way subsists over the Order route.

Other Matters

16. I have had regard to the various representations made in support of the Order including those from Eardisley Parish Council and local residents. Furthermore, I note that there is a considerable amount of local support for the addition of a footpath along the Order route. However, the desirability or otherwise of a route is not relevant in my consideration of whether or not to confirm the Order and the matters raised do not affect my reasoning above.

Conclusion

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

Formal decision

18. I do not confirm the Order.

Rory Cridland

INSPECTOR