



Order Decision

Inquiry opened on 7 August 2012

by **Michael R Lowe** BSc (Hons)

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

Decision date: 2 November 2012

Order Ref: FPS/M4510/7/2

- This Order is made under section 53(2) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Council of the City of Newcastle upon Tyne Castle Farm Modification Order 2011.
 - The Order is dated 26 August 2011 and proposes to modify the Definitive Map and Statement by adding a network of four footpaths across the Donkey Field at Castle Farm, Newcastle upon Tyne as detailed in the Order map and schedule.
 - There were 3 objections outstanding when the Council of the City of Newcastle upon Tyne (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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Decision

1. I do not confirm the Order.

Preliminary Matters

2. I held a public inquiry into the Order at The Civic Centre, Newcastle upon Tyne on 7 and 8 August 2012. I visited the site accompanied by the parties on 8 August 2012.
3. The Order citation states that it is made under the section 53(2)(a) of the 1981 Act. The Council requested that this be amended to section 53(2)(b) as the Order concerns events after the commencement of the 1981 Act.
4. In October 2000 the Friends of Jesmond Dene made an application to the Council to add four footpaths over land at Castle Farm to the definitive map and statement of public rights of way. The Council considered the application in January 2011 and refused to make the Order requested. The Friends of Jesmond Dene appealed to the Secretary of State, who appointed an Inspector to determine the appeal. The appeal was upheld on the basis that the claimed footpaths were reasonably alleged to subsist¹. The Inspector noted that the claimed footpaths did not connect to any public rights of way on the definitive map, but that several of the claimants marked connecting routes of unknown status. The Council was directed to make an Order to give effect to the appeal. The Council subsequently decided to take a neutral stance at the Inquiry and the case for the confirmation of the Order was presented by Mr McEwan, the Chairman of the Friends of Jesmond Dene.
5. Following the close of the Inquiry on 8 August 2012 the Council discovered and submitted a copy of the City and County of Newcastle upon Tyne byelaws for

¹ The Planning Inspectorate Appeal Decision FPS/M4510/14A/1 dated 19 July 2011.

pleasure grounds, confirmed by the Minister of Health in 1937. The byelaws provide for the management and regulation of Jesmond Dene, amongst other pleasure grounds in the City of Newcastle upon Tyne. I arranged for this to be circulated to the parties and I have taken account of the byelaws and the responses of the parties.

Main Issue

6. The Order has been made under section 53(2) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i). The main issue is therefore whether the evidence is sufficient to show, on the balance of probability, that a public footpath which is not shown in the map and statement subsists on the routes in question such that the definitive map and statement require modification.
7. In the context of section 53 of the 1981 Act the requirements of section 31 of the Highways Act 1980 (the 1980 Act) are namely;
 - a) the date on which the right of the public to use the claimed footpaths was brought into question;
 - b) whether the claimed routes were of such character that use by the public could not give rise at common law to any presumption of dedication; and
 - c) whether the claimed footpaths were actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years ending on the date on which their right to do so was brought into question; and if so
 - d) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed footpaths.
8. Whether, in the alternative, the evidence is such, again on the balance of probability, as to establish dedication at common law.

Reasons

9. The Order routes are four footpaths across an area of grassland known as the 'Donkey Field'. They are shown on the Order plan with lettering A, B, C, D & E depicting the end points and nodes, with A, B & C forming the access points to a triangular network of paths and D-E forming a cross link. The Donkey Field is a more or less triangular field, with Jesmond Dene Park to the west and south, Paddy Freeman's Park to the east and Castle Farm to the north. Jesmond Dene Park and Paddy Freeman's Park are part of the Ouseburn Parks and points A, B & C link to this parkland. Castle Farm was re-developed for residential use after 1984.
10. In July 2012, shortly before the opening of the Inquiry, a judgment was made in the High Court², the Kotegaonkar case, concerning the question of whether or not a public highway can exist if it is not connected to another highway or a means of access over land to which the public has a right of access. I arranged for this case to be copied to the parties in advance of the Inquiry. The case provides a clear legal authority that an essential characteristic of a highway is that it must connect to another public highway or a place to which the public have access 'as of right'.

² Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs [2012] EWHC 1967 (Admin).

11. Land to which the public has access 'as of right' would include land subject to section 194 of the Law of property Act 1925; urban commons and the like, to which the public have a statutory right of access. However, as is clear from the Kotegaonkar case, land to which the public enjoy access by permission or licence is not enjoyed by the public 'as of right'.
12. It was not suggested that points A, B or C were linked to land to which the public enjoyed access as of right by any statutory right of access. It therefore follows that the Order as made must fail, as the footpaths as described in the Order do not have the characteristics of a highway.
13. However, I have the power to modify an Order if the circumstances indicate that it is appropriate to do so and I have therefore considered the Friends of Jesmond Dene's request to modify the Order to add a further length of footpath from point C to the public road; Castle Farm Road by Dene Bridge. I have also considered whether the Order could be modified to extend a public footpath to link to points A & B. It is self evident that the public have used an extensive network of footpaths, for many years, within the surrounding Jesmond Dene and Paddy Freeman's parks and that these footpaths link to the disputed footpaths through the Donkey Field at points A, B & C.
14. An essential part of establishing a public right of way, whether under statute or at common law, is that the public's use of a claimed way was 'as of right'. That is without force, secrecy or permission. On land held by a local authority under the Open Spaces Act 1906 or under section 164 or the Public Health Act 1875 the public enjoy access 'by right' and the land is said to be held on statutory trust for public recreation³. The Beresford case does not provide a clear authority for the proposition that all land held by a local authority as a public park, recreation ground, open space or similar recreational purposes is available to the public 'by right' and not 'as of right'. Nonetheless, the comments of Lord Walker, albeit obiter, provide some credence for the notion that when land is held by a local authority for a statutory purpose which includes public access then the public's access is 'by right', and for all practical purposes is by permission.
15. The land to the south of the Donkey Field, connecting to point A, was acquired by a deed of gift in 1883 from Sir William Armstrong. The deed of gift was submitted by the Council but it does not specifically refer to the statutory power under which the land was acquired by the Council. The deed does, however, state that the land was for a public park and recreation and pleasure ground. Section 164 of the Public Health Act 1875 gave a power to urban authorities to acquire land for public walks and pleasure grounds.
16. The land to the west, connecting with point C, was acquired in 1931 but again it is not known on what basis the land was acquired. The land to the east, known as Paddy Freeman's Park, was acquired in 1952 under the Education Act 1944 and then appropriated to leisure purposes in 1992.
17. What is not in dispute is that all the lands connecting at points A, B & C are part of the present day Ouseburn Parks and that it would appear that at all times since each parcel of land was acquired by the Council the land has been set out and used as a public park.

³ R v City of Sunderland ex parte Beresford [2003] UKHL 60 & R (Malpass) v Durham County Council [2012] EWHC 1934 (Admin).

18. The byelaws for pleasure grounds apply to Jesmond Dene, but there is no plan attached to the byelaws to enable an exact determination of the land to which they apply. It is also not stated in the byelaws under what statutory provisions they were made; the only clue being that they repealed earlier byelaws made in 1874 & 1881 and that the Minister of Health confirmed them in 1937. The Public Health Act 1875 made provision for the making of byelaws for the regulation of public pleasure grounds and the language of the byelaws and their confirmation by the Minister of Health would indicate that the lands to which they refer were held by the Council under the 1875 Act. It would appear most likely that the byelaws applied to the land acquired in 1883 as that is Jesmond Dene Park, and also to the land acquired in 1931, which was an extension to the Jesmond Dene Park.
19. It appears to me that it is more likely than not that the public's use of the land connecting points A and B was 'by right' and therefore could not have been 'as of right'. The same would apply to point C at least after 1992, if not after 1952. The essential point being that the land concerned was, and is, part of a public park on land held by a local authority for a statutory purpose which involves public recreational use of the land.
20. I appreciate that there is a great deal of uncertainty as to the statutory basis upon which the Council acquired the various plots of land connecting to the claimed footpaths in the Donkey Field and that a search of the Council's minutes in the archives might shed more light on this matter. Nonetheless, the issue for me is whether or not to propose a modification to an Order, which as made, must fail on the precedent of the Kotegaonkar case.
21. The first aspect of a proposal to modify the Order would be a provisional conclusion that a public footpath subsists that links to the claimed footpaths across the Donkey Field. That would require a conclusion that a public footpath could exist over land that is part of the present day Ouseburn Parks. The burden of proof rests, initially, upon those who assert the right to demonstrate that the public use of the claimed right of way is 'as of right' and therefore not by permission. In my view, on the balance of probability, the land over which such a connection could be made is used by the public 'by right' and not 'as of right', for the reasons set out above. For this reason I decline to propose any modification of the Order to include a link to A, B or C.
22. That is sufficient to conclude all the matters before me, but I will briefly comment upon the question of the nature of the use of the claimed footpaths across the Donkey Field. In my view, the necessary evidence of 20 years use 'as of right' during the 20 year period before the application was made in October 2000 was not sufficiently established for the reasons set out in the Council's decision not to make the Order in 2011. There is cogent evidence that before 1982 the field was used for the keeping of stock and that the field was fenced. I have no doubt that the fence was not wholly effective in preventing public access and that some members of the public could climb between or step over the stands of barbed wire. However, in my view such a fence meant that access was by force and, together with other actions, was a clear indication by the landowner that there was no intention to dedicate a public footpath.

Conclusion

23. 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

The Council of the City of Newcastle upon Tyne

represented by

Rachel Dixon

Solicitor

who called

Gary McDonald

Transport Policy Manager

Michael Hancock

Ranger

In support of the Order

Donald McEwan

The applicant for the Order and Chairman of the Friends of Jesmond Dene

Mr J.E. Jay

Douglas Lovelock

Christine Wilkie

Mike Cook

Mr R. Wooster

Mrs E.A. Plimley

Michael Howard

Ann Sedgwick

D Blair

The Objectors

Michelle Temple

of Counsel, instructed by Swinburne & Jackson

who called

Mohammed Ajaib

Malcolm Harrison

David Ord

Fred Whiteley

DOCUMENTS (submitted at the inquiry)

- 1 Plan submitted by the Friends of Jesmond Dene to extend the claimed footpaths to point C
- 2 E-mail from Alex Bell
- 3 Plan of land owned by the Council
- 4 Plan of adopted highway

DOCUMENTS (submitted after the inquiry)

- 1 Letter from Council dated 24 August 2012 and copy of byelaws
- 2 Letter from Swinburne & Jackson dated 28 August 2012
- 3 Letter from Donald McEwan dated 5 September 2012