



Order Decision

Site visit made on 27 February 2013

by **Alan Beckett BA, MSC, MIPROW**

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

Decision date: **26 MAR 2013**

Order Ref: FPS/T0355/7/2

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Footpath 15 Shottesbrooke / 44 Waltham St. Lawrence in the Royal Borough of Windsor and Maidenhead Order 2011.
- The Order is dated 15 November 2011 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when the Council of the Royal Borough of Windsor and Maidenhead submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the Order path from public vantage points on Wednesday 27 February 2013.
2. The Council of the Royal Borough of Windsor and Maidenhead (the Council) made the Order at the direction of the Secretary of State following a successful schedule 14 appeal by the applicant for the Order, Mr David Ramm. The direction was made on the basis that it was reasonable for Mr Ramm to allege that the claimed footpath subsisted. However, for the Order to be confirmed, I must be satisfied that the evidence discovered demonstrates, on a balance of probabilities, that the claimed right of way subsists¹.

The Main Issues

3. The Order was made under Section 53 (2) (b) of the 1981 Act, relying on the occurrence of an event specified in Section 53 (3) (c) (i) of that Act. For the Order to be confirmed, I must be satisfied that the evidence discovered, when taken with all other relevant evidence is sufficient to show that, on a balance of probabilities, a public right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
4. No evidence of use of the claimed footpath by the public has been submitted in support of Mr Ramm's application. The evidence submitted is drawn from documentary sources and the main issue is whether that documentary evidence demonstrates, on a balance of probabilities, the subsistence of a public right of way on foot over the Order route.

¹ *Todd & Bradley v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin

Reasons

Eighteenth century mapping

5. The eighteenth century small scale mapping (Rocque 1761; Pride 1790; Robertson 1792) shows the Order route to be an enclosed track from Broadmoor Lane to the stream. Rocque and Robertson show a continuation of the Order route to pass over Binham's or Beenham's Heath whereas Pride shows an unenclosed route south of the stream petering out on Beenham's Heath. Whilst these small scale maps indicate the existence of an enclosed track between Broadmoor Lane and the stream, they are inconsistent as evidence of the existence in the eighteenth century of a through route and do not demonstrate the status of the route shown.
6. A composite map drawn in 1974 and based on Rocque's map, a 1712 map of the Shottesbrooke Estate and a parish map of White Waltham (date not identified) is of assistance in identifying the location of features such as Pundles Farm, Smewins Farm and the former church at the junction of Smewins Road and Beenham's Road. However, the map does not of itself demonstrate the existence of a public right of way over the Order route.
7. The record of the perambulation of the boundaries of Shottesbrooke parish in 1753 does not record the parish boundary from the former church running north along or adjacent to an enclosed lane. The record of the perambulation does not provide evidence of the existence of a public right of way over the Order route.

Inclosure Awards and maps

8. Three enclosure awards relate to routes adjacent to the Order route. The Waltham St. Lawrence Award 1805 was made under an 1803 local Act which incorporated the provisions of the 1801 Inclosure Consolidation Act (the 1801 Act). The White Waltham and Shottesbrooke Commons Award of 1810 was made under an 1807 local Act which incorporated the provisions of the 1801 Act. The Waltham St. Lawrence Waste Lands Inclosure Award 1815 was made under an 1810 local Act which incorporated the provisions of the 1801 Act.
9. Section 8 of the 1801 Act required all new highways to be set out at a width of not less than 30 feet. In the case of *R v Secretary of State for the Environment ex parte Andrews* [1993] (*Andrews*), it was held that the award of new public routes by inclosure commissioners at a width of less than 30 feet was *ultra vires*. The Court in *Andrews* also held that the width requirements of section 8 did not apply to the award of those routes which had been public rights of way prior to the inclosure process and which were awarded to prevent such rights from being extinguished under section 11 of the 1801 Act.
10. Although the commissioners had no power under the 1801 Act to set out public ways at a lesser width than 30 feet, this would not preclude a public right of way subsequently coming into existence over any route so set out and awarded through long use.
11. The Waltham St. Lawrence Award set out a public footpath '*proceeding in its ancient direction*' at a width of six feet on the alignment of the current Waltham St. Lawrence Footpath 29. The retention of a pre-existing footpath by the award at a width of less than 30 feet was within the powers available to the commissioners and indicates that there must have been some form of public

access over that part of Pundles Lane between Broadmoor Lane and point A on the Order plan in order for the public to be able to access the awarded footpath; this section of the lane is currently recorded as Shottesbrooke public footpath 12.

12. Although Pundles Lane is referred to in the award as a boundary of some of the lands being enclosed and awarded, the lane is not described as being a public highway or noted as being of ancient origin. In this respect the award has limited evidential value as to the status of the Order route.

White Waltham and Shottesbrooke Commons Inclosure Award 1810

13. This award set out a public carriage road and driftway 30 feet wide 'from the South Lodge of Shottesbrooke Park in a southward direction and in its present Track to a Lane leading toward Binfield'. In the award the route is identified as 'South Lodge to Binfield'. There is no indication on the award plan as to the location of South Lodge although Mr Ramm submitted a composite map showing the existence of a building within South Wood just off Broadmoor Lane which he contended would have been South Lodge. At the scale of the plan, a distance of 220 yards from that building places the southern end of the awarded road further along Pundles Lane than the point at which footpath 29 commences.
14. Whereas the award of a public carriageway and drift road may signify that the awarded route continued at the same status, the award does not refer to the route by name although the name Pundles Lane had been applied to the route in the inclosure award for the neighbouring parish only 5 years earlier. Furthermore, there is no indication from the award plan that the awarded public carriage road (or some continuation of it) had an outlet on Smewins Road.
15. Whilst Mr Ramm submits that the description 'toward Binfield' in the award description is indicative of other turnings which needed to be taken along the route before Binfield could be reached, the inclosure map does not suggest that it would have been possible to undertake a journey to Binfield using the awarded route as it had no outlet onto Smewins Road. Despite the award of a public carriage road having been made, I do not consider the 1810 award to demonstrate that the continuation of that route was of the same public status.

Waltham St. Lawrence Waste Lands Inclosure Award 1815

16. The award set out a public footpath of the width of four feet from the southern end of "an ancient Lane called Pundles Lane" running in a southerly direction to join the "public road in the parish of Shottesbrooke". The award plan shows Pundles Lane as an enclosed lane which terminated at or around point B on the Order plan. There is no feature marked on the inclosure plan to show a southerly continuation of the track to the stream or beyond the stream. However what was described as the 'draft' inclosure plan shows a peck line annotated 'foot path' following the parish boundary from Smewins Road to point B.
17. On behalf of the objector it was submitted that the award of a new footpath demonstrated the absence of any public through route from the southern end of Pundles Lane to Smewins Road prior to inclosure. It was also contended that if there had been no public access between these two points prior to inclosure it was unlikely that there had been a public right of way over the enclosed lane

as its southern end would not have been a place to which the public would have resorted.

18. Although Pundles Lane is referred to as an 'ancient lane' there is nothing in the award text to suggest that the route being awarded was in existence prior to inclosure; the footpath is not described as following its '*ancient direction*' as footpath 29 was in the 1805 award. The inclosure evidence suggests that what was being awarded was a new footpath, not the recognition of an existing public right of way which required protection from the provisions of section 11 of the 1801 General Act.
19. I am guided by the decision of the court in the *Andrews* case and conclude that the award of a new footpath from the south end of Pundles Lane to Smewins Road was *ultra vires* and cannot, of itself, be evidence of the existence of a public right of way over the line shown in the draft award map. Consequently, I place little weight upon the 1815 inclosure award documents as evidence of the existence of a public right of way over C – B and by implication over the remainder of the Order route.

Early nineteenth century maps

20. The 1822 Ordnance Survey 1" map shows the Order route and its continuation as a bounded track throughout. The 1823 map of Windsor Forest shows the enclosed section of Pundles Lane terminating at point B; the key to the map shows that footpaths and bridleways were not depicted. Greenwood (1829) does not show any part of Pundles Lane. There is an inconsistency in the mapping of the Order route within these early nineteenth century maps.

Tithe

21. Pundles Lane is shown as an enclosed track from Broadmoor Lane to point B on the Waltham St. Lawrence tithe plan and is shown as serving land parcels 204 (Pundles Corner), 205 (Pundles Meadow) and 209 (Pundles). There is no indication on the tithe plan that a route of any description continues south from point B. Pundles Lane is untithed but as an access to other titheable land the enclosed lane is likely to have been unproductive. The tithe documents do not provide any evidence of the status of the Order route.

Ordnance Survey boundary sketch books 1871 – 1897

22. Boundary sketch books were not prepared for the purpose of recording public rights of way, their primary purpose being to ensure the accurate depiction of features on the ground when a revision of published mapping was undertaken. The 1871 Shottesbrooke boundary sketch book notes the existence of a stile at Smewins Road on the line of what is now Waltham St. Lawrence footpath 38 and shows a path following the parish boundary ditch before crossing 'The Cut' to point C and onwards to point B at the southern end of the enclosed part of Pundles Lane. Although the sketch book does not provide evidence of the status of this marked route, it shows that a feature was sufficiently prominent on the ground for the meresman to note as part of his survey. The recording of this route does not however demonstrate that the route shown was a public route. With the exception of the omission of the word 'stile' at the junction with Smewins Road, the 1871 sketch book for Waltham St. Lawrence shows the same detail as the Shottesbrooke sketch book.

23. The 1897 boundary remark books are inconsistent in the depiction of the continuation of a route from the enclosed section of Pundles Lane. One shows the path south of 'The Cut' by means of a dotted line, whereas the other shows it by means of a double peck line. Both show a connection between the enclosed section of Pundles Lane and The Cut by means of a double peck line. Whilst the boundary sketch and remark books indicate that there was a feature on the ground which the meresman felt should be noted, these books do not provide evidence of the status of that feature.

Ordnance Survey mapping 1872- 1912

24. The evidence in the boundary sketch and remark books is inconsistent with what is shown in the Ordnance Survey 25" and 6" maps published contemporaneously with the information gathered via the sketch books. Ordnance Survey large scale mapping shows a track or path leading from Smewins Road to The Cut which then turns to run north west at point C and which does not make a connection with Pundles Lane. This is the route of the current Waltham St. Lawrence footpath 38. The enclosed section of Pundles Lane is shown gated where it terminates at enclosure 193.
25. The 1897 Ordnance Survey object name book records Pundles Lane as being an '*old lane*'. This description is in contrast to the entry for Broadmoor Lane which is described as a '*Parish road*' and Garthing Lane which is described as an '*occupation road*'. Other routes known to be BOATs or restricted byways are recorded as '*public lanes*'. The inference to be drawn from the object name book evidence is that in 1897 Pundles Lane was not considered to carry any public status.
26. Ordnance Survey small scale maps produced during this period are inconsistent with the large scale mapping in that they show a continuation of Pundles Lane over The Cut to Smewins Road as a bounded through route. This is most likely to be a result of the scale at which the map was published with the current footpath 38 being shown to connect with Pundles Lane when no such connection was shown on the large scale maps of the same period.

1910 Finance Act plans, valuation sheets and field books

27. The enclosed section of Pundles Lane is excluded from adjacent hereditaments. The current line of footpath 38 passed through hereditament 143 for which a reduction in taxable value of £75 for public rights of way was granted. Although the land crossed by footpath 38 only formed part of hereditament 143, it is likely that the allowance granted was in part due to the existence of a footpath on the alignment of footpath 38 and not in regard of an unrecorded route C – B within that hereditament.
28. In a number of cases the Courts have held that the exclusion of a claimed route from assessment under the Finance Act 1910 can be good evidence of the existence of public rights. However, the Finance Act documentation has to be viewed in the context of the other available evidence. In this case I do not attach significant weight to the Finance Act plan as evidence of the existence of public rights; as a means of access to adjacent fields (as demonstrated by the tithe evidence) Pundles Lane would have had little by way of development value and was therefore unlikely to attract incremental value duty.

1932 Rights of Way Act and Survey of Public Rights of Way under the National Parks and Access to the Countryside Act 1949

29. Shottesbrooke footpath 12 was recorded by the parish council in a survey undertaken under the provisions of the 1932 Act. The parish council also considered the southern section of Smewins Road to be a bridle road. No evidence was submitted regarding the rights of way network in Waltham St. Lawrence from this date.
30. The majority of Pundles Lane was not considered to be a public right of way by either Shottesbrooke or Waltham St Lawrence parishes in the survey under the provisions of the 1949 Act. Marginal notes on the parish survey map indicates that Waltham St. Lawrence parish knew that a public footpath from Smewins Road along the Shottesbrooke parish boundary had been awarded at inclosure; the understanding of the parish council at the time was that the footpath northward from The Cut did not connect with Pundles Lane but ran over fields to the north-west to connect with Downfield Lane.
31. Other than the path which is currently recorded as footpath 12, Shottesbrooke parish council did not claim that Pundles Lane had any form of public status. A marginal note appended to the parish claim for a bridleway over Smewins Road notes the award of a public carriage road under the 1810 inclosure.
32. There is no indication from the survey under the 1949 Act that the Order route carried public rights of any description. In Waltham St. Lawrence, the parish claims were based on 50 years of uninterrupted public use; in Shottesbrooke parish, the paths were claimed on the basis of use 'throughout living memory'. In Waltham St. Lawrence, recollections of use for over 50 years would place local knowledge about the position and location of public rights of way within the parish back into the first years of the twentieth century. In Shottesbrooke, if 'living memory' in 1951 could be considered to relate to a time 70 years earlier, that would suggest that the parish survey was drawn from experience dating back to the early 1880s.
33. I place significant weight upon the parish survey with regard to the reputation of the status of the Order route. The survey under the 1949 Act stands as evidence that there was no local knowledge or reputation that the Order route was subject to public rights. The parish councils were also aware of the inclosure awards but did not consider that the awards had any bearing upon the status of the Order route.

Conclusions on the evidence

34. The small scale maps produced by private cartographers and by Ordnance Survey suggest that there was a through route from Broadmoor Lane to Smewins Road. However the large scale and detailed inclosure, tithe and Ordnance Survey maps demonstrate that the enclosed section of Pundles Lane terminated some distance to the north of the stream and did not make a link with Smewins Road.
35. In 1815 the Waltham St. Lawrence inclosure commissioners purported to set out a public footpath between Pundles Lane and Smewins Road, but that award was *ultra vires*. It is clear from the map evidence that from at least 1872 a footpath commenced at Smewins Road and followed, in part, the route purportedly set out at inclosure. Significantly though, the path consistently shown on Ordnance Survey mapping since 1872 did not continue to, or along,

Pundles Lane; the parish survey conducted in the early 1950 suggests that throughout the first half of the twentieth century Pundles Lane did not enjoy a local reputation as a public right of way.

36. Whilst the evidence adduced may have been sufficient for a reasonable allegation to be made as to the existence of a public right of way over the Order route, I am not persuaded that the evidence is sufficient to demonstrate, on a balance of probabilities, that the claimed right of way subsists.

Other matters

37. Objections to the confirmation of the Order were also made on the grounds that the recording of the route as a public right of way and the opening of the path to pedestrian traffic would have an adverse impact upon the flora and fauna found along Pundles Lane. In addition, it was submitted that a public right of way would have an adverse impact upon the training of polo ponies which takes place adjacent to the claimed right of way.
38. The current or potential use of the land crossed by the claimed public footpath or the impact the public right of way would have upon the use of adjacent land are not matters which I can take into account when determining whether public rights subsist over the Order route. Accordingly, in reaching my decision I have not attached any weight to objections of this nature.
39. An objection was also made on the grounds that Part I of the Schedule did not specify the width of the footpath. As the Order is not to be confirmed, I do not need to take this objection into consideration.

Overall Conclusion

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

Formal Decision

41. I do not confirm the Order.

Alan Beckett

Inspector