



# Appeal Decision

by **Mark Yates BA(Hons) MIPROW**

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 10 November 2015

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## Appeal Ref: FPS/F0114/14A/1

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of the Bath and North East Somerset Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 21 November 2014 was refused by the Council on 31 March 2015.
- The appellant claims that the appeal route at Combe Down, Bath should be added to the definitive map and statement for the area as a footpath. The claimed footpath ("the claimed route") proceeds between Pope's Walk and Bradford Road.

**Summary of Decision: The appeal is allowed.**

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### Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. All of the points referred to below correspond to those delineated on a map of the claimed route produced by the Council, which is attached to this decision.

### Main Issues

4. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that "*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...*".
5. As was made clear in the case of *R v Secretary of State for the Environment ex parte Bagshaw and Norton 1994* and clarified in *R v Secretary of State for Wales ex parte Emery 1998* this involves two tests at the Schedule 14 stage:

Test A: Does a right of way subsist? This requires clear evidence in favour of the appellant and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged to subsist.

6. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as

of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

7. If Section 31 of the 1980 Act is inapplicable, then the issue of common law dedication should be considered. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in the public use. Use of the claimed route by the public must be as of right (without force, secrecy or permission). However, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

## **Reasons**

### ***Statutory dedication***

8. The 1980 Act does not apply to land belonging to the Crown, except under a special agreement. It is apparent that the land crossed by the D-G section was in the ownership of the Ministry of Defence ("MOD") between 1941 and 2013 and Crown land encompasses land owned by a government department. There is no evidence of a special agreement being in place during this period. Nor is there any evidence of use by the public prior to 1941. The land was sold in March 2013 to Curo Enterprise Limited ("Curo").
9. The remainder of the claimed route is stated to cross land owned by Combe Down Rugby Football Club ("CDRFC") and the owners of properties that front on to the route, between points C-D and A-C respectively. Whilst the Council gave consideration to the use of the different sections of the route, the evidence is not generally supportive of the public use being limited to the A-D section.
10. In light of the above, statutory dedication is not applicable and the application needs to be determined under the common law.

### ***Common law dedication***

11. Although parts of the claimed route are evident on particular Ordnance Survey maps and aerial photographs, this would not necessarily serve as an indication of use by the public.
12. The Council raises the possibility that the MOD land was requisitioned by the Crown. It says that if the land was requisitioned, the Crown would not have obtained the fee simple and instead would just have a right to possession. This issue stems from the statement by the MOD that there was a lack of certainty regarding whether there had been an open market sale. However, it cannot be determined from the evidence provided that the land was requisitioned. Nor is there evidence to show that the other landowners did not have the capacity to dedicate the claimed route.
13. I have been provided with 30 user evidence forms ("UEFs") in support of use of the claimed route and the Council conducted interviews with a number of these

- users. Four other people provided some additional information in relation to the route. It is also apparent that responses were received from a proportion of the users to questions put by the appellant following the decision to not make an order.
14. The Council and Curo submit that the use by those people who were employed by the MOD would not have been *as of right*. I note the points made by the appellant that the claimed route was located outside of the perimeter fence of the MOD site and access to the site was via a security gate located on Pope's Walk. In addition, reference is made to people being unaware that the claimed route crossed land owned by the MOD and the lack of permission granted to employees to use the route.
  15. The use of the claimed route by MOD employees could have been by way of implied permission and therefore it would be unsafe to rely upon their evidence of use during the period they were employed by the MOD. However, I am not necessarily convinced by Curo's assertion that this extends to relatives of MOD employees.
  16. Curo also refers to some of the users being tenants of the landowner but no further explanation is provided regarding this matter. I understand from the appellant that properties in Trinity Road are owned by Curo. However, I am unable to conclude from the information provided that the use by those people who lived in Trinity Road was not *as of right*. The fact that some people accessed the claimed route from properties on Stonehouse Lane does not appear to have any bearing on the application. The user evidence indicates that the majority of the users used the whole of the route.
  17. I am not convinced that it can be determined that any items stored on the claimed route had the effect of preventing use of the route. Nonetheless, photographs supplied by the appellant appear to show the width of the route restricted at particular points. It is apparent that some of the users strayed off the claimed route and proceeded to a greater extent over the land owned by CDRFC, including on occasions the pitch. Further, not all of the users continued as far as points A or B. It also appears that a few of the users had permission to be on the rugby club's land.
  18. It is recognised that there is a conflict of evidence regarding the alleged locking of a gate at point C, which was in position until 1990. Bearing in mind also that the majority of the use is stated to have occurred after the removal of this gate. There is nothing to suggest that the gate mentioned by the appellant at point B served to obstruct use of the claimed route.
  19. Copies have been provided of letters sent on behalf of CDRFC in 2007 and 2013 to particular properties in Stonehouse Lane which abut the club's land. These letters make it clear that access arrangements are by consent and that there is no right of way for the residents. It appears that none of the users received such a letter. Nonetheless, it could be interpreted as relating to the conduct of particular residents in respect of their use of the land owned by CDRFC. This may be distinct from the use of the short section of the claimed route towards the opposite edge of the club's land. The Council accepts that the challenges mentioned by CDRFC appear to have been directed at people walking along the touchline of the pitch rather than the claimed route. The appellant refers to two witnesses who state that they were informed that the

footpath proceeded in the locality of the claimed route when observed on the rugby club's land.

20. I agree with the Council that there is no evidence that the path was specifically provided for the public. The MOD has outlined reasons why fences are often not placed directly on the boundary of their land. However, a route was available for the public to use and there is nothing to suggest that any action was taken to deter this use when it was observed by security guards. Some of the users refer to occasions when they passed the time of day with the guards.
21. It is apparent that Curo erected notices in 2015 to deny the existence of a public right of way. No details have been provided of any earlier notices being erected to challenge use of the claimed route. The Council accepts that there is a conflict of evidence in relation to alleged verbal challenges on behalf of Curo.

### **Conclusions**

22. Discounting the potential permissive use, there remains in my view a fair amount of written evidence of use, dating back to the 1960s, which is most prevalent from 2000 onwards. A good proportion of this use is stated to have occurred on a daily or weekly basis. I recognise that there is an issue with some of the use in the locality of the rugby club and this potentially lessens the evidence in relation to the route as a whole. The fact that the use was by local residents does not prevent a finding that it was representative of use by the public.
23. Nothing has been provided to demonstrate that the landowners did not have the capacity to dedicate a footpath. It is apparent that the public use was open and observed on occasions. There is no incontrovertible evidence to show that the landowners did not dedicate a footpath over the claimed route prior to the submission of the application. This is most evident in relation to the lack of action taken by the MOD in response to this use. The photographs of the signs erected by Curo indicate that these were erected after the determination of the application by the Council. Whilst I accept that action undertaken by CDRFC could possibly be incompatible with the dedication of a section of the route, this cannot be resolved from the written submissions.
24. Overall, I do not find from the written evidence provided that a right of way can be deemed to subsist bearing in mind the amount of use and given the urban location of the claimed route. There is also a conflict of evidence on certain issues. However, it is my view that the evidence is sufficient to reasonably allege that a right of way subsists in line with test B, as outlined in paragraph 5 above.

### **Other Matters**

25. I note that it is Curo's intention to provide a pedestrian route between Pope's Walk and Bradford Road as part of the approved development for the site. However, this issue has no bearing on my consideration of the appeal.

### **Overall Conclusion**

26. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

## **Formal Decision**

27. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Bath and North East Somerset Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a public footpath as proposed in the application dated 21 November 2014. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

*Mark Yates*

**Inspector**