



# 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: 21 February 2018

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## Appeal Ref: FPS/Z1775/14A/2

- 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 Portsmouth City Council ("the Council") not to make an order under Section 53(2) of that Act.
- The applications dated 18 July 2016 were refused by the Council on 17 July 2017.
- The appellants claim that a route at Town Quay, The Camber, Old Portsmouth ("the claimed route") should be added to the definitive map and statement for the area. This route commences from Trimmers Court junction with East Street and proceeds along the quayside edge to the Bridge Tavern. It continues along the quayside edge to the southern end of Trimmers Court.

## 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 ("the Secretary of State") 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. An application to add the claimed route to the definitive map and statement as a byway open to all traffic was submitted by the appellants in November 2014. This application was refused by the Council and an appeal to the Secretary of State was unsuccessful. The appeal was dismissed on the ground that any public rights for mechanically propelled vehicles had been extinguished by Section 67 of the Natural Environment and Rural Communities Act 2006. The appellants subsequently made two further applications for the claimed route to be recorded as a footpath or restricted byway and these are the subject of this appeal. It is apparent that the evidence provided in relation to the 2016 applications is largely the same as the evidence supplied for the earlier application.

### 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..."*.
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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* Section 53(3)(c)(i) involves two tests at the Schedule 14 stage:

Test A: Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of public rights 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. Section 31(8) of the 1980 Act states that "*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes*".
8. If statutory dedication is inapplicable, consideration should be given to whether an implication of dedication can be shown at common law. In considering this issue regard can be given to the documentary and user evidence provided. When examining the documentary evidence, Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.

## **Reasons**

### ***Statutory dedication***

9. It is generally accepted that the status of the claimed route was brought into question by the obstruction of the route in the early part of 2014. This means that the relevant twenty year period to be considered for the purpose of statutory dedication is 1994-2014 ("the relevant period").
10. Eleven user evidence forms were originally submitted in support of use of the claimed route. Further evidence has been provided from over ninety people in relation to use of the route. I note that additional information has been obtained from some of the users in the form of interviews conducted by the Council. The Council accepts that the user evidence could be sufficient to raise a presumption of the dedication of a footpath. Although reference is made to some potential use being '*by right*' as opposed to '*as of right*', this issue cannot generally be clarified from the written submissions. Nor is it apparent that the applications were turned down on this ground. However, the evidence of use

- by mechanically propelled vehicles has been discounted in light of the previous appeal decision.
11. The Council says there is evidence of use by nineteen cyclists during the relevant period. In contrast, the appellants believe that there is evidence of use by a greater number of cyclists. In terms of information regarding the extent of the different forms of use, the appellants point to Test B outlined in paragraph 5 above. There is evidence of widespread use by pedestrians during the relevant period.
  12. I do not necessarily accept the Council's view that the use by cyclists after the enactment of the Countryside Act 1968 would be commonly attributed to a bridleway. It is not alleged in this case that the evidence is supportive of a pre-existing bridleway and no evidence of use by horse riders has been provided. The cycling and pedestrian use when taken together could be supportive of the dedication of a restricted byway. Clearly, the pedestrian use by itself would be supportive of the dedication of a footpath.
  13. The Council draws attention to potential interruptions due to areas being blocked or people waiting for certain activities to cease. In this respect reference is made to the activities of KB Boats. The appellants say that control was exercised on infrequent occasions for health and safety reasons. They consider that cordoning off a route in such circumstances is not unusual for a public right of way. It is stated to have involved the temporary placing of barriers or bollards whilst a boat was craned. There is a conflict of credible submissions on this issue and no incontrovertible evidence to show that the interruptions were sufficient to prevent dedication under Section 31 of the 1980 Act. I note that the Council acknowledges there are photographs which show some level of public access was available when boats were being lifted. It is also possible that the claimed route was dedicated subject to some form of limitation.
  14. I have addressed above the potential interruptions to the use of the claimed route. Overall there is no evidence of action being taken during the relevant period to clearly demonstrate to the public that there was a lack of intention by the Council, as the landowner, to dedicate a public right of way over the claimed route.
  15. It is apparent that the Council primarily refused to make an order on the ground of statutory incompatibility in accordance with Section 31(8) of the 1980 Act. The Council considers that a public right of way in this locality would conflict with the statutory purpose for which the Camber was created and maintained. Legal advice obtained by the Council is that the applications should be turned down if the dedication of a public right of way is incompatible with its statutory functions as harbour master. By reference to the '*Portsmouth (Camber Dock and Flathouse Wharf) Harbour Revision Order 1990*' and earlier statutory provisions, it is felt that the Council is entitled to find that such a conflict occurs where a public right of way would:
    - impede use of the adjoining quay to moor vessels;
    - restrict the Council's ability to alter the existing quay;
    - interfere with the wish or need to allocate areas of the Camber for parking and to restrict the power to erect fencing;

- affect the Council's power to set apart and appropriate any part of the dock undertakings for exclusive or preferential use and accommodate any particular trade, activity, person, vessel or class of vessels; or
  - restrict the Council's ability to construct warehouses, storehouses, sheds or other buildings, or gates, fences and entrances within the harbour, dock or pier.
16. The opinion of the Harbour Master is that a public right of way would interfere with the ability of the Council to organise itself in relation to current and future operations. As outlined in the case of *The Ramblers Association v Secretary of State for Environment, Food and Rural Affairs [2017]*, the issue of statutory incompatibility should be considered in light of the circumstances when the matter is being examined rather than at an earlier time. Whilst the Council also refers to particular bylaws, it is not apparent how these are relevant to the question of whether the claimed route could have been dedicated as a public right of way.
17. The appellants dispute that the operation of the port is incompatible with the dedication of the claimed route by reference to the present use of this port. It is submitted that the historical evidence is supportive of the Camber operating for some years entirely in association with a dedicated highway when the port was much busier. They say that for most of the relevant period the Camber has been used as a standby harbour for smaller craft, marine recreation, fishing vessels and marine services facilities. The traditional dock operations for which the statutory powers were acquired are stated to have now almost completely ceased. There are conflicting views regarding whether the activities of Ben Ainslie Racing, who lease land affected by the applications, are encompassed by the statutory functions of the port. The appellants also dispute that the legal judgments cited by the Council are directly applicable to the circumstances relating to the Camber.
18. The submissions put forward by the Council may mean that dedication could not have arisen by virtue of Section 31(8) of the 1980 Act. Nonetheless, I do not consider it can be determined from the written submissions alone that this is the case and clearly the appellants' dispute that statutory incompatibility arises in respect of the claimed route.
19. Overall there is a conflict of credible submissions regarding the evidence and no incontrovertible evidence that a way cannot be reasonably alleged to subsist. Therefore, I conclude that test B is applicable. Whilst the user evidence provided could be supportive of the dedication of a footpath, it could equally raise a reasonable allegation of the claimed route having been dedicated as a restricted byway. In the circumstances it would be appropriate to make an order to add a restricted byway to the definitive map and statement.
20. There are also conflicting views regarding the width of the claimed route. In the circumstances I do not consider it appropriate to provide a direction on this matter. The width specified in the order should be based on the evidence. If any party believes that the width included in an order is incorrect there will be an opportunity to make an objection or representation to the order on this ground. Further, bearing in mind the Council has determined the various applications within a year of receipt, I am not satisfied that it is necessarily for me to set a date for an order to be made.

### **Common law dedication**

21. In light of my conclusion above on the issue of statutory dedication it is not necessary for me to address the issue of common law dedication. However, a large amount of documentary evidence has been provided.
22. I do not consider it necessary to recite the evidence provided, which is largely summarised in paragraphs 16-25 of the decision by the Inspector in relation to the earlier appeal. I have looked at the submissions of the parties and the evidence provided. Notwithstanding the potential for traffic regulation orders to be applied to routes which are not highways, I see no reason to disagree with the conclusions of the Inspector in paragraph 27 of her decision that it is at least reasonable to allege from the documentary evidence that public rights subsist over the claimed route and these rights may well extend to vehicular traffic. I also note that any dedication in terms of the full extent of the claimed route may not have been possible until the 1930s due to the previous layout of buildings and alleyways towards the western end of the route. The documentary evidence is bolstered by the user evidence which dates back to the 1920s.
23. Clearly any public rights for mechanically propelled vehicles are extinguished in this case by Section 67 of the Natural Environment and Rural Communities Act 2006. Nonetheless, the documentary and user evidence raises a reasonable allegation of the dedication of a public right of way, which could now potentially be recorded as a restricted byway.

### **Conclusion**

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

### **Formal Decision**

25. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Portsmouth City 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 restricted byway over the route as proposed in the relevant application dated 18 July 2016. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 to the 1981 Act.

*Mark Yates*

**Inspector**