



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: 31 December 2018

Appeal Ref: FPS/Z4310/14A/3

- 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 Liverpool City Council (“the Council”) not to make an order under Section 53(2) of that Act.
- The application dated 15 December 2016 was refused by the Council on 16 December 2017.
- The appellant claims that a footpath between Chatsworth Avenue and Lynwood Road, Liverpool (“the claimed route”) should be added to the definitive map and statement for the area.

Summary of Decision: The appeal is allowed.

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. Bearing in mind my comments below, I am satisfied I can make my decision without the need to visit the site.
3. A number of the representations express concerns regarding crime and anti-social behaviour, or put forward the potential benefits of the route being recorded as a public footpath. However, such matters are not relevant in determining whether an order should be made. I set out the main issues to be considered below.

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...”*. In considering this issue there are two tests to be applied:

Test A: Does a right of way subsist on the balance of probabilities?

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.

5. 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 ("statutory dedication"). 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.
6. Alternatively, an implication of dedication may be shown at common law if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.
7. Consideration also needs to be given in this case to Section 57 of the British Transport Commission Act 1949 Act ("the 1949 Act"), which provides that:
"As from the passing of this Act no right of way as against the Board shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Board and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Board".

Reasons

Documentary evidence

8. The documentary evidence submitted in this case is sparse with the appellant relying on Ordnance Survey ("OS") mapping dating back to the nineteenth century.
9. The claimed route is shown on the OS maps by means of two solid lines. Whilst this is evidence of the physical existence of a track, it provides no clarification regarding whether the route had public or private status. This would apply even if the initials "FP" were present to denote a footpath. A symbol identified by the appellant appears to show that two parcels of land were braced together.
10. The limited amount of documentary evidence is not sufficient to infer that the claimed route is a historical public right of way. This means that I do not find that the route is a public footpath which pre-dates the railway station.

The user evidence

Statutory dedication

11. It is not disputed that the status of the claimed route was brought into question by the erection of fencing in 2005. Therefore, the relevant period to be considered for the purpose of statutory dedication is 1985-2005 ("the relevant period").
12. Both Network Rail and the Council assert that the claimed route forms part of a permissive route to Orrell Park Station and Section 57 of the 1949 Act is applicable as the route formed an access or approach to the station. Attention is drawn to the decision of another Inspector in a similar case nearby. In contrast, the appellant points to the route heading in the direction of the station before turning towards Chatsworth Avenue. He says there is a fence at the point the claimed route heads north-westwards and this separates the route from the platform to the east.

13. There will be doubts regarding whether the claimed route could have been dedicated under statute. However, the extent to which access has been available to the station platform is unclear from the evidence. The conflicting views on whether Section 57 of the 1949 Act is applicable in this case cannot be resolved from the written submissions. Nor can it be determined that the circumstances in the decision of the other Inspector are the same as this appeal. Therefore, I do not rule out the possibility that the dedication of a public footpath could have occurred in this case.
14. Two user evidence forms have been supplied in support of use of the claimed route. I agree with the Council that the forms are insufficient to raise a presumption of dedication under statute. However, additional evidence has been provided which is supportive of more widespread use. Mrs MacLean¹ says her three children attended Rice Lane Primary School between 1984 and 1995 and the route was used to travel to the school and also to visit friends and family. She refers to use by many families. An anonymous letter states that the writer often used the route as a child in the 1980s. Prof. Lesley was one of the people who completed an evidence form and he says the route was well used by people taking their children to school.
15. Reference is also made by the supporters of the application to a public footpath sign at Chatsworth Avenue which may have served to encourage people to use the route whilst it remained in place². Although there is some conflicting evidence regarding the sign, none of the parties who oppose the application have rebutted the evidence of use. Further, some of the submissions from the objectors could point to an acceptance that the route was used by the public.
16. I do not rule out that dedication was prevented by virtue of Section 57 of the 1949 Act. However, it is unclear whether this is the case from the evidence provided. The evidence of use outlined above falls well short of satisfying test A. It is nonetheless sufficient to reasonably allege that a right of way subsists in line with test B. There is also nothing to suggest that the use of the route was challenged or interrupted during the relevant period. Having regard to the above, I find there to be a conflict of credible evidence and that an order should be made on the ground that a right of way can be reasonably alleged to subsist.

Common law dedication

17. I have reached a view on the documentary evidence in paragraph 10 above. In light of my conclusion regarding statutory dedication, there is no need for me to consider the user evidence in the context of common law dedication.

Conclusion

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

Formal Decision

19. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Liverpool 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

¹ She states that the Council has lost the information she previously supplied

² Prof. Lesley says it was removed when the route was obstructed

footpath over the route as proposed in the application dated 15 December 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