



Appeal Decision

by **D. M. Young BSc (Hons) MA MRTPI MIHE**

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

Decision date: 18 December 2018

Appeal Ref: **FPS/L3055/14A/16**

- The appeal is made under Section 53(5) and paragraph 4(1) to the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Nottinghamshire County Council not to make an Order under Section 53(2) of that Act.
- The application was made on 10 July 2017 and was refused by Nottinghamshire County Council on 5 June 2018.
- The Appellant claims that the appeal route from Highland Grove to Worksop Bridleway No. 34, Worksop should be added to the Definitive Map and Statement as a public footpath.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
2. The appellant¹, requests that the Secretary of State directs Nottinghamshire County Council (NCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a public footpath. The applications were considered in a report to the Council's Planning and Licensing Committee on 5 June 2018. This appeal relates to the Council's decision not to make an Order.
3. For ease of reference in this decision, I shall refer to the points labelled on "Plan A" prepared by NCC. This plan shows the western end of the claimed footpath at the end of Highland Grove as point A. The southern end of the route at its intersection with Worksop Bridleway 34 is marked as point E with intermediate points B, C and D in between.
4. In addition to the submissions from the appellant and NCC, I have before me representations made by various interested parties. I have considered all these documents in forming my conclusions. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

The Main Issues

5. Section 53(2) of the 1981 Act requires a surveying authority to make orders to modify its definitive map and statement in consequence of certain events specified in Section 53(3). One type of event is set out in sub-section 53(3)(c)(i): "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... that a*

¹ Although separate applications were made by Mr Stuart Thorpe & Mr Helmuth Osborne only the latter has brought this appeal.

right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates ...".

6. The majority of the evidence in this case relates to usage of the claimed route by local people up until its closure in 2017. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
7. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability? (Test A) or has a right of way been reasonably alleged to subsist? (Test B). For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.
8. It is also open to me to consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.

Reasons

When the right to use the way was brought into question

9. In order to calculate the relevant 20-year period, it is necessary to establish the point at which the public's use of the route was called into question. There is no dispute between the parties that the route was physically obstructed in 2017. The latest possible 20-year period is therefore 1997-2017.
10. However various interested parties have referred to the erection of notices along the route between points A and B. Photographs from 2013 and 2009 clearly show signage on the blue barrier across the route between points A and B. The displayed wording: "*Hospital Staff Access Only, No Public Right of Way, Strictly no Dogs Allowed*" is unequivocal and should have left users in no doubt that their use of the route was not as '*as of right*'. It is also evident from the various photographs that there was a large blue sign on the gable wall of 34 Highland Grove. This was located at eye level and contained similar wording. This photographic evidence casts considerable doubt on the answers given by some in their User Evidence Forms (UEFs) regarding the lack signage on the route. Based on the photographic evidence, an earlier 20-year period of 1989-2009 can be identified.

11. However, based on the evidence of local residents and the landowner, it seems unlikely that the signage was first erected in 2009. Local residents have suggested the alternative dates of 2007 and 1997. The appellant himself states that the signs were first erected in 1992. Diane Blood states that the signs were first erected in 1988 and after that there was a concerted effort by hospital staff to challenge use of the path by the general public. Others state that the fence and signage were erected when No 34 & 36 were converted for hospital use for psychiatric patients around 1990/1991. Irene Eyre who has lived on Highland Grove for 50 years states that the route has never been a public footpath as there has always been a notice to say "*No public right of way – NHS staff only*".
12. The letter from the local NHS Trust states that the path has existed from approximately 1979 onwards and served the hospital site. In the early 1990s No 36 was acquired by the NHS and together with No 34 was developed as accommodation unit for mental health patients. It was around this time that a fence, gate and signage were first erected between points A-B. A former employee of the hospital between 1979 and 2001 puts the purchase of No 36 "*around 1988*" and confirms that a fence and gate were erected across the route between 1988/1990 which remained in place until replaced by the staggered blue barrier shown on the 2009 Street View image. Moreover, the pedestrian gate was sometimes locked by hospital staff who were also instructed to challenge people using the route as a short cut. A Statutory Declaration from the Director of Estates and Facilities for Doncaster and Bassetlaw Hospitals NHS Trust states that the path has been used since the early 1980s and that in 1992 signs were erected that stated that the route was for hospital staff only with no public right of way. The signage remained in situ until 2017.
13. Whilst there are discrepancies between the various testimonies and notwithstanding that some of the original signage may have been removed for a short period following the closure of the hospital, the evidence of local people and those with a working knowledge of the hospital site is that a fence and gate with clear signage was erected sometime between 1988 and 1992. I am therefore satisfied that signage was erected advising the public that the route was not a public right of way by 1992 at the very latest. I am also satisfied that at least some of this signage remained in situ up until 2016 thus clearly demonstrating a lack of intention to dedicate on the part of the landowner during the latest possible 20 year period. Taking all the available evidence I intend to use 1972-1992 as the relevant 20 year period in this case.

Documentary Evidence

14. Up until 1959 no part of the appeal route is shown on local mapping. It was not included in the 1953 parish survey under the requirements of the National Parks and Access to the Countryside Act 1949. According to the Council, the parish survey for the area was completed by William Shaw who lived locally and had a good knowledge of the area.
15. The section between points B-C is shown on the 1959 (1:1250) and again on the 1962 (1:2500) editions of the Ordnance Survey (OS) plan. The 1976 (1:120) OS plan shows a route commencing at point B with a similar alignment through the hospital grounds to point E. Subsequent 1978, 1983, and 1992 editions show the same arrangement. A building plan supplied by the appellant

dating from 1969 shows a small section of the route commencing at point B and running in an eastwards direction.

16. Overall, I find the historical mapping evidence in relation to the route to be patchy. Whilst there is strong evidence to suggest the physical existence of a route from point B-E from 1976 onwards, this is on a slightly different alignment and excludes the section between points A-B. Moreover, since 1888 the OS maps have carried a disclaimer stating that the representation of a road, track or footpath is no evidence of the existence of a right of way. The historical mapping evidence therefore adds little support the existence of a public footpath along the entirety of the claimed route during the relevant 20 year period.

Evidence of public use

17. 5 UEFs have been submitted in support of the claim in addition to 6 statements describing use of the claimed route. The Council conducted interviews with 5 people who had provided information about the route.
18. Although there are some minor variations in the way some respondents have described the section of the route between points C-E, I am satisfied that when taken collectively and having regard to the accompanying maps, the UEFs describe a path that is consistent with the appeal route.
19. Some interested parties have provided information about the path but have not indicated when they used the route or how often. Of those that did, Stuart, Peter, Andrew, Adam and Kathryn Thorpe all refer to their use of the route between 1989 and 2017. This therefore only covers 3 of the 20 years in question. Sheila McMahon and Diane Blood used the route between 1980 and 2017 and can therefore claim 12 years use. Leonard Williams used the route daily between 1980 and 1986 although he worked at the hospital and was not strictly speaking using it as a public right of way. Helen Wood used the path from 2008 onwards which is outside the 20 year period. Mr Stuart Thorpe states that he has not known about the path since 1974 but did not use it himself until 1989. The appellant used the route daily between 1968 and 1980 and can therefore account for 8 years use within the relevant period. Only Mr Romano who used the route daily between 1968 and 2017 can attest to having used the route regularly over the 20 year period.
20. This is a case with many contradictory statements about the when the path came into being, when the various gates and barriers were installed and when the notices were erected or indeed taken down. Although there may be sufficient use in the last few years of the 20 year period to support the claim there is insufficient use in majority of the period to raise a presumption of dedication. In my view therefore this is insufficient to raise a presumption of dedication as a public right of way. I have not identified any other 20-year period when the route could be reasonably alleged to subsist.

Common Law

21. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it. In this case, there is clear evidence from 1992 onwards that signage was erected on the route thus demonstrating the landowner's lack of

intention to dedicate. Bearing in mind the burden of proof lies with the person claiming the rights, there is also insufficient evidence before me to demonstrate that the landowner intended to dedicate the route prior to 1992.

Other Matters

22. I understand that planning permission has been granted for the redevelopment of the hospital site. However, this is a matter outside the criteria set out in the 1981 Act and accordingly I have given it no weight in reaching my conclusion. I have also noted comments in relation to parking in Highland Grove following the closure of the route. Again this is not a matter which is relevant to my decision.

Conclusions

23. On the evidence before me, I consider the evidence insufficient to lead me to conclude that it is reasonable to allege that public rights subsist along the claimed route. Accordingly, I conclude that neither Test A nor Test B is met and the appeal should be dismissed.

Formal Decision

24. The appeal is dismissed.

D. M. Young

Inspector