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# Appeal Decision

by **K R Saward Solicitor**

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

Decision date: 13 September 2019

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## Appeal Ref: FPS/R0660/14A/2

- The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Cheshire East Council ('the Council') not to make an Order under Section 53 of that Act.
- The application dated 16 March 2007 was refused by the Council on 3 December 2018.
- The appellant claims that the definitive map and statement for the area ('DMS') should be modified by adding footpaths from Carver Avenue/Crescent Road to Byley Lane, Cranage.

**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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied that I can make my decision without doing so.
2. A copy of a map prepared by the Council showing the claimed routes is attached for reference purposes.
3. The Council's decision follows a Direction<sup>1</sup> of the Secretary of State issued on 16 March 2018 for the Council to determine the application within 6 months.

## Legal Framework

4. For an addition to be made to the DMS, section 53(3)(c)(i) provides that a modification order shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a 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.
5. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*<sup>2</sup> an Order to add a route should be made if either of two tests is met:

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

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

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<sup>1</sup> Ref: FPS/R0660/14D/3

<sup>2</sup> [1994] 68 P & CR 402

## **Main Issue**

6. The the main issue is whether on the balance of probabilities a public footpath subsists along the claimed routes or is reasonably alleged to subsist.

## **Reasons**

### *Background*

7. The application was submitted by Cranage Parish Council for several linked paths between Carver Avenue and different parts of Byley Lane, based upon user evidence. An external consultant engaged by the Council to investigate the application also examined available archival records to establish whether the claimed routes are of an historical origin. Extracts of the documents are provided. It is uncontested that they do not show any evidence of public rights along the claimed routes.
8. The Parish Council advances its case on common law principles. Ordinarily, where there is evidence relating to usage of the claimed route section 31 of the Highways Act 1980 ('the 1980 Act') is relevant. Subject to certain criteria, it provides a statutory presumption of dedication of a way as a highway where it has been actually enjoyed by the public as of right and without interruption for a full period of 20 years.
9. However, the land affected by the claimed paths was classed as Crown land whilst held by Hospitals and Regional Health Authorities from at least 1934 until 2001 when it was sold by The Secretary of State for Health<sup>3</sup>. The hospital on the site had closed in 1995. By virtue of section 327 of the 1980 Act, section 31 does not apply to Crown land (which includes land held by a government department) unless the appropriate authority agreed with the highway authority that the provisions of the 1980 Act apply in relation to the land. No such agreement appears to have been entered.
10. There are now several landowners and part of the land is unregistered.
11. It is common ground between the Parish Council and the relevant landowner that fencing was first erected across part of the path behind Yew Tree Cottage some time in 2005. This was said to be done to prevent Travellers entering the land. Another affected landowner states that fencing and padlocked gates were erected around his land immediately after its acquisition on 1 February 2006. This would have prevented public use of B-G and F-G. The section between D-E was fenced by January 2006. Gaps were left at each end of E-C when fencing was erected in 2007, but they were closed off later that year when sheep were introduced onto the land. Fencing stopped use of A-B-C-D in 2006 or at least before the application was made in March 2007. Whichever date is applied, there cannot have been an uninterrupted 20-year period of public use from 2001 from when the land ceased to be Crown land for section 31 to apply.
12. Nevertheless, dedication may be presumed against the Crown at common law.

## **Common Law**

13. An inference that a way has been dedicated for public use may be drawn at common law where the actions of the landowners (or lack of action) indicates

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<sup>3</sup> One landowner gives a purchase date of March 2001

that they intended a way to be dedicated as highway and where the public have accepted that dedication.

14. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated. The burden of proof lies with the claimant to show that the evidence suffices to indicate an intention to dedicate.
15. On 14 June 1934 the Cheshire Joint Board for the Mentally Defective had deposited a 6" scale map and statement with the highway authority under The Rights of Way Act 1932.
16. No public rights of way were shown on the map or admitted. In the absence of proof of contrary intention, the deposit would have been sufficient evidence to negative the intention of the landowner to dedicate such a way as a highway.
17. For ongoing protection, the owner or successors in title would need to have made statutory declarations prior to the expiration of 6 years to the effect that no additional ways over the land had been dedicated<sup>4</sup>. The Council confirms that no further statement and plan were submitted ending the protection from public rights of way claims.
18. Thus, the deposit would have sufficed to demonstrate that the landowner did not intend to dedicate any ways over the land in 1934 and the following 6 years. The Council states that there was no indication of the existence of public rights of way when the land was sold in 2001 and it is unknown whether or not the Health Authority knew and accepted usage by the public. However, the landowner did not need to acknowledge use by the public before dedication can be deemed at common law. It is enough for the landowner to have acquiesced.
19. When the landowners fenced off their newly acquired land between 2005 and 2007 it was an overt act making it clear that public rights were not acknowledged. It leaves a long period going back to 1940 in which public rights could be acquired which warrants further exploration from the user evidence.

#### *Analysis of user evidence*

20. The original application was supported by around 20 letters or user evidence forms. Not all have plans attached and where they do it is not always clear which route was taken and there are often inconsistencies with the application plan. Many do not specify the frequency of use and in some cases the period of use is unclear. Four of the users were minors who used the field for play and to reach the bus stop until it was fenced. From what they say, it appears that they used the land generally rather than a defined path. The forms and letters describe public use of the land over many years with several people claiming use by bicycle as well as on foot. The amount of cycle use is not particularly clear and appears to have been secondary to the use on foot.
21. There is some claimed use on horse-back, but only by two people and one of those indicates they did not always take the same alignment. The forms give a flavour of use by residents using the paths as a cut through to the village avoiding the need to use the footway beside the busy road. However, in

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<sup>4</sup> section 1(4) of the 1932 Act

isolation there is insufficient consistency or level of detail in the forms and letters for the evidence to carry much weight.

22. The user evidence forms and letters were supplemented by telephone calls, emails and face-to-face interviews conducted on behalf of the Council. Several witnesses signed statements which carry more weight particularly as they identify specifically the route used with reference to a clear plan.
23. The earliest claimed use is since birth in 1934. Most support is found for the route A-B-C-D which provides a link between Carver Avenue and Byley Lane along an alignment running behind the cottages in Deans Row. The Parish Council claim that the route has been used since the 1950's. This is disputed by one landowner. Whilst acknowledging the presence of a well-defined path for the route A-B-C-D, the owner states: "No doubt access has existed from A to D by various routes across the land but not specifically the route claimed by the council...". It is submitted that in 1994 rubble and soil was deposited in the field which caused users to use the route south of point B rather than cut across the field. The objector accepts that the route claimed by the Parish Council existed from 1994 to 2006/7. Witnesses on the other hand appear to indicate that the alignment only changed when fencing was erected in 2006-2007.
24. The plan produced is stated to be the approximate location of the paths as the Council has not undertaken a full survey of the routes. This may account for discrepancies or it could be that the route has moved over the years. There is a conflict in evidence, but if the landowner is right there is still around 13 years in which there was undisputed use of A-B-C-D.
25. The general consensus among the landowners who responded is that A-B-C-D has been used by the public albeit the width has lessened after one landowner enclosed land behind Deans Row in or around 2006/7. Indeed, the Council concluded that "The witness evidence shows clear evidence of use of the route A-B-C-D...". There are nine people who claim use of this route, six of whom verified their evidence at interview. All claimed use up until 2006 over a period ranging from 15 or so years up to 60 plus years on a regular daily or weekly basis. The number is not high, but it demonstrates a continuity of use over a regular and prolonged period until the route was no longer available.
26. There is less claimed use of the other routes. Only four or five of the interviewed witnesses claimed use of them but having given written statements their evidence is of a reasonable quality over quite a lengthy period.
27. I am also mindful that those who completed user evidence forms say they saw other people using the routes. Potentially from those responses there may well have been greater use which could be brought forward if an Order is made.
28. The Council concluded that there is insufficient evidence to show that public rights are deemed to exist by common law dedication during the time of ownership by the Crown and since 2001 by subsequent owners. However, all that is required at this stage is for the route to be reasonably alleged to subsist. There is no need at common law to show a full 20-year period of use. Moreover, the majority of user evidence did not start until some years after the deposit was made under the 1932 Act and so it does not establish negative intention of the owner to dedicate the paths.

29. The Council suggests that latterly some landowners may have allowed use in the belief that it was on a permissive basis, but there is no evidence before me that express permission was given to the public at any time. By deliberately leaving gaps at either end of the fencing erected between E-C to facilitate pedestrian use, it appears that the landowner acknowledged use of his land by the public before fully enclosing it later on.
30. It appears unlikely that any of the landowners would have been unaware of public use of their land when it was ongoing for such a long period of time. The routes affect various parts of the land rather than somewhere the public could go unobserved.
31. In summary, there is insufficient evidence to show on the balance of probabilities that a right of way subsists over the claimed routes to fulfil the first test. When the second and lower test is applied, I am satisfied there is enough evidence to reasonably allege a right of way subsists at common law to draw the inference that a footpath has been dedicated for public use over the claimed routes.

### **Conclusion**

32. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that it is reasonable to allege that a right of way subsists as a footpath.

### **Other Matters**

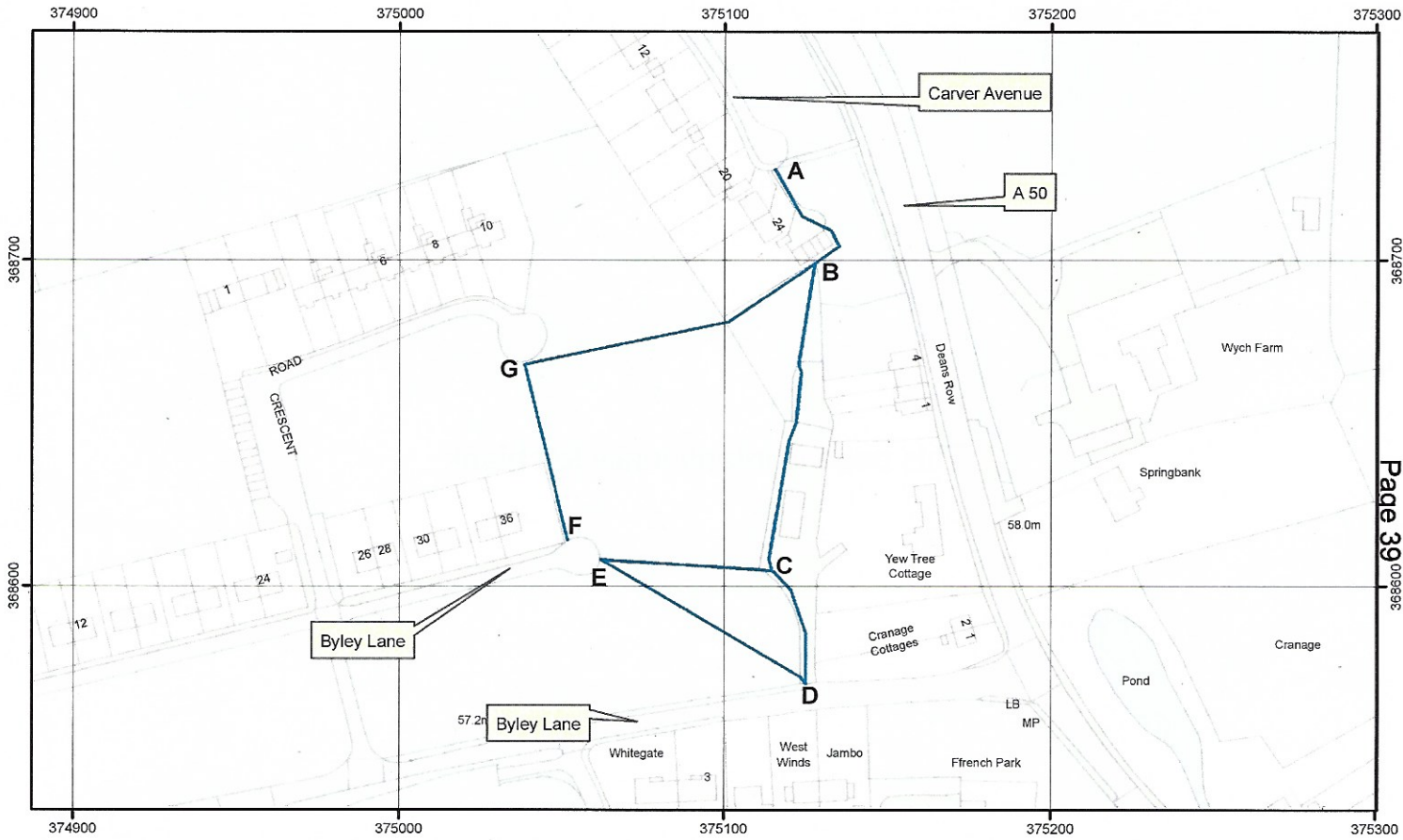
33. Whether there has been any breach of the Code of Conduct for District and Parish Councillors falls outside the scope of this Decision.


### **Formal Decision**

34. I allow the appeal. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, East Cheshire Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a footpath as set out in the application dated 16 March 2007. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*KR Seward*

INSPECTOR




**Claimed Footpath Additions**  
**Carver Avenue/ Crescent Road/ Byley Lane**  
**Craneage. Ref: CO/8/34**

Plan No.  
**WCA/016**

This is a working copy of the definitive map and should not be used for legal purposes



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