

Appeal Decision

by **Martin Elliott BSc FIPROW**

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

Decision date: 06 FEBRUARY 2020

Appeal Ref: **FPS/Z4718/14A/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 Kirklees Council not to make an Order under section 53(2) of that Act.
 - The four Applications dated 3 January 2019 were refused by Kirklees Council on 6 June 2019.
 - The appellant, Mr J Adamson, claims that the appeal routes at Highfields/Clare Hill, Huddersfield, should be added to the definitive map and statement for the area as public footpaths.
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Summary of Decision: The appeal is not allowed.

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 appeal relates to four applications under section 53(5) of the 1981 Act.
2. The appellant considers that a site visit would clarify the situation and has requested such a visit. Whilst I note the request I do not consider it necessary to carry out a site visit; a site visit would not provide an opportunity to discuss the merits of the case. I am satisfied that I can make my decision without the need to carry out a site visit.
3. The application routes broadly follow the (now wooded) perimeter of a playing field. The routes are identified on the various application plans (A to B, B to C, C to D and D to A).
4. The appellant says that if the collection of public user evidence is still required to confirm the existence of the claimed paths then the appellant requires notice from the Planning Inspectorate of a reasonable time period to collect this evidence.
5. The appeal is against the decision of the Council not to make an order (or orders), that decision being made on the basis of the evidence before the Council at that time. Whilst there is nothing to preclude the submission of additional evidence as part of the appeal I am required to consider the appeal on the basis of the evidence before me, it is not my role to seek further evidence. The Council advise that the applications were not accompanied by any user or documentary evidence. It appears from the submissions of the

Council that they made attempts, between May and June 2019, to secure additional evidence from the appellant. Despite those efforts no additional evidence was received.

Main issues

6. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

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? 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.

7. In consideration of the appeals the statutory dedication of public rights of way under section 31 of the Highways Act 1980 is relevant. This provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route.
8. It is also appropriate for me to consider, if necessary, the evidence at common law and whether the use raises an inference of dedication. This requires the consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public.
9. Documentary evidence has also been submitted and considered in connection with the claim.
10. The main issue is whether the evidence shows that rights of way subsist, or are reasonably alleged to subsist on the appeal routes. For the purposes of this appeal it is only necessary to find that the evidence meets test B, the lower test, for the Council to be directed to make an order.

Reasons

Documentary evidence

Mapping

11. None of the Ordnance Survey maps from 1893 to 2019, including the base map used for the 1985 Definitive Map, show any of the routes. Ordnance Survey maps were produced to record topographical features and not with the

intention of showing the status of any public right of way. In any event, given that the claimed routes are not shown, they do not offer any assistance as to their physical existence or status.

12. The appellant contends that the track/footpath roughly along the north and east side of the playing fields is confirmed by the 1985 Ordnance Survey map and is recorded on the Huddersfield A-Z map. The appellant also says that the track along the northwest side of the playing fields is shown on the maps included in the officer's report, on the parish map of Holy Trinity Huddersfield, the Ordnance Survey map of 2006 and the Policies Map for the Draft Local Plan.
13. I note that the sections of track along the northwest and northeast side of the playing field are shown on the various maps. However, the track does not form part of the claimed routes. I also revert to my comments above relating to the production of Ordnance Survey maps (paragraph 11) which are also applicable. In respect of the parish map of Holy Trinity, Huddersfield it is noted that the track along the northwest edge of the playing field is identified as a path but as stated above the track does not form part of the claimed route. There are no indications as to how the map was prepared but it provides no evidence as to the status (public or private) of any of the routes shown thereon.

Aerial photographs

14. The aerial photograph of 17 April 1949 appears to show a worn track along part of the boundary of the Cemetery Road allotments although this does not correspond with the claimed route A to B which is slightly further to the south of this track.
15. The appellant contends that an aerial photograph from June 1949 shows a track leading to a former cluster of buildings from what was subsequently recorded as footpath 343. It is also contended that the photograph shows footways along the edge of the land which was to become the playing fields. Whilst I note these contentions the aerial photograph lacks detail and it is therefore difficult to reach any conclusion in respect of worn routes on the playing field.
16. An aerial photograph published in the Huddersfield Examiner on 19 March 1994 appears to show a track along the northwest side of the playing fields although again the photograph lacks detail. The track shown is not one of the claimed routes but is a route which follows the boundary of the playing fields.
17. Aerial photographs submitted by the Council dating from 2002 to 2018 may show worn tracks which correspond in part with the claimed routes and also show apparent entry points to the playing field. An aerial photograph dated from 1934 'Britain from Above' does not assist in determining the appeal.
18. Aerial photographs show topographical features on the day when the photographs were taken. However, they provide no evidence as to the status of any route shown. Overall the aerial photographs do not support the existence of the claimed routes.

Conclusions on documentary evidence

19. The documentary evidence does not give any indications that the claimed routes are public rights of way and consequently does not raise a reasonable allegation as to the existence of public rights.

Statutory Dedication – Section 31 of the Highways Act 1980

20. In considering a statutory dedication under section 31 of the Highways Act 1980 the 20 year period to be considered applies retrospectively from the date on which the right of the public to use the way was brought into question. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. Neither the Council nor the appellant have considered this issue in the submissions before me. Nevertheless if I am to consider the statutory dedication of the routes then I need to reach a conclusion thereon.
21. The appellant indicates that from approximately 2005 security fencing has separated the track/footpath on the northwest and northeast side of the playing fields. A witness statement dated February 2019 suggests that the fence was erected some twelve to thirteen years previous to the statement. The appellant contends that this walking route has progressively been displaced onto the two sides of the playing fields. It does not appear that this fencing obstructed any of the claimed routes and there is nothing to indicate that the public understood that the right to use any of the claimed routes was being brought into question by the erection of the fence. Consequently the erection of the fence is not an event which brings the right to use the way into question.
22. Subsections (7A) and (7B) of the 1980 Act provides that an application under section 53(5) of the 1981 Act is capable of bringing the right to use a way into question, the relevant date being that of the application. In the absence of any other dates when the right to use the way was brought into question the applications made in January 2019 would have brought the right to use the ways into question. This would set a relevant twenty year period of January 1999 to January 2019.
23. Notwithstanding the above the applications do not include any user evidence forms or other evidence. Such evidence is normally required in order to ascertain the use of claimed routes. I have however had regard to the evidence before me.
24. The appellant states that for the last 35 years or so he has walked backwards and forwards across the playing fields often to Huddersfield town centre. He refers to walking a route along the northwest side of the playing fields in the 1980s and 1990s; this is the track identified in the aerial photograph published in the Huddersfield Examiner (paragraph 16 above) and not part of the claimed route A to B. He also contends that the public has walked for generations across the playing fields and along its sides.
25. A statement to the Planning Committee confirms that the individual giving the statement has regularly walked across the playing field for the past 33 years. Access was gained from the end of Cemetery Road using 'the well-worn and

clearly evident footpath'. Reference is made to seeing other people making use of the same route onto the playing field area.

26. The appellant refers to the heavily exposed earth on the exit/entry points of the claimed routes which it is asserted shows the continuous passage of people on and off the land occupied by the playing fields; these are shown on photographs submitted by the Council. Whilst this might indicate ingress and egress by pedestrians it provides no evidence as to the routes used over the playing field or whether such use, or part of such use, was by the public as of right. As noted in the submissions from the appellant it is stated that the public often fan out from the present well-trodden entry points although the public do not cross pitches when matches are being played. This does not support the use of a defined route.
27. As noted above the appellant has not submitted any evidence of use forms. As such the only evidence of use before me is that from the appellant and the statement to the planning committee. None of this evidence provides any evidence as to the use of the claimed routes. It may be the case that the public entered the playing field at various locations and walked over the field but that does not evidence the use of the claimed routes. It rather suggests that use by the public was of the wider playing field and not along any reasonably defined route. Although there is a suggestion that the public walked around the playing fields along the only unrestricted route, that provides no evidence as to the use of the claimed routes. In the absence of any evidence of use forms no conclusions can be reached as to whether the public used the claimed routes, any periods of use, the frequency of any such use and whether such use was as of right and without interruption.
28. Having regard to all of the evidence it is insufficient to raise a reasonable allegation that the claimed routes are public footpaths. Notwithstanding the fact that I have no evidence as to any landowner demonstrating a lack of intention to dedicate it is, in view of my findings, not necessary to consider this element.

Dedication at common law

29. I have considered the evidence of use in the context of a statutory dedication. Bearing in mind my conclusions I do not consider that there is sufficient evidence of use to raise a reasonable allegation of an inference of dedication at common law.
30. The appellant points out that the gate in the proximity of point B has, for as long as he can remember, had two adjacent bars cut out to assist pedestrians through the gate. Whilst the missing bars may assist public access to the playing field there is no information before me as to how the gap was created. There is nothing before me to indicate that it was the landowner who made the gaps with the intention of facilitating public access. In any event even if the gaps were created by the landowner to facilitate public access this provides no evidence as to the use of the claimed routes and any intentions of the landowner in this respect. The presence of the gap does not assist in respect of a common law dedication.

Other Matters

31. Greenhead Sixth Form College, the majority landowner, objects to the claims on the basis of student safeguarding issues, raises concerns in respect of dog

fouling, the potential for interruption of any games being played on the pitches, damage to the pitches through pedestrian access and adverse effects on the College's rights over the land. Whilst I note and can appreciate these concerns they are not matters which I can take into account. The issue is whether or not rights of way subsist or are reasonably alleged to subsist.

Conclusion

32. Having regard to these and all other matters raised in the written representations I conclude that the appeal should not be allowed.

Formal Decision

33. I do not allow the appeal.

Martin Elliott

Inspector