



Appeal Decision

by K R Seward Solicitor

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

Decision date: 24 April 2020

Appeal Ref: FPS/E0535/14A/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 Cambridgeshire County Council not to make an Order under Section 53 of that Act.
- The application dated 21 September 2018 was refused by the Council on 7 October 2019.
- The appellant claims that the definitive map and statement for the area should be modified by adding a footpath between Virginia Way and Alabama Way to "Long Plantation" Woods and thence to Hill Rise Park.

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 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 in the circumstances of this case that I can make my decision without doing so.
2. A copy of a map prepared by the County Council is attached for reference purposes. This shows a route leading into Long Plantation annotated as the 'Application Route'. The County Council says its investigations extended to an additional route to Hill Rise Park marked on the map as 'Additional Investigation Route'. If only the first section of route is considered up to the entrance into Long Plantation then there would be a cul-de-sac path not linking to any other. Although the applicant's map did not depict the entire route as shown by the County Council, the dashed line denoting the claimed path continues into the plantation with arrows pointing towards Hill Rise Park. The additional stretch is included within the description of the claimed path in the original application form. Moreover, most users who submitted evidence refer to a path to Hill Rise Park. It therefore seems to me that the application route is the entire length shown and it is appropriate for it to be considered.

Legal Framework

3. For an addition to be made to the definitive map and statement ('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.

4. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*¹ 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.

Main Issue

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

Reasons

6. The archival documents researched by the County Council did not reveal any evidence of the claimed path. The application relies solely upon evidence relating to usage and so section 31 of the Highways Act 1980 ('the 1980 Act') is relevant. It provides that where a way over any land, other than a way of such 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 to be 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 calculated retrospectively from the date when the right of the public to use the way was brought into question.

User evidence

7. The application was prompted by a planning application for a 'new build private dwelling' affecting the claimed route which was granted planning permission on 24 September 2018. Therefore, I take the application date of 21 September 2018 as the date when the public use of the claimed route was brought into question giving a relevant period from September 1998-September 2018.
8. The application was supported by eleven user evidence forms ('UEF's'). The County Council interviewed the applicant and three other users. Two of those witnesses had not completed UEF's. As the names have been redacted from the copy UEF's, it is difficult to be sure which UEF was completed by a witness whose statement was also taken.
9. The period of use ranged from a few months to about 25 years. Four users who completed UEF's claimed a full 20 year's use throughout the relevant period based on weekly or daily use. They are supported by six users claiming between around 12-18 years use over the period preceding the application. All users claimed use on foot only.
10. It appears that Huntingdonshire District Council owns the land affected by most of the claimed route except for a short section behind No's 11 and 13 Virginia Way which belongs to a private individual. Both owners raise objections.
11. The private landowner who purchased the land around 4 years ago argues that the access point is very overgrown indicating it is only used by a handful of

¹ [1994] 68 P & CR 402

people. The photographs to illustrate this were submitted in April 2019. Vegetation can grow quickly and if the images are recent, they do not assist in establishing the position prior to the application in September 2018.

12. The local authority owner dismisses the evidence of users who claim access from Virginia Way as not being the route claimed. However, the map indicates that the start of the route in Alabama Way was also accessible from Virginia Way. It is not reasonable to discount their evidence in those circumstances.
13. The applicant states that the level of daily footfall along the claimed route goes far beyond the number of witness testimonies submitted. I can only go on the evidence provided, but I note from the series of photographs supplied there is certainly a worn path through the plantation which could indicate regular use. Whilst there is not a high volume of witness evidence, particularly for the earlier years in the 20-year period, it could still suffice to raise the statutory presumption in favour of dedication as a public footpath if the use was 'as of right'. Such dedication is also subject to the actions of the landowners not indicating a lack of intention to dedicate a public right of way.

As of right

14. The term 'as of right' means without secrecy, force or consent.
15. During the County Council's investigation, a fence was found at point 2 on the attached map which had been visibly broken down and trodden into the ground as shown in photographs taken in March 2019. The conclusion drawn was that the public use was not without 'force'. To support this view, a copy of the 'Definitive Map Orders: Consistency Guidelines' once published by the Planning Inspectorate is produced which gives an example of 'force' as the breaking of locks, cutting of wire or passing over, through or around an intentional blockage.
16. The private landowner further contends that "the fence at the entrance to the plantation has been vandalised and pushed over to create the access in the first place".
17. In a signed statement, the District Council Officer also describes concrete posts on each side of the claimed path at point 2 to which 'green wire netting' was still attached. As there are holes through the posts, it is suggested there was originally a post and wire fence. While this is possible, the District Council acknowledges that it has been unable to ascertain when any such fencing was erected or indeed when the more recent green wire fencing first appeared. All its boundaries thereabouts may have good quality fencing coated with plastic, but it does not establish that the claimed path was fenced at some point during the relevant period as alleged.
18. The District Council asserts that the users who completed UEF's are clearly erroneous in answering that they had never known of any obstructions when there must have been a fence.
19. In one unsigned witness statement, the user says he "noticed recently an old trodden down wired green fence" which he had never seen before. The applicant says there is an old fence post but has never known a fence since his use began in 2005.
20. A local resident since 1977 says in a signed and dated witness statement that

there was a chain link fence “a long time ago” which has now gone. He refers to it being ripped down and trodden down. It is not specified when and where this fence was. If it was across the claimed route, then it corroborates the case made by the landowners which might be enough to defeat the application depending on when the fencing was in place.

21. The County Council considers there are strong parallels with a previous Appeal Decision² involving an application to add a footpath in Lingdale where the public stepped over a low fence to gain access to the claimed path. The Inspector found that the presence of the fence throughout the 20-year period meant that use of the route was by force. In that case, it was accepted by users that access involved climbing the fence. That is in sharp contrast to this case where users maintain there was never any obstruction impeding passage.
22. It appears likely from the photographic evidence that there was once a green wire fence across the claimed path where the remnants still remained in 2019. Quite when it was erected and whether it was before September 2018 is far less clear. Users are consistent in stating that there was never any obstruction apart from the one witness whose statement indicates a chain link fence at some point. Whether the path was unobstructed because fencing had already been broken down and moved aside is not altogether clear from the information.
23. Thus, there is a conflict in evidence which cannot be resolved unless tested.

Lack of intention to dedicate

24. The erection of fencing across a claimed route would indicate an intention on a landowner’s part not to dedicate the route as a public right of way. If there was a fence erected across the path, then that fence would have belonged to the District Council. Fencing would not need to have been present throughout the entirety of the relevant period before the intention not to dedicate could arise.
25. If the District Council had taken steps to prevent public use, there is some indication this may only have been to prevent access/egress south of point 2. Witnesses say that the District Council has maintained the claimed route within its ownership by clearing the way through the woods of vegetation and trees. Photographs show where trees have been cut back. Indeed, several witnesses refer to walking dogs through the wooded plantation.
26. If the District Council has maintained a path for the benefit of the public, those actions would be inconsistent with a lack of intention to dedicate that section.
27. On this matter also, there is a conflict in the evidence.

Other Matters

28. One landowner reports the claimed route is being used for fly tipping of garden waste in the plantation. That is a separate civil/criminal law matter.
29. My decision must be based on the actual route claimed rather than any other route which might be more suitable and accessible for public use. Similarly, concerns over road safety if the path were to close by removing a pedestrian route which avoids trafficked roads cannot influence my decision.

² Order Ref: ROW/3206860 dated 12 July 2019

Overall Conclusion

30. Having regard to the above and all other matters raised in the written representations, I conclude that it has not been shown on the balance of probabilities that a public right of way subsists over the claimed route to fulfil the first test. Based on the second and lower test, I am satisfied there is sufficient evidence available to reasonably allege the existence of a public footpath under section 31 of the 1980 Act.

Formal Decision

31. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Cambridgeshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act, not later than 12³ months from the date of this decision, to modify the definitive map and statement to add a footpath as set out in the application dated 21 September 2018. 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.


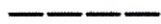

KR Seward

INSPECTOR

³ A longer period has been given than would otherwise have been afforded due to the exceptional circumstances arising from the ongoing global coronavirus pandemic



Date: 22 03 19
By: fn311

Key		
Application Route		
Additional Investigation Route		
Scale: 1:2500		10