



Appeal Decision

by K R Saward Solicitor

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

Decision date: 2 April 2020

Appeal Ref: FPS/K0235/14A/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 Bedford Borough Council not to make an Order under Section 53 of that Act.
- The application dated 11 June 2018 was refused by the Council on 8 October 2019.
- The appellant claims that the definitive map and statement for the area should be modified by adding a footpath from the junction of Wymington Bridleway 11 and Footpath 1 via the "Ballast Pit" and Railway Accommodation Arches to Wymington Footpath 6 in the parish of Wymington.

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 accompanying the application showing the claimed route is attached for reference purposes.

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.

¹ [1994] 68 P & CR 402

Main Issue

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

Reasons

Background

6. The claimed footpath starts at the junction of existing Wymington Bridleway 11 ('BR11') and Footpath 1 ('FP1') and proceeds in a south westerly direction via the "Ballast Pit" and under the railway arches before heading south and south-east to connect with Wymington Footpath 6.
7. The claimed route affects land which is now within the ownership of two landowners. Objection has been raised by the owner of the most northern-eastern section where the claimed path connects with BR11 and FP1.

Documentary evidence

8. As part of its investigation, the Council examined archival documents. It has produced extracts of such documents where any part of the claimed route is shown. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other tribunal to take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, giving it such weight as is justified by the circumstances.
9. The Council identifies 'a minor segment' of the north-eastern end of the route being shown in the Inclosure documents² for the parish of Wymington as a 'Private Drift and Carriage Road'. It gives no indication of public status. The same segment is shown by double peck lines on the Greenwood Map of Bedfordshire 1825 believed to represent an unenclosed track. It also appears as an occupation or accommodation road on the deposited plan for the Midland Mainline Railway 1854 and Loop Line Railway 1876, although it is difficult to see from the quality of the reproduced copies.
10. No part of the claimed route is shown on the parish survey or any of the maps leading up to and including the first definitive map.
11. The most eastern part of the claimed route is consistently shown by double peck lines in various Ordnance Survey editions from 1883 to 1961. The claimed route in the vicinity of the railway line is similarly shown in editions from 1901 to 1958. The southernmost section is also shown by double peck lines in 1883.
12. These maps mostly record the physical presence of a route from the railway lines heading north-east to connect with currently recorded public paths. They provide little evidence in support of its status particularly as it may simply denote an access to the railway land.

Statutory dedication – section 31 of the 1980 Act

13. The application was supported by 42 users claiming use from the 1940's. Section 31 of the 1980 Act is relevant where there is evidence of use. It provides that where a way over any land, other than a way of such character

² No date is given for the documents

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.

Bringing into question

14. There is some disparity in dates, but a locked gate was erected across the route in or around October 2017 after the current owner of the most northern end section of the route bought the land in June of that year. The parties disagree on whether a gap was deliberately left for walkers or whether users created a gap at one side. Whatever the actual circumstances, it appears that use by the public continued until robust metal fencing was erected in January 2018 preventing any form of access and which prompted the application. It is undisputed by the objector that this can be taken as a date when the public's right to use the path was brought into question. There are two possible dates emerging for when the public use was brought into question giving a relevant 20-year period of 1997-2017 or 1998-2018.

Lack of intention to dedicate

15. Whilst user evidence forms have been completed over these periods, a deposit had been made with the Council under section 31(6) of the 1980 Act in respect of land to the south-western side of the railway line. The Act allows an owner to admit what ways over the land are dedicated as highways by the deposit of a map and statement with the local authority responsible for maintaining the DMS. In the absence of proof of a contrary intention, the effect of such a deposit is sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway. For ongoing protection, the owner or successors in title would need to have made statutory declarations at intervals³ thereafter to the effect that no additional ways over the land had been dedicated.
16. The Council and objecting landowner maintain that there has been continuous protection afforded by section 31 for this part of the land since the first map and statutory declaration was deposited on 24 February 1994. The claimed footpath was not included within the Schedule of admitted highways. However, the list is said to relate to the Podington Estate whereas the claimed path is within the parish of Wymington. Podington appears to be a neighbouring parish. Without the accompanying map it is unclear if the deposit covers the relevant land.
17. The applicants also query this 1994 deposit because section 31(6) requires it to be made by the owner of the land. The statutory declaration is sworn by the managing director of the Bromborough Estate Co Ltd. The Official Copies of the registered title say land was transferred to the Estate on 27 June 1997 i.e. after the 1994 deposit was made. A copy of the accompanying Title Plan has not been supplied. The Council took the 1994 deposit as covering part of the claimed route, but I cannot be satisfied that is correct in the absence of the relevant maps and clarification over the apparent disparity in ownership dates.

³ The periods of time have been subject to change

18. A further map and statement supported by a statutory declaration was deposited on 4 October 1997 for the Bromborough Estate covering land in Wymington, amongst other parishes. Statutory Declarations were then made on behalf of the Estate on 9 February 2000 and 4 February 2009. It is undisputed that they cover land affected by part of the claimed route.
19. As the applicants point out, to receive the ongoing benefit from the provisions of section 31(6) the law originally required another declaration to be made within 6 years. Failure to do so would end the period of protection. The period was subsequently changed to 10 years with effect from 13 February 2004 where a statutory declaration had been lodged within the preceding 6 years. The period was extended to 20 years on 1 October 2013.
20. Even if the 1994 deposit was ineffective or irrelevant, it was only 3 years or so before the subsequent deposit took effect on 4 October 1997. With the declaration that followed thereafter cover was in place between the period from 4 October 1997 up to 8 February 2006. In the meantime, the 6-year period was extended to 10 years by statutory instrument taking the cover until 8 February 2010. Before then the next statutory declaration was made on 4 February 2009 which does not now expire until 3 February 2029.
21. Therefore, the deposits made under section 31(6) demonstrate a lack of intention to dedicate. They provide sufficient evidence to defeat a claim for statutory dedication over most of the route, as now belongs to the Estate, from at least October 1997, if not 1994.
22. The erection of signage can, depending on the circumstances, also amount to a lack of intention to dedicate. The previous owners/occupiers who farmed part of the land claim that a sign was erected on one of the gates in the early 1980's saying: "Keep out – Private" or "Private Property/Keep Out", which was present until recently. The applicants say the only sign on the gate said: "Keep dogs on a lead", while sheep were in the ballast hole. They also challenge the date when the sign was said to be erected because it pre-dates the farmers' time of occupation. Clearly, there is a direct conflict in evidence on this issue.
23. As indicated in *R (oao) Godmanchester Town Council and Drain v SSEFRA and Cambridgeshire County Council*⁴ a deposit made under section 31(6) may also be taken as a date when the public use of the route was brought into question for an earlier 20 year period to be considered i.e. before 1994 or 1997.

Railway land

24. The Council pointed out that between 1974 and 1998 part of the claimed route passed through land owned by the railway undertaker including a "Ballast Pit". The sections beneath the railway arches and embankment are still owned by Network Rail whose general policy is to rebut claims for rights of way based on provisions within the British Transport Commission Act 1949. In particular, section 55 makes it an offence to trespass on any part of the railway and section 57 prevents the acquisition of a right of way by prescription or user of any road, footpath, thoroughfare or access to the railway.
25. The Council maintains that these provisions interrupted or prevented dedication of a public right of way over those parts of the claimed route when they

⁴ [2005] EWCA Civ 1597, [2006] 2 All ER 960, [2006] 2 P & CR 1) [2007] UKHL 28, [2007] 3 WLR 85, [2007] 4 All ER 273A

belonged to the railway. There is no dispute that the railway company disposed of the land (including the Ballast Pit) in 1998. Therefore, it remained in occupation by the rail operator over the 20-year period prior to 1997 and 1994.

26. Notably, section 31(8) of the 1980 Act provides that nothing in section 31 “affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes”. Case law confirms that a public right of way can be dedicated over railway land provided that public use of the footpath is not incompatible with the statutory purposes of the railway authority. Incompatibility is a matter of fact to be determined at the date when the question is considered by the decision-maker.
27. There is disagreement over whether it was operational railway land. The objecting landowner accepts there is no evidence to suggest at the current time that the alleged right of way would interfere with the adequate and efficient discharge of the undertaker’s statutory duties as it runs under the railway. They note it is a matter for the railway operator as statutory undertaker. Network Rail has not added to its general position to raise a specific objection.
28. The applicants disagree with the Council and objector over whether the claimed path was always accessible prior to the disposal of land by the railway. It is also disputed whether access could be gained subsequently when the land was used for livestock grazing.
29. From what the applicants say, it would have been possible for the public to use a path running beneath the railway and across the land on either side without interference with railway operations. If that is so, the status of the railway land does not appear to have prevented the acquisition of public rights.

Cul-de-sac paths

30. No depositions were made under section 31(6) for the other affected land until 25 October 2017 by the current owner of the north-eastern end of the claimed path. The appellants claim that this deposit is invalid as it fails to recognise a recorded footpath, but it would not be invalid for that reason.
31. The absence of a deposition prior to 2017 raises the possibility of dedication by user of the unprotected part the claimed path over the preceding 20-year period. In defence, the owner relies upon the judgment in *The Ramblers Association v SSEFRA*⁵ as authority that the claimed path would be a cul-de-sac because there could be no right to walk further along land belonging to the Estate given the section 31 deposit nor would it provide access to any point of popular resort at its terminus.
32. It is clear that public rights may be established over a cul-de-sac by actual use as of right by members of the public. However, in this case the evidence indicates walkers were not using the claimed path up to a certain point only to turn back the same way to connect with the existing public rights of way network. Rather, it was being used as part of a much longer single path.
33. Even if that is enough to defeat a claim over the north-eastern stretch of path over the 20-year period prior to 2017, there was not a cul-de-sac prior to the

⁵ [2017] EWHC 716 (Admin)

deposition in 1994 or 1997. Public rights could have been acquired over the whole route prior to that time.

Evidence of use by the public

34. Whichever of those two dates in the 1990s is applied, around 25 people claim use throughout the entire preceding 20-year period with a couple more claiming use starting later in the 1970's. Many of the users noted recent obstructions towards the end of 2017 but nothing previously preventing their access.
35. The Council states its Officers interviewed witnesses who had completed UEF's "who it was considered could give the most comprehensive and cogent record" of the period between 1974 to 1994. Details of who was interviewed and the interview records are not supplied. The Council drew a general inference that the recollection of those users was not consistent and indicated that other routes were used, some of which were a considerable distance from the claimed route. Without further details it is difficult for me to gauge the strength of the user evidence over this period.
36. Two farmers who say they worked and occupied the land to the west of the railway from 1978, and most of the remaining land from 1997 to 2016, claim that gates at various points were kept closed for farm security and to keep walkers and motorcycles out. This could indicate that there was not continuous uninterrupted user over a 20-year period. However, users dispute that the gates were ever locked. There is also disagreement over whether the claimed path always followed the same alignment or if people walked all over the land to the north.
37. If an earlier 20-year period is taken to coincide with preparation of the Provisional Map in 1977 as discussed by the objector, there is still evidence from a small number of users. However, the previous owners maintain that the long southern stretch of the claimed path did not exist until the early 1970's when a track was made. Prior to that time, it is asserted by the objector that any route through the railway arches was a cul-de-sac, merely used for railway purposes and to gain access to the western side of the railway line. Again, there is a conflict of evidence.

As of right

38. The term 'as of right' means without secrecy, force or consent. If notices were torn down as claimed by previous landowners, then it would indicate that use has not been without force. That would also be the case if users continued despite locked gates. The applicants dispute any of this ever occurred.
39. The two farmers who say they owned land from the 1980's until 2016 confirm they were aware of members of the public using the path. One would tell people to stick to the path which could indicate at least a level of acquiescence in the public use, but it does not constitute 'consent'. The other says he would "sometimes or very often" prevent users from proceeding, but this is contradicted by users.

Conclusion on user evidence

40. Statutory dedication for the whole route cannot have occurred over the 20-year period prior to the claimed route being obstructed by gates in 2017/2018

because the owner of land to the west of the railway clearly did not intend to dedicate the route. Firm evidence of this is found in the deposits and declarations made under section 31(6) which covered the entirety of the period. In consequence, the remainder of the route would be a cul-de-sac path which might be enough to defeat the claim if there is no end focal point.

41. Although the depositions are clear acts of negative intention, that does not assist the landowners if public rights had already been acquired.
42. If a different period is taken triggered by the section 31(6) deposit made in 1997 (or 1994) then there is a sufficient amount of user evidence throughout the preceding 20-years. Having interviewed an unquantified number of witnesses, the Council questions the quality of the evidence and whether users stuck to the same path being claimed. The availability of the claimed route is also disputed by one landowner and whether it was used with force. There is also an issue over whether there was signage along the route from the 1980's indicating that there was no intention to dedicate. Ultimately, there is a direct conflict in evidence which can only be resolved if tested.

Conclusion

43. There is some documentary evidence of the physical existence of a track along an alignment consistent with part of the claimed route, but not its status.
44. There is insufficient evidence to show on the balance of probabilities that a right of way subsists over the claimed route to fulfil the first test. When the second and lower test is applied, all that is needed is for there to be a reasonable allegation that a public right of way subsists. I am satisfied there is enough evidence to reasonably allege the existence of a public footpath for statutory dedication to apply prior to the first section 31(6) deposit in 1994/97.

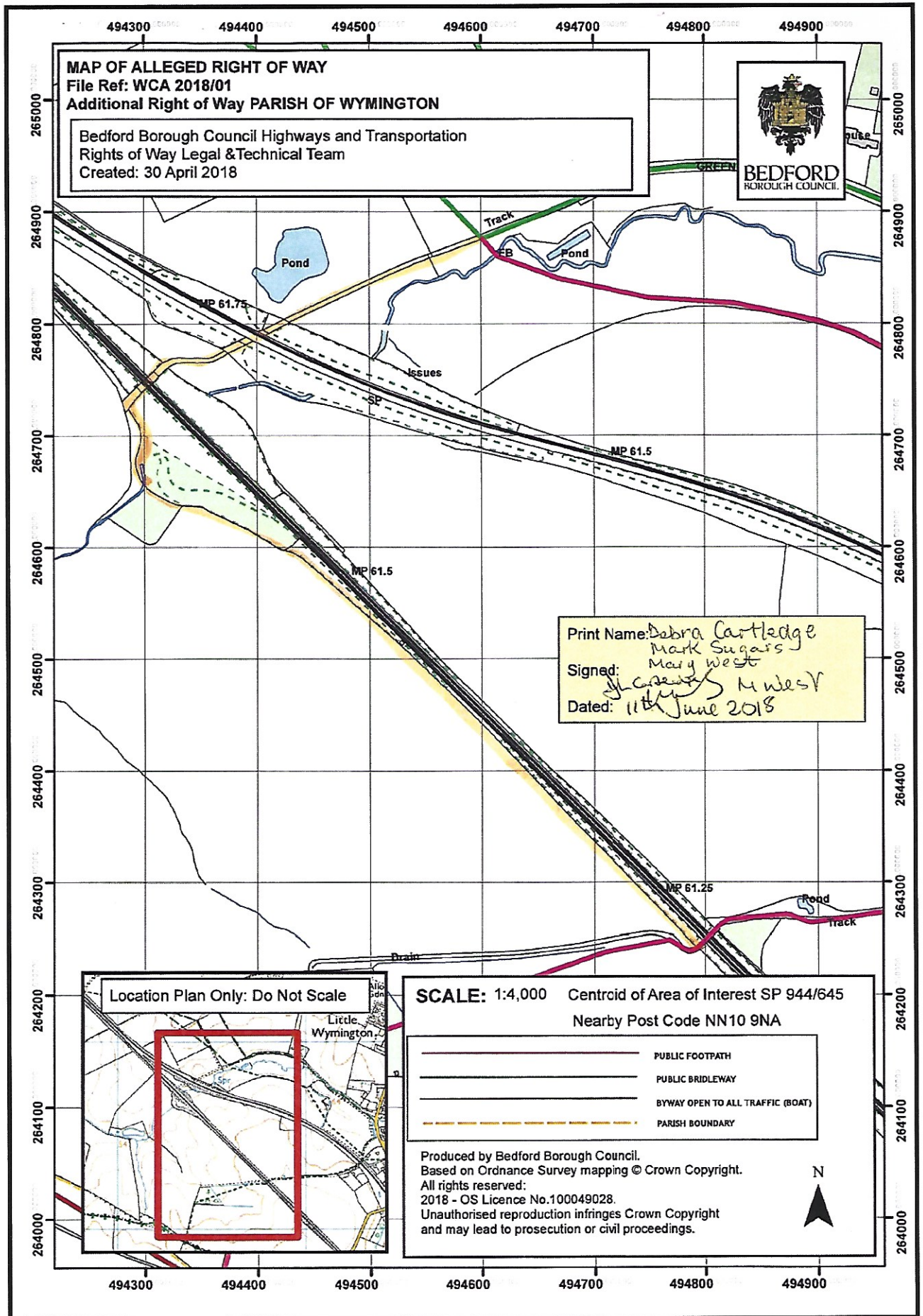
Formal Decision

45. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Bedford Borough Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act, not later than 12⁶ 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 11 June 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

⁶ A longer period has been given than would otherwise have been afforded due to the exceptional circumstances arising from the ongoing public health emergency



Appendix B – Summary of Public Path User Evidence