



# Appeal Decision

by **Mark Yates** BA(Hons) MIPROW

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

Decision date: 8 April 2020

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## Appeal Ref: FPS/M1900/14A/12

- 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 Hertfordshire County Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 6 February 2018 was refused by the Council on 10 April 2019.
- The appellants claim that a footpath between Upper Ashlyns Road and Chesham Road, Berkhamsted ("the claimed route"), should be added to the definitive map and statement for the area.

## 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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. All of the points referred to below correspond to those delineated on the attached map. The claimed route links Upper Ashlyns Road (point 1) with Footpath 13 (point 2) and Chesham Road (point 3). In doing so it crosses the Chesham Road cricket ground (Berkhamsted School playing fields).

### Main Issues

4. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that "*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...*".
  5. In considering this issue there are two tests to be applied:
    - Test A: Does a right of way subsist on the balance of probabilities?
    - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.
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For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

6. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
7. If statutory dedication is not applicable, consideration would ordinarily be given to whether an implication of dedication can be shown at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

## **Reasons**

### ***Capacity***

8. Whilst it remains the case that a landowner has to have the capacity to dedicate a highway under the common law, statute has removed this barrier to dedication. This arose firstly from Section 1 of the Rights of Way Act 1932 and it is now the case under Section 31 of the 1980 Act. Use of a way by the public for a period of twenty years can raise a presumption of dedication under statute. However, Section 31(8) of the 1980 Act states "*Nothing in this section 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*".
9. In respect of the Consistency Guidelines published by the Planning Inspectorate, these are currently under review and have not been updated since 2016. Therefore, they should be treated with some caution. Further, these guidelines were produced to provide general guidance on particular topics involving rights of way casework and do not represent government policy. Nonetheless, as they have not been withdrawn, the guidelines may still provide some assistance.
10. The land crossed by the claimed route is owned by the Berkhamsted Schools Group ("the landowner"), which is stated to have been a registered charity since 1962. It is understood that its predecessor was also a charity. Section 29 of the Charities Act 1960 required a charity wishing to make a disposition involving land it owned, including the granting of rights over the land in question, to seek an order of the Court or the Charity Commissioners, or for it to involve a bona fide purchaser for the best value. Similar provisions were contained in the Charities Acts of 1993<sup>1</sup> and 2011<sup>2</sup>.

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<sup>1</sup> See Section 36

<sup>2</sup> See Section 117

11. The appellants accept that if the land is owned by a charity an issue arises at common law and this position appears to be supported by paragraph 5.64 of the Consistency Guidelines. Documentation has been provided in support of the landowner being a charity. In terms of the public benefit of this charity, I agree with the landowner that this relates to the educational purposes of the school rather than the wider public interest. Overall, the submissions of the parties point to it being unlikely that the landowner had the capacity to dedicate a public footpath under common law.
12. Conflicting views have been provided on the issue of whether statutory incapacity, in accordance with Section 31(8) of the 1980 Act, is applicable in this case. The landowner submits that a footpath would restrict use of the playing field and prevent action being taken for health and safety and security purposes. Further, it is asserted that a right of way with no value would impose a burden on the landowner with no commensurate benefit, which is incompatible with its obligation to protect its charitable assets. In contrast, the appellants consider that a footpath along the northern edge of the land would not restrict use of the field. Reference is also made to the fact that Footpath 13 crosses the site.
13. It is possible that the dedication of a footpath would be incompatible with the use of the land. However, this is something that would need to be supported by evidence. The written submissions alone do not enable me to reach a conclusion on this matter.

### ***Statutory dedication***

#### *When the status of the claimed route was first brought into question*

14. The obiter dictum<sup>3</sup> comments of Lord Hoffman in paragraph 37 of the *Godmanchester* judgment<sup>4</sup> are supportive of there being symmetry between acts that are sufficient to bring the status of the way into question and those that demonstrate a lack of intention to dedicate a public right of way. In this case, a number of events have been put forward as potentially bringing the status of the claimed route into question.
15. The Council's view is that the claimed route was brought into question by way of notices erected in 2010, which served to challenge use of the route. This action was taken in conjunction with letters sent to neighbouring properties advising that there was no public right of way over the land in question. The Council points to use of the route being interrupted at points 1 and 3 during the period prior to 2010. However, consideration needs to be given to whether the earlier events were sufficient to have brought the status of the route into question. The appellants assert that public use of sections of the route was challenged by events that occurred in 1999 and 2007.
16. Reference has been made to a notice erected in 2008 that contained the wording "*Berkhamsted Collegiate School Private Grounds No Dogs Allowed*". The Council do not consider that the word "*Private*" in this context is sufficient to challenge users of the claimed route by reference to the *Paterson*<sup>5</sup> case. I

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<sup>3</sup> An opinion given in the judgment that is not essential to the decision and therefore not legally binding as a precedent.

<sup>4</sup> *Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28

<sup>5</sup> *Brian Paterson v Secretary of State for Environment, Food and Rural Affairs and others* [2010] EWHC 394 (Admin)

do not disagree with this view. Dogs would generally be taken to be a usual accompaniment for people using a footpath. However, there must be some doubt regarding whether "no dogs" worded signs are sufficient to challenge people using a way.

17. It is accepted that the former stile at point 1 was closed by means of fencing for a period of 10 days during the Christmas holidays in 2007. The landowner says advance notification was given to outline that it would be closed during this period. Two local residents (Mr and Mrs Partridge) understand that this action was taken in response to burglaries to the school tool sheds. The appellants assert that this fencing would have served to challenge use between points 1-2 ("the western section"). I take the view that there is the potential for this action to have served to bring the status of the route into question. Clearly, it would not have impacted on those people who only travelled between points 2-3 ("the eastern section").
18. It is also agreed that a gate at point 3 has been locked since the late 1990s, originally at weekends and during school holidays. The appellants estimate this first occurred in 1999 and they submit that this action brought the status of the eastern section into question. Reference is made by the landowner to people being challenged on occasions when trying to climb over the gate. The consistent locking of this gate since 1999 would have clearly served to challenge users.
19. The position is less clear regarding other older signage. Reference is made by the Council to an old notice facing north at point 2, which is worded in the same manner as signs stated to have been placed on Footpath 13, namely "*Berkhamsted School Private Fields. Keep to Public Footpath along lines of trees. Please keep dogs on a lead*". The wording of this sign would not in my view serve to clearly challenge use of another route and the appellants state that it cannot be seen from the claimed route. Reference has also been made to an old sign at point 1 asking people to not take dogs onto the site. However, I have outlined above that I have doubts regarding whether such wording would challenge users of the claimed route.
20. Witness statements from the head groundsman (Mr Herring) and groundsman (Mr Davidson) point to the presence of signs in the 1980s that were worded in a similar way to the more recent signs that have served to challenge the public. This point is disputed by the appellants and they draw attention to the 2008 signs only stating that no dogs were allowed. Nor is there any evidence to corroborate that signs were in place that served to challenge the public around this time. Overall, there is conflicting evidence regarding whether signs present during the 1980s were sufficient to challenge use of the claimed route. I therefore consider it unsafe to conclude that this was the case from the written submissions.
21. I take the view that the claimed route was first brought into question by the locking of the gate at point 3. This action is likely to have served to challenge people attempting to use the whole of the route at times. The relevant twenty-year period ("the relevant period") for the purpose of statutory dedication should therefore be taken to be 1979-99. This finding does not rule out the possibility that only a section of the route has been dedicated as a footpath following public use involving a different period.

*Public use of the claimed route*

22. Sixty-seven user evidence forms (“UEFs”) and four additional statements have been submitted in support of use of the claimed route. I find that around fifty of these people have provided evidence of use during some or all of the relevant period. A proportion of the users only used the western section or the eastern section. However, the evidence of use of the eastern section by itself appears to be quite limited. A number of the users refer to use by other specified people. This anecdotal evidence may not carry a significant amount of weight, but it is suggestive of the UEFs and statements not representing the total extent of the use.
23. Aerial photographs from the relevant period show some potential signs of wear in connection with the claimed route at the time when the photographs were taken, but this is not necessarily reflective of public use. The depiction of the route on the Berkhamsted Citizens Association Footpath Map may be supportive of a locally held belief that it was used by the public.
24. The Council draws attention to variations between the claimed route and the route marked on the plans attached to some of the UEFs. This occurs in relation to the eastern section and is applicable to a small number of the users. It cannot be determined that this arose from confusion regarding the new pavilion shown on the maps in the locality of where the claimed route proceeded to the southern side of the old pavilion. However, in my experience, discrepancies do sometimes occur between the route a person marks on a map and the route they actually used.
25. It is not disputed that the claimed route was used during the relevant period and I find that there is evidence of regular use throughout this period. The main issue between the appellants and the landowner relates to permissive use of the route. This permission was in connection with access for pupils of the Ashlyns School, which is located to the east of point 3. The Council turned down the application in light of the actions of the landowner prior to 2010. It does not dispute that some people used the route with permission but acknowledges that overall the user was as of right.
26. Mr Davidson outlines that he was a pupil at Ashlyns School between 1963-69 and he was aware of a small number of pupils having a paper pass to cross the playing fields. However, this falls outside of the relevant period for consideration. Mr Herring commenced working at the school in 1980 and he says that the pass system was originally in operation. It is estimated that around twenty passes were issued a year before they were replaced sometime between 1985-88 by a more general permission. The landowner asserts that this general permission was communicated verbally by both schools to parents and pupils and was spread by word of mouth.
27. Mr and Mrs Partridge dispute that a permit system was in operation and reference is made to discussions with the former deputy head and other members of staff on this matter. However, no evidence has been provided from people who were involved with the Ashlyns School during the relevant period. Mr Partridge was a governor between 2000-2008 and the current headteacher has only been in post since 2009. One of the users (Mr Ward) mentions that passes were issued during the period he attended the Ashlyns School (1980-84). Ms Lewis refers to passes being issued later to her children on request.

28. Around thirteen of the users made use of the claimed route during the relevant period to walk to Ashlyns School. A proportion of these people also used the route during periods when they did not attend this school. Aside from the parties highlighted above, none of the other users mention having a pass or any widespread permission granted to school children.
29. There is clearly some evidence that is supportive of passes being issued to pupils during the relevant period. Whilst the landowner puts a figure of around twenty passes previously being issued each year, there are no records to corroborate this statement. There is also doubt regarding the degree to which any general permission was communicated to the public. A number of former pupils make no mention of passes or receiving permission to use the route. At this stage, I consider that it is only safe to disregard the evidence in connection with those people who it is acknowledged obtained a pass to use the claimed route. Additionally, I note that one of the users (Mrs Stephens) says she was employed by the landowner between 1992-2004 and accordingly I have erred on the side of caution and discounted her evidence of use during these years.
30. I consider that the user evidence is sufficient to reasonably allege that there was public use during the relevant period that raises a presumption of the dedication of a footpath. In reaching this view, I acknowledge that there is a potential for the permissive use to have been greater than the written evidence suggests and for knowledge of any permission to be more widespread.

*Whether the landowner demonstrated a lack of intention to dedicate a footpath*

31. It is not possible to conclude from the evidence provided that notices in place during the 1980s served to challenge users of the claimed route. Further, I am not satisfied from the written evidence that the extent of the permission granted was sufficient to demonstrate to the public that there was no intention to dedicate a footpath.
32. A couple of the users have referred to challenges being issued. Evidence of isolated challenges may not be sufficient to demonstrate a lack of intention to dedicate a footpath. The submissions of the landowner are suggestive of a greater number of challenges being issued. However, I find it significant that there is a general lack of clarity on particular matters such as when and where these challenges occurred. The Council acknowledges that there is conflicting evidence regarding challenges and to some extent notices.

*Conclusions on the evidence*

33. There is a significant amount of evidence of use of the claimed route during the relevant period. I acknowledge that there is the potential for the dedication of a footpath to be incompatible with the use of the land. However, I do not have clear evidence to demonstrate that this is the case.
34. I have disregarded some of the user evidence and there is an element of doubt regarding whether certain people used the whole of the claimed route, but the number of people involved does not significantly diminish the evidence in support of use of the route. I also acknowledge that an issue potentially arises in respect of permissive use of the claimed route and whether action was taken to demonstrate a lack of intention by the landowner to dedicate a public footpath.

35. There is a clear conflict between the written submissions of the parties on particular matters. Nonetheless, there is no incontrovertible evidence that a right of way could not be reasonably alleged to subsist. The evidence is sufficient to reasonably allege that a footpath has been dedicated in accordance with Section 31 of the 1980 Act. Although I do not need to reach a conclusion regarding common law dedication, it is apparent that an issue arises with the capacity of the landowner to make such a dedication.

**Other Matters**

36. Whilst reference has been made to various benefits arising from the claimed route being recorded as a public footpath, such matters are not relevant to my decision.

**Conclusion**

37. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

**Formal Decision**

38. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Hertfordshire County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the route as proposed in the application dated 6 February 2018. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Mark Yates*

**Inspector**