



## Appeal Decisions

Inquiry opened on 5 September 2017

**by Barney Grimshaw BA DPA MRTPI (Rtd)**

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

**Decision date: 19 September 2017**

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### Appeal Ref: FPS/A5270/14A/1

- This 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 Ealing Council not to make an Order under section 53(2) of that Act.
- The Application dated 5 June 2015 was refused by Ealing Council on 26 July 2016.
- The Appellant claims that a route running from the main entrance to Warren Farm Sports Centre in Windmill Lane, Southall to a 5-bar gate in the north-east perimeter fence near a level crossing over the Brentford Branch railway should be added to the definitive map as a footpath.

**Summary of Decision: The appeal is dismissed.**

### Appeal Ref: FPS/A5270/14A/2

- This 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 Ealing Council not to make an Order under section 53(2) of that Act.
- The Application dated 28 August 2015 was refused by Ealing Council on 26 July 2016.
- The Appellant claims that a route running from the main entrance to Warren Farm Sports Centre in Windmill Lane, Southall to a hole in the perimeter fence at the south-eastern corner of Warren Farm close to Trumper's Way industrial estate should be added to the definitive map as a footpath.

**Summary of Decision: The appeal is dismissed.**

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### Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I held a non-statutory public inquiry into the appeals on 5, 6 and 7 September 2017 at Ealing Town Hall. I made an unaccompanied site inspection on Monday 4 September 2017 when I was able to walk the whole of both claimed routes and a further inspection on Wednesday 6 September when I was accompanied by parties attending the inquiry
3. I attach copies of two maps submitted with the applications showing the claimed routes for reference purposes.

### Main issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered which, when

considered with all 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. 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 me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

5. Most of the evidence in this case relates to usage of the claimed route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where a way over any land, other than a way of such a 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 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
6. Common law also requires me to consider whether the use of the route and the actions of the landowner have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.

## **Reasons**

7. These appeals relate to claimed footpaths crossing land at Warren Farm Sports Centre, Windmill Lane, Southall. The land is currently owned by Ealing Council and at present is largely unused but, from 1990 to 2013 it was operated as a sports centre with football and cricket pitches and other facilities available for hire. From around 1956 until 1990 the land was owned by the Inner London Education Authority (ILEA) and provided sports facilities for the use of school children. Prior to this the land was farmland.
8. Applications and appeals have been made in respect of two claimed footpaths. One runs from the main entrance to Warren Farm Sports Centre in Windmill Lane (Point A) south-eastwards and eastwards along a tarmac road then north-eastwards across a grass area, formerly occupied by sports pitches, to a 5 bar gate in the north-eastern perimeter fence (Point B, Map 1) where it links with an established footpath that leads over a level crossing to Jubilee Meadow and onwards. I refer to this path as Footpath 1. The second path also runs from the main entrance to Warren Farm Sports Centre in Windmill Lane (Point A) south-eastwards and eastwards along the tarmac road but then continues east south-eastwards to a hole in the perimeter fence at the south-eastern corner of Warren Farm (Point B, Map 2) where it links with an established footpath close to Trumper's Way. I refer to this path as Footpath 2.

### **Documentary Evidence**

9. Ordnance Survey (OS) maps dated between 1879 and 1932 appear to show a path running on a similar alignment to the current public footpath across Jubilee Meadow and entering Warren Farm at Point B on claimed Footpath 1. The path then divides with one branch running to the buildings of Warren Farm and the other running southwards towards Windmill Lane. Similar paths cannot be discerned on the copy of a 1962 OS map that I have seen.
10. The paths shown on these maps do not correspond with either of the claimed footpaths. Also, these OS maps, while providing good evidence of features that existed on the ground at the time they were surveyed, do not indicate the existence or otherwise of public rights over routes shown.
11. A Development Brief for Warren Farm prepared in 2011 includes a map on which an annotation reads "*Pedestrian access*" alongside an arrow which appears to point to the location of the 5-bar gate at Point B on Footpath 1. It was pointed out by objectors that this brief had been prepared by external consultants as informal planning guidance to Ealing Council as planning authority and in no way represented the view of the council as landowner or surveying authority.

### *Conclusions regarding the Documentary Evidence*

12. In my view, the documentary evidence that is available does not indicate whether public footpaths subsist over the claimed routes.

### **Statutory Dedication**

13. Access to Warren Farm from Windmill Lane by way of the main entrance (Point A) is freely available to pedestrians and as far as I am aware has been so since the land was developed for sports use. There is a vehicle barrier across the access road near the entrance but this is apparently usually open and in any event has a pedestrian by-pass alongside it. A further vehicle barrier part way along the access road is often closed but has gaps at either side through which pedestrians can pass easily. There are also signs alongside the access road stating for example that dogs are not allowed and that CCTV cameras are in operation. These are clearly intended to be read by people accessing the site.
14. The appellant and supporters of the appeals suggest that the availability of access at this point is consistent with a presumption that the landowner intended to dedicate public rights of way over the land. However, in my view allowing public access to a sports centre for people to participate in sports, to spectate or indeed for more general recreational use does not necessarily imply an intention to dedicate specific routes across the site as public rights of way.

### *Footpath 1*

15. The application for this path to be added to the definitive map was made in June 2015
16. Twenty-three User Evidence Forms (UEFs) or affidavits were submitted in support of the claim for Footpath 1, each signed in the presence of a solicitor. These describe use of the route from 1973 until 2015. Nine people claimed to have used the route throughout the 20 year period ending in 2015 and fourteen for part of that period.

17. The frequency of use claimed varied from daily to only a few times per year. All users stated that they had not been challenged in their use nor had they sought or been granted permission to use the route. However, most users noted that there was a gate across the route and some stated that this had been locked and they had climbed over it.
18. A petition containing 189 names (and 29 anonymous contributions) was also submitted in support of the application. This requested the addition of the path to the definitive map but contained no specific evidence of use of the claimed path.
19. Mr Howard, chair and secretary of the Warren Farm Fliers, who had a licence to fly model aircraft at Warren Farm from 1997 until 2014 and again since May 2017 at times when pitches were not in use, gave evidence that he frequently saw people using the claimed paths.
20. In April 2015 grass mowing was undertaken at Warren Farm by Ealing Council some of which coincided with the lines of the claimed footpaths. Supporters of the appeals suggested that this indicated an acceptance of the claims but this was disputed on behalf of the council. No further mowing appears to have taken place along the same lines since April 2015 except to facilitate use by the flying club.
21. Photographic evidence shows what appears to be a worn path visible along the route of footpath 1 at some times. It was suggested by an objector that this might indicate the line of a drain rather than a trodden path. However, a drainage survey carried out in 2013 would appear to show that the drain in question only follows part of the route of the claimed path.
22. The user evidence was not challenged or contested by the council as surveying authority or by objectors to the appeals. Their cases concentrated on evidence which in their view indicated that use was not 'as of right' as required by the 1980 Act and/or that the landowner had indicated a lack of intent to dedicate rights of way.
23. Mr Belman, who was employed by Ealing Council as a ranger from 1988 to 2008, gave evidence that in 1988 Warren Farm was enclosed by a high (2.4m) chain link fence that had obviously been in place for some time, possibly since the 1950s, and was maintained by ILEA staff. This fence is still in place. At Point B there was a locked gate which was constructed of similar materials to the fence and was the same height. Holes were made in this gate which were repaired by ILEA staff. After Ealing Council acquired the land repairs continued to be made until around 1992/93. This evidence which was not contested by other parties suggests to me that before 1993 public access to Warren Farm by way of Point B was brought into question by the existence of the locked gate, that any public access that was gained by way of holes cut in the gate was contentious and not 'as of right' and that the erection and repair of the fence and gate indicated that the landowner did not intend to dedicate a right of way along the claimed route.
24. According to Mr Belman and again not contested by other parties, in 1994 the gate at Point B was replaced by a metal 5-bar gate fitted with a padlock which was normally kept locked. Mr Belman in his written statement said that he arranged for the chain link gate to be replaced with a metal 5-bar gate "*...so that walkers could freely make access to Warren Farm without damage*". However, at the inquiry he made clear that the decision to replace the gate had

not been made by him although he had been party to discussions about it. Also, on behalf of the council as landowner it was stated that the council had no record of a decision being made to install a gate that would facilitate public access and that this would have amounted to a significant change of policy as previously efforts had been made to restrict access by locking the gate and repairing holes in it.

25. Mr Belman also stated that facilitating public access was in accordance with the council's Brent River Park Countryside Management Plan (1990). However, although a general aim of that plan is to promote public access to the Park, the detailed principles relating to visitor access include an intention to provide for "*...the special requirements of the elderly, disabled and other special groups*" and "*...to prevent illegal or unauthorised vehicle access at entrance points, while not excluding push-chairs, the disabled and other legitimate users*". These principles are clearly not satisfied by the provision of access which necessitates climbing over a gate. In addition, no footpath signs or other furniture typically provided in connection with public paths in the Park has ever been in place at Point B or anywhere else along the claimed Footpath 1.
26. Nevertheless, the evidence of users indicates that people did use the claimed path by climbing the gate and I saw for myself signs of wear on the gate indicative of it having been climbed.
27. The appellant also pointed out the presence of a gap between the gate and the fence and suggested that this could also be used as a means of access. However, this gap is very narrow, would not be usable by many users and was not referred to by other path users. Also, photographs taken in 2016 and earlier appear to show the gap overgrown with brambles and other vegetation. In addition, Mr Belman confirmed that the gap only existed because it would have been impossible to set the new gate post in concrete immediately alongside the existing fence post which is itself set in concrete. In practice the gate post was set as close as was possible to the fence post and the gap that remained was not intended as a means of pedestrian access.
28. The appellant stated that a walker approaching Point B from the north on the existing public footpath would cross the railway and see ahead of him the 5-bar gate and beyond it a concrete ramp and what would appear to be a path continuing across Warren Farm. Accordingly, he suggested that despite the gate being locked the walker might think that his path continued over the gate. However, immediately to the left of the 5-bar gate the walker would also see a metal pedestrian gate which is not locked and leads to the continuation of the existing public footpath around the outside of the perimeter of Warren Farm. There are no signs indicating either route at this point. It was argued by objectors that a reasonable person would not conclude that a public right of way continued over a locked gate rather than through an unlocked pedestrian gate.
29. Until 2013, Warren Farm was a sports centre and land crossed by the claimed footpath was occupied by football pitches. Pitches were not marked out in exactly the same location each year but it is likely that the claimed footpath always crossed a number of pitches. The evidence of users suggests that they rarely encountered football matches in progress but when they did they simply walked around the edge of the pitch and their use was not interrupted. On behalf of objectors it was argued that no landowner would dedicate a right of way over his land the effect of which would give users the entitlement to use

the way at all times and accordingly interrupt games of football on pitches he was charging a fee for use. The appellant argued that it was not uncommon for obstructions to be encountered on public footpaths which required users to deviate from the official route. However, although in some circumstances there may be a right to deviate from an established right of way that is obstructed there is to my knowledge no precedent for a presumption that a path has been dedicated on the basis that it might be regularly obstructed.

30. Evidence was submitted to show that rangers have regularly patrolled Warren Farm both while it was in use as sports centre and since. However, records of these patrols showed no instance of walkers having been told that routes were not public rights of way. Also, no instance of conflict occurring between walkers and users of pitches had been recorded.

### *Footpath 2*

31. The application for this path to be added to the definitive map was made in August 2015
32. Sixteen User Evidence Forms (UEFs) or affidavits were submitted in support of the claim for Footpath 1, each signed in the presence of a solicitor. These describe use of the route from 1980 until 2015. Five people claimed to have used the route throughout the 20 year period ending in 2015 and eleven for part of that period.
33. The frequency of use claimed varied from weekly to only a few times per year. All users stated that they had not been challenged in their use nor had they sought or been granted permission to use the route.
34. A petition containing 60 names was also submitted in support of the application. This requested the addition of the path to the definitive map but contained no specific evidence of use of the claimed path.
35. As mentioned previously, Mr Howard also gave evidence of seeing walkers on this route and patrols recorded no instance of walkers having been challenged or of conflict with users of pitches.
36. Again the user evidence was not challenged or contested by the council as surveying authority or by objectors to the appeals. Their cases concentrated on evidence which in their view indicated that use was not 'as of right' as required by the 1980 Act and/or that the landowner had indicated a lack of intent to dedicate rights of way.
37. At Point B on this path it passes through a hole in the perimeter fence of Warren Farm. On my visits I noted that the hole did not extend to the full height of the fence but was large enough for people to pass through without difficulty. Mr Belman stated in evidence that to his knowledge the hole was repaired from time to time until around 1992/93 but after then until at least 2008 no further repairs had been carried out. Mr Belman also stated that repairs had ceased as a result of a decision being made not to continue trying to prevent access. However, no record exists within the council of any formal decision of this sort which would have indicated a significant change of policy.
38. From photographs and on my visits I saw evidence of at least 3 repairs having been made to the fence at this point as different types of fencing had been used and could still be seen. None of these repairs appeared to have been made recently but it was not possible to tell with any certainty when they had

been made. It also seemed to me clear from the appearance of the fence and the evidence of repairs having been made to it that the hole had been forcibly made and was not the result of deliberate action on the part of the landowner to provide access. However, it was also clear from wear on the ground that numerous people had indeed used the hole as a means of access.

39. In a written statement, James Morton, who has been employed as a ranger by Ealing Council since 2007, states that he requested a contractor to make repairs to 4 gaps in the perimeter fence the largest of which was '*close to the railway crossing*' in March 2013. A subsequent quotation and invoice indicate that repairs were in fact carried out to 11 sections of chain link fencing. On my visits I saw no evidence to indicate whether or not the hole at Point B was in fact repaired in 2013. Mr Morton also states that repairs to the fence had been carried out in the last 10 years but does not specify that these were at Point B although he does state that he himself made emergency repairs close to Point B on one occasion.
40. Again the land crossed by the claimed footpath was occupied by football pitches until 2013 and, although users said they rarely encountered games in play and if they did they simply walked around the edge of the pitch, similar considerations to those described above in relation to Footpath 1 also apply in this case.

#### *Conclusions regarding statutory dedication*

41. It is not disputed that both claimed footpaths have been used by the public for more than 20 years and in my view the amount of use could be sufficient to raise a presumption that the routes had been dedicated as public footpaths. However, it is also clear that use of both routes before around 1993 or 1994 involved passing through forcibly made holes in a gate or fence which the landowner repeatedly sought to repair and thereby prevent access. This action by the landowner in my view continually brought public use into question and any such use cannot be regarded as having been 'as of right'.
42. From 1994 to the present day public use of Footpath 1 has involved climbing over a locked 5-bar gate. Despite the evidence of Mr Belman, it is my view that no reasonable person would conclude that by placing a locked gate across a route the landowner was displaying an intention to dedicate it as a public right of way, unless there was also a sign or some other indication that they were invited to climb the gate, which there was not. I must therefore conclude that the maintenance of the locked gate continually brought public use of Footpath 1 into question, indicated a lack of intention to dedicate a public right of way and that any use made of it was not 'as of right'.
43. As far as Footpath 2 is concerned it is my view that, even if the hole in the fence at Point B was not repaired after 1993, it would have still been clear to users that the hole had been forcibly made and that the landowner had not intended to provide public access at that point unless there had been some sign or other indication of an intention to dedicate a public right of way, which there was not. I therefore conclude that public use of the claimed route was not 'as of right' as required under the 1980 Act.
44. In addition, it would appear that until 2013 both claimed routes would have run across football pitches and, although I accept that it would have been easy for people to walk around the edge of any pitch that was in use. I do not think any landowner would deliberately intend to dedicate a right of way in these

circumstances as such dedication would give users an entitlement to use the path at any time and to interrupt games of football. Consequently it is my view that the presence of the pitches would have brought public use of the paths into question whenever they were marked out and indicated a lack of intention on the part of the landowner to dedicate public rights of way.

45. Overall therefore I conclude that on the balance of probabilities rights of way do not subsist over the claimed routes and nor are they reasonably alleged to subsist.

### **Common Law**

46. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
47. In this case, although there is evidence of public use of the claimed routes over a longer period than 20 years, there is no evidence to indicate that landowners intended to dedicate the claimed routes as public rights of way. In fact, by fencing the site and attempting to restrict access and by using the land for formal sports, landowners indicated that they did not intend to dedicate rights of way in my view. It would therefore not be reasonable to infer that either of the claimed footpaths has been dedicated as a public right of way at common law.

### **Other matters**

48. Three Metropolitan Police tags are attached to the Warren Farm perimeter fence where there is a hole at Point B on claimed Footpath 2. These are known to have been in place since before September 2015 but, despite enquiries being made of the police it has not been possible to discover when or why they were attached. In these circumstances it is not possible to afford any weight to the presence of the tags in determining the appeals.
49. At the inquiry, attention was drawn on behalf of Ealing Council as surveying authority to the fact that notice of the inquiry had not been posted on site or in a local paper as is normally required for rights of way inquiries. However, as the inquiry was non-statutory, procedures were not subject to the normal rules and there was no statutory responsibility for notices to be posted.

### **Conclusion**

50. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities public footpaths neither subsist nor are reasonably alleged to subsist over the claimed routes. The appeals should therefore be dismissed.

### **Formal Decision**

51. I dismiss both appeals.

*Barney Grimshaw*

Inspector



## **APPEARANCES**

### **Appellant**

Malcolm Weller

Path user and local resident

### **Supporters**

Philip Belman

Former ranger, Ealing Council (EC)

### **Surveying Authority**

Douglas Edwards QC

Counsel representing EC as Surveying Authority

Who called:

Chris Bunting

Assistant Director of Leisure, EC

### **Landowner**

Philip Petchey

Counsel representing EC as landowner

Who called:

Keith Townsend

Executive Director, Environment and Customer Services, EC

### **Interested Parties**

Stephen Whale

Counsel representing Queens Park Rangers Holdings Ltd

Who called:

Veronica Jane Carey

Solicitor, Withers LLP

Frances Zammit

Local resident

## **DOCUMENTS**

1. Five bundles of documents including all statements of case, proofs of evidence and additional material submitted in advance of the inquiry.
2. Opening Statement of M Weller, appellant.
3. Position Statement by Ealing Council as landowner.
4. Signed and dated copies of Evidence Forms submitted by P Belman.
5. Photo (Exhibit 1.20) showing gap at gate submitted by M Weller.
6. Aerial photo dated 26/9/2008 with overlay showing line of Footpath 2 and layout of pitches.
7. Enlarged section of aerial photo dated 1995.
8. Extract from Warren Farm Development Brief.
9. Copy of invoice for fencing work by Drayton Fencing dated 26/03/2013.
10. Closing submission of QPR Holdings Ltd.
11. Closing submission of Ealing Council as landowner.
12. Closing submission of Ealing Council as surveying authority.
13. Closing submission of Frances Zammit.
14. Closing submission of Malcom Weller.
15. Closing submission of Phil Belman.



