



# Appeal Decision

by **Michael R Lowe** BSc (Hons)

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

Decision date: 31 March 2016

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## Appeal Ref: FPS/Y3940/14A/8

### Appeal by Mr Richard Arthur Edwards & Mrs Virginia Blanche Edwards

- 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 Wiltshire Council (the Council) not to make an Order under section 53(2) of that Act.
  - The Application by Mr & Mrs Edwards, dated 28 January 2015 and amended on 23 March 2015, was refused by Wiltshire Council on 22 September 2015.
  - The Appellants claim that the appeal route in the Parish of Box between Wadswick Lane and footpath 58 (Box), should be added to the definitive map and statement for the area as a footpath.
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### Decision

1. I dismiss the appeal.

### Preliminary Matters

2. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
3. The appeal has been decided on the basis of the papers submitted.
4. The appeal seeks to have the route of footpath 56 shown on the definitive map and statement 'on its correct historic and used line'. However, the application to the Council only sought to add a new footpath and it is on that basis that the Council determined the application. I have determined the appeal on the basis of the Council's refusal to add a footpath, as that was the application made to the Council.

### Main issue

5. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgments.
6. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and clarified in the case of R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

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Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B

7. Section 31 of the Highways 1980 Act (the 1980 Act) provides that a way may be presumed to have been dedicated as a highway if it has actually been enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years calculated retrospectively from the date on which the right of the public to use the way is brought into question. Landowners can, however, take steps to negate the presumed intention to dedicate a right of way by, for example, closing the way or erecting notices which clearly indicate that no public right of way exists. The presumption of dedication does not apply if there is sufficient evidence that there was no intention during the 20 year period to dedicate the way. Further, under section 31(6), a landowner may deposit with the highway authority a map and statement showing those ways, if any, which he or she agrees are dedicated as highways, followed by a statutory declaration to the effect that no additional ways have been dedicated. In the absence of proof of a contrary intention, the declaration will be sufficient evidence to negative any intention to dedicate any additional highways.
8. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way 'as of right' for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. Whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must be assessed objectively. Unlike presumed dedication under the Highways Act, use by the public does not raise a presumption of an intention to dedicate. The burden of proof is on those asserting the public right to show on the facts that there was an intention to dedicate. The quality and quantity of public user must be sufficient to bring home to a landowner that a right is being asserted, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User, which is acquiesced in by the owner, is 'as of right'. However, user which is with the licence or permission of the owner, is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.

## **Reasons**

9. Ordnance Survey maps from 1886, 1900 and 1921 indicate that from at least the late 19C the route of footpath 56 followed the alignment as shown on the current definitive map. The footpath is delineated passing south of a field boundary and then entering an area of land immediately north of Chapel Cottage, with the map indicating 'L.B.', a letter box in this vicinity. This area of

land is shown braced to Wadswick Road as part of parcel 830 on the 1886 map, and on the subsequent maps until the edition of 1967. The Tithe Map of 1840 depicts this area of land coloured in the same manner and as part of the highway, Wadswick Road, indicating that the land is not productive or tithable. In 1978 part of this land was sold to a Mr Batt, the then owner of Chapel Cottage. A plan prepared in conjunction with this sale describes the land as waste ground.

10. It appears to me that the whole of the land parcel 830, as shown on the 1886 OS map, is probably 'highway waste', that is part of the verge of Wadswick Road. If this land is part of the public highway then the public would have access over the whole of the land, notwithstanding the construction of a garage and enclosure. The legal maxim *once a highway, always a highway* would apply, for the public cannot release their rights through lack of use. The question of the route of a footpath over land parcel 830 does not arise, as the whole of the land is subject to full highway rights and there is no evidence of any stopping up order.
11. An aerial photograph said to date from 1973 indicates that the garden of Chapel Cottage had extended northwards incorporating part of parcel 830, consistent with the 1967 map. However, the Parish Survey in 1950, which led to the first definitive map and statement, does not give any clear indication that the garden had been extended at that time. After about 1978 a garage was constructed to the north of Chapel Cottage.
12. With regard to the alleged footpath between parcel 830 and footpath 58 it is apparent from a survey conducted by the Cotswold Voluntary Warden Service that the wall north of footpath 56, and shown in the aerial photograph of 1973, was still present in 1988. At some time after this date the wall was removed and the two fields combined into a single arable field.
13. On 5 August 2011 Alex Barton made a statutory declaration on behalf of RB & T Barton and submitted the declaration to the Council under the provisions of section 31(6) of the 1980 Act. The statutory declaration followed a statement and deposited plan which did not admit to a public footpath along the appeal route. Although the deposit made by 'Tim Barton', as the declared owner of the land, differs from the declaration by 'RB & T Barton', I consider that the declaration is sufficient to bring into question the appeal route on 5 August 2011, as 'bringing into question' under the 1980 Act does not specifically have to be an action of the landowner. I therefore conclude that for the purposes of the 1980 Act the 20 year period is that before 5 August 2011.
14. Four witness statements indicate that the appeal route has been used by the public, the earliest use being in 1995. The evidence in support of the appeal route is therefore short of indicating public user for the 20 year period in question and the claim under the provisions of the 1980 Act must fail.
15. At common law there is no defined period of public user, but the intention of the landowner is at issue and public user is only evidence of the landowner's intention. In this case any use of the appeal route could be explained as a deviation from the historical route, as shown on the definitive map and supported by the documentary evidence. In my view, the evidence of public user in the context of the northward extension of the garden and buildings at Chapel Cottage does not indicate any intention by the landowner to dedicate a public footpath along the appeal route.

**Conclusion**

16. In my view it is not reasonable to allege that a right of way subsists either under the statutory provisions of the 1980 Act or at common law.
17. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

*Michael R Lowe*

INSPECTOR