



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: 1 December 2016

Appeal Ref: FPS/P3800/14A/1

- 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 West Sussex County Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 9 October 2014 was refused by the Council on 16 June 2016¹.
- The appellant claims that a route between Restricted Byway 2059 and the used route of Bridleway 3183, in the parish of Bramber ("the claimed route"), should be added to the definitive map and statement as a bridleway.

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 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 I can make my decision without the need to do so.
3. The claimed route serves as a link between Restricted Byway 2059 and the used route of Bridleway 3183. It crosses land owned by members of the Passmore family and proceeds in the locality of fields used by the Sussex Radio Flying Club and the Sussex Casting Club. A feature of particular relevance is a fence that has existed at times across the claimed route.

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. As was made clear in the case of *R v Secretary of State for the Environment ex parte Bagshaw and Norton 1994* and clarified in *R v Secretary of State for Wales ex parte Emery 1998* this involves two tests at the Schedule 14 stage:

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

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way

¹ The date of the unsigned notice of the decision which followed the consideration of the application at the meeting of the Council's Rights of Way Committee on 7 June 2016

cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged to subsist.

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 ("statutory dedication"). 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, then the issue of common law dedication should be considered. An implication of dedication may be shown at common law if there is evidence from which it can be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.

Reasons

8. The Council took the erection of the present fence in 2014 as being the event which brought the status of the claimed route into question. They therefore considered the user evidence in terms of the period of 1994-2014 for the purpose of statutory dedication. This issue is not disputed by the appellant who submitted her application in 2014. Further support for the fence being erected in 2014 is found in the user evidence forms ("UEFs") submitted in relation to use of the claimed route². In contrast, the landowners say that the present fence was erected in around 2012. If this is the case, it would constitute a bringing into question and the relevant period should be taken to be 1992-2012.
9. The evidence of the landowners is supportive of a previous fence in this location having been removed, after it had become depilated, by around 1994. I do not therefore consider that I should place much reliance on the statement by a flying club member (Mr Simmons) that the original fence continued to exist well into the 2000s. On this issue, there will be some concern in terms of the route claimed to have been used prior to access being possible. Nonetheless, it is not alleged that statutory dedication applies to a period prior to the existence of the original fence.
10. Nine UEFs were submitted in support of the application and two additional forms have been provided following the submission of this appeal. It is apparent that the Council accepts that the user evidence could be sufficient to raise a presumption of the dedication of a bridleway. Whilst I do not disagree, there is a little concern about the extent of the equestrian use provided. I also note that the landowners dispute this evidence of use.
11. Depending upon when access became possible and when the present fence was erected will determine whether there could have been use over a period of twenty years. The conflict in the evidence on this issue cannot be resolved from the written submissions provided.
12. The reasons for turning down the application were that the use was considered to have been interrupted and the action taken was viewed as constituting a lack of intention to dedicate a public right of way. As outlined below, there is again a conflict between the evidence of the parties.

² I note that one of the users (Mrs Griffiths) states that the fence was erected in late 2013

13. None of the users recall any action which prevented them from using the claimed route prior to the erection of the present fence. Nor do they refer to any challenges to their use of the route. In contrast, the landowners mention challenges to people on the land generally, which often attracted abusive responses. The casting club refers to additional challenges and states that if anyone tried to walk through the field they were asked to leave and use the defined right of way.
14. There is evidence of a notice in relation to the activities of the flying club being in place on the gate near to a parking area. However, the wording and location of this notice would not in my view serve as an interruption to use of the claimed route. The position is less clear in terms of notices erected by the casting club, which appear to have only been erected on match days³. These signs were worded "**WARNING** TOURNAMENT in progress. For your safety, please **Do NOT** enter the field, keep to defined Bridleway & Footpath". Nonetheless, I do not find from the information supplied that these served as a clear interruption to the public use of the claimed route. Bearing in mind also the apparent periods of time that these notices were in place.
15. I also doubt whether the wording and locations of the notices served to indicate a lack of intention to dedicate a public right of way. Furthermore, the notices do not appear to have been erected on behalf of the landowners. Therefore, they are unlikely to have indicated that there was a lack of intention by the landowners to dedicate a section of bridleway.
16. In respect of the photographs provided by the appellant, I do not find that they provide any clear evidence in relation to use of the claimed route during the potential relevant period for the purpose of statutory dedication or assist in determining when the original fencing was removed and the present fencing erected.
17. Overall, in relation to statutory dedication, there is a conflict of credible evidence and no incontrovertible evidence that a way cannot be reasonably alleged to subsist. Therefore, I conclude that an order should be made. The Council does not appear to have considered the issue of common law dedication in reaching its decision on the application. However, in light of my conclusion above, there is no need for me to consider whether an implication of dedication arises at common law.

Other Matters

18. Some matters have been raised which are not relevant to my decision. These include issues relating to whether it is desirable for the claimed route to be recorded as a public bridleway and the potential impact of a bridleway in this locality.

Conclusion

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

³ One day events are generally held on a monthly basis and in some years international matches are held over two days.

Formal Decision

20. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act West Sussex 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 public bridleway over the route as proposed in the application dated 9 October 2014. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 to the 1981 Act.

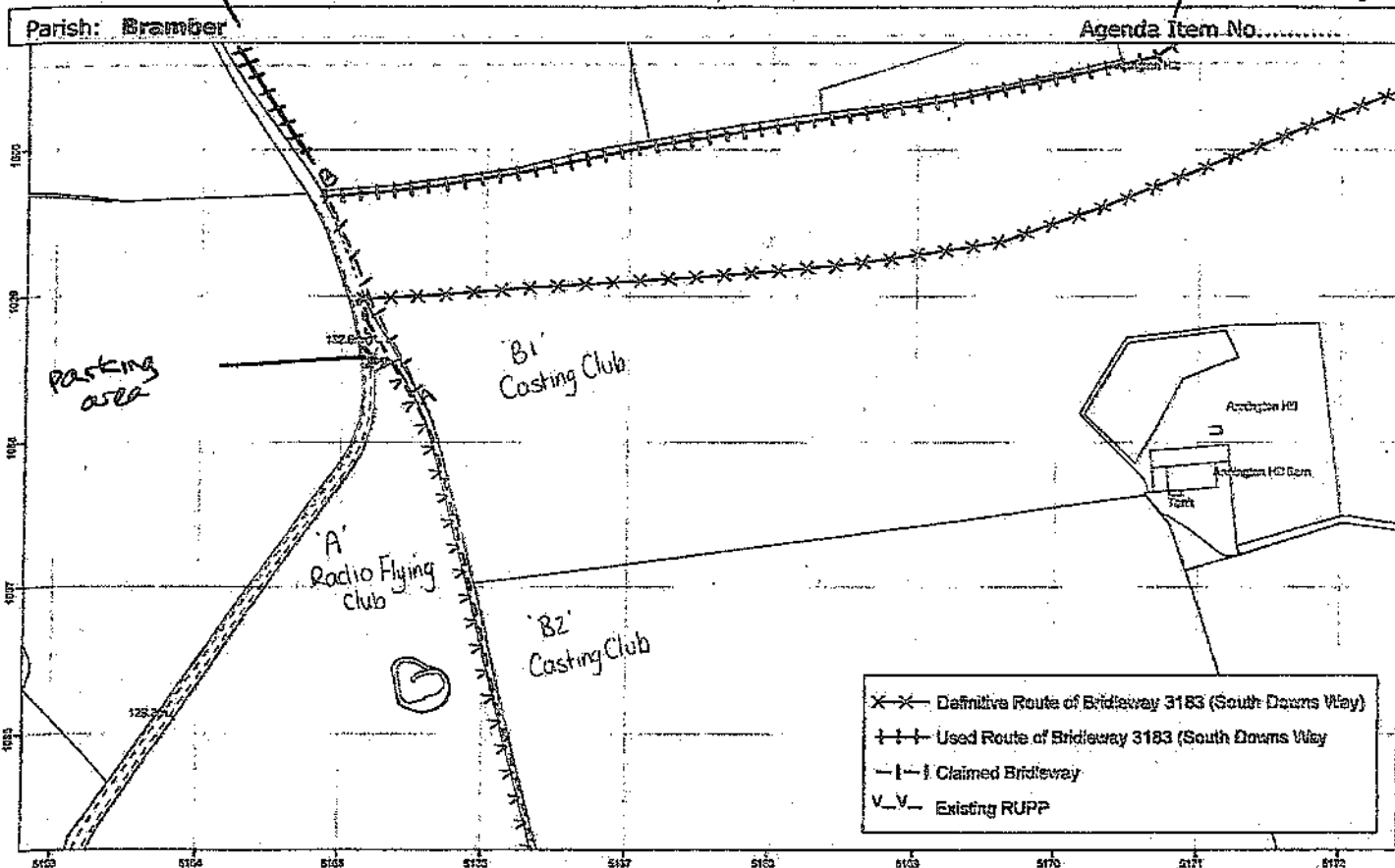
Mark Yates

Inspector

Downs Way to Winchester

Used route of South Downs Way to Eastbourne

Definitive route of South Downs Way to Eastbourne



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DMMO 3/14 - Site Plan



Plan: 01691 1:2,500 at A3
Date: 18.05.2016

OS Sheet: TQ 10 NE
Grid Ref: 5165 1089

Photocopy liable to distortion.

Tony Kershaw
Head of
Legal and Democratic Services