
Appeal Decision

by Barney Grimshaw BA DPA MRTPI (Rtd)

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

Decision date: 22 February 2016

Appeal Ref: FPS/Y3940/14A/7

- 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 County Council not to make an Order under section 53(2) of that Act.
- The Application dated 6 April 2015 was refused by Wiltshire County Council on 2 October 2015.
- The Appellant claims that the appeal route over the site of former West Wiltshire District Council offices should be added to the definitive map as a public footpath.

Summary of Decision: The appeal is dismissed.

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.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map which accompanied the application showing the claimed route 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. Much 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 paths and the actions of the landowner have been of such a nature that the dedication of the paths by the landowner can be inferred.

Reasons

7. The claimed route leads from Wiltshire Drive in the north south-westwards along an adopted footway then along the boundary of the former district council office site, across an access road to a nursery (formerly a social club) and a car parking area to join a section of surfaced path leading to Bradley Road.
8. All the land crossed by the route is currently owned by Wiltshire Council but, from 1974 to 2009 it was owned by West Wiltshire District Council (WWDC) as the site of its offices and associated facilities and from 1973 to 1974 by its predecessor authority Trowbridge Urban District Council (UDC). Prior to 1973 the land was owned by EH Bradley and Sons and in agricultural use.

Documentary Evidence

9. No substantive documentary evidence regarding the status of the appeal route has been submitted. Ordnance Survey (OS) maps prepared between 1887 and 1973 do not show the route which is a good indication that no path was visible on the ground at the time the maps were surveyed.
10. In the survey of rights of way carried out in 1950 by Trowbridge UDC, the route was not identified and consequently it was not included in the definitive map.
11. When planning applications were made in 1972 for the construction of district council offices no reference was made to the existence of a public right of way on the site although the construction of a short section of path linking the car park to a bus layby on Bradley Road appeared to form part of the proposed development.
12. The northernmost part of the route is already recorded as a highway maintainable at public expense in highway records. It forms part of a footpath link from Elcombe Close to Wiltshire Drive.

Statutory Dedication

Date when public use was brought into question

13. Public use of the claimed route was brought into question in 2014 when a barrier was erected across it at the time that demolition of the adjacent council offices commenced. The erection of this barrier seems to have triggered the application for the route to be added to the definitive map.

14. A sign was erected by Wiltshire Council in 2009/10 adjacent to the route which clearly stated "*No public right of way*". This sign is still in place. A number of witnesses said that this sign replaced previous similar signs, possibly erected in 2001 or earlier. A former WWDC caretaker, employed at the site from 1985-2009 reported that as far as he could remember there was always a sign at the Bradley Road end of the path stating that it was not a public right of way. However, as the precise wording, date of erection and location of this or other signs is not known, it is difficult to conclude that they brought public use into question on any specific date.
15. In around 2004 a post and chain fence was erected by a tenant of the district council around car parking spaces leased from the council. This fencing appears to have at least partially obstructed the claimed route.
16. In my view, public use of the appeal route was clearly brought into question in 2014 but may well have previously been brought into question in 2009/10 and 2004. I have considered the implications of each of these dates with regard to the possibility that dedication of the route as a public footpath might be presumed in accordance with the provisions of the 1980 Act.

Evidence of public use

17. The application is supported by 15 User Evidence Forms (UEFs), additional information and photographs submitted by the applicant and 4 letters written by people who had not completed UEFs.
18. Whichever date is considered to be the time when use of the route was brought into question, 10 people claim to have used the route throughout the preceding 20 year period and additionally 4 or 5 people claim to have used it for part of the period. Most people claimed to have used the route frequently, often on a daily basis. Users also generally stated that they had seen other people using the route.
19. On the face of it the available user evidence, although relatively limited in view of the location of the claimed route within a large urban area, appears to indicate the existence of a footpath which was used by some members of the public for a continuous period of over 20 years before such use was brought into question. However, the county council has drawn attention to a number of factors which it suggests tend to indicate that public use of the claimed route was not such as to satisfy the requirements of the 1980 Act.
20. Eight of the people who completed UEFs (and 2 that wrote supporting letters) were either employees or council members of WWDC, the owner of the land crossed by the appeal route during the relevant periods. It is suggested that their use of the route to get to and from the council offices was accordingly by permission or invitation rather than 'as of right'. In addition, examination of the evidence provided indicates that some of these people generally only used part of the claimed route, typically the southern section between the council car park and Bradley Road.
21. It is also pointed out that the land crossed by the claimed footpath was occupied by district council offices and by other facilities to which members of the public needed to have access. This being the case, it is suggested that use of the route for the purpose of gaining access to these facilities should also be regarded as taking place by licence or invitation rather than 'as of right'.

22. It is further noted that there was not a defined path over much of the claimed route. A paved path leads from Bradley Road, where there is a bus stop, to the former council car park and a publicly adopted paved path leads from Wiltshire Drive to Elcombe Close. However, between these paths the claimed route is not defined and crosses a parking area and associated grassed areas. The county council argues that it would not have been possible for members of the public to consistently follow the claimed route as this was obstructed at times by parked cars, fences, a recycling facility, lamp posts and possibly tree planting. Some users of the route also acknowledged that it was sometimes necessary to deviate to avoid obstructions.
23. In general it appears that the land crossed by the appeal route was in public ownership, largely unfenced and occupied by council offices and other facilities to which members of the public were entitled to have access. Much of the use of the route appears to have taken place for the purpose of such access and was effectively by permission or invitation of the landowner or one of his tenants. The way that the land was developed suggests that although pedestrian access over part of the appeal route was encouraged by the construction of a surfaced path (Bradley Road to the car park), no provision was made for such access over other sections and indeed the route was obstructed in various ways.
24. The sign erected in 2009 not only indicated that there was no public right of way but also that use of the land for sports and other pastimes was permitted. It seems possible that this also reflected the attitude of the former WWDC.
25. Overall, it is my view that the evidence that has been submitted is not sufficient to raise a presumption that the appeal route has been dedicated as a public footpath in accordance with the provisions of the 1980 Act.

Common Law

26. 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.
27. In this case, it seems clear that some members of the public have used the claimed route or one similar to it since the former district council offices were constructed (1973/74). However, as considered above, such use was not sufficient to raise the presumption that the route had been dedicated as a public footpath under the 1980 Act. Also, it is not clear that the district council as landowner intended to dedicate a public footpath by allowing pedestrian access to its offices and other facilities. In fact it can be argued that by causing or allowing the route to be obstructed in various ways the landowner indicated that he had no intention to dedicate such a right of way.
28. Some users claim that the route was used before the development of the council offices in 1973/74 when the land was occupied by open fields and Wiltshire Drive had not been constructed. However, no OS or other plans that have been produced indicate the existence of the route before this time. Also it was not claimed as a public right of way during the preparation of the definitive map and no right of way was identified when planning permission for the offices was considered. The user evidence that is available relating to this period is limited and in my view not sufficient on its own for an inference of dedication to be reasonably alleged.

29. Overall, it is my view that there is insufficient evidence available to justify an inference of dedication of the appeal route as a public footpath at common law.

Conclusion

30. Having regard to these and all other matters raised in the written representations I conclude that the evidence does not indicate that a public footpath subsists over the appeal route nor that on the balance of probabilities it is reasonable to allege that a public footpath subsists. Accordingly, the appeal should be dismissed.

Formal Decision

31. I dismiss the appeal.

Barney Grimshaw

Inspector

