The Planning Inspectorate

Appeal Decision

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 22 May 2017

Appeal Ref: FPS/P3800/14A/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 West Sussex County Council not to make an Order under section 53(2) of that Act.
- The application dated 14 August 2015 was refused by way of notice from West Sussex County Council dated 16 November 2016.
- The appellant claims that a footpath, or footpaths, should be recorded on the Definitive Map and Statement for the area.

Summary of Decision: The appeal is dismissed

Preliminary Matters

1. I am appointed 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 Wildlife and Countryside Act 1981 ("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.

Description of the route

3. The application refers to the route in two sections: A – B which runs generally west from Selsfield Road; and B – C, which runs south-west to join Footpath 22 WH ("FP22"). The recorded footpath 21 WH ("FP21") crosses the claimed route at point B. The claimed route itself follows the alignment of a vehicular driveway giving access to eight properties at Stonelands, as well as other properties and land with rights over the route.

Main issues

4. In considering the evidence, I take account of the relevant part of the 1981 Act and relevant court judgements. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement ("the DMS") for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

> *"(i) 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, being a right of way to which this Part applies."*

5. By reference to *R v SSE ex parte Bagshaw and Norton (1994)* and *Todd v Secretary of State for the Environment, Food and Rural Affairs (2004),* there are two tests. An Order should be made where either of the following tests are met:

> *Test A, does a right of way subsist on the balance of probabilities?*

There must be clear evidence in favour of the appellant 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 cannot be reasonably alleged to subsist, then it must be a reasonable allegation.

6. Such matters may be considered at statute, under the Highways Act 1980 ("the 1980 Act") or at common law. The appellant believes that the user evidence is sufficient to raise a presumption of dedication under the statute in relation to section A – B. He argues that the entirety of the route can be shown to be a public right of way at common law, particularly by reference to documents.

7. Section 31 of the 1980 Act states that where a way has been enjoyed by the public without interruption for a full period of 20 years, the way is presumed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention to dedicate it during that period. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question.

8. *R (on the application of Godmanchester and Drain) v SSEFRA (2007)* ("*Godmanchester*") addresses the meaning of s31(2) with regard to what acts constitute 'bringing into question.' By reference to earlier case law: "*Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway."*

9. Dedication can be inferred at common law, but both dedication by the owner and use by the public must occur to create a highway. The question of dedication is one of fact to be determined from the evidence. Use by the public provides evidence, but it is not conclusive evidence from which dedication can be inferred. There is no defined minimum period of use at common law but the legal burden of proving the owner's intentions remains with the claimant. The appellant suggested that the claimed route, along with what is now recorded as part of FP22, was an ancient highway, not necessarily simply a footpath.

10. In relation to documentary evidence, section 32 of the 1980 Act, '*Evidence of dedication of way as highway*', sets out that "*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced*."

11. I must decide whether a reasonable allegation of public rights has been made 'on the balance of probabilities'.

Assessment of the evidence

Section 31 of the Highways Act 1980

When the status of the claimed route was called into question

12. The 1980 Act requires that the twenty-year period is calculated retrospectively from a date of 'calling into question' of the public rights. West Sussex County Council ("WSCC") relied on a date of 1998, which was when an electric gate was placed across the eastern end of the driveway, near point A. The appellant argued that as a pedestrian gate was left alongside the vehicular gates, people could still walk the claimed route from this time. This was prevented in 2012, when the appellant found that gate locked.

13. Stonelands Residents Association ("the SRA"), who jointly own the land crossed by the claimed route, indicate that from taking residence in 1999 anyone found walking on the drive was challenged regarding their presence. The appellant indicates that he was never stopped in using the route. One of the user evidence forms ("UEFs") refers to "*One resident once said "the footpath is that way" and pointed summer 2004".* Although the user continued use to 2006, this reported interaction correlates to the reported actions of the landowners in pointing out the recorded footpaths if coming across people on the drive and, in my view, effectively challenging such use.

14. As *Godmanchester* sets out, it is necessary for the actions to clearly challenge the use. The electric gates appear to have interrupted the use of part of the route, forcing users to follow an alternative, through only part of the route formerly available. However, the public appear not to have understood this to be a challenge to their use as a whole, although I note the WCSS comment that West Hoathly Parish Council ("the Parish Council") would have been consulted on this application and did not object on the basis that a public right of way was affected. On balance, I agree with the appellant that this was probably insufficient to have called use into question.

15. The SRA refer to challenges from 1999 and there is some corroboration of this from 2004. The locking of the gate in 2012 is a clear date on which use was prevented and so called into question.

16. There has been some discussion regarding the sign at point A, "*Private drive",* which appears to have been in place for some years. Whilst this may be sufficient to make it clear that vehicular use over the route would be private, I agree with the appellant that it is unlikely to have been sufficient to have called use on foot into question. Public and private rights can co-exist over the same land and taking account of *Burrows v SSEFRA (2004)*[1], I do not find this sign to have been sufficient to have prevented the acquisition of public rights on foot. As a result, on the balance of probabilities, it is insufficient to have called use into question at an earlier date.

17. I consider that there is a relevant twenty-year period of 1992 – 2012, with another potential period of 1984 – 2004, when there is corroborative evidence that use of the route was challenged by the landowners. As this interrupts the later period I am satisfied that 1984 – 2004 is the relevant twenty-year period.

[1] (QBD) [2004] EWHC 132 (Admin)

Evidence of use

18. The application was accompanied by eight UEFs, referring to use from 1970 – 2015, with all users claiming use of section A – B. WSCC referred to three users of section B – C, and it appeared to me from the completion of the maps (rather than the generally pre-completed section of the UEF giving the "*Description of Claimed Route"*) that two people might have used this section. However, the appellant indicates clearly that there was only one person.

19. The appellant relied on the number of users as being sufficient to raise a presumption of dedication over section A – B in the twenty-year period to 2012. I do not consider that it is the number of users which is the important matter, so much as the amount of use, which also relates to frequency. The majority of the reported use was just once or twice a year, with only two people reporting more frequent use, which relates to the years 2002 - 2015. Use following the accepted locking of the pedestrian gate in 2012 is not relevant to this claim.

20. One of the users indicated, in a later letter, that as a Parish Walks leader she would take 10 – 30 people along the section A - B once a year. Direct evidence from these individual users has not been provided.

21. I note that the SRA received information from another person involved in such walks that, as far as he was aware, the claimed route had not been a recognised footpath during his period of walking from the 1970s. I also note that the SRA residents do not recall groups walking, except by permission, for example the Ramblers' Association ("the RA") in 2002 and other groups subsequently. The letter from the RA makes it clear that permission was being sought, with no understanding of there being existing public rights over the route. Such use does not fulfil the requirement under the statute for use to be 'as of right'; that is without force, without secrecy and without permission[2].

22. Taking any of the potential twenty-year periods identified, including the WSCC period of 1978 – 1998 and the appellant's preferred period of 1992 – 2012, I am not satisfied that the evidence of use before me is sufficient to raise a presumption of dedication. Use between 4 and 9 times a year by 3 – 6 people in the earlier parts of any potential twenty-year period, and use by just one person on section B – C, is not sufficient on the balance of probabilities to raise that presumption. The test of whether a reasonable allegation has been made that public rights subsist over the claimed route has not been met under the 1980 Act, on either section A – B or B – C.

23. As I am not satisfied, on the balance of probabilities, that the case has been made under the statute, I shall go on to look at the evidence at common law.

Common Law

24. The appellant has referred to a star rating system contained in a publication '*Rights of Way Restoring the Record*' but has not provided information as to the methodology or reliability of this system. I shall consider the documentary evidence with reference to section 32 of the 1980 Act, referred to in the Main Issues, above.

[2] *Nec vi, nec clam, nec precario*

Documentary Evidence

Mapping

25. The Gardner and Gream[3] 1795 small-scale map was relied on to show that the claimed route had existed over a long period of time and was shown in the way that other roads were shown. I agree that there is a feature here. However, there is no key to the map and so whether it is showing a public or a private route is unclear.

26. The formation of the Ordnance Survey ("OS") was a response to a military need for accurate maps. Over the years a variety of maps have been developed to meet the growing need for up-to-date maps of the UK. OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey. They do not show whether any route was public or private but may assist in conjunction with other information. Since 1888 OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way.

27. The 1806 OS surveyor's map appears to show the claimed route to Stonelands; however, I agree with the SRA that the published maps 1805 - 1874[4] and 1813 appear to show a route to the south of the claimed route, running almost directly east from point C and also then west towards the White Hart Inn on Ardingly Road. FP22 (parts a, b and c) closely follows this alignment. The 1808 map latterly referred to by the appellant appears to show a similar alignment, although the copy provided does not clearly show the western end.

28. The 1874 OS map shows the claimed route, with a barrier, likely to be a gate, near point A and a pecked line indicating a feature on the alignment east of point C, as seen on the earlier maps. Changes at Stonelands can be seen on the 1897 map, with what appears to be landscaping at the property and the lodge marked near point A, as well as a lodge on the western access, to the north-east of the White Hart Inn. The southern route seen on the earlier mapping is shown in part as a defined track. The 1912 and 1938 OS mapping shows a similar situation to that seen in the late nineteenth century, with East Lodge marked and a gate in this location.

29. The mapping assists in showing that there has been a physical feature on the ground over a long period. However, I agree with the SRA that the appellant's argument that this was an ancient public through-route for the purpose of driving stock or pack animals, as well as on foot, is not supported by the mapping as a whole. The mapping does not consistently show the claimed route, with the southern route, on the alignment of FP22, sometimes appearing to be of greater importance. Another possible 'through-route', identified by the SRA, is seen to the north of the claimed route on several of the maps, including a number of the OS maps and the tithe map.

30. The existence of lodges and gates at either end of the claimed route from at least the end of the nineteenth century is supportive of private use, at least form this point in time. If there was a public highway being closed off by a landowner for their own purposes, as suggested, then it would be expected

[3] Alternatively referred to as being Yeakell and Gardner
[4] This is a reproduced historical map, not an original

that the local public would have raised the issue, for example through their Parish Council. No such evidence, for example by way of minutes, has been provided.

Ordnance Survey Book of Reference

31. This appears to relate to the 1874 OS map and provides '*Remarks*' on the features shown on the map. The claimed route is numbered 208 and identified as '*Road*'. There is no distinction made between public and private roads.

Tithe plan and apportionment, Parish of Westhoathly, 1841

32. The Tithe Commutation Act 1836 converted tithes into a fixed money rent. The documents consist of the apportionment, the map and the file, and are concerned with identifying titheable land. Whilst tithe maps may not necessarily provide evidence of public rights of way, they are generally good evidence of the topography of the roads they portray, especially those which form boundaries of titheable land. As statutory documents, where they do provide evidence it should be given the appropriate weight bearing in mind the original purpose of the documents concerned.

33. The possible 'through-route' to the north is shown but not the route to the south. I am unclear which 'markings' are being referred to by the appellant: there are bracing features, which merely relate to ownership, rather than an indication of rights; as well as paper marks simply arising, as suggested by the SRA, as a result of age. There is nothing to suggest a footpath, which would rarely be shown on a tithe map in any event, as they are unlikely to affect potential tithe payments. In relation to a through-route, there appears to have been some misunderstanding that common land is in the public domain, in relation to an 'onward path' to White Hart. Common land is privately owned and, at that time, only those with a right of common would have had any right to use or access.

34. The claimed route is tinted in the same manner as the public road, Selsfield Road, from which it runs on one copy of the map. Part of the track of the western entrance is similarly tinted but there is no indication of a through-route, with the western section seemingly gated at each end. The point of the tithe process was to identify productive land on which tithe should be paid. It seems that the surfacing and/or use of the claimed route were such that no payment was taken. However, this situation can refer to private use as well as public and I agree with WSCC that the route appears to serve Stonelands only.

Finance (1909 - 1910) Act

35. The Finance (1909 - 1910) Act ("the 1910 Act") provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user and to the right of common and to any easements affecting the land.

36. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. Routes shown on the base plans which correspond to

known public highways, usually vehicular, are not normally included in the hereditaments, i.e. they will be shown uncoloured and unnumbered.

37. I agree that the reduction in this hereditament, 589, Stonelands, of £1,000 for 3 footpaths appears very large in comparison to general values, for example one footpath on hereditament 63, Sandhole and Baskings Parva, in the same ownership, only received a £75 reduction and Stonelands House had a gross annual value of just £214. Although the entry under "*Fixed Charges, Easements, Common Rights and Restrictions"* in the Field Book indicates "*Yes, many*" the entry under "*Charges, Easements, and Restrictions affecting market value of Fee Simple"* is simply "*3 Footpaths*". I agree with WSCC that the hereditament has three footpaths crossing it, which are now recorded on the DMS as FP's 21, 22 and 23.

38. I do not consider that the appellant's calculations of the lengths of routes takes the argument further in showing that the claimed route was counted as part of the reduction. I agree with the SRA that there is no correlation in lengths, status and reduction to reasonably explain the reduction value. I do not find the documents provide evidence that the assessor and landowner agreed that there were public rights along the estate roads.

39. The claimed route is not excluded from the hereditament, which might be expected if there were higher vehicular rights over the claimed route. I do not consider that the 1910 Act information provides any support, on the balance of probabilities, for the existence of public rights over the claimed route.

Planning

40. Stonelands has been apparently been an estate, a school from 1949 until the 1960s or 70s, part of the Church of Scientology to the mid – late 1990s and subsequently developed to individual residential properties, with some shared ownership. Stonelands Farm is now a separate property, lying to the south of Stonelands. The planning records relate to the various developments. In response to the Hartwell Homes application in the mid-1990s Buckley and Co indicated that they had a private right of way over the claimed route; this indicates that there was no understanding on their part of higher public rights.

41. In relation to the proposal to install electric gates, the residents of One East Lodge indicated that "…*local residents have had pedestrian access over the top section of Stonelands Drive for many years as a means of access to the public footpath that crosses the driveway…please could the proposal include provision for a pedestrian stile access to allow the local residents safe access to the public footpaths…".* On balance, this relates to the section A – B.

42. The planning approval recommendation[5] indicates that "*Unfortunately, it has not proved possible to have a gated system which would allow for continued public use of the private driveway. The lack of such provision is not a valid reason to refuse this proposal.".* As it happens, despite the planning comment, a pedestrian gate was provided adjacent to the vehicular gate. However, if there had been a public right of way over the driveway at this time, it would not be possible to block it off in the way suggested by the planning recommendation; this indicates that there was no recognition of such rights.

[5] HO/039/97

43. The Land Registry official copy, 12 July 2004, for Title Number WSX280679 indicates that there is "*…a right of way at all times and for all purposes in favour of the owner for the time bring of the property known as "East Lodge"… over that part of the said driveway referred to in (c) above where the said driveway meets the main road which is edged pink coloured green and hatched blue on the Plan Number 1…".* This easement dates from a conveyance of 1 June 1960, not from the date of the office copy. However, it is unclear whether the rights extend over the whole drive as oppose to simply the use of relevant gate or gates *"…from such adjoining property…".*

Requests for permissive use

44. The request for permission on the part of the RA has already been noted. In addition, I understand they suggested in 2004 that a permissive route should be considered. The Parish Council also suggested this in 2012/13. Again this does not suggest any understanding on the part of these organisations of existing public rights.

The Definitive Map and Statement

45. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out specific procedures to be followed in their production. The Parish Council Rights of Way Committee meeting of April 1949 shows engagement in this process. I note the involvement of the then owner of Stonelands as a member of the Committee. Whilst such involvement would now be seen as inappropriate, the appellant provides no evidence of deliberate concealment or removal of public rights.

46. When the owner was Chairman of the Parish Council she was actively involved in a project to mark the public rights of way in the Parish, which included the three recorded routes crossing Stonelands.

Parish Council Map

47. The Parish Council produced a booklet *'West Hoathly Past and Present', "…with a map showing…the established rights of way".* The claimed route has not been identified as a right of way on any of the versions, the earliest I have dating from 1958.

Surfacing

48. No evidence has been provided to support the suggestion that the route might have been surfaced by the Highways Authority at public expense.

User Evidence

49. I have found the user evidence wanting under the statute and, therefore, it should be no surprise that it is lacking to a greater extent at common law. There is some evidence of use dating from 1970 but it is minimal, with only one user until the mid-1970s. I agree with WSCC that the use as a whole is insufficient to meet the requirements in *Mann v Brodie (1885)* that "*The number of users must be such as might reasonably be expected if the way had been a public way."*

50. Dedication by the owner and user by the public must occur to create a highway. The burden of proof lies on the appellant to show that it was the

intention of the landowner to dedicate a right of way. I am not satisfied that burden has been discharged in relation to any period of time.

Summary

51. I agree with the appellant that it is the evidence as a whole that needs to be considered. However, giving appropriate weight to the mapping evidence, taking account of its purpose, there is insufficient evidence of a long-standing through-route, which may have had higher rights, on the claimed alignment. The mapping generally suggests a cul-de-sac access to and from a private estate, which was gated from at least the mid to late nineteenth century. The physical existence of a route does not show that it was a public right of way.

52. There is nothing to prevent public rights becoming established over a private drive but there is very little evidence of public use, with the earliest amounting to only once a year. The planning authority did not believe there to be public rights, which could not be cut off by the installation of an electric gate across the route. The Parish Council made no objection to the planning application on this basis and they and the RA subsequently sought permissive access.

53. Although the appellant refers to there being no evidence of stopping up order, it would first need to be shown that public rights existed in order for the maxim 'once a highway, always a highway' to be relevant. I agree with WSCC that there is no direct evidence of existing public rights within the documentary evidence. There is no evidence of express dedication and I am not satisfied that the appellant has demonstrated implied dedication at common law.

Summary

54. Taking account of the evidence as a whole, I am not satisfied that it is sufficient, on the balance of probabilities, to satisfy the test that there is a reasonable allegation of the existence of a public right of way on either section A – B or B – C. The evidence presented is of insufficient substance, on the balance of probabilities, to support a credible claim, either at statute or common law.

Other matters

55. The law does not allow me to consider such matters as the desirability or otherwise of the route; road safety; or, the alleged behaviour of Parish Council members, or other organisations or individuals. I have not taken account of these issues.

Conclusion

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

Formal decision

57. I dismiss the appeal.

Heidi Cruickshank

Inspector