



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: 30 November 2017

Appeal Ref: FPS/Z1585/14A/14

Appeal by Mayland Parish Council

- 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 Essex County Council (the Council) not to make an Order under section 53(2) of that Act.
 - The Application by Mayland Parish Council, dated 11 October 2016, was refused by Essex County Council on 11 April 2017.
 - The Appellant claims that the appeal route in the Parish of Mayland, between North Drive and Nipsells Chase, Mayland, should be added to the definitive map and statement for the area as a footpath.
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Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Essex 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 footpath as set out in the application dated 11 October 2016.
2. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Preliminary Matters

3. 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 1981 Act.
4. The appeal has been decided on the basis of the papers submitted.

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.

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. The issues under section 31 of the Highways Act 1980 (the 1980 Act) are -
 - a) whether the claimed route was of such character that its use could not give rise at common law to any presumption of dedication; and
 - b) the date on which the right of the public to use the claimed footpath was brought into question;
 - c) whether the claimed footpath was actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years ending on the date on which their right to do so was brought into question; and if so
 - d) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed footpath.Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
8. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.
9. A highway may be created at common law by the dedication of the owner with the acceptance of 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

10. The application was made by Mayland Parish Council. The basis of the application is that a public footpath has been established between North Drive

and Nipsells Chase. Some 25 user evidence forms were submitted in support of the application indicating public use of the way mainly, but not exclusively, on foot. The County Council investigated the application and consulted with the landowners and the local residents.

The character of the way

11. The first question is whether the claimed footpath is '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'. The user must be as a right of passage over a more or less defined route and not a mere indefinite passing over land. It is not possible to have a public right indefinitely to stray or meander over land or go where you like. The Council was concerned that several of the user evidence forms indicated that the public would use a wider area than the claimed footpath for recreational use, in particular around a pond. I have studied the user evidence forms and the evidence of maps and aerial photographs. It appears to me that there is sufficient evidence, at least for the purposes of Test B, to conclude that the claimed route was sufficiently well defined until about 2014, when the route became overgrown.

The date on which the right of the public to use the claimed footpath was brought into question

Whether the claimed footpath was actually enjoyed by the public 'as of right' (without secrecy, force or permission) and without interruption for a period of not less than 20 years, and if so

Whether there is sufficient evidence that there was during the 20 year period no intention to dedicate the claimed footpath

12. It is clear from the statement of the owners of 3 Seaview Parade and from some of the user evidence forms that the claimed route was obstructed by about July 2014 and that was sufficient to bring the claimed footpath into question.
13. There is clear evidence of public use of the claimed route during the 20 year period prior to 2014 and indeed some of the user evidence forms indicate use back to the 1970s. There is a conflict of evidence as to the extent of public user during the latter part of the 20 year period due to the growth of vegetation, but I am satisfied that the user evidence forms and the aerial photographs are sufficient evidence for the purposes of Test B. There is no indication of use by force or with permission. There is some indication that the use of the claimed way included horse riders and cyclists. It appears to me that such usage was not sufficient in quantity to indicate clearly to an owner of land that equestrian or vehicular rights were being asserted.
14. There is no evidence that there was, during the 20 year period, no intention to dedicate the claimed public footpath by any owner.

Conclusion

15. I therefore conclude that the claim on the basis of section 31 of the 1980 Act succeeds in accordance with Test B. In the light of my conclusions as to the requirements of section 31 of the 1980 Act, it is not necessary to consider dedication at common law. However, I can see no obstacle to a conclusion that a footpath can be implied to have been dedicated at common law along the

claimed route in accordance with Test B. I am not satisfied that the evidence is sufficiently clear as to meet Test A.

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

Michael R Lowe

INSPECTOR