



# Appeal Decision

**by Martin Elliott BSc FIPROW**

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

**Decision date: 19 June 2017**

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## **Appeal Ref: FPS/X2600/14A/3**

- 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 Norfolk County Council not to make an Order under section 53(2) of that Act.
- The Application dated 26 October 2015 was refused by Norfolk County Council on 28 November 2016.
- The appellants, Mrs E Wright, Mrs P Brown and Mrs L Banes, claim that the appeal route, from footpath FP2 Great Witchingham to Marriott's Way, should be added to the definitive map and statement for the area as a public footpath.

**Summary of Decision: The appeal is allowed.**

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## **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 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.

## **Main issues**

3. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way 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 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 I should find that a public right of way has been reasonably alleged.

4. Section 32 of the Highways Act 1980 provides 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.

5. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
6. The main issue is whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the appeal route to the definitive map and statement for the area. I shall firstly consider the documentary evidence then, if necessary consider the statutory dedication of the way under section 31 of the Highways Act 1980.

## **Reasons**

### ***Documentary evidence***

7. The route is shown on Faden's map of Norfolk dated 1797 and Bryant's map of 1826. The route was stopped up in the inclosure award of 1811. However, Quarter Session records from 1813 identify the route as Old Hall Walk. The tithe map and apportionment 1843 identifies the route as being in the ownership of New College Oxford, occupied by William Plane, and described as a Drift. The northern end of the route is identified in the altered apportionment of 1922 as being taken over by the Midland and Great Northern Joint Railway Company. The route is identified as Hall Walk on the 1884, 1886, 1905 and 1906 editions of the Ordnance Survey mapping. It should be noted that Ordnance Survey maps were produced to record topographical features and not to identify public rights or way. The Council say that the route continues to be depicted on maps to the present day although these maps have not been submitted.
8. In an Assent dated 7 December 1987 between M Comer and The Forest School 1938 Limited reference is made to the Beneficiary to uphold a covenant to allow for unimpeded pedestrian access and specifically excepts and reserves a pedestrian right of way over the appeal route. However, the Assent does not provide evidence as to public rights. If the route was considered to be public it would not have been necessary to reserve a pedestrian right of way.
9. Parish Council records relating to the parish survey under the National Parks and Access to the Countryside Act 1949 refer to the recording of the route on the draft map. The route was subsequently not recorded on the definitive map. Although the route was not included on the definitive map and statement for the area this does not preclude the existence of public rights. Nevertheless the Parish Council records do not assist in determining the appeal.
10. The documentary evidence supports the physical existence of a route since 1797 but does not provide evidence as to the existence of public rights. In view of this it is appropriate to consider the statutory dedication of the route.

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**Statutory Dedication – Section 31 of the Highways Act 1980**

11. The appellant argues that there is credible evidence of use of the claimed route for several decades back to 1945 which they consider is sufficient to establish actual enjoyment of the way for a full twenty year period terminating in 1965, or later periods.

*When the right to use the way was brought into question*

12. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it.
13. In 2015 a Mr Swatman erected fencing and barbed wire, the appellant says that this was to prevent use. The obstruction of the claimed route in 2015 is acknowledged in the evidence of use forms and the form of Mr P Moore indicates that the route was obstructed in May of that year. The Parish Council minutes of 20 July 2015 acknowledge the closure of the claimed route and state that the matter was to be raised with the County Council. An application under section 53(5) and Schedule 14 of the 1981 Act was subsequently made on 26 October 2015. In my view the obstruction of the claimed route in 2015 clearly brought the right to use the way into question and sets a relevant 20 year period of 1995 to 2015.
14. The Council and Birketts LLP (Birketts) acting on behalf of two of the affected landowners, suggest other events which they consider brought the right to use the way into question. Birketts submit that the various actions which they consider as demonstrating a lack of intention to dedicate are also sufficient to bring into question the right to use the route.
15. In 1985 Mr J C Comer lodged a statement and map pursuant to section 31(6) of the Highways Act 1980. Whilst it is suggested that this would have brought the right to use the way into question it is noted that the statement was not followed by a statutory declaration as required by the Act. In the absence of such a declaration the deposit is not sufficient to demonstrate a lack of intention to dedicate and therefore not sufficient to bring the right to use the way into question.
16. In 1984 a locked gate was erected at the end of Hall Walk along with notices stating 'PRIVATE PROPERTY – City of Norwich Angling Club – Members Only'. A locked gate was present until 2007. Although Birketts say that a stile was provided in 2001, accompanied by appropriate signage, the statement of Mr Ivins indicates that before the 'squeeze gate' in 2001 there had been a wooden stile at both ends of the track. Whilst the erection of a locked gate may have restricted use of the claimed route there is nothing from the evidence of use forms to suggest, noting the presence of stiles, that use was prevented. Furthermore, there is nothing to indicate that those using the way understood, by the locking of the gate and erection of notices, that their right to use the way was being brought into question.
17. Birketts state that when the stile was provided in 2001 this was accompanied by appropriate signage to facilitate the Wensum Valley project permissive access. Again there is nothing to indicate that those using the way understood that their right to use the way was being challenged, use of the way continued.

18. In 2007 a different gate was erected as part of works to secure the site against otters; the gate remained locked. The stile erected in 2001 was replaced with a pedestrian gate and permissive signage was retained. Although a different gate was erected this would not have raised any questions as to the right to use the way since it replaced an existing locked gate. As regards appropriate signage I refer to my previous comments at paragraph 16.
19. Birketts contend that since 1984 signs have been displayed asserting the private nature of the land. Although I acknowledge at paragraph 16 above that notices were erected in 1984 use continued and in the circumstances, again having regard to the existence of stiles, the notices may not have been understood as challenging use.
20. Birketts refer to the Parish Council minutes over a period from 1959 to the current day which consistently record the fact that the landowner asserted that the route was private and that the Parish Council specifically accepted that the route is private. Whilst the minutes make reference to such matters there is no evidence to indicate that those using the way understood that their right to use the way was being brought into question.
21. Birketts say that in May 2015 Mr P Swatman made a statement and declaration under section 31(6) of the Highways Act 1980. I have not been provided with the documents but the making of a statement and declaration would be sufficient to bring the right to use the way into question. It was around this time that the route was obstructed by Mr Swatman and therefore supports the view that the right to use the way was brought into question in 2015.
22. The applicant has identified a twenty year period terminating in 1965. However, I have been provided with no evidence as to an event in 1965 which would have brought the right to use the way into question.
23. Having regard to the above there is clear evidence that the right to use the way was brought into question in 2015. As regards other events I do not consider that these were sufficient to bring the right to use the way into question.

*Evidence of use*

24. In view of the above (paragraph 23) it is appropriate to consider the use of the way in the period 1995 to 2015. There are 20 evidence of use forms relating to 21 individual users. The forms indicate regular and uninterrupted use by the public, on foot, throughout this period. The forms indicate that use was as of right.
25. The Council are of the view that use was not as of right. Birketts do not dispute that at certain times there has been public use of the route but it is contended that such use that has taken place has been demonstrably permissive.
26. There is no evidence that use was secretive or by force. The issue to be considered is whether use was with permission. None of the evidence of use forms indicate that permission was given to use the way. However, the user evidence form of Mrs Myram states that the route was in family ownership and therefore some of her use may not be as of right. Mr Sarsby indicates that he worked for an owner or occupier of the land but did not have permission to use the route which he used for pleasure and going to and from Hall Walk. A Mr

Wright claims use to access land used as the school cricket pitch. The map accompanying his evidence of use form indicates that the cricket field is at the northern end of the claimed route. Mr Wright did not use the route for any other purpose. It is quite possible that his use of the route was with implied permission although no details of any access arrangements have been provided. Mr Arthurton worked for Mr Comer from 1960. The date when he ceased work is unclear but the summary of the evidence of use form suggests that this was in 1962; Birketts believe that Mr John Comer owned the land until his death in 1986. It is possible that Mr Arthurton worked for Mr Comer until 1986 and therefore use up to that time may have been with inferred permission. However, whilst use in connection with his employment may have been with inferred permission Mr Arthurton indicates that he did not have permission to use the route and that his use was for dog walking. There is nothing to indicate that use after 1995 was in connection with any employment.

27. As regards use with permission the statement of Mr Ivins refers to correspondence from 1997 and states that there was no objection to parishioners walking around the lakes providing they did not disturb the fishing club members. The correspondence of 1 June 1997 states that the Whitwell Hall Country Centre fishing club is happy to allow access to the lakes on the understanding that the land is private property. An accompanying plan indicates that the route from Hall Walk to Marriott's Way is around the lake. The Parish Council agreed to place a copy of the relevant details on the parish notice board and in the forthcoming issue of the Wensum Diary. Whilst I note the assertions of Birketts that the correspondence between the Parish Council and Mr Ivins sets out unambiguously the terms of permissive access it is not clear in my view that the correspondence sets out permission to use the claimed route. The correspondence sets out the correct route around the ponds and this is not the claimed route.
28. Correspondence in relation to the Wensum Valley project refers to the implementation of a permissive path agreement and refers to the placing of permissive plaques on the route. Photographs show permissive path signs and are annotated '2008 to present day' although no dates are provided as to when the photographs were taken.
29. The Council say that Mr A Williams of the Norfolk Trails Team advises that the claimed path was permissive when he first managed Marriott's Way 18 to 20 years ago when permissive path signs existed on the gates. The Council also say that it was possible that the claimed route was subject to permissive arrangements under a Stewardship Scheme around 1992 however, in the absence of a copy of the agreement it is difficult to reach any conclusions. It is noted that this agreement would fall outside the relevant twenty year period.
30. Whilst there is evidence that use of the route was with permission the evidence of use forms do not suggest that use was with permission. The granting of permission to some does not prevent use by others from being without permission. In light of the above there is a conflict of credible evidence as to whether use was with permission.
31. The evidence of Mr Ivins indicates that the claimed route was overgrown and unused in the period 1986 to 2007. However, this conflicts with the evidence contained within the evidence of use forms which indicates uninterrupted

access along the claimed route. There is therefore a conflict in the evidence as to whether the route could be used during this period which encompasses the twenty year period ending in 2015.

32. Birketts make the point that the Parish Council minutes recognise that the route was closed from the early 1960s until about 1990. Whilst this falls outside the relevant twenty year period to 2015 this is a matter which may require further consideration in the event of an inquiry being held and a different twenty year period being argued.
33. Having regard to the above, there is evidence of use, as of right and without interruption. However, there is also evidence to suggest that use was with permission. There is therefore a conflict of credible evidence as to whether use was as of right. There is also a conflict of credible evidence as to the availability of the route.

*Lack of intention to dedicate*

34. For there to be sufficient evidence that there was no intention to dedicate the way there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public. The relevant case is *R oao Godmanchester Town Council and Drain v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28*.
35. The Council contend that the map and statement deposited by Mr J C Comer in 1985 under section 31(6) of the Highways Act 1980 demonstrated a lack of intention to dedicate the way. The map and statement is also referred to by Birketts. The Council state that no statutory declaration was made following the deposit of the map and statement. As noted above (paragraph 15), in the absence of a statutory declaration, the map and statement is not sufficient to demonstrate a lack of intention to dedicate.
36. Birketts have identified a number of events which they consider not only brought the right to use the way into question but also demonstrated a lack of intention to dedicate the way.
37. In 1984 a locked gate was erected across the route; the gate was replaced in 2007. Whilst the locking of a gate, and the replacement of the same, may demonstrate a lack of intention to dedicate the evidence of use forms indicate uninterrupted access along the claimed route from 1984 to 2015. It is noted that the evidence of Mr Ivins is that a stile was present adjacent to the gate and that these stiles were replaced in 2001. When the gate was replaced in 2007 the stiles were replaced with a pedestrian gate. In the circumstances I do not consider that the erection and locking of the gate was sufficient to demonstrate a lack of intention to dedicate.
38. There is evidence that various notices were erected on or adjacent to the claimed route from 1984. However, use of the route continued until 2015 when the route was obstructed and there is nothing to suggest that those using the route were disabused of the notion that the way was a public footpath. There is therefore a conflict of credible evidence as to whether notices on the route were sufficient to demonstrate a lack of intention to dedicate.

39. As regards the Parish Council minutes from 1959 to the current day, whilst they record the fact that the landowner asserted that the route was private there is nothing from the evidence of use forms that those using the way were disabused of the notion that the way is public. Given that the status of the route was raised in the public domain the minutes are supportive of the attitude of the landowner in respect of public rights. However, there is again a conflict of credible evidence.
40. It is noted that in May 2015 Mr Swatman made a statement and declaration under section 31 of the Highways Act 1980. The evidence indicates that it was in May 2015 when the claimed route was obstructed and brought the right to use the way into question. The statement and declaration appears to coincide with the obstruction of the way and has no retrospective effect.

### **Overall conclusions on the evidence**

41. Having regard to all of the above, the documentary evidence is not sufficient to show that the claimed footpath subsists or is reasonably alleged to subsist. There is evidence of use of the way by the public without interruption but there is a conflict of credible evidence as to whether use was with permission and therefore not as of right. There is also a conflict of credible evidence in respect of a lack of intention to dedicate. There is no incontrovertible evidence that a right of way could not be reasonably alleged to subsist. As such I should find that a right of way is reasonably alleged to subsist and an order should be made so that the evidence can be tested at a public inquiry if necessary.

### **Other Matters**

42. The appellant raises concerns as to future access, the need for access to Marriott's Way and the need to use Porters Lane to join the Wensum Way to Marriott's Way. Whilst I note these concerns they are not matters which I can take into account in reaching my decision. The appellant also raises concerns that the application will be dealt with in isolation from other applications. Again I note this concern but any decision must be based on the merits of each case.

### **Conclusion**

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

### **Formal Decision**

44. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Norfolk 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 footpath from footpath FP2 Great Witchingham to Marriott's Way. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Martin Elliott*

Inspector