The Planning Inspectorate

Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 17 August 2017

Appeal Ref: FPS/R5510/14A/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 the Council of the London Borough of Hillingdon (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 8 April 2016 was refused by the Council on 23 March 2017.
- The appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath between the southern end of Azalea Walk and footpath R154.

Summary of Decision: The Appeal is granted.

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 1981 Act.

2. This appeal has been determined on the basis of the papers submitted.

Main Issues

3. In arriving at my conclusions I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act and the findings of the High Court in the *Bagshaw and Norton*[1] case.

4. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence 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. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

   Test A - Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the appellant and no credible evidence to the contrary.

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

[1] *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

evidence that a right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

5. Where it is claimed that a public footpath has come into existence through long use, the claimant is required to demonstrate that there has been uninterrupted use by the public for a period of not less than 20 years prior to the right to do so being brought into question. Furthermore, such use has to have been 'as of right'; that is, without force, secrecy or permission. If the user evidence can be said to satisfy these tests, then a presumption arises that the way has been dedicated as a public footpath. This is however, a rebuttable presumption, and can be defeated if there is sufficient evidence to show that during that 20-year period there was no intention on the part of the landowner to dedicate such a public way.

6. The main issue in this case is whether the available evidence demonstrates that a public right of way subsists over the claimed route (test A above) or whether the evidence is sufficient for the appellant to reasonably allege that a public right of way subsists (test B).

Assessment of the available evidence

7. The appeal route runs from the southern end of the publicly maintainable road known as Azalea Walk and crosses the service road and forecourt of some garages with access to footpath R154 being through a gateway located in the south eastern corner of the garage site.

8. In around 2011 or 2012 the residents of Azalea Walk were consulted about closing access to the footpath following incidents of anti-social behaviour with the majority of those consulted being in favour of the proposal. In July 2012 with the permission of the freeholder of the fence line, a new fence and gate was erected by the Azalea Walk Residents Association. The gate was locked with residents being given keys to the gate. A sign saying 'private property' was also attached to the gate on the side facing footpath R154.

9. I understand that although the freeholder had agreed to the erection of a new fence and gate, consent had not been given to the gate being locked. The gate was subsequently removed but then re-erected. It was the locking of the gate which gave rise to the application to record the appeal route on the definitive map. Consequently, and for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period of use is 1992 – 2012.

10. The application was accompanied by 39 user evidence forms (UEFs). The copies of these forms forwarded to me contained a plan which had been signed and dated by the person completing the UEF in all but two cases. The plans are identical and have not been drawn by each individual respondent. It is not a requirement for any respondent to provide a plan to illustrate their evidence although such plans can be useful when there is doubt about the precise line which has been used. Given the position of the gate at issue in relation to the southern end of the publicly maintainable Azalea Walk, it is highly probable that the route shown in the plan (or a slight variation on it) would have been used by the public.

11. The Council appears to have reduced the weight it attached to the user evidence as a result of 'generic' maps being submitted. I do not consider that this is the correct way of viewing the evidence at the Schedule 14 stage. There

is no evidence in the papers submitted to suggest that the Council engaged in seeking to interview respondents in the light of any concerns that it may have had regarding the route claimed to have been used; the interviewing of respondents is likely to have resolved any doubts the Council had over the plans.

12. The Council also appears to have discounted the evidence of a number of respondents as a result of them failing to specify what they believed the status of the claimed route to be, or because they had passed away or had moved out of the area and could no longer be contacted. These are not sufficient grounds to dismiss or not consider the evidence which has been adduced. In *R v Oxfordshire County Council and Others ex parte Sunningwell Parish Council* [UKHL 2000] the subjective belief of users was held to be irrelevant in determining the status of land claimed to be a town or village green. In my view, the same principle applies where the claim is of the existence of a public right of way. It matters not what the individual user believed the route to be; it is the evidence of use of the route which is to be considered.

13. Similarly, where respondents have subsequently passed away or have left the district the evidence they gave cannot simply be dismissed because it is no longer possible to question or clarify matters with them. Although the weight to be attached to such evidence may be lessened because it is not possible to contact them to question or clarify matters it cannot be wholly discounted.

14. The Council also appear to have rejected the application on the ground that it is not possible to determine the width of the claimed path from the estimates of width provided by the respondents. The claimed route crosses an open area used as a service road and the forecourt of garages; being unenclosed on either side, it is understandable that estimates of the width of the path will vary. In the absence of any documentary or other evidence of width, a determination of the width of the path can be made based on the type of use and what would be reasonable in the circumstances. This approach is set out in Advice Note 16 published by the Planning Inspectorate and in a letter sent from Defra to surveying authorities in February 2007. This approach does not appear to have been taken by the Council in this case.

15. The application was accompanied by 39 UEFs. Of these 39 individuals 20 claimed to have used the Appeal route for 20 years or more prior to 2012. Of these, 10 individuals claimed use of between 20 and 30 years, 7 claimed use of between 30 and 40 years and 3 claimed over 40 years use. In addition18 individuals claimed use of between 1 and 19 years with 1 individual claiming to have used the path during the 1970s and 1980s. Taking these UEFs at face value, there is evidence that the path has been in use for a considerable period of time and that use has occurred throughout the relevant 20–year period.

16. Use of the path was said to have been for utilitarian purposes such as travelling to the local shops, to catch a train or to go to the library. Frequency of claimed use varied from daily use to monthly with a range of frequencies within those two extremes.

17. Prior to 2012 there is no evidence that the appeal route was obstructed in any way and pedestrians were free to pass and re-pass between footpath R154 and Azalea Walk. Use of the appeal route appears to have been without force. There is nothing in the evidence before me to suggest that use was not free and open; the evidence is that the use which took place did so in full view of

anyone who cared to look. Use of the appeal route appears to have been without secrecy.

18. The freehold of the land on which the fence has been erected fence is understood to belong to a company called Brightsplit Limited. Brightsplit gave its consent to the erection of a new fence and gate but not to the locking of the gate. There is no evidence before me to suggest that those individuals who claimed to have walked the appeal route have sought or been given permission to do so by the freeholder of the fence or the freeholders of the garage forecourt and service road. Use of the appeal route appears to have been without permission. No evidence has been submitted from which it could be concluded that the claimed use has been interrupted in any way.

19. The majority of users are resident within Flag Walk, Sutton Close, Mount Park Walk and Gerrard Gardens with other users residing at a number of other addresses. Only 1 user is resident in Azalea Walk. There is no legal interpretation of the term "the public". A dictionary definition is "the people as a whole, or the community in general". Coleridge C. J. (1887)[2] commented that use by "the public" at common law "*must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge*". In this respect the individuals who submitted evidence forms in support of the application, being "residents in the neighbourhood" can be regarded as members of the public.

20. The evidence of claimed use extends back to 1965 when the Azalea Walk estate was first developed. Claimed use extends from that date until the locking of the gate in 2012 with use having taken place throughout that period. Although the frequency of individual use varies between users, on the face of it that use appears to have occurred at sufficient frequency for those resident in Azalea Walk to have been aware of it. The public appear to have enjoyed use of the appeal route during the relevant 20-year period.

21. Objections to the application were received from owners of the garage forecourt and service road and from other residents in Azalea Walk. The objectors claim that access over the service road and garage forecourt has always been by way of an easement which is restricted to those resident in Azalea Walk and not for the general public. No evidence has been submitted to show that the provisions of the lease or leases in which these easements are found have been communicated to the public.

22. The objectors state that challenges have been issued to inform users that the gate to footpath R154 was private and not a public right of way. It was acknowledged that it was difficult to deliver personal challenges to those who have passed over the appeal route as the Estate comprised 94 houses and it was difficult to distinguish between residents and other members of the public.

23. The Council referred to correspondence which it had received in 2007 and 2008 in connection with the Taylor Wimpey re-development of the former RAF Eastcote and an additional footpath link into Azalea Walk. The author of this correspondence stated that the garage forecourt and service roads were privately owned land and the adjacent developer could not create a new access over privately owned land. In further correspondence with the Council's

[2] R. v. Inhabitants of Southampton (1887) 19 QBD 590; RWLR April 1998 S6.3 pp55

Planning Department, the author stated that the access point was gated and had originally been intended to allow residents of Azalea Walk access to the shops at Eastcote.

24. Whilst this correspondence demonstrates a belief amongst certain residents that access through the gate was reserved to residents of Azalea Walk, there is no evidence before me that this view was communicated to those members of the public who were engaged in using the path. No evidence has been provided to demonstrate that prohibitory signs or notices had been erected to warn the public that there was no public right of way through the gate or along the forecourt and service road. The only evidence of a notice was that erected in 2012 on the footpath R154 side of the gate once it had been locked.

25. The Council has reached conclusions on the evidence adduced that are different to those reached by the appellant. I conclude that there is no conflict of evidence regarding the appeal route, merely a conflict of interpretation of that evidence. Consequently the appeal fails Test A referred to in paragraph 4 above. However, no incontrovertible evidence has been submitted as why a public footpath cannot be reasonably alleged to subsist. It follows that the application succeeds against Test B.

Conclusion

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

Formal Decision

27. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Council of the London Borough of Hillingdon is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement for the area to add a public footpath between the southern end of Azalea Walk, Eastcote and footpath R154.This decision is without prejudice to any decisions that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector