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## Appeal Decisions

by **Martin Elliott BSc FIPROW**

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

Decision date: **01 MAY 2019**

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### Appeal Ref: **FPS/T1600/14A/2**

#### **Route A**

- 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 Gloucestershire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 20 December 2016 was refused by Gloucestershire County Council on 29 March 2018.
- The appellant, Mr Adrian Kingsbury, on behalf of the Springbank Neighbourhood Forum, claims that the appeal route, from Henley Road northeast across the green to follow the field boundary in a north-westerly direction to join footpath ZCH15, 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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### Appeal Ref: **FPS/T1600/14A/3**

#### **Route B**

- 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 Gloucestershire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 23 November 2016 was refused by Gloucestershire County Council on 29 March 2018.
- The appellant, Mr Adrian Kingsbury, on behalf of the Springbank Neighbourhood Forum, claims that the appeal route, from Henley Road, east to ZCH5, along part of ABO30 to the cattle grid on Class 5 road number 72286, 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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### Appeal Ref: **FPS/T1600/14A/4**

#### **Route C**

- 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 Gloucestershire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 23 November 2016 was refused by Gloucestershire County Council on 29 March 2018.
- The appellant, Mr Adrian Kingsbury, on behalf of the Springbank Neighbourhood Forum, claims that the appeal route, from the allotment gardens on Henley Road, east along the field boundary to Public Footpath ZCH5, 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 these appeals 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 decisions without the need to do so. Representations have been received on behalf of the owner

of the majority of the land crossed by the appeal routes, I shall refer to these representations as from the landowner.

3. The Council has identified the appeal routes as A, B (sub-divided into B1 and B2) and C as shown on the plan GCC3 attached to the committee report to the Commons and Rights of Way Committee dated 29 March 2018. For convenience a copy of the plan is appended to this decision showing the routes and the various location points.
4. The Council say that in respect of route A the section of appeal route between Henley Road and point A is already recorded as a publicly maintained highway. However, the land is described in the original application as a green. No evidence has been provided to support the status of this land. Part of appeal route B also follows existing public footpaths (D-H-E). In the event that the appeals in respect of these routes are granted it will not be necessary to add existing sections of highway to the definitive map and statement.

### **Main issues**

5. 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.

For the purposes of these appeals it is only necessary to find that the evidence meets test B, the lower test. The Council say that the applications fail to satisfy the statutory requirements and that, on the balance of probability, highway rights cannot be considered to subsist. It appears to me that the Council has applied test A to the assessment of the evidence but have not considered test B.

6. In consideration of the appeals section Section 31 of the Highways Act 1980 is relevant. This 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.
7. It is also appropriate for me to consider, if necessary, the evidence at common law. This requires the consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway,

whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.

8. The main issue is whether the evidence shows that a right of way subsists, or is reasonably alleged to subsist, on the unrecorded sections of the appeal routes, such that an order (or orders) should be made to add the routes to the definitive map and statement for the area. The applications are based on evidence of use. However, the Council has had regard to documentary evidence but has concluded that this is insufficient to show the existence of public footpaths. No argument is raised that documentary evidence supports the existence of public footpaths. In my view the documentary evidence considered by the Council is insufficient to show that public footpaths subsist or are reasonably alleged to subsist.

### **Reasons**

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

##### *When the right to use the ways was brought into question*

9. 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.
10. The Council have identified three events which they consider could have brought the right to use the application routes into question. The applications to add the routes to the definitive map and statement were made in November/December 2016. These applications, in accordance with section 69 of the Natural Environment and Rural Communities Act 2006, would, in the absence of any other challenge, have brought the right to use the ways into question in 2016. This would set a relevant twenty year period of 1996 to 2016.
11. It is also contended that the right to use the ways was brought into question in 2001 when a ditch was excavated along the length of Henley Road. The Council having considered the evidence took the view that the ditch was dug between 1998 and 2001 but for the purposes of their consideration of the application have taken 2001 as the date when the ditch was dug. The Council say that the ditch was dug as a result of years of sustained vandalism and was clearly excavated to prevent access, particularly by members of the public with motor vehicles. However they state that whether users understood that the excavation of the ditch was aimed at them is unclear.
12. From my examination of the evidence of use forms (UEFs) none make reference to the use of the routes being prevented by the excavation of a ditch. Use continued after 2001 and there is nothing to indicate that the excavation of a ditch was understood to be a challenge to the pedestrian use of the ways. On the basis of the evidence before me I do not consider that the excavation of the ditch was sufficient to bring the right to use the ways into question.
13. The Council have also considered whether events in 1984 brought the right to use the ways into question but have concluded that they were insufficient to

constitute a challenge. I have considered the evidence, the erection of a fence and correspondence from the County Surveyor to the farm manager at Whitehall Farm, and agree that these events were insufficient to bring the right to use the ways into question.

14. No other events have been put forward which are considered to be events which brought the right to use the ways into question. Bearing in mind the above the relevant twenty year period to be considered is the 20 years between November/December 1996 and November/December 2016.

*Evidence of use*

15. 35 UEFs from 30 individuals were submitted with the applications.
16. In respect of route A the UEFs show that seven individuals have used the route for a full twenty year period. A further seven have used the way for part of the period, some of those using the way for a significant part of the relevant period. A number of UEFs do not provide sufficient detail to establish when the route was used and it is difficult to give these UEFs any weight. However, it is possible these individuals used the route during the relevant period. Use was on foot mainly on a daily or weekly basis although some use was less frequent. Whilst there is reference to livestock fencing there is nothing to indicate that use of the way was interrupted. Other than one individual none have ever been given permission to use the route. Consequently apart from one person the use was as of right. There is no evidence that use was challenged.
17. In relation to route B twelve individuals have used the route or part of the route for the full twenty year period with a further four using the route for part of the period. As with route A a number of UEFs do not provide sufficient detail to establish when the route was used and it is difficult to give these UEFs any weight. It is however possible that the individuals used the route during the relevant period. Use was on foot on a daily or weekly basis although some use was less frequent. There is no indication that use was interrupted or challenged or that use was not as of right. Although some UEFs refer to a barbed wire fence, and the fence being replaced in the late 1990s by a more substantial post and rail fence, there is nothing to indicate that use was interrupted.
18. In respect of route C there are eight individuals who have used the route for the full twenty year period and a further two using the way for part of the period. As with route A and B some UEFs do not provide sufficient detail as to when the route was used and I revert to previous comments. Use was on foot on a daily or weekly basis and as of right. There is no evidence that use was challenged. Some UEFs refer to livestock fencing along Henley Road one of these mentions 'boarding' as an obstruction although this is not qualified. However, there is nothing to indicate that any of those using the route were interrupted in their use.
19. The landowner has suggested that a number of forms should be discounted because the use by some was outside of the relevant twenty year period. However, other than those UEFs identified at paragraphs 16 to 18 where use during the relevant period is unclear, it is clear that there was use either for the full twenty year period or part of that period. It is not necessary for all individuals to have used the route for the full twenty year period. Evidence of use for less than twenty years still amounts to use during the relevant period.

20. The Council contend that some of the UEFs suggest repetition or lack quality and that some of the maps have been copied. It is not surprising that in completing the forms there are similarities in responses of partners and I acknowledge that some of the responses made by other unrelated individuals are also similar. Nevertheless there is nothing before me to suggest that the evidence contained in the UEFs should be discounted. Some weight should be given to the signed UEFs and it is noted that in a number of cases the witness has indicated a willingness to attend a public inquiry. These comments are equally applicable in respect of the issue of maps being copied. Should an Order be made, and an inquiry held, then an opportunity will be provided to test the evidence.
21. The Council raise issues as to sufficiency of use by reference to *Mann v Brodie 1885*. It is acknowledged that the appeal routes are on the urban fringe of Cheltenham where the population of the local ward was 13,440 in 2011. It might be expected that the levels of use would be higher than in a more remote rural setting. It may also be the case that the user evidence amounts to evidence from only 19 households. However, I disagree with the Council that the evidence of use is insufficient to raise a presumption of dedication. On my analysis the evidence of use forms show regular use of the three routes; some of those who used the routes acknowledge use by others and refer to meeting the tenant whilst using the paths. That level of use in my view is just sufficient to carry to the mind of a reasonable person that a right to enjoyment was being asserted. There is no evidence before me to suggest that the ways were not used by the public.

#### *Interruption*

22. The Council argue that the use of the routes during the relevant twenty year period was interrupted by the excavation of a ditch in 2001 and the erection of a substantial metal fence in 2005. I also note that around the year 2000 the land use changed from pasture to arable. The indications are that prior to the change of use the land was fenced with barbed wire. The change of use appears to have arisen because livestock were continually escaping from the land because the fence was being cut. The Council acknowledge that an interruption is an actual and physical stopping up of enjoyment of the public's use of the way and that any interruption must not be shown to be for any other purpose. The landowner asserts that the installation of the fencing shows the landowners intentions to prevent public access, mark the site as private and clearly interrupt use of the site.
23. Although a number of those using the routes refer to livestock fencing there is no indication that their use of the ways was interrupted by this fencing. Nevertheless, whilst the fencing appears to have been vandalised on numerous occasions, the fencing, when in situ, could have interrupted the use of the ways. In respect of the excavation of the ditch, again there is nothing to indicate that this prevented pedestrian use. The landowner contends that the ditch (and fence which I take to be the fence erected in 2005) was installed to prevent pedestrian and vehicular access although an Email to the applicant from Mr Pullen, the tenant, states that people have never been stopped from walking on the land. In my view the digging of a ditch could have prevented, or at least hindered, pedestrian use of the various routes.
24. As regards the metal fence erected in 2005 the Council acknowledge that it did not prevent some members from gaining access on foot. It should also be

noted that none of the evidence of use forms refer to a substantial metal fence or to use being interrupted. Furthermore, the statutory declaration of Mr Pullen indicates that the fence was erected to stop people driving cars and motorbikes in the field. Notwithstanding the intentions of the fence it is possible that the fence prevented and interrupted access.

25. Bearing in mind the above there is a conflict of credible evidence as to whether use of the routes was interrupted.

*Use as of right*

26. Use as of right is use without force, secrecy or permission. There is no suggestion that use was in secret but issues arise in respect of whether use was with force and permission.
27. The landowner contends that the public have used a level of force to ensure continued access to the site. It is stated that trespassers have gone to extreme lengths to remove fences, including cutting locks to gates and hinges, cutting wire, removing posts and using machinery to cut through steel fencing.
28. I acknowledge that the evidence shows a degree of vandalism to boundary fencing however, there is nothing from the UEFs to suggest that those using the route on foot did so by force. Nevertheless breaching boundary features may be seen as use of the ways by force. I note that the tenant has been threatened when he has confronted motorcyclists. However the use by force by motorcyclists and other vehicular users does not render use on foot as being by force. In my view there is a conflict of credible evidence as to whether or not use by the public on foot was with force.
29. In terms of use with permission the Council say that Mr Holt was granted express permission to walk route A and contend that others used the paths by implied permission due to their assistance with regard to cattle escapes and other issues.
30. In respect of Mr Holt his UEF relating to route A states that he had permission to use the route. No other details are provided as to the circumstances of this permission. The additional statement from Mr Holt provides no evidence of any permission being granted although the statement says that when '*the farmers*' were '*asked if they mind us accessing*' the usual response was '*keep off the crops*'. However, I do not consider that this amounts to an express, or implied, permission. The landowner states that the tenant has never given express permission to use any part of the site and there is no evidence of any permission being granted by the landowner.
31. Permission may be implied by the conduct of the landowner. However, whilst some members of the local community may have assisted the tenant, for example by advising him of escaped cattle, the evidence before me is insufficient to raise an inference that the tenant or the landowner gave permission to use the routes.
32. It is noted that paragraph 3 of the Grounds of Appeal states that '*the application was made under the use as permissive paths*'. It is not clear as to the intentions of this statement but it might suggest that the paths were regarded as permissive. However, other than the evidence of Mr Holt there is nothing to suggest that the paths were permissive or that permission had been granted to use the ways. One individual in her UEF states that she always

regarded the route (A and B) as a public footpath and that therefore no permission was needed. Another states that no permission was granted because it was assumed that the route (route A) was a public footpath.

33. Notwithstanding the above, whilst some of the use may be with permission this does not preclude use by others from being without permission. Nevertheless there is a conflict of evidence as to whether some use was with permission or not.

*Other evidence of use*

34. Aerial photographs from 1999, 2006, 2007 and 2016 were submitted with the application entitled 'Evidence of Pedestrian Use'. Whilst the photographs appear to show worn lines it cannot be concluded that the lines are evidence of pedestrian use. It is noted that the land was subjected to use by motorcycles and other vehicles and the lines may be in consequence of that use. It can only be concluded from the aerial photographs that there were worn tracks on the ground on the day that the photographs were taken. They do not provide evidence as to the status of the routes.

*Lack of intention to dedicate*

35. For there to be sufficient evidence that there was no intention to dedicate a 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*.
36. It is acknowledged that at times fencing has been erected and ditches dug. The landowner states that the fencing and the digging of ditches was paid for by them to prevent access to the site. However, there is nothing to indicate that the public understood that the landowner was intending to disabuse the public of the notion that the ways were public footpaths. The erection of fencing and the digging of ditches may be seen as an act to demonstrate a lack of intention to dedicate. However, in the circumstances, and on the basis of the evidence before me, I do not consider that these actions were sufficient to demonstrate a lack of intention to dedicate.
37. The landowner states that it has never intended to dedicate the land for public use. However, whilst that may be view of the landowner, as set out above, a lack of intention to dedicate must be communicated to the public who used the way. I also note the suggestion that it was clear, due to the presence of livestock, that the routes were not intended for use as rights. I do not consider this sufficient to demonstrate a lack of intention to dedicate. It is not unusual for public rights of way to pass over land grazed by livestock and as such their presence would not have brought it home to the public that the ways were not public footpaths.
38. There is no evidence of any other events which might be considered as demonstrating a lack of intention to dedicate.

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

39. Having regard to all of the above, there is evidence of use of the ways by the public and that use is just sufficient to raise a presumption of dedication of footpaths. There is a conflict of credible evidence as to whether use was interrupted and whether use was with permission or force and therefore not as of right. However, there is no incontrovertible evidence that rights of way could not be reasonably alleged to subsist. As such I should find that rights of way are reasonably alleged to subsist and an order (or orders) should be made so that if objections are received the evidence can be tested at a public inquiry if necessary. In view of my conclusions it is not necessary to consider dedication at common law.

### **Other Matters**

40. The Notice of Appeal states that the Council took no account of the community benefit of recreational access, the use of the routes to walk to places of work and the economic benefits for the nearest public house. Furthermore, that the Council have taken no guidance from the development corporation who have expressed a wish to see formal access rights from existing developments which would be maintained, or provided for, within any development plans. It is also suggested by the landowner that the applications are an attempt to frustrate the development of the site.

41. Whilst I note these issues they are not matters which I can take into account in considering the appeals. My determination must be based on the criteria set out at paragraphs 5 to 7 above.

### **Conclusions**

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

### **Formal Decisions**

43. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Gloucestershire County Council is directed to make an order (or orders) under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add:

- i) A public footpath northeast across the green to follow the field boundary in a north-westerly direction to join footpath ZCH15 (Route A);
- ii) A public footpath from Henley Road, east to ZCH5, along part of ABO30 to the cattle grid on Class 5 road number 72286 (Route B);
- iii) A public footpath from the allotment gardens on Henley Road, east along the field boundary to Public Footpath ZCH5 (Route C);

These decisions are 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



