



## Appeal Decision

by **Helen Heward BSc (Hons), MRTPI**

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

Decision date: **09 JANUARY 2020**

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### Appeal Ref: **FPS/L5810/14A/1**

- 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 The London Borough of Richmond Upon Thames not to make an Order under Section 53(2) of that Act (the 1981 Act).
- The application dated 7 July 2018 was refused by way of a decision notice dated 6 December 2018.
- The appellant, Rita Golden, claims that a route should be recorded as a public footpath on the Definitive Map and Statement for the area.

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

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### Preliminary Matters – Alignment of the Claimed Route

1. The application was made by Rita Golden although supported by others. The appeal was duly made by the applicant within the required period.
2. The claimed route is through the curtilage of the Church of St Michael and All Angels from Elm Bank Gardens to Charles Street. The application plan has three points specified by grid references. The landowner, Saint Michael and All Angels Church (the Church), submit that a fundamental part of the claimed route passes over a car parking area and an area that was previously a fenced off garden until 2005 or otherwise enclosed.
3. Before the Council determined the application, the applicant clarified that grid reference (1) was wrong and should have been specified as further east on Elm Bank Gardens where the pavement directly faces the main church door; that the right of way goes directly around the church, following the walls of the church, and not across the car parking facility. A second map shows this route shaded in red.
4. Whilst noting the landowner's submissions, the obligation on the surveying authority is to make a judgment based on the best evidence it has. A letter accompanying the appeal dated 31 December 2018 encloses a map showing the "correct position of the route". The appellant restates that the route goes around the church following the walls, not across a car park, and that the grid reference for position (1) was wrong. I have determined the appeal on this basis.

### Main issues

5. The Council determined the application by reference to section 53(3)(b) of the 1981 Act and section 31 of the Highways Act 1980 ("the 1980 Act"). Section 53(3)(b) of the 1981 Act relates to the situation where there has been "*the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...*".
  6. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which,
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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.*"

7. The two tests were described as "A" and "B" in *R v SSE ex parte Norton & Bagshaw [1994] 68 P&CR 402*:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

8. It was also held in *Norton & Bagshaw* that an Order should be made where either of the tests is met. The evidence to establish Test B will be less than that necessary to establish Test A.
9. In order to record a public right of way the use must be 'as of right'. In the case of *R(Lewis) v Redcar and Cleveland (No 2), 2010*<sup>1</sup> ("*Redcar*") it was held that for use to be 'as of right' it must be without force, without secrecy and without permission. I must be satisfied that the relevant tests have been met on the balance of probabilities.

## Reasons

*Is it reasonable to allege that a right of way subsists?*

10. Section 31 of the Highways Act 1980 ("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.
11. It was held in *R (on the application of Godmanchester and Drain) v SSEFRA, 2007*<sup>2</sup>, ("*Godmanchester*") that "*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.*" *Godmanchester* refers to the need to read s31 of the 1980 Act as a whole and sets out that "*The primary example of an act which would negate an intention to dedicate is the erection and maintenance of a notice inconsistent with dedication in such manner as to be visible to persons using the way.*"
12. The route was called into question around 4 December 2017 when a sign was erected advising that the route was not a public right of way and that use of the footpath was permitted courtesy of St Michaels and All Angels Church Barnes. The claimed period considered by the Council was December 1997-2017.
13. Submissions for the Appellant assert that if the landowner's claims regarding closures in 2011 (during building works) or 2005 (the provision of the car parking)

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<sup>1</sup> [2010] UKSC 11

<sup>2</sup> [2007] UKHL 28

are accepted, then that would call into question two additional potential periods of use; 1991-2011 and 1985-2005.

14. There were 17 User Evidence Forms (UEFs) dated April 2018 submitted in support of the application, 10 submitted additional comments, 15 from addresses at Elm Bank Gardens, and two from an address at Charles Street. Two users explain in a letter that they only lived at the address given on the UEF from 2010. Prior to that they were "*constant visitors to the area, parking on both sides of the church and walking between the two streets, using the pathway*". Most UEFs cover the claimed period 1997 to 2018, apart from one which ends in 2017 and one which is undated. The UEFs provide a picture of regular and frequent use over the claimed period, often daily, and mostly at least a couple of times a week throughout the year.
15. The number of users providing evidence for the potential period 1991-2011 drops slightly, with one user not covering most of the period and two not providing evidence of the first couple of years. For the potential period 1985-2005 the number of users drops again, but there are still 10 users covering this entire period and the users report regular and frequent use, with one user stating a much higher use during the early years when children were at school.
16. A variety of reasons for use are given including leisure, recreation, playing, shopping, education or accompanying children to school, work/business and going to Barnes Village and Barnes Bridge [train] Station. No purpose significantly dominates.
17. The majority claim that the route was not obstructed, and no notices erected until the recent sign and do not refer to building or tree works obstructing use. But a few of the original UEFs and letters recall temporary obstruction/closure events. These are consistently described as being associated with building or tree works and to have resulted in temporary interruptions of use of the route by blockage or causing a slight variation.
18. They include that the route was closed once every few years for tree trimming when they were stopped one or two days for health and safety reasons. User evidence is that the route was closed for not more than 10 days and this is clarified as having been an estimation and not a record of fact. Users do not recall any long periods of closure and assert that every effort was made to preserve at least a partial route through the Church's property. One user states in an email dated 27 September 2018 "*can't remember any occasion when the path was fully blocked, it was always possible to find a route through*".
19. At appeal the number of UEFs increased to 50 including those submitted at the application stage, although there is an element of duplication between the application and appeal stage. Most additional witness addresses appear to be within approximately a half mile walk of the route.
20. The Church challenges the credibility of user evidence. Several of the original 17 UEFs provide few details but all are individually signed and an absence of information about closures does not amount to evidence of collusion or an attempt to withhold prejudicial information. All these 17 UEFs attested to use of the route, predominantly on foot and a few also on bike. It is not necessary that all users provide evidence of use throughout the 20-year period.

21. One user only gives a partial grid reference for the route but in an additional email provides further information including referring to the '*big build*'. Another does not describe the way, but the word "*attached*" is written on the form although it is not clear what this attachment should have been. In a letter they provide additional information including referring to it being closed briefly when the new perimeter wall on the Charles St side was being built.
22. There is a general lack of any physical description of the route or surface of the claimed way on the UEF's. Aside from describing 'start' and 'to' the form does not prompt the user to elaborate. The claimed route is short. It is plausible that a user might consider it self-evident and not requiring elaboration or might not have thought it necessary to provide more information in this regard.
23. The Church advise that five users (two of the original 17 and three in the later submissions) are, or were, parishioners and long-standing members of the Church and recorded on the electoral role.
24. From the UEF's submitted with the application alone, and discounting the undated UEF and the five who might have been using the route by right, I am satisfied that an adequate number of users provide a body of clear and credible evidence of use of an unhindered route as a footpath and 'as of right'; without force, without secrecy and without permission<sup>3</sup>, for the claimed period, and the two potential earlier periods.
25. Emery indicates that "*...where the applicant...produces credible evidence of actual enjoyment of a way as a public right of way over a full period of twenty years...then the allegation that a right of way subsists is reasonable...*". I find the user evidence sufficient to raise a presumption of dedication within the claimed period 1997-2017 under s31(1) of the 1980 Act. It would also be sufficient for the potential periods 1991-2011 and 1985-2005.

*Is there is a conflict of credible evidence?*

26. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant period, the statutory presumption can be overturned.

*Boxing Day Closures*

27. It is claimed that a chain was placed across the footpath every Boxing Day. Several users dispute the claim. The Church states that the practice occurred during the incumbency of a Reverend between 1965-1985 and accepts that the practice may have fallen into disuse by or before 1995. There is little evidence to say that the practice continued beyond 1985, one individual states that the practice had stopped by the late 1970's and in a statutory declaration it is stated that an individual had certain knowledge that the curtilage was not closed on Boxing Day from 1990. The evidence indicates that this practice predated the claimed period of 1997-2017 and, on a balance of probability, would have stopped before the potential earlier periods of 1991-2011 and 1985-2005.

*Closures for building, engineering, construction, tree and landscape works*

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<sup>3</sup> *nec vi, nec clam, nec precario*

28. Aside from the Boxing Day closures there is scant evidence to say that the route was not regularly used by the public other than during times of building, construction and maintenance works. The evidence for this covers a number of discreet projects or works.
29. Over several months in 2011 building works took place to provide a new lych-gate, paved cloister area, relaying of drains and path to the west of the church, a disabled user car park and the relaying of the north side of the church yard. Photographs show an entrance to the churchyard barricaded by tall industrial demountable metal fences. Photographs 03 and 04 are said to provide evidence that the Charles Street frontage was closed off. The Church submit there was full closure of at least 10 full consecutive days during this building project and shorter closures on at least another couple of occasions.
30. A person engaged as a site foreman from June 2011 for roughly six months advises that before commencement of work it was made clear by a number of people including the architect and builder that public access through the churchyard between Charles Street and Elm Bank Gardens was to be maintained at all times. Their evidence is provided by way of a Statutory Declaration. They explain that the working area within the churchyard was delineated by Charles Street to the south, the front elevation of the community centre to the east, the church to the north and a temporary portacabin office/store to the west. They state that the route was closed for a few days and access was maintained, except for fewer than a half a dozen occasions, when access may not have been possible for a few hours.
31. Evidence from an individual who assisted the church with building matters adds that the path was only closed for a part or most of each day, and that access from Charles Street to Elm Bank Gardens was maintained throughout the duration of the works. Some user evidence corroborates that the Charles Street entrance was diverted, and a temporary way maintained. This seems plausible, particularly as access would have needed to be maintained to the church and community centre for services and activities. One user recalls that during this '*big build*' the builders kept the access open for most of the time adding "*it was how we could have a good nose at what was happening*".
32. It may have been that closures started before the foreman commenced work, when amongst other things, works for the relaying of drains on the west side of the church took place. A separate landscape contractor tasked with works to the north and west of the churchyard worked independently on the building.
33. The scale of the building project was large. The curtilage is not great, the claimed route would have been affected and this is not disputed. Correspondence evidenced by both parties indicates that a number of individuals associated with the Church discussed needs for temporary closure of the path. For example a copy of a PCC minute of 12 May 2011 records that "*PH advised that there would be a period of approximately 10 days when the footpath would require closure during the day, GF stated that he did not think this would be popular with the locals and that notices be put on the gates explaining the works taking place...*".
34. However the approximate estimation of 10 days was no more than a predication and there is little persuasive evidence to demonstrate an actual closure of 10 consecutive days.

35. There is some difficulty in determining the evidence about the nature, location and purpose of temporary footpaths. The Church disputes claims that a path of crushed concrete was laid to maintain temporary footpath access through the churchyard between Charles Street and Elm Bank Gardens until the permanent route through the new lychgate was opened. The Church submits that the only temporary path created was of made of plywood panels and laid to provide temporary access from Charles Street to the south door of the church. Against this it is claimed that a crushed concrete path was laid for the convenience of the general public. Although the projects described are quite significant, I am not persuaded that there is evidence to say that the public were not able to use temporary measures as claimed. Moreover, it is also claimed, and the evidence does not refute, that access may have been maintained through the church itself.
36. Emails dated 30 March to 12 April 2012 discuss landscaping and works to a path which took place around this time. The Church state that these works closed the path and other closures may have taken place for the craning in of the office, erection of hurricane fencing and other works.
37. Other correspondence from 2012 contemplates how temporary access should be managed including providing access through the church for one day, notices and having volunteers directing traffic and placating 'troublemakers'. Reference is made to past events when attempts to ban resulted in people becoming 'very stropky' and 'walked all over work and ruined it'.
38. Pollarding of trees took place over one day, Monday 17 April 2012, when the route was closed that day. A photograph, 4 October 2014, shows some posts and chains. Users dispute that this was to prevent use of the route. One states it was to control vehicles in the car park and another that the bollards and chain were put up to deter cars but did not restrict access by foot. It is difficult to tell.
39. The landowner states that in 2015 the path to the west of the church was closed for at least four days to allow the installation of a new heating system to the and that the path was closed for several days to allow a high voltage steel wire armoured electricity cable to be entrenched from the western boundary to the boiler room along a line across the footpath. On 21 November the path was closed to (unsuccessfully) install heat exchangers to the boiler room. Then on the 2 December 2015 it was closed again to allow for the (successful) heat exchangers installation. But one user states that access remained available when the heating was renewed. The Church advise the path on the west side and the north side was closed on the 6 and 7 June 2017 for two days for tree works.
40. Overall, I find little evidence to substantiate a view that there was a closure for an extended period of up to 10 consecutive days on any one occasion. Rather the evidence indicates that it was likely that the route was closed for no more than a handful of occasions during works, each being a temporary closure of very short duration. The evidence indicates that the period when the temporary closures would have been longest in terms of total number of days would have been during the building project of 2011. Evidence as to whether an alternative external route was available to the public during these times is not conclusive, but on the basis of the Church's own evidence it appears likely that a route through the church itself was available when an external one was not. Evidence for and in support of the Appellant, indicates that within the periods of interruption the actual times of closure were even shorter, sometimes for a few hours.

41. Therefore, I do not doubt that some closures took place, but the evidence creates a picture of a very limited number of short temporary closures and interruptions all specifically related to building, construction, tree or other works of various kinds. The Church acknowledges this, and that all were temporary, but maintains that they were closures of the path for the Church's own purposes, that they did interrupt use and were without warning or notice and at times and for a duration chosen by the Church.
42. A landowner's lack of intention to dedicate does not have to be continuously displayed or demonstrated throughout the whole period. Nor is there a requirement that the way has to be closed simply for the purpose of demonstrating an intention not to dedicate, or that the closure or interruption has to be directed at the users of the way. Any series of acts indicating an intention to keep the way private might be enough. However, a temporary closure would not necessarily amount to interruption of use.
43. *Godmanchester* approved the obiter dicta of Denning LJ in *Fairey*<sup>4</sup> (1956) who held that "*in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate*". Hoffmann LJ held that "*upon the true construction of s31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is ... objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885)<sup>5</sup>, to 'disabuse' [him]' of the notion that the way was a public highway*".
44. *Fernlee Estates Ltd V City and County of Swansea and the National Assembly for Wales* [2001] 24 EG 161 held that interruptions must prevent enjoyment of a right of way by some physical and actual interruption and whilst it had to be an interruption of fact, the intention and circumstances were also relevant, in that if it was not intentional it would not necessarily be sufficient to rebut the presumption that a way has been dedicated as a highway; for example a tree falling across the path. Whilst the circumstances in *Fernlee* are quite different the significance of the intention is relevant.
45. Whilst the public would not have had to contest the closures to demonstrate that they were overt acts, equally, a lack of challenge does not indicate that the public understood and accepted that the way was not a public right of way.
46. The user who referred to tree trimmings, another who used the route for some years when taking children to and from school, and the Appellant in reference to the temporary closure of the route for the heating works, all opine that fencing and signage indicated a construction site and health and safety concerns. One argues that a sign apologising for inconvenience would have indicated to them that the Church realised the public use the path as a right of way around the church which was now blocked. Although the Church state this was no more than standard construction site signage of the builder. Certainly, signs such as one saying "*Warning Construction Site! Keep out*" may well have been. Signage apologising for inconvenience could reasonably have been for the benefit of people attending

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<sup>4</sup> *Fairey v Southampton County Council* (QBD)[1956] 1 All ER 419, (CA) [1956] 2 QB 439

<sup>5</sup> *Mann v Brodie* [1885] HL 378, 10 App Cas 378

the Church. Whether or not it would have been reasonable to interpret that it was a message for users of the route is not clear and is not determinative.

47. In this case I find that it is both plausible and probable that all of the temporary closures, interruptions and subsequent re-opening of the route could and would have been understood so as to facilitate works and/or make safe. Particularly those associated with measures such as temporary construction paths around works or being diverted around temporary safety fencing.
48. A reasonable person might have tolerated the closures in this way. That a number of similar 'works' related events occurred throughout the period could quite plausibly reinforce such notions, rather than disabuse them. It is not surprising that these events might have been uncontested. I also find it plausible that a reasonable person might not even register, or later recall, such events as a closure or interruption.
49. In contrast the sign erected on 4 December 2017 clearly communicated that the landowner did not intend to dedicate a public right of way. Although the Church maintains that they allowed and continue to allow permissive access there is little evidence that the landowner took any similar action to indicate that they did not intend to dedicate the way as a highway prior to December 2017.
50. Therefore in summary I have found that there were a handful of short temporary that were open, obvious and overtly physical closures, disruptions and diversions of the route. These would have occurred during the claimed period 1997-2017. But they were small in number, frequency and duration and all had a very clear relationship with specific works/projects.
51. Accordingly I conclude that there is insufficient incontestable evidence to show that by these closures a reasonable user would have understood that the owner was intending to disabuse them of the notion that the way was a public highway, or to render the applicant's evidence improbable. The evidence that there was no intention to dedicate the route during the claimed period 1997-2017 is insufficient.
52. Given my findings, in paragraphs 1-3 regarding the formation of the car parking in an area of former planting in 2005 and Boxing Day Closures at paragraph 26, I also find insufficient evidence that there was no intention to dedicate the claimed route during the potential periods 1991-2011 and 1985-2005.
53. The Council's report recognised a clash of evidence between that of the user evidence and that for the landowner. The Church consider that a public inquiry would be waste of time and money and is unjustified in this case. However, *Emery* indicates that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate. Based on the evidence and testimonies before me, I consider that it is appropriate. The making of an Order leaves both the applicant and objector with the ability to object under Schedule 15. At that stage the conflicting evidence can be heard, and those issues determined.

### **Other Matters**

54. A street lighting column was erected by the Council along the route many years ago. It appears very much like public highway lighting columns in the locality. Correspondence with the Diocese of Southwark in 1991 indicates that the Diocese was aware that this lighting column had been erected by the Council and sought to



ascertain whether there was a legal right of way over the churchyard. However I am not persuaded that this is evidence of any overt acts to disabuse a user that it was public right of way. It is plausible that the column could have reinforced users' perceptions that the route was part of the wider public highway network. However, it is not evidence that it is a public right of way or of an intention to dedicate.

55. A letter from the Diocese dated 31 October 1991 clearly indicates that they were of the opinion that the route was not a right of way but there is little evidence to say that this was communicated to users of the way either.
56. The Chairperson of the Barnes Community Association (BCC) advises that a letter from a past chairperson written with their letterhead is not from the BCC and I have treated it as being an individual representation.
57. Statements that the Church has no intention of closing the route and about potential effect of recording the right of way on this Church or other churches by way of precedent are not material. Equally I attach no weight to evidence of current use including a census of footfall.

### **Conclusions**

58. I found sufficient evidence to raise a presumption of dedication of a public right of way for the claimed route in the period 1997–2017, and for two potential earlier periods of 1985–2005 and 1991–2011. Against this the landowner presented evidence about a small number of short, temporary closures.
59. Having regard to *Fernlee* and *Godmanchester*, I found that the evidence of the nature, circumstances and likely intention with which the barring of the way took place was not sufficient to demonstrate that a reasonable user would have been made aware that the owner had challenged their right to use the way as a highway, and to overtly rebut the presumption that a way has been dedicated as a highway.
60. Therefore, having considered all the relevant evidence I conclude that the allegation that a right of way subsists is reasonable, and the appeal should be allowed.
61. Although I have been asked to set a suitable timescale for making the Order, given that there is little evidence to suggest that the Council did not deal with the application in a reasonable time frame, I do not consider it necessary to do so.

### **Formal Decision**

62. The appeal is allowed, and the London Borough of Richmond Upon Thames Council is directed to make an Order, to record on the Definitive Map and Statement the route though the curtilage of the Church of St Michael and All Angels from Elm Bank Gardens to Charles Street.

*Helen Heward*

**Inspector**