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| **Appeal Decision** |
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| **by Barney Grimshaw BA DPA MRTPI (Rtd)** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 9 November 2021** |

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| **Appeal Ref: FPS/X2600/14A/4** |
| * 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 Norfolk County Council not to make an Order under section 53(2) of that Act.
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| * The Application dated 16 May 2016 was refused in part by Norfolk County Council on 18 December 2020.
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| * The Appellant claims that 4 routes running between the villages of Winterton-on-Sea and Hemsby should be added to the definitive map as footpaths.
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| **Summary of Decision: The appeal is allowed with regard to two of the claimed routes.**  |
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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 Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map which shows all 4 of the claimed routes for reference purposes. On this map, route 1 runs between Points B-C-D-E-G-H, route 2 between B-C-D-F-G-H, route 3 A-C-D-E-G-H and route 4 A-C-D-F-G-H.

Main issues

1. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates.
2. Much of the evidence in this case relates to usage of the claimed routes. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. Common law also requires me to consider whether the use of the route and the actions of the landowner have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.

Reasons

1. The original application in this case related to 5 claimed routes. The application was successful in respect of one of the routes claimed but rejected for the other 4 routes. The current appeal relates to these 4 routes.

***Documentary Evidence***

1. Although the application relied on user evidence rather than documentary evidence, Norfolk County Council, the Order Making Authority (OMA), undertook archive research and presented the findings which I have summarised briefly below.

*Routes 1 and 2*

1. Early commercial maps and Ordnance Survey (OS) maps do not show the claimed routes. The 1938 OS map shows that most of the roads over which routes 1 and 2 run had then been constructed although there was no link between Bush Road in the north and Long Beach Road in the south.
2. Most of the land over which the routes run was requisitioned during the war to site an RAF radar station. A link between Bush Road and Long Beach Road was built by the RAF and can be seen on an aerial photo from 1946 (but not on one from 1940). The RAF site was not accessible to the public and public use of the routes could not therefore have commenced before 1947 when the site ceased to be a military camp.
3. A bungalow was built at the southern end of Bush Road in the early 1960s. The conveyance for the property (dated April 1962) shows that the road link between Bush Road and Long Beach Road was then replaced by a footpath link 3́́́́ ́(0.9m) wide on a slightly different alignment. Accordingly, the routes used by the public before and after 1962 were slightly different.
4. Winterton Valley Estate (WVE) was built in the 1970s and involved the removal of most of Bush Road. However, it is possible that it may still have been possible to walk the line of routes 1 and 2 as the old road was grassed over but not apparently obstructed, except at the property now known as Highlands, where the eastern part of the road was incorporated into the property boundary by fencing by 1970.

*Routes 3 and 4*

1. The southern part of these routes corresponds to those of routes 1 and 2 respectively. However, the northern section of both routes follows a different alignment through Winterton Valley Estate (WVE).
2. When WVE was built in the 1970s most of Bush Road was removed and a new estate road constructed along which the claimed routes run. Evidence from the site owner and a 1974 sales map indicates that the new road was completed by 1974, suggesting that public use of routes 3 and 4 could not have commenced before 1973/74. Apparently, a temporary road existed before 1973/74 on a different alignment and some people may have used this route.

*Conclusions regarding the Documentary Evidence*

1. The documentary evidence that is available indicates that routes 1 and 2 may have been physically available to be used by the public between 1947 and 1962 and then again after 1962 but on a slightly different alignment at one point. Routes 3 and 4 appear to have been physically available from around 1973/74 onwards. However, none of the documentary evidence I have seen indicates whether or not any public rights subsisted over the routes.
2. Accordingly, the determination of this appeal depends on whether the evidence relating to public use of the routes indicates that they can be presumed to have been dedicated as public rights of way in accordance with the provisions of the 1980 Act (Statutory Dedication) or can be inferred at common law.

***Statutory Dedication***

*When use of the Order routes was brought into question*

1. A section common to all 4 routes was obstructed at the property, 1 Bush Road, in 2015 bringing public use of all the routes into question and triggering the application for them to be added to the definitive map.
2. The northern part of routes 1 and 2 follows the line of the old Bush Road. The surface of this road was removed between 1970 and 1974 and approximately half the width was enclosed within the boundary of the property, Highlands, by 1977. It may have been possible for people to continue to use the routes after these dates, but the evidence of users suggests that most use transferred to routes 3 and 4.
3. There is substantiated evidence that a sign which included the words *“No Public Right of Way”* has been maintained at a point towards the northern end of routes 1 and 2 since 1971 and possibly earlier. Such a sign may have brought public use into question although most people claiming to have used the routes state that they saw no signs.
4. As already mentioned, the alignment of routes 1 and 2 was altered in the vicinity of the junction between Bush Road and Long Beach Road in 1962. Although this was a relatively minor change involving a short section of the routes, the OMA argues that the routes before and after 1962 should be considered separately as different routes.
5. The estate road along which routes 3 and 4 run was not completed until 1973/74. There is substantiated evidence of signs, which included the words *“No Public Right of Way”* having been in place on the northern section of these routes in 1981, 1996, 2007, 2009, 2012 and 2016. Again, although such signs could have brought public use into question, most people claiming to have used the routes state that they saw no signs.
6. It is further claimed that similar signs were in place before 1981 but this is not substantiated by photographic or other evidence. There is also evidence of the presence of a number of signs which did not specifically state that there was no right of way on foot.

*Use by the public*

1. 133 User Evidence Forms (UEFs) were submitted in support of the application. However, 96 of these were completed by owners or tenants of properties served by the claimed routes who would have had a private right to use parts of the routes. These UEFs were discounted by the OMA leaving 37 forms submitted on behalf of 39 individuals to be considered. However, although the use of routes in the exercise of a private right cannot contribute to the raising of a statutory presumption of dedication of those routes as public rights of way, other information contained in the UEFs is relevant to consideration of the status of routes. Also, I have seen no evidence to suggest that any private rights extended to the whole of any of the claimed routes.
2. I have not seen the original forms that were submitted but have had a detailed summary of them prepared by the OMA. These show that, of the 39 people covered by the forms accepted by the OMA, 12 people claimed to have used route 1, 3 route 2, 24 route 3 and 6 route 4.
3. The period of use described extended from 1947 (and earlier) to 1985 in respect of routes 1 and 2 and from 1970 to 2015 in respect of routes 3 and 4.
4. The frequency of use claimed varied, but many users stated they had used the routes weekly or more often. Several people claimed to have used the routes with bicycles as well as on foot but the frequency of each type of use is not known.

*The evidence and actions of the landowners*

1. The owner of land crossed by the northern section of the claimed routes, WVE, has produced a significant amount of evidence of action taken which would indicate a lack of intention to dedicate any rights of way since the estate was developed from 1970 onwards. In addition to the signs already referred to, a record of 95 challenges made to users of the routes between 2000 and 2016 has been submitted and details of 7 occasions when temporary permissions have been issued for use of the routes between 1995 and 2013. It is also claimed that challenges were made before 2000 but not recorded in the way they have been since then.
2. The owner of the Long Beach Estate, crossed by the southern sections of the claimed routes, since 1963 states that he has challenged users, erected signs and given permissions to some people. This evidence is not substantiated by photos or other documents in the same way as that relating to the WVE land.

*Conclusions regarding statutory dedication*

1. Evidence of public use of all the claimed routes, other than by people with a private right to use at least parts of them, is limited. This is perhaps not surprising in respect of use which took place over 50 years ago.
2. Routes 3 and 4 came into existence on their current alignment in 1973/74. Since then, the evidence, which is substantiated by photos and other documents, indicates that signs have been in place which included the wording *“No Public Right of Way”.* Although users of the route say they did not see the signs and their use was accordingly not brought into question by them, they do indicate a lack of intention on the part of a landowner to dedicate public rights of way. As do the challenges and permissions recorded.
3. Routes 1 and 2 were in existence and physically available for public use from 1947. However, in 1962 the alignment of the routes was altered as a result of the development at 1 Bush Road. Then, between 1970 and 1974 the surface of the northern part of the routes was removed and they were partially obstructed at one point. There is also evidence of a sign having been maintained stating *“No Public Right of Way”* since 1971 and claimed use decreased significantly after this time.
4. Since 1971, use of routes 1 and 2 has been limited and, even if the sign that has been in place did not bring public use into question it did indicate a lack of intention on the part of a landowner to dedicate public rights of way. Therefore, it cannot be presumed that the whole of either route 1 or 2 has been dedicated as a public footpath in accordance with the provisions of the 1980 Act as a result of public use since 1971.
5. However, there is evidence of public use of routes 1 and 2 from 1947 until 1971 and, although the available route changed in 1962 that is not necessarily fatal to the claim. If the new link that was created was available for public use and therefore did not result in the unaffected sections becoming cul de sac routes terminating at points to which there was no reason for the public to require access, these sections are capable of being presumed to have been dedicated as public rights of way under the 1980 Act.

***Common Law***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
2. In this case, although there is evidence of public use of routes 3 and 4, the actions of the landowners indicated a lack of intention to dedicate public rights of way. It cannot therefore be inferred that these routes have been dedicated as public footpaths at common law.
3. The situation with respect to routes 1 and “ is less straight forward.
4. The planning permission for the bungalow built on the line of the claimed routes at the southern end of Bush Road, dated 30 May 1961, included a condition *“Provision shall be made for a footpath link between the estate road and Long Beach Estate Road to the south-east”*. The reason for imposing the condition was stated as being *“In order that pedestrians may have an unrestricted passage along this section of the coast line”*. The subsequent conveyance of the land for the bungalow, dated 12 April 1962, reserved for the vendor the right to pass on foot along a 3 ́wide footpath subject to contributing to the cost of its maintenance.
5. It is argued that the planning condition did not specify that the footpath link should be public and, if it had resulted in a public footpath link being available, there would have been no need for a private right to be reserved in the subsequent conveyance. However, it is my view that the wording of the condition and, more particularly, the reason for it, is not consistent with an intention that the route should only be available to an individual. The evidence of users also indicates that public use of the routes was not interrupted and continued. Also, as the new link was not recorded as a public right of way, it may have been considered prudent to ensure that the vendor’s right was safeguarded in any event.
6. In these circumstances, it is my view that acceptance of the planning condition by the landowner and the use of the new link by the public means that it is reasonable to allege that the new footpath link has been dedicated as a public footpath at common law.

**Other Matters**

1. A number of other issues were raised in support of the application particularly relating to the desirability of the claimed routes and the difficulty and danger of using alternatives.
2. On the other hand, some owners or occupiers of properties close to the routes expressed concern about public use of the route and its possible use by motorcyclists.
3. I understand these issues but, as they lie outside the criteria set out in the relevant legislation, I have given them no weight in reaching my decision.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities it is reasonable to allege that the claimed routes 1 and 2 are public footpaths as a result of a combination of statutory dedication and inferred dedication at common law. The appeal should therefore be allowed in part.

Formal Decision

1. The appeal is allowed in part and 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 to add public footpaths 1 and 2, as proposed in the application dated 16 May 2016. This order to be made within 3 months of the date of this direction. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Barney Grimshaw

Inspector

