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| **Appeal Decision** |
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| **by Susan Doran BA Hons MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 15 March 2022** |

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| **Appeal Ref: FPS/C1245/14A/13** |
| * 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 Dorset Council not to make an Order under Section 53(2) of that Act. |
| * The Application dated 11 March 2010 was refused by Dorset Council on 23 December 2020. |
| * The Appellant claims that the appeal route from Holton Heath Trading Park to Rockley Jetty (referred to as ‘The Cordite Way’) in the parish of Wareham St Martin 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 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. The appeal concerns an application to add a public footpath along a disused railway line. The Appellant also seeks a ‘Direction Request’ as a decision was not made on the application within 12 months of its submission to Dorset Council (‘the Council’). However, this is a separate process, and in any event the application has now been determined by the Council. The Appellant has appealed the Council’s determination, not to make an order, and that appeal is the subject of this decision.
4. Submissions have been made by the Appellant, the Council, and various landowners, and include evidence submitted by the Appellant after the Council reached its decision on the application. In addition, I accepted a late submission from an interested party which has been circulated to all parties for comment. In this decision I have taken into account the responses to the late submission, together with all other evidence available to me. However, I have not relied on a number of local, national and other policy and initiative documents submitted by the interested party as they are not ones that I am able to consider in relation to the relevant tests, which I set out below.
5. In reaching this decision I have found it convenient to refer to a plan attached to the Council’s Committee Report (Appendix 1) showing the route between points A to G. A copy of the plan is appended to this decision.

Main issues

1. The application was made under section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in section 53(3).
2. Section 53(3)(c)(i) of the 1981 Act specifies that an 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 in the High Court in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994],this involves two tests:

**Test A.** Does a right of way subsist on a balance of probabilities?

**Test B.** Is it reasonable to allege on the balance of probabilities 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.

1. In relation to Test B, the Court of Appeal recognised in *R v Secretary of State for Wales ex parte Emery [1998]* that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that *"…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."*
2. As regards the documentary evidence, section 32 of the Highways Act 1980 (‘the 1980 Act’) requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
3. For the user evidence, section 31 of the 1980 Act is relevant. This requires consideration as to whether 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 calculated retrospectively from the date when the right of the public to use the way was brought into question.
4. Alternatively, I may consider the common law which requires consideration as to whether the use of the route and the actions of the landowners have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred, and the public have accepted that dedication.

There is no fixed period of use, therefore the shorter the period, the more difficult it may be to show dedication by the landowner and acceptance by the public of that dedication, than with dedication by statute.

**Reasons**

1. The appeal route runs along the disused Royal Naval Cordite Factory (‘RNCF’) narrow gauge railway line which carried cordite to loading barges at Rockley Jetty, Poole Harbour between 1915 and the 1940s. The track was removed in the 1950s, and a trading estate now occupies land on the former factory site. The appeal route commences at a roundabout on the trading estate and skirts around the outside of Holton Heath Nature Reserve and Holton Lee following the former railway line, then crosses over the mainline railway (from Wareham to Poole) via a bridge and runs to the jetty passing alongside the mainline railway. The appeal route forms a cul-de-sac at Rockley Jetty.
2. In addition to the evidence adduced of claimed use by the public for recreation are a wide range of documentary sources. County maps, Ordnance Survey (‘OS’), tithe, Finance Act and Definitive Map records were investigated by the Council, as well as estate maps, touring maps, surveys undertaken by the Parish and by the Ramblers’, together with other Council records. There has also been research of turnpike, inclosure, rail and canal records, highway authority minutes, and a 1922 private agreement.
3. The Appellant takes issue with a number of findings made in the Council’s Report, and suggests the evidence provided with and since the application is likely to represent only a small proportion of the appeal route’s actual use. The interested party suggests there are other potential sources of evidence that could or should be investigated, for example photographic evidence, potential use by workers from the trading estate and by fishermen that was not sought or provided when the application was made and investigated, together with other documentary sources.
4. There may well be further evidence to support a case in favour of the Appellant. However, my decision is reached on the evidence that has been adduced and is currently available to me against the tests set out above. In this case there is both documentary and user evidence.

***Documentary evidence***

1. The appeal route, or parts of it, is documented in some of the sources available. Part (B-C on the appended plan, Appendix 1) is depicted on the 1805 OS drawing and again on OS maps dating to 1856, 1887 and 1900. Similarly, the same section, or one corresponding to it, appears on the 1843 Wareham St Martin Tithe Map and Award. It is suggested there may have been public use of a path to Holton Lees prior to 1890. However, only parts of the appeal route are depicted on the earlier OS and other mapping. It is not until 1925 that the whole of the appeal route is shown on OS mapping as a railway with the bridge marked at E, though sections are missing on the 1954 map, possibly due to wartime restrictions. A short section (A-B) appears on the 1990 OS map. Collectively, these records confirm the physical existence of parts of the appeal route prior to and post the existence of the RNCF railway, though not its status. From 1925 (until dismantled), the documentary evidence confirms the existence of the railway following the alignment of the appeal route.
2. A 1947 aerial photograph shows both the RNCF and railway. Subsequent aerial photographs from 1972 to 2017 document changes, including the establishment of the trading estate, and appear to show wear lines to a greater or lesser degree depending on vegetation cover. Those that do show what could be parts of the appeal route provide some evidence in support of the existence of a physical feature where visible, but they provide no evidence as to its status.
3. An undated (possibly 1940s) plan of the RNCF shows various features, but there is no key to identify them. Again, it provides evidence of the physical existence of what it shows. A number of photographs taken from 2011 onwards depicting parts of the route, including the bridge, show evidence of wear and of people walking along the appeal route.
4. Taken as a whole the documentary and photographic sources confirm the physical existence of the appeal route, or parts of it, though none provides evidence of status. The more recent photographs provide some limited support for its use. However, several post-date the application. Accordingly, I find the documentary evidence is of limited value in terms of the appeal.

***Statutory dedication***

*Evidence of use*

1. The application was prompted by the appeal route (A) being fenced/closed off in 2009. For the purposes of presumed dedication under section 31 of the 1980 Act, I consider this action would have brought into question the public’s right to use it, providing a 20-year period of 1989-2009. Other obstructions are noted, including gates (E), which appear to have been later in 2009 or 2010. It is suggested the gates were present/locked before this date although no indication is given as to when this may have been. If put up or locked in 2009-2010, this would coincide with the date of the application and/or provide another potential 20-year period of 1990-2010. It is thought that both the fencing and gates were put up for safety reasons and were temporary rather than intended to prevent passage. Nevertheless, both would have interrupted passage and can be interpreted as an event which challenged the public’s right to use the appeal route, and in this case led to the application.
2. Other dates to consider are 1991 and 2006 when one of the landowners deposited statements under section 31(6) of the 1980 Act, supplemented by declarations in 1996 and 2007. Section 31(6) of the 1980 Act enables a landowner to deposit with the appropriate council a statement and plan showing admitted public rights of way on their land and subsequently make a declaration that no additional rights of way over it have been dedicated since the date the plan was deposited. In the absence of proof of a contrary intention, the deposit and declaration are deemed to negate the intention of the owner or successors in title to dedicate any additional ways as a highway. Whilst I have not seen copies of the documents described, there is nothing to suggest they were not lodged as required.
3. Although the Council did not consider the section 31(6) deposits brought the public’s right to use the appeal route into question as there was no requirement that they be advertised, I am guided by the *Godmanchester* case (Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs [2007] UKHL 28). In the judgement, support was expressed for a symmetry between acts sufficient to bring the status of a way into question and acts that demonstrate a lack of intention to dedicate a public right of way. Accordingly, I would regard both 1991 and 2006 as dates which act as a bringing into question, providing 20-year periods of 1971-1991 and 1986-2006 respectively.
4. Some 63 user evidence forms (‘UEFs’) were submitted either with the application, or subsequently. It is the case that more weight is attached to those UEFs that have been signed. In this instance, 2 forms considered by the Council were unsigned, although I do not discount this evidence entirely.
5. Claimed use of the appeal route covers a period from 1955 to 2010 (the date of the application), with continued use evidenced after this date. Use was recreational and for pleasure, to go birdwatching, fishing and dog walking. There is nothing to suggest that it was carried out by force or by stealth. However, it is possible that some use was permissive – one person indicated on their UEF that they had permission to use the appeal route. A handful of people claimed use in connection with a Scout group and it is unclear if this use was as of right or by permission. Some people accessed the appeal route from a car park at nearby Holton Lee. It is not clear whether this access was via public or private ways, though it seems likely it was the latter. Although the Appellant says users made donations for use of the car park, they argue no permission was sought from the Holton Lee Charity to use the appeal route. Nevertheless, these points would benefit from further clarification.
6. No barriers existed between the charity land and the land on which the appeal route lies (with gates/stiles provided through later fencing), and no prohibitive notices were in place. The only notices, described by a handful of users, referred to closing gates and ‘Danger Keep off’ in respect of the bridge crossing the mainline railway. This suggests use was encouraged or at least not actively discouraged.
7. Use was initially by one or two people in the early years, then rising steadily through to 1999 before peaking in 2007/8. Not all users followed the appeal route in its entirety. As indicated above, some used sections of it in conjunction with other ways, forming a circular route. For the 20-year period leading up to 2009, a minimum of 17 individuals used the appeal route, and with the additional UEFs submitted since the application was considered, the figure rises.
8. This evidence of claimed use submitted after consideration of the application by the Council describes use as weekly, monthly, every few months and annually from the mid-1960s, mid-late 1970s and late 1980s/1990s onwards. All users referred to seeing other people using the appeal route, and none indicated the presence of notices or having been challenged or obstructed in their use. There is reference to use by others attending summer camps in the late 1970s-1980s on adjacent land which would have been permissive; and one UEF refers to a tenant having told the claimant the appeal route was not public in the 1970s.
9. Aerial photographs provide some support for the existence of a worn way (where seen and not obscured by vegetation) at the time they were taken. However, this does not provide unequivocal evidence that the appeal route was being used by the public, and as of right.
10. I have considered the Council’s analysis of the UEFs available when making their decision. This provides a break-down of the frequency of use per week, including the minimum frequency, during the various years/decades of use. I have also considered the user evidence submitted subsequently. Taking each of the possible 20-year periods in turn, there is equally good evidence of use by the public as of right, that is without force, secrecy or permission (notwithstanding some use may have been carried out with permission), and without interruption, for the periods 1989-2009 and 1990-2010, sufficient to reasonably allege the existence of public rights on foot. Similarly, there is good evidence of such use for the 20-year period 1986-2006. Understandably, given the passage of time, there are fewer individuals claiming use for the earliest 20-year period 1971-1991. Nevertheless, the Council considered use by 21 people during this period, as of right. A further 8 UEFs have been submitted claiming use during the early years of this 20-year period and/or during the middle and latter part of the period, again with frequency of claimed use varying from weekly to monthly, every few months and annually. Collectively, I consider this user evidence is more significant than that considered by the Council, albeit the numbers and frequency of use vary and remain lower for the early part of this 20-year period.
11. Whilst most use described is on foot, there is also claimed use with a bicycle by several individuals. This began in 1968 with a handful of users, rising to double figures by 2003-2005, and rising again in 2008. Thereafter, cycle use declined sharply. Whilst none of the cyclists were challenged, the frequency of their use and the number of users was low. In 1968 use was fortnightly, and for the height of cycle use (2003-2008), less than twice a week. I would not regard this as sufficient to reasonably allege the existence of public rights higher than on foot.

*Landowner evidence*

1. As indicated above (paragraph 21), section 31(6) deposits under the 1980 Act were submitted to the then Dorset County Council by the owner of the Lees Estate. The first, in1991, was supplemented in 1997 by a declaration that no additional ways had been dedicated. There followed a gap until 2006 when a second deposit was lodged, with a declaration following in 2007 (and again in 2017). All the documents concerned that part of the appeal route from C-D-E-F and G. No actions were taken on the ground in relation to these events, such as notices, barriers, or challenges.
2. Consequently, the Lees Estate Settlement did not consider the appeal route to be a public right of way. Nevertheless, it appears it was aware of occasional use of it by the public on foot. Apparently, people were required to obtain permission to use it, although no records were kept, and some people were given permission to access the beach. It is not clear when such permissions were granted, nor to whom, or how.
3. The deposits under the 1980 Act, later backed up with statutory declarations would demonstrate a lack of intention to dedicate any additional public rights of way over the land and consequently the appeal route between C and G, and for any 20-year period from 1991 and from 2006 onwards, albeit the public would not, or are unlikely to, have been aware of their existence.
4. Gates at the trading estate (A) were locked by the then landowner in 2009. Gates were also installed and locked at E. It was not until 2013 (after the application was submitted) that Network Rail declared the bridge over the mainline railway to be unsafe, fenced it off and put up a sign indicating there was no public access. In support of their argument that dedication of a public right of way over the bridge crossing the mainline railway may be incompatible with their statutory objectives (here, the efficient and safe operation of the railway), Network Rail cites the case of *Ramblers v Secretary of State and Network Rail* [2017]. However, the circumstances in the appeal differ from those in the judgement cited which concerned use of a level crossing.
5. The Holton Lee Charity as adjoining leaseholders did not believe the appeal route to be public and had told people who visited their land by permit. However, as stated above, unlocked gates and stiles between the Charity’s land and the appeal route may be interpreted as not discouraging access.

*Conclusions*

1. The public’s right to use the appeal route was brought into question in 2009 when a gate was locked at E (and/or it seems again in 2010). Whilst during the 20-year period 1989 to 2009 use appears to have been as of right and without interruption, with no evidence of contrary notices or challenges, there is clear evidence that a landowner of the greater part of the route (C-G) had demonstrated a lack of intention to dedicate by way of lodging the section 31(6) deposits and declarations with the highway authority in 1991 and again in 2006. The same is true for the twenty-year period 1986-2006 which would have been subject to the 1991 section 31(6) deposit and declaration.
2. However, there is no evidence of any lack of intention to dedicate the appeal route (or parts of it) on behalf of any landowner prior to 1991.
3. There is a body of claimed use by the public dating from 1955 to 1991, albeit in the earlier years the frequency of use and the number of users is low. I note the comments of the Council and of Network Rail as regards the levels of claimed use during these years. Nevertheless, the combined evidence of use (that considered by the Council and that submitted subsequently) points to increasing levels and frequency of use by the mid-1960s and early 1970s onwards, such that a right of way may have come into existence through long use of the appeal route for recreation. There is no evidence that use was anything other than open, or that it was challenged in any way. It remains possible that some use may have been permissive although the evidence in this regard is unclear. The level and frequency of use appears commensurate with the locality and sufficient for the landowners to have been aware it was taking place.
4. Whilst I do not consider that Test A has been met (paragraph 8) I consider the balance tips in favour of a reasonable allegation that a public right of way on foot subsists (Test B). Having reached this finding there is no need for me to address the common law.

**Other matters**

1. The desirability of establishing a public route at this location for reasons of its suitability, for health and wellbeing, safety, relieving congestion, for sustainability reasons, as a ‘trail’, asset, or resource for local people and for workers on the trading estate, for its strategic benefit in the rights of way network, and so forth, whilst important reasons for those arguing them, are not matters that can be considered under the 1981 Act. Neither are safety issues as regards the bridge over the mainline railway, or the cost of maintaining/replacing it, or references to nearby contaminated land, matters that are relevant in determining the appeal under the relevant legislation.
2. Support is expressed by some of the landowners to establish the appeal route (or most of it) through dedication, with links to other routes in the area. Support for its establishment from the Parish Council and a local Community Group is also expressed. However, these too I am unable to take account of in determining the appeal.

**Conclusion**

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

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Dorset Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within 12 months of the date of this decision to modify the Dorset Council Definitive Map and Statement by adding a public footpath as shown between points A and G on the plan attached to the application dated 11 March 2010. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

S Doran

**Inspect****or**

