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| **Appeal Decision** |
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| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 4 July 2022** |

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| **Appeal Ref: FPS/U1050/14A/13** |
| * 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 Derbyshire County Council (“the Council”) not to include all of the claimed routes in the proposed Order.
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| * The application was dated 24 January 2019 and this appeal relates to the Council’s decision of 5 August 2020 in relation to the application. Nottinghamshire County had Council consented to the Council determining the part of the application which involves land within Nottinghamshire.
* The appellant claims that the relevant routes should be recorded as bridleways in the definitive map and statement.
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| **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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act. All of the points referred to below correspond to those delineated on the map with the Council’s report into the application which is also attached to this Appeal Decision.
2. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
3. The Council resolved in the notice of its decision, dated 5 August 2020, to make an Orderto add a bridleway to the definitive map, which mainly follows a route running parallel to a railway line,between points A-B-C-Y-D (“the railway route”) and upgrade the northern part of Long Eaton Footpath 7, between points X-D, to bridleway status. Therefore, it does not fall to me to consider these routes as part of this appeal.
4. Secondly, the Council resolved not to make an Orderin relation to the following elements of the application:
* The addition of a bridleway across land known as Erewash Field, between points C-G.
* Addition of a network of bridleways around Trent Meadows, involving points L-K-F, M-J-K and J-E.
* The upgrading of the continuation of a proportion of Long Eaton Footpath No. 7 to bridleway status. This proposal also includes the addition of a new section of bridleway. The route in question proceeds between points D-E-F-G-H (“the Footpath 7 route”).
1. Additionally, the Council considered the historical evidence in relation to a claimed bridleway (between points X-D-Y-Z), which was included in a separate application of 7 May 2019. As outlined in paragraph 3 above, the D-Y section forms part of the railway route, which the Council proposes to include in an Order to modify the definitive map. It also proposes to modify the definitive map in relation to the status of the northern part of Long Eaton Footpath 7 (points X-D). Although consideration was given to the evidence in relation to the remaining Y-Z section, the Council’s notice of 5 August 2020 contains no recommendation regarding this route. The Council’s report clearly outlines that the matter under consideration is the application of 24 January 2019.
2. In light of the above, I do not consider that it is appropriate for me to presently consider the Y-Z section. The determination of whether an Order should be made to add it to the definitive map still resides with the Council. Further, the appellant has the option of requesting that the Secretary of State direct the Council to determine any unresolved application in accordance with Paragraph 3(2) of Schedule 14 of the 1981 Act.
3. The Council refers to the fact that it has resolved to make anOrder in this case and there is the option to object to the omission of the additional routes when the Order is made. Paragraph 4(1) of Schedule 14 enables an applicant to appeal against the decision of an authority to not make an Order. However, this needs to be read in conjunction with Paragraph 3(1) of the Schedule. This specifies that the authority has to investigate thematters included in the application and decide whether to make an Orderto which the application relates. In this case, the Council has resolved to not include in the proposed Order the majority of the routes included in the application.
4. Having regard to the above, it is appropriate to consider the appeal in light of the routes outlined in paragraph 4 above.

**Main Issues**

1. Where no public right of way is presently recorded, Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *“a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist…”.*
2. In considering the above there are separate two tests to be applied:
* Test A: Does a right of way subsist on the balance of probabilities?
* Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

At this stage, I need only be satisfied that the evidence meets Test B, the lesser test.

1. Where it is proposed that an existing way should be upgraded from footpath to bridleway status, Section 53(3)(c)(ii) of the 1981 Act specifies that an Order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *“a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description*”. The evidential test to be applied is the balance of probabilities.
2. It is apparent that in relation to the Footpath 7 route an anomalous outcome could potentially arise from the different standards of proof to be applied to the different sections of the route at this stage. Should I find that only test B is applicable, given a proportion of this route is presently unrecorded, the reasonable approach would be for the whole of the route to be included in an Order. This will provide an opportunity for the status of the route to be fully explored at the confirmation stage when the Order would be determined on the balance of probabilities.
3. The relevant statutory provision for the dedication of a public right of way is found in Section 31 of the Highways Act 1980. This requires consideration of whether there has been use of a way by the public, as of right (without force, secrecy and permission) and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
4. If statutory dedication is not applicable, I shall consider whether the evidence is supportive of the dedication of a footpath under common law. Dedication at common law requires consideration of three issues: whether the owner of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there was acceptance of the dedication by the public.

**Reasons**

***Statutory Dedication***

*When the status of the claimed routes was brought into question*

1. There is nothing to suggest that the status of the routes across Trent Meadows was brought into question prior to the application of 2019. This application could also have served to bring the status of the other claimed routes into question. However, the Council believes this is more likely to have occurred in 2007 when permissive access is stated to have been granted over particular routes. The appellant accepts that the current landowner erected signs on the route across Erewash Field in around 2017, which served to prohibit public access.
2. It is stated that the Trent Valley Greenway project provided permissive access for members of the public in relation to the Footpath 7 route and the approved railway route. In essence this means that any use, aside from pedestrians using the existing public footpath, would be by permission. This could apply directly to use of the Footpath 7 route and indirectly to the Erewash Field route given that any use of the latter was via a permissive path at each end.
3. In the absence of a copy of an agreement it cannot be determined what legal arrangements were put in place for permissive access in the area. Nor have details been provided of the wording and locations of signs to inform people that use of particular routes was by permission of the landowner. It is possible that measures were in place which made it clear that access over particular routes was by permission. However, it cannot be determined whether this was the case from the evidence presently available. Whilst the status of the relevant routes could have been brought into question in 2007, it could potentially be the case that this did not happen until the later signage for the route across the Erewash Field and the application of 2019 for the Footpath 7 route. It is also possible that the status of the Erewash Field route was brought into question by some other earlier action to challenge use by the public (see paragraph 34 below).
4. The routes across Trent Meadows are likely to have been brought into question by the application of 2019. At this stage, I consider that the appropriate approach in relation to the other claimed routes is to assess the evidence in light of the potential events that could have brought their status into question and the resultant twenty-year periods.

 *The user evidence*

1. Around 120 user evidence forms (“UEFs”) have been submitted by people in support of use of the claimed routes. Some of these users have provided further information in relation to their use of routes in the locality.
2. The Council points to problems in interpreting UEFs involving use of more than one route. It says a UEF is designed for one route with a request for separate forms to be completed for any additional routes used. In response, the appellant points to the practical difficulties in persuading people to complete multiple forms. The majority of the UEFs contain a standard description, which includes the railway route and the Erewash Field route.However, the form asks people to mark on a map the route used.The UEFs therefore need to be considered at this stage in light of what people have marked on the maps attached to the forms. It is reasonable to presume that they have used the route or routes they have marked on their map.
3. I accept that the submission of a single UEF where a person is claiming to have used more than one route causes problems when assessing the extent of their use of each route. This issue is more pronounced where people are claiming use by different means, such as on foot, cycle or horseback. Questions will invariably arise when the use of multiple routes is stated to have occurred on a regular basis. Nonetheless, given that this was a matter of concern for the Council, no attempt was made to clarify by interview or written questionnaire, the extent of the use of the different routes. Therefore, at this stage, the written evidence of use needs to be taken at face value unless there is incontrovertible evidence which means that a different conclusion should be reached on a particular matter.
4. A proportion of the users only state that they used the railway route, and their evidence should be discounted for the purpose of this appeal. It would also usually be appropriate to discount the use of the Footpath 7 route on foot. Nonetheless, I recognise that pedestrians will not have previously had a right to use the parts of this route that deviate away from the recorded public right of way.
5. It cannot be concluded from the evidence that use of any of the routes was by way of people doing so in secret or by the use of force. The issue of permissive use needs to be considered in the context of when the status of the routes was brought into question. I address separately below the issue of whether the use of the Trent Meadows routes was as of right.

*Use of the Erewash Field route*

1. The UEFs provide significant support for use of the Erewash Field route by the different types of user during the relevant twenty-year period irrespective of whether the bringing into question is taken to be 2017 or 2007. The relevant periods being 1997-2017 and 1987-2007 respectively. The evidence is supportive of use throughout both of these periods. However, land in the locality was previously subjected to mineral extraction and an issue arises regarding the extent to which access would have been possible prior to the land being restored.
2. I do not necessarily find from looking at the Ordnance Survey map from the late 1980s that the extent of the flooded gravel pits would have prevented use of the Erewash Field route.Nonetheless, a 1983-95 Ordnance Survey map shows the land crossed by this route comprising of a gravel pit. No details have been provided of when this map was surveyed but additional information reveals that the Erewash Field and Trent Meadows area were landfill sites with material inputted between 1978 and 1990. There would then have been a period during which the site was restored to grassland.An aerial photograph of 1999 shows that the Erewash Field comprised of grassland and scrub and there is a worn route between points C-G. This is replicated on the 2009 and 2016 aerial photographs, but the situation is less clear on a 2001 aerial photograph.
3. Although the present landowner (Leaworks Lakeside Limited) estimates that the whole site would have been restored by the late 1990s, there is no evidence to show when the land would have been available for the public to use. However, it is probablethat the public would not have been able to use the route until at least the early 1990s. This means that any reliance placed on use throughout the whole of the earlier twenty-year period (1987-2007) is likely to fail.
4. If the status of the Erewash Field route was brought into question in2017 it is more likely that the public would have been able to use the route throughout the preceding twenty-year period. The extent of the use contained in the UEFs for this period would be sufficient to raise a presumption of the dedication of a public bridleway. However, the information provided raises significant doubt regarding whether the public would have been able to use the route throughout the whole of the earlier relevant period. Therefore, if the status of the Erewash Field route was brought into question in 2007, consideration would need to be given to whether the dedication of a public right of way at common law can be inferred from the evidence.

*Use of the Footpath 7 route*

1. It is apparent that the legal line of Footpath 7 varies in places to the route more commonly used. Footpath 7 is stated by the Council to proceed along the base of an embankment. In contrast, the Council says the multi-user route instigated in 2007 runs initially along the top of the embankment before merging onto the same alignment as Footpath 7. Whilst it appears that the application route is more aligned to the multi-user route identified by the Council, it cannot be concluded at this stage whether all the users used this particular route or whether the route used has varied over time.
2. When taken at face value, the UEFs provide evidence of significant use of this route throughout both of the potential relevant periods. No details have been provided of any interference with the land crossed by the route during these periods and this is unlikely to have occurred in relation to the proportion of the route that corresponds witha public footpath. There is further evidence of use of this route in the additional submissions from some of the users. It seems to me that the use of this route is greater than the other appeal routes, which is not surprising given that it links with the routes included in the application and a public right of way alongside the River Trent. The evidence of use from cyclists and horse riders alone is sufficient to raise a presumption of dedication.

*Use of the Trent Meadows routes*

1. The routes within Trent Meadows are stated to have been specifically laid out by Erewash Borough Council 25 years ago. It is therefore likely that they were available for the public to use throughout the relevant period of 1999-2019 in this case. The number of peoplewho state that they have used these routes is less than the other appeal routes. It is also difficult to assess the evidence of usefor the different sections given that there is some variety in the routes used. Nonetheless, it is not disputed that these routes have been used and they were provided for people to use.
2. Although it cannot be determined at this stage whether there were any structures in place that hindered use by cyclists or horse riders, I note the stiles shown at points on photographs provided. However, there is evidence of use on foot, cycle and horseback in the UEFs. In the absence of incontrovertible evidence to show that access was not possible, I proceed at this stage on the basis that the routes were available to all users.
3. The Council says the laying out of these routes served as an invitation for the public to use them and enjoy in the same way as paths within public parks and gardens. There is a car park, picnic area and play area in this locality. It is suggested that the use of the routes across Trent Meadows could therefore be ‘*by right*’ as opposed to ‘*as of right’*. Nothing has been provided by Erewash Borough Council to suggest that this is the case. There is no evidence that the paths were laid out under any specific statutory provision and there are no bylaws in place for this site.Whilst it is possible that the use of the claimed routes at Trent Meadows was by right, this cannot be determined from the evidence presently available.
4. Overall, it is reasonable to allege that the evidence is sufficient to support the dedication of public bridleways over the relevant routes at Trent Meadows.

*Whether any landowner demonstrated a lack of intention to dedicate a public right of way*

1. I have addressed the issue of permissive access which may mean that an earlier twenty-year period is considered in relation to two of the claimed routes. The only potential challenge relates to the assertion by Leaworks Lakeside Limited that people have in the past been challenged when using the Erewash Field route. In contrast, none of the users refer to any challenges to their use prior to the more recent signage. I also note that no direct evidence has been provided from those people who are alleged to have challenged users of the route.
2. Overall, there isa conflict of evidence on this matter that cannot be resolved from the written submissions.

***Common Law Dedication***

1. Given the potential for the status of the Erewash Field route to have been brought into question in 2007 and the evidence whichsuggests that access was not available for the whole of the relevant twenty-year period, dedication under statute could possibly fail. However, at the present time, there is a large body of evidence in support of use of this route over a number of years. The user evidence when taken in conjunction with the lack of cogent evidence to show that the landowner took any action prior to 2007 to deter such use could potentially give rise to an implication of the dedication of a bridleway at common law.
2. I have concluded that the written evidence is sufficient to raise a presumption of dedication under statute for the other two routes. This would not prevent a case alternatively being made for the dedication of these routes at common law. I note that the Council raises the possibility that the actions of the landowner (Erewash Borough Council) inproviding the routes across Trent Meadows and the subsequent public use could be supportive of the dedication of public rights of way at common law.

***Conclusions***

1. Having regard to the above, I find there to be some uncertainty regarding particular matters that cannot be resolved from the written submissions. Nonetheless, a significant amount of evidence has been provided in support of use of these routes which, when taken at face value, is largely credible. Further, there is no incontrovertible evidence to demonstrate that a right of way could not be reasonably alleged to subsist. I therefore conclude that it is reasonable to allege that the relevant routes are public bridleways.
2. In reaching this conclusion I have firstly had regard to the potential for the routes to have been dedicated under statute. Whilst I recognise that this may not be applicable in terms of the Erewash Field route, there is the potential for this route to have dedicated at common law.

**Other Matters**

1. Issues relating to the suitability of a route being recorded as a bridleway and the impact on land crossed by the route are not matters that are relevant to my decision.

**Overall 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 of the 1981 Act, Derbyshire 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 for the area by adding new sections of bridleway to the map and statement and upgrading part of an existing right of way to bridleway status in relation to the relevant routes included in the application dated 24 January 2020. This decision is 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.

Mark Yates

 **Inspector**

