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| **Appeal Decision** |
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| **by Grahame Kean B.A. (Hons), Solicitor HCA** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs****Decision date: 11 October 2022** |
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**Appeal Ref: FPS/W0340/14A/7**

* The appeal is made under Section 53(5) and Paragraph 4(1) of the Wildlife and Countryside Act 1981 (the “1981 Act”) against the decision of West Berkshire Council (the “Council”) not to make an order under s53(2) of that Act.
* The Application dated 28 August 2018 was refused by the Council on 3 August 2021.
* The Appellant claims that the definitive map and statement for the area should be modified by the addition of a footpath over Inkpen Great Plantation (between Restricted Byway Inkpen 47 and Public Footpath Inkpen 27) (‘Route 1’).

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

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**Preliminary matters and history of the application**

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 to the 1981 Act.
2. If I consider that an order should be made paragraph 4(2) of Schedule 14 enables me on behalf of the Secretary of State to “*give to the authority such directions as appear to him necessary for the purpose*”.
3. The appealed application is one of several that were understood to have been made, requesting various routes through Inkpen Great Plantation to be recorded on the Definitive Map as public footpaths. However several user evidence forms (UEF) did not relate to any route near Route 1, the subject of this appeal, and were excluded from consideration by the Council. However Route 5 albeit the subject of a separate application, was considered as possibly related also to Route 1. For the avoidance of doubt I have also considered the UEFs as they appear to relate to the southern end of Route 5.

**Main issue**

1. The main issue is whether the available evidence shows that, on the balance of probabilities the appeal route (route) is a public footpath which should be recorded by way of a modification to the Definitive Map and Statement (DMS).

**Legal framework**

1. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way subsists which is not shown in the map and statement or is reasonably alleged to subsist over land in the area to which the map relates.
2. I note that the anomaly pointed up by the Council with regard to the Applicant’s Schedule 14 certificate. However, since in practice, all landowners were contacted and were aware of the application, and the Council determined it on that basis, I do not regard the right to appeal as being materially affected by Mr Austin solely being notified as representative of Mendip Forestry.

***User evidence***

1. For a claim that a right of way exists based on user evidence under s31 Highways Act 1980 (the 1980 Act), the evidence must demonstrate that use has occurred over a defined route for at least twenty years prior to the date at which the public’s right to do so was brought into question. If the user evidence suffices to raise a presumption that the route was dedicated to the public, the presumption is rebuttable if there is sufficient evidence to demonstrate that, during that 20-year period, there was no intention by the landowner to dedicate.

***Common law***

1. There is also a common law test for the dedication of public rights of way, based on the fact that such public rights may be said to have been dedicated by the owner of the land through which the claimed route runs. There is rarely evidence of an express dedication and none in this case. Dedication may be presumed if there is evidence from which it may be inferred that that the landowner has dedicated a right of way and the public has accepted the dedication. There is no fixed user period required at common law, therefore the shorter the period, the more onerous a task it may be to show dedication by the landowner and acceptance by the public of that dedication, than dedication by statute.

**Reasons**

*Council’s reasons for refusal and date when user was brought into question*

1. The Council refused to make an order, considering the evidence not to be sufficient reasonably to allege that that a public right of way existed over the route. It reasoned that the claimed way, Route 1, does not correspond with any established or used route over the 20 year period 1998-2018, or any earlier time and it was therefore not reasonable to allege that a public footpath subsists along the actual application route.
2. It appears that events in 2018 connected to forestry work then ongoing caused various altercations between walkers and representatives of the owners of this private woodland and the former were challenged as to their use of the land. Also in 2019 ‘No Unauthorised Access’ signs were erected where the owners considered trespass was evident. I am content to accept the relevant twenty-year period to examine for the claimed route as between 1998 to 2018.

*Documentary evidence*

1. Route 1 crosses two plantation areas, divided by a line running approximately south-south-west from point A and which can be seen in aerial images. I agree with the Council that the evidence as to felling and planting in 1997/1998 and aerial photographs between 1996 and 2003 makes it unlikely that public use would have obtained for a significant period on Route 1. A discernible path is said to be the “2019 used route”. It only shows the path at that time, and had a significantly different line from A-B, notably being c76 m east of B and following a line south-east of the claimed route. From a review of the evidence submitted the claimed route appears to be an amalgamation of various routes taken between RB47 and PF27. Those routes may not have co-existed but obtained over different periods.
2. The documentary evidence supplied, including the historical mapping and aerial photography does not support on the balance of probabilities the existence of a historical public right of way or a case for consistent user of the actual route claimed.

*User evidence*

1. Of the user evidence forms (UEF) submitted, they generally indicate routes that approximate to Route 1. In my view the user evidence probably relates to a several different routes that may have been used over time to make the crossing over the plantation areas in the vicinity of points A-B. I agree with the Council that there is no single, consistently used, definable route.
2. A key feature of the appellant’s case is that the Council’s appraisal of the evidence is tainted by what it perceives as a random selection of 5 villagers who it is asserted, were not representative of residents who have regularly walked the footpath under review, as they did not reside adjacent to it.
3. I have reviewed the UEFs that approximate to Route 1 and I also note that the first-hand evidence of use was taken into account from all thirty-six witnesses. Six UEFs were considered further. It was noted that the route used in 2019 was up to 125m from the line of the claimed route which appeared to be an approximation of where people had walked in the past, rather than an accurate delineation. The selection took into account the length and frequency of the use stated in their UEFs and their residence within c800m of Route 1.
4. After reviewing the rationale for interviewing a select number of local residents in respect of their longstanding regular use, I find that was not an unreasonable way to proceed, provided that, and I am satisfied that such is the case, the Council also took into account the other evidence submitted. Quite simply the evidence has not identified a route on the ground that can be plotted on an order map with any reasonable degree of precision and the Council’s refusal of the application for this reason is understandable.
5. I recognise that further statements from residents in regard to Route 1 might have been provided on request, however I have no good reason to believe that the Applicant was unable to provide a representative sample of user evidence all of which has been considered, albeit that some more pertinent information was examined, not unreasonably, more thoroughly, including that from the chair of the Parish Council who completed the application form and map. Although she was clear during the 2019 site visit that the ‘2019 worn route’ then available was the intended Route 1 that she used, other attendees appeared equally clear that this was not the route they had used prior to the 2018 forestry works, suggesting a more direct route.
6. The aerial imagery taken as whole leads me to consider it unlikely that Route 1 was used consistently throughout the relevant period. I accept as does the Council, that some latitude should be given when determining the route on the ground that Route 1 is intended to represent, however there is a lack of clear evidence on the ground as well as in the UEFs of a single clear route that could be shown to exist as a consistently used route.
7. There are clearly several ways through the wooded areas in the vicinity of Route 1 that may well have been used to a greater or lesser extent at various periods within the relevant period under examination. In my view the UEFs have been compiled by individual users conscientiously and I have no reason to doubt their veracity. Nevertheless there are significant differences in the start and end points of some UEF plans as compared with the claimed route, as well as differences in the route taken through the plantation in cases where the stated termini do correspond with A and B on the Order map. As some of the users reported in the UEFs, their own path through the woods has itself varied over the years due to a variety of reasons, such as density of vegetation, the particular destination sought and so forth. For the avoidance of doubt I have taken account of the additional information including the petition documents supplied with the appeal. However it does not alter my view that the differences in the various routes identified that are said to relate to Route 1 are too great to regard them as corresponding to a single pathway A-B.
8. Therefore I find on the balance of probability that on the information available to me there is no route that can be confidently identified as Route 1 that the public used over the relevant 20 year period. It is therefore not reasonable to allege the existence of a public footpath under section 31(6) of the 1980 Act.
9. Similarly, at common law and having regard to the same information available to me, same difficulties of route identification arise, albeit that the period of user to be considered might be less than under statute and for this reason I have come to the same conclusion that it is not reasonable to allege public rights of passage over Route 1.
10. The general principle is that a highway such as a right of way follows a defined route. The public may have a right to deviate from such a line but only in certain, specific circumstances, for example if it is wrongfully obstructed. But of course a certain line must be established in the first place before any legitimate deviation can take place and no “moving right of way theory” can supplant this requirement for it is well established that a highway should have a defined route. As was stated in *The Queen on the Application of Gloucester County Council v Secretary of State for the Environment Transport & Regions, The Ramblers Association, 1 December, 2000 (High Court)*:

*“There may be cases where a path is literally so well-trodden over the years by the public…that the right of way has several tracks over a short distance from point A to point B. But subject to such clearly established usage, the route of a highway can and should be defined with some precision”. (paragraph 70).*

1. The absence of a precise path is not necessarily fatal if the claimed route had several alignments but in this case there is no hard evidence on the ground of clearly established usage over Route 1.

*Other matter*

1. All that said, the user evidence does indicate longstanding public use and the Council accepts that there is no indication that access to the area in general has been by force, secrecy or permission or any compelling evidence of actions that would have come to the attention of users that would be inconsistent with dedication and acceptance of public rights of passage. The evidence diligently compiled and submitted in respect of the appealed application can of course still be used potentially to support an application to record a public right of way along a different route, or if it is considered that the relevant criteria are met, an application for a right of way that consists of several alignments, but that is not a matter for me.

**Conclusion**

1. Taking all the evidence together I consider that it is not reasonable to allege that a right of way exists over the claimed route.

**Formal Decision**

1. The appeal is dismissed.

Grahame Kean

INSPECTOR