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| **Appeal Decision** |
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| **by J Hunter BA (Hons) MRTPI** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 04 November 2022** |

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| **Appeal Ref: FPS/G1440/14A/15** |
| * 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 East Sussex County Council not to make an Order under section 53(2) of that Act. |
| * By application dated 13 March 2018, Mr C Smith on behalf of the Open Spaces Society claimed that a route from point A, De Montfort Road (grid ref 540698 110110) to point C, Western Road (grid ref 540692 110088) in the Parish of Lewes should be recorded in the definitive map and statement. |
| * The application was refused by East Sussex County Council and the appellant was formally notified of the decision by letter dated 15 March 2021. |
| **Summary of Decision: The appeal is allowed.** |
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###### Preliminary Matters

1. I am appointed 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 that I can make my decision without the need to do so.
3. The appellant, Mr Smith, requests that the Secretary of State directs East Sussex County Council (ESCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a public footpath.
4. In addition to the submissions from the appellant and ESCC, I have before me Public Rights of Way user evidence forms documenting the use of the route claimed by 45 individuals. I have considered all of these documents in forming my conclusions.

Main issues

1. 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, 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.”

1. The tests were described as “A” and “B” in R v SSE ex parte Norton & Bagshaw [1994] 68 P&CR 402. It was held 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.

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.

1. The route under consideration only came into existence in its entirety following the development of the site, which appears to have been completed in 2012. As a result, there is no twenty-year period of use that could be considered under the statute of the Highways Act 1980 and so the case needs to be determined at common law.
2. At common law the issues to be considered are whether, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right by the public. In doing so I bear in mind that the burden of proof lies with the person who asserts the right exists. It is not sufficient simply to demonstrate use by the public of a certain route for a long time. Where such use did occur and no steps were taken to prevent it, the public’s use of the way may constitute evidence that the landowner was quite content it should continue and therefore contribute to the justifiable conclusion that dedication of the way could quite reasonably be implied. However, the focus needs to be the landowner – what actions were taken (or not) in relation to the public and what could fairly be deduced from that in relation to the status of the way in dispute, assuming that the level of public use was sufficient to make the owner aware that a right of way was being asserted.
3. The main issue in this case is whether the evidence is sufficient to show that the route has been used in such a way and on such terms that public rights of way on foot can be presumed to have been established over them.

Reasons

1. The claimed route runs north to south between De Montfort Road and Western Road (Points A-B-C), the northern part of the route (Points A-B) is in the ownership of SE George, the southern part (B-C) is in the ownership of Creative Developments Ltd. Neither of the owners have provided comments on the claimed right of way. Notwithstanding this, I have no evidence to suggest that either party would not have the capacity to dedicate it.
2. In relation to evidence of dedication, the submitted information includes a planning application which relates to the land on which the southern part of the claimed route lies. The planning application was made in March 2010 for the demolition of a public house and the construction of 5 town houses. Section 5 of the accompanying planning application form states that a new public right of way would be provided on or adjacent to the site. The planning application was approved by Lewes District Council (LDC) subject to a planning obligation, signed and dated by Creative Developments Ltd and LDC on the 27 October 2010.
3. The second schedule of the planning obligation provides details of covenants relating to the construction of a footpath between De Montfort Road and Western Road and on the line of the claimed route. The covenants, amongst other things, require that the footpath ‘*shall be open to the public for free and uninterrupted public access on foot on everyday throughout the year for twenty fours hours a day forever thereafter or until the Footpath becomes a public highway maintainable at the public expense.’*
4. The proposal by the developer to create a new public right of way evidenced by the planning application form and the signed planning obligation implies intention to dedicate, this is strengthened by there being no challenges to the claimed route nor to the use of the route by members of the public.
5. The user evidence details the use of the claimed route from around 2012 following the completion of the townhouses. The frequency of use varies from daily use to access local schools, to once per week but none of the 45 users who submitted an evidence form suggested that there had been any interruption to the use, any challenges to the use of the route or signs or notices. The frequent and uninterrupted use by members of the public without any evidence of there being any steps taken to prevent it indicates that the owners could not have been unaware that a right of way was being asserted and furthermore it implies that the owners were quite content to allow the use to continue.
6. I acknowledge the ESCC’s evidence in dispute of the claimed route relies on three elements which the ESCC state would not be necessary if the route had been dedicated as a public right of way. The first is that the landowners retained rights over the path and covenanted to ‘keep open,’ the second; that the landowners would need to seek permission from the LDC for closures and repairs and finally that the planning obligation did not set out the process for the dedication of the footpath. Furthermore, ESCC consider that the planning obligation and transfer are dated later than the planning application and therefore provide conflicting evidence in relation to intended dedication.

Summary

1. Examining the evidence in this case under the common law approach, I consider that the deliberate proposal to create a constructed path along A-B-C as part of the development for five townhouses and with no evidence of any objection to or restrictions to its use by the public, indicates a clear indication that the landowners were positively providing a way for public use.
2. The planning documents indicate a capacity and intention to dedicate a footpath for use by the general public. The keeping open of the path for use, alongside a need to ask the highway authority for permission to close it for any reason, is entirely consistent with the requirements for a public right of way. The user evidence indicates acceptance of that path for their use and nothing more is required for the dedication of a footpath.
3. The issue of how and whether the route should be recorded as a highway maintainable at public expense is an entirely separate matter between the landowner and the highway authority. Recording of the route as a footpath on the Definitive Map and Statement would not of itself require that it be recorded on the ‘list of streets’ under section 36 of the Highways Act 1980.
4. On the basis of the written material before me, I consider the evidence sufficient to show either that a public right of way has been reasonably alleged to subsist and consequently Test B is met.

Conclusion

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

Formal Decision

1. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, East Sussex 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 public footpath as requested by the application within three months of the date of this Order.
2. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

J Hunter

**Inspector**