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| **Appeal Decision** |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 16 January 2023** |

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| **Appeal Ref: ROW/3301269** |
| * 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. * The application dated 25 April 2018 was refused by the Council on 19 May 2022. |
| * The appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath between Heydon Road and The Street as shown on the plan appended to this decision.   **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. The claimed route is shown on the plan appended to this decision labelled A-B-C-D-E and I will use it to identify various sections and location points in my 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 occurrence of specific events cited in Section 53(3).
2. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under Section 53 of the 1981 Act. 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 which is not shown subsists or is reasonably alleged to subsist over land in the area to which the map relates.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act and the findings of the Courts in the cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] (‘Bagshaw and Norton’) and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367 (‘Emery’).
4. As made clear by the High Court in *Bagshaw and Norton* this involves two tests:

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 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 the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, 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. Roche LJ also held that *“Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication.”*
3. User evidence has been submitted in support of the claimed route. Section 31 of the Highways Act 1980 (the 1980 Act) relies on a statutory presumption of dedication as a highway where it has been actually enjoyed by the public as a right of way and without interruption for a full period of twenty years. The date when the public’s rights to use the routes was brought into question would need to be established. I would then need to determine if use by the public occurred for a twenty year period prior to this that is sufficient to raise a presumption of dedication. If this was the case, I must then consider if there is sufficient evidence that there was no intention on the part of the landowners to dedicate public rights during this period.
4. Under common law, an inference that a way has been dedicated for public use may be drawn when the actions of the landowners (or lack of action), indicate that they intended a way to be dedicated as a highway and where the public have accepted that dedication. Use by the public can be evidence of the intention to dedicate; this use should be as of right without force, secrecy, or permission. There is no fixed period of use at common law and use may range from a few years to several decades, based on the facts of the case. The more intensive and open the use, the shorter the period required to raise the inference of dedication. The burden of proof lies with the claimant to demonstrate that the evidence is sufficient to indicate an intention of dedication.
5. I need to consider if the evidence provided is sufficient to infer the dedication of public rights over the claimed route at some point in the past. Section 32 of 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 appropriate, before determining whether or not a way has been dedicated as highway.
6. At this stage, I only need to be satisfied that the evidence meets Test B, the lesser test. My decision is reached on the balance of probability.

Reasons

***Documentary Evidence***

*Estate, Commercial, and Ordnance Survey (OS) Maps*

1. Extracts of the Survey of the Heydon Estate 1693 and Survey maps by James North dating between 1776 to 1785 show the southeast end of the claimed route. Faden’s Map of Norfolk 1797, Bryant’s Map of Norfolk 1826, and Archer’s map published by Tallis in 1842 show a route between A and E. These maps indicate the existence of the claimed route although their scale and detail are not sufficient to plot it with any accuracy. Without their keys and background, I am unable to reach conclusions regarding the status of the claimed route.
2. The Cassini Historical Map Old Series 1838 (from historic OS mapping) shows all of the claimed route with double solid edges. However, the section between B and C is on a different alignment running just north of the claimed route.
3. OS maps of various scales between 1885 and 1992 show the claimed route on its current line with double dashed or solid and dashed edges. The earlier line between B and C is also shown. There are lines across both ends of the claimed route with buildings on either side indicating the gates and lodges.
4. Bartholomew’s maps of 1921, 1947 and 1959 show the claimed route on its current line with double solid edges. Norfolk County Council (NCC) advises that the key indicates it was a *‘secondary road (good)’* on the 1921 map and *‘inferior road not to be recommended to cyclists’* on later maps.
5. Bartholomew’s maps and OS maps since the late 19th century carry a disclaimer advising that the representation of a road, track, or footpath on it is not evidence of public rights. These maps show the physical existence of the claimed route and are suggestive of public rights, including for cyclists on Bartholomew’s maps, but it could also be argued that they are private routes.

*The Heydon Tithe Map 1841*

1. The Heydon Tithe Map 1841 shows the claimed route with double solid edges coloured yellow although the section between B and C is on a different alignment running to the north of the claimed route. Other proven public routes are coloured yellow, as are routes shown with dashed edges in the grounds of Heydon Hall.
2. The purpose of Tithe maps was to identify titheable land that was capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of routes. Showing the claimed route in the same manner as known public highways is suggestive of public rights, but not status. NCC considers that the claimed route was a private occupation road because private roads would not have produced crops.

*Plans of Roads*

1. The Plan of Roads 1807 shows a route on a similar line to the claimed route coloured green with double solid edges. It is labelled *‘old road to Saxthorpe 2.14p**’*, *‘F’* at the northwest end, *‘E’* near the middle (near C on the map of the claimed route) and the land on either side is labelled *‘Park**’*. Three other roads are shown coloured green, one from the church heading southeast and two from *‘E’* running north and southwest. Heydon Road and an unnamed road are shown coloured yellow, and The Street is coloured orange. The key states *‘Yellow new Roads, Green the old ones turnd, Orange the present road**’*.
2. A Plan of Roads in the Parishes of Heydon and Sall, Norfolk 1836 shows the claimed route coloured green with double solid lines on the same line as the Tithe map. It is labelled *‘B’* at the northwest end and *‘H’* at the southeast end. The key indicates that B to H is an *‘old road to be stopped up 790 yards, width 24 feet.’* Another old road running southeast from the church is to be diverted and turned with a new road to the south.
3. The 1807 and 1836 Plans of Roads intended to stop up the claimed route indicating that public rights were considered to exist. I consider that the public rights are likely to have been vehicular because the claimed route is referred to as a road and the replacement routes are carriageways.
4. There is no certification before me to confirm if the roads were stopped up as proposed. Unless there is evidence to the contrary, it should be presumed that everything which should have been done was done. The new roads shown on the 1807 Plan of Roads between The Street and the northwest end of the claimed route were provided and are shown on maps from 1826. The roads running north and southwest from *‘E’* are not shown on later maps indicating that they were stopped up in 1807. However, the claimed route and the road running southeast from the church are still shown on later maps. If they were extinguished in 1807, it would not have been necessary to stop them up in 1836. Therefore, in my opinion, they were not extinguished in 1807.
5. The 1838 Cassini map and 1841 Tithe map show the claimed route on its original line. This could indicate that it was not stopped up in 1836 although I note that there is only five years between this map and the Tithe map. Later maps indicate the presence of lodge houses and gates across the claimed route and the alignment changed between B and C. This suggests that the 1836 stopping up was completed as it would not have been possible to erect gates across a public road.

*Handover Maps*

1. Handover maps indicating publicly maintainable routes were given to NCC by the Rural District Council when they took over responsibility for highway maintenance. Two Handover maps from 1929 and the 1950s show the claimed route uncoloured and therefore not maintainable at public expense. Heydon Road and The Street are both coloured to the gates at either end of the claimed route. These maps do not preclude the existence of privately maintained highways.

*Published Walking Routes*

1. Walk 17; Heydon in the Best Tea Shop Walks in Norfolk 2000, shows the claimed route with a dashed line. It is shown by double dashed lines in a walk published in the Eastern Evening News in 2000 and it is part of A short Heydon Walk in Brandt Alastair Sawday’s Slow Norfolk & Suffolk 2010. These publications are promoting routes for the public to use and there is nothing to indicate that permission is required.

*Conclusions on the Documentary Evidence*

1. The documentary evidence indicates the existence of the claimed route between A and E since the late 1600s. Maps concerning the stopping up of the claimed route in 1807 and 1836 suggest public vehicular rights existed in the early 1800s. Later maps show that the alignment of the middle section changed between 1841 and 1885 and gates and lodge houses were erected. This suggests that the 1836 stopping up was completed although there is no documentation to confirm this. Some of the later maps are suggestive of public rights, including for cyclists.
2. ***Statutory Dedication***

*User Evidence*

1. Fifty five user evidence forms were submitted in support of the claimed route. Six are from people who lived within the Heydon Hall Estate, so their use was private. Another four are from people who lived or worked on the estate during some of their period of use, therefore it is unclear if their use was public or private. However, this still leaves forty five forms showing public use.
2. These forms show use of the claimed route between 1972 and 2018. Forty three people used it on foot, twenty four on a bicycle, one on a horse and one in a vehicle. Use appears frequent with most people claiming use either weekly or monthly for recreational purposes or to reach places in the locality. No one recalls being challenged or given permission to use the claimed route. Most people refer to gates at A and E which were normally open until around 2017 when the gates at A were closed and locked. A few people recall them occasionally being closed, but never locked, before 2017 with one saying this occurred from 2006. Two people refer to signs or notices on the claimed route. Use appears to have been open without secrecy or force.

*Landowners Evidence*

1. It is claimed that the gates at A and E were periodically closed, with the intention of preventing public rights being established and appropriate signage was displayed on the gates from at least the 1970s. Use was confined to the estate owners, their employees, tenants, and residents of Heydon who had been given permission and they are not aware of any significant use by anyone else. The landowners do not regard the claimed route as a public right of way and have not tolerated use by the general public. They have routinely challenged anyone using the claimed route who is not connected to the estate, as have their employees and tenants. A map and statement under Section 31(6) of the 1980 Act was deposited with NCC in 1995 and was followed up with a statutory declaration in 2001.

*Gates*

1. A tenant of Corpusty Lodge (at point A) says he shut and locked the gates once a year between 1967 and 1995 to ensure that the claimed route remained private, as agreed verbally with the landowners. This normally occurred around Michaelmas, and he also closed the gates when his son was playing in the drive.
2. It is claimed that the gates at both ends were shut in the 1950s when the land was grazed, during the foot and mouth crisis in 2001, and from 2006 to prevent motorcyclists racing down the claimed route, but no reference is made to them being locked. One employee recalls being asked to place a tree across the claimed route to prevent people driving dangerously at night. A landowner recalls a tenant of Corpusty Lodge between 2004 and 2018 asking if they could lock the gates at night to feel safer. A tenant of the same property states that the gates were locked in 2007 when he moved in. The reasons given for the closures do not appear to be with the intention of preventing public rights. Closures for disease control, security or to prevent dangerous driving would, in my opinion, not be relevant interruptions under Section 31(1) on the 1980 Act. Closing gates is not an effective interruption if the public are still able to open them and use the claimed route.

*Notices*

1. Notices are present at both ends which are said to have been erected in the 1970s and one landowner claims private signs were present from the 1950s. At point A the notice says, *‘PRIVATE No Through Road’* and at point E it says *‘PRIVATE Visitors are Welcome to walk in the* *Park but do so at their own risk. DOGS MUST BE KEPT ON LEADS.’* Just north of E a notice into the grounds of Heydon Hall says *‘PRIVATE Visitors are Welcome to walk in the Park. Please stick to the road. DOGS MUST be kept on leads. NO ENTRY when livestock are out.’*
2. I need to consider how these notices would have been understood by members of the public. None of them make it clear that there was no intention to dedicate a public right of way. Reference to ‘private’ does not preclude the existence of public rights and many rights of way cross private land. By referring to a road, the notice at A may be interpreted by users as being directed towards motor vehicles not walkers, cyclists, or horse riders.
3. The notices at E welcome the public to use the park land but do not explicitly grant permission. Welcoming use does not necessarily mean that use of the property can only be permissive, and many users of the claimed route believed it was already a public right of way. The appellant does not consider the claimed route to be part of the park as it is outside of the enclosed grounds of Heydon Hall. Livestock are not grazed on the claimed route so you can always enter, reinforcing his view that it is not part of the park. The public are likely to understand that the notices do not apply to the claimed route if they do not view it as part of the park. Users may also have considered the wording to mean that the landowners were dedicating the land for use by the public.
4. Although it is claimed that the notices were present from at least the 1970s, most of the path users do not recall seeing them. In the photos before me, there is vegetation by the notices which may have obscured them explaining why they were not seen. In order to effectively convey the lack of intention to dedicate notices need to be visible to the public.

*Statutory Declaration*

1. Under Section 31(6) of the 1980 Act, landowners can deposit a map and statement with the relevant council to show any ways they admit have been dedicated as highways. Within the relevant period they may then make a statutory declaration to the effect that no additional ways over the land have been dedicated since the deposit. A deposited statement on its own is not sufficient to meet the requirements of Section 31(6) and for a statutory declaration to be effective it must be lodged as a separate event from original deposit.
2. In 1995 the landowners deposited with the council a statement and plan under Section 31(6) stating that there were no highways over their land. In 2001 another deposit was made stating that they had previously made a deposit, had not dedicated any additional highways, and had no intention to dedicate any.
3. However, the 1995 deposit also included statutory declaration wording and the 2001 deposit is not stated to be a statutory declaration despite containing statements consistent with one; some of the prescribed wording is also omitted. Furthermore, both deposits do not appear to have been signed or witnessed. Only certain people can administer statutory declarations and it is not possible to tell if the person administering this one could.
4. The landowners consider that the deposits were clear as to their intentions not to dedicate a public right of way, even if they are not in the prescribed format or correctly administered. At the very least they call into question the right of the public to use the claimed route.
5. In *Godmanchester Town Council and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Lord Hoffman stated that *“I do not say that all acts which count as negativing an intention to dedicate would also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under Section 31 (5) or (6) will always have this effect. I should think that they* *probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we do not need to decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts.”*
6. Lord Hope of Craighead went on to say that sufficient evidence of a lack of intention to dedicate a right of way would be demonstrated by a Section 31(6) *“deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as it is backed up… by a declaration that no additional way has been dedicated in the meantime.”*
7. The landowner's deposits do not appear to meet the requirements of Section 31(6) due to being incorrectly signed, worded, and administered. Both submissions include aspects of deposits and declarations meaning that they were not lodged as separate events. Therefore, in my opinion, they do not provide sufficient evidence of a lack of intention to dedicate public rights or call into question use by the public.

*When was the claimed route called into question?*

1. When relying on presumed dedication a twenty year period of enjoyment by the public as of right and without interruption needs to be demonstrated. The date when the public’s use of the claimed route was brought into question needs to be established. Use was clearly challenged by the locking of gates in 2017 which would establish a twenty year period between 1997 and 2017.
2. Earlier challenge dates have been suggested by the landowners although the effectiveness of these challenges needs further examination as discussed above. Even if these events were found to have called use of the claimed route into question, there is evidence of enjoyment by the public dating back to 1972 which could be sufficient to raise a presumption of dedication for most of the claimed challenges.

*Conclusions on the User Evidence*

1. The user evidence indicates use by the public as of right, without challenge, secrecy, force, permission, or interruption for a period of forty five years between 1972 and 2017 on foot, bicycle, and horse. This is contested by the landowners who say that public use was limited and with permission, they have challenged use and have taken action to prevent the dedication of public rights. I have considered above that the notices do not explicitly state there was no public right of way or that the public had permission to use it and I doubt the validity and effectiveness of the landowner's Section 31(6) deposits.
2. The disputes regarding the locked gates, permission, challenges, intention of the notices and the effectiveness of the statutory declaration cannot be resolved from the written submissions before me. A significant amount of user evidence is provided in support of the claimed route, which at face value appears credible. There is no incontrovertible evidence to demonstrate a lack of intention to dedicate by the landowners.

*Overall Conclusions*

1. Having regard to the above, I find there to be conflict in both the documentary and user evidence. Some of the documentary evidence suggests vehicular rights and there is evidence of use by bicycles and horses but this is limited. The application is for a footpath and there is sufficient user evidence to support these rights. Therefore, an Order should be made on the grounds that a right of way can be reasonably alleged to subsist. If objections are made there would then be an opportunity for the conflicting evidence to be tested more thoroughly and the issues determined at an inquiry.

###### Conclusions

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, the Norfolk County Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the public footpath, as proposed in the application dated 25 April 2018 and shown on the plan appended to this decision.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.
3. Claire Tregembo

INSPECTOR

**Map of Claimed Route**

