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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: 26 January 2023** |

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| **Appeal Ref: FPS/X1355/14A/3** |
| * 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 Durham County Council not to make an Order under section 53(2) of that Act.
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| * The Application dated 1 February 2005 was refused by Durham County Council on 10 February 2022 and the Appellants notified on 15 February 2022.
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| * The Appellants claim that the appeal route from West View to St Mary’s Church Yard, Barnard Castle should be added to the definitive map and statement for the area as a public footpath.
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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 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. In addition to the submissions from Durham County Council (the Council) and the Appellants are comments on behalf of the Open Spaces Society (OSS) acting as an interested party. I have taken into account all the submissions available to me in reaching my decision.
4. The original application sought to add a route from the adopted highway at West View through a stone doorway entering a parcel of land that formed access to the former National School, then through a gap in the wall to St Mary’s Church. From there, it crossed the churchyard to an adopted footpath running through the churchyard. However, the Council considered only that section between West View and the gap in the churchyard wall (the appeal route), since the churchyard is subject to ecclesiastical law as a burial ground and therefore not open to a public right of way arising through deemed dedication. I have considered the same section in 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. The evidence adduced is of claimed use by the public. This requires me to consider the requirements of Section 31(1) of the Highways Act 1980 (‘the 1980 Act’) which provides that *“Where 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 to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”* and Section 31(2), that “*The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice … or otherwise”*. The question of dedication may also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance with no set period of user.
3. At this stage, I need only be satisfied that the evidence meets Test B, the lesser test. My decision is reached on the balance of probability.

Reasons

*Evidence of use*

1. Sixteen user evidence forms together with 10 witness statements were submitted in support of the application (the user evidence).
2. The Council considered the user evidence under the 1980 Act and determined 2003 to be the date when the right of the public to use the appeal route was brought into question. This followed the status of the land having been queried when it was put up for sale and provides a 20-year period of 1983 to 2003. There is nothing to suggest an alternative date.
3. An analysis of the user evidence led the Council to conclude that use was not by the public at large. They determined 11 of the 23 claimants met the necessary 20 years or more uninterrupted use of the appeal route. However, 9 of these individuals used it to visit friends or relatives living in, or themselves resided in, West View or the immediate vicinity. Accordingly, they were regarded as a defined class of people, namely residents and lawful visitors of residents, whose use of the appeal route was private rather than public. Only two individuals used it for recreation, for example dog walking, as part of a route to access Demesnes, a nearby park or recreation ground. The evidence of two users was considered insufficient to bring to the attention of the landowner that public rights were being asserted. Accordingly, the reasonably alleged test had not been met.
4. The user evidence forms provided have been redacted, so it is difficult to establish where the claimants live in relation to the appeal route (other than the town where they live, of which I note some do not live locally). However, some forms include a map of the wider area as well as a description of where the claimants were going. I note that several claimants refer to visiting relatives or properties at West View. However, from my analysis of the evidence as presented, 2 of the witness statements refer to accessing Demesnes as well as West View, 1 refers to travelling from Demesnes to the town centre, 2 describe passing to and from Demesnes, including for dog walking, and one refers to going to the old school site at St Mary’s Close and Demesnes. As regards the user forms, 4 refer to going to West View and Demesnes, 1 to Demesnes and 1 from the town to Demesnes. Other maps provided by the Council indicate that claimants would need to use connecting public highways as well as the appeal route in order to reach Demesnes, or the town, for example.
5. There is nothing in the user evidence to indicate that users were challenged, given permission, interrupted or obstructed, nor that they exercised force in their use of the appeal route. Many describe seeing other people using it, with the appellant describing use by others over many years as ‘use by the public’.

*Landowner and other evidence*

1. Correspondence between the Appellants and Teesdale District Council (TDC) and the Council (dating between 2004 and 2007) provides some background to how the appeal route came into being. It suggests that around 1980, when TDC tidied up the area as part of an environmental improvement scheme, the pathway itself was either established as a physical route on the ground or, as an existing feature was cleared of overgrowth. Thereafter, regular maintenance of the area and appeal route ensured its availability for use, including some works to provide and/or improve its surface.
2. Writing in May 2004 a TDC officer expressed their view that the appeal route had been ‘an accepted right of way’ across the land over the 13 years they had known it. In another letter of September 2004, an officer wrote that they believed the path to have been created as a link between the churchyard and West View, as part of a project to improve the area. A plan attached to an internal memorandum of 2004 describes the appeal route as a public right of way providing an important link. This reflects comments that it provides a step-free alternative to other routes.
3. It is unclear whether the appeal route was an official part of the plans or works carried out by TDC, whether it was newly formed, or an existing route that was retained. Further, the Council points out that even if TDC had constructed the path, they did not have the authority to create or dedicate a public highway over the land. They were neither the landowner nor highway authority at the time, notwithstanding that they may have maintained it.In support of their argument, the Council refers to *Barlow v Wigan Metropolitan Borough Council* [2020] EWCA Civ 696, arguing that a highway must be constructed by a council in its capacity of highway authority. This case sought to identify liability and whether the path in question was a highway maintainable at public expense for the purposes of the 1980 Act. Nevertheless, whatever the circumstances of the coming into being of the path, the correspondence provides an indication of the reputation of the appeal route at that time as a way in use by the public, and that public monies were expended on its upkeep. I note the Council’s view that it is not unusual for ‘ad hoc’ repairs and maintenance to be carried out on routes that do not have formal public status. In this case, however, the evidence suggests that maintenance has been more routine in nature rather than occasional.
4. Council officers had indicated in writing that the Appellants’ application was likely to be successful following its submission in 2005. However, whilst the Appellants refer to this, the correspondence simply expresses officers’ opinion, made prior to the application’s submission and/or investigation.
5. Sales particulars dated 2006 relating to the land describe the footpath crossing it and photographs show it. Accordingly, its presence would have been known to any landowner or potential landowner. A Council letter of April 2007 states the current landowner accepted the existence of the path; and documents relating to a planning appeal in 2007 described the appeal route as a well-used/clearly defined footpath. Again, this provides evidence as to the reputation of the way.

*Physical evidence*

1. The appeal route appears to have existed as a physical feature since at least 1980. Although physical existence is not in itself evidence as to status and could indicate public or private use, it nevertheless reflects consistent wear over time. It may suggest a greater level of wear than would be the case with use by a few people visiting a small number of houses in a private capacity.
2. In addition, the surfacing of the path connecting an area accessed by the public (the churchyard) with a network of highways in and around West View provides some support for a higher volume of use than might be expected were use of the appeal route private in nature.

*Conclusions*

1. The appeal route forms a cul-de-sac with openings in the wall provided and or retained at both ends. The law does not prevent a cul-de-sac being recorded as a public right of way. Nevertheless, it should lead to a place of public resort. In this case the churchyard is capable of being a place to which the public would wish to go, and it provides an opportunity for onward travel accessing the public highway network.
2. In reaching their conclusions, as set out in the Report to their Highways Committee, the Council appears to have considered only the user evidence, and only in terms of the number of individuals it regarded as using the appeal route for recreational purposes for 20 years or more. However, there is also use of the appeal route by claimants for lesser periods to be weighed in the balance, some of whom referred to accessing other locations such as Demesnes for recreation. In addition, the evidence of maintenance with public monies, and of reputation should be weighed in the balance. The Council has not expanded on the reputed acceptance by the landowner of the appeal route’s use, and this is something which may carry some weight. The evidence may also support a case at common law.
3. When taken as a whole I consider the evidence is sufficient to tip the balance in favour of Test B having been met.

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 Durham 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 Durham County Council to add a public footpath as proposed in the application dated 1 February 2005. The Order should be made within 3 months of the date of this direction. 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.

Susan Doran

**Inspecto****r**