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| **Appeal Decision** |
| by C Beeby BA (Hons) MIPROW |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 08 March 2023** |

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| **Appeal Ref: FPS/Q1770/14A/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 Hampshire County Council (the Council) not to make a definitive map modification order (DMMO) under s53(2) of that Act. |
| * The Application dated 20 September 2020 was refused by the Council on 12 April 2022. |
| * The Appellant claims that the definitive map and statement (DM&S) of public rights of way should be modified by adding a footpath (shown as D-B-E on the attached plan) between Shepherds Row and the A3093 in Andover. |
| **Summary of Decision: The appeal is allowed in respect of part of the application route as set out in the Formal Decision below.** |
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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 to the 1981 Act.
2. The appeal has been determined on the papers submitted. I have not visited the site, however I am satisfied that I can make my decision without such a visit.
3. Several plans are provided, which refer to points along the application route by a number of different annotations. For the avoidance of doubt, this decision refers solely to points shown on “Location Plan A – Routes claimed by applicant”, at Page 42 of the document bundle which accompanies the Council’s Response to Appeal dated July 2022. I therefore attach a copy of this plan, which depicts the western end of the appeal route (at Shepherds Row) as Point D, a point adjacent to an area of vehicle parking off Highlands Road as Point B and the eastern end of the route (by the A3093 road) as Point E.

**Background**

1. User, documentary and landowner evidence has been submitted in respect of the application. It sought to record two routes, comprising a north-south route (A-B-C) between London Road and Ladies Walk, and the appeal route D-B-E. In April 2022 the Council decided to make a DMMO in respect of the route A-B-C. It decided not to make a DMMO in respect of the route D-B-E, which is the subject of this appeal.

Legislative Framework

1. 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 in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
2. 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.

Main Issue

1. The main issue is consequently whether 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.
2. User Evidence Forms (UEFs) have been submitted in support of the application. As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty 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. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. If statutory dedication is not applicable I shall consider whether dedication has been shown at common law. Such a dedication requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

Reasons

*Statutory and common law dedication: route over deposit land*

*Bringing into question*

1. Section 31(6) of the 1980 Act allows an owner to indicate any ways over the land which are dedicated as highways by the deposit of a map and statement with the authority responsible for maintaining the DM&S. Where such a deposit has been made, declarations made by the owner or their successors in title and lodged by them with the council within the relevant period from the date of the deposit to the effect that no additional way has been dedicated are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or their successors in title to dedicate any such additional way as a highway.
2. A deposit under the 1980 Act dated 25 September 2008 was submitted to the Council. This related to all of the land crossed by the DMMO application route except for the section from Point D travelling east to cross a play area, and was submitted by its owner. The deposit states that no ways over the land have been dedicated as highways.
3. A declaration under the 1980 Act dated 19 December 2008 was subsequently submitted by the owner. This stated that no additional ways had been dedicated over the land within the September deposit.
4. The 2008 deposit and declaration were both in the required form and were signed and dated. As a result, together they initially provided protection from the acquisition of public rights over the land for ten years from the date of the deposit. That protection was then extended to twenty years by statutory provisions which came into effect on 1 October 2013. These documents consequently provide sufficient proof that no ways were dedicated over the land concerned over the period 25 September 2008 to 20 September 2020 (the DMMO application date).
5. A further declaration dated 19 September 2018 was then submitted by the landowner’s executor, followed by a deposit of 27 September 2018 and a declaration of 15 November 2018. All three documents relate to the same area of land as the 2008 deposit. They were in the required form and were signed and dated.
6. A deposit made under section 31(6) may be taken as a date that public use of a route was called into question. The September 2008 deposit consequently brought such use into question, with a resulting statutory twenty-year period of 1988-2008 arising for consideration of the section of the application route which crossed the land covered by the deposit (“the deposit land”).

*Evidence of use: statutory dedication over deposit land*

1. Eight people record use over the whole of the period 1988-2008. Two of these do not mark the application route on their map and state that they have only used the other claimed route, two people mark only a section of the application route, and two people mark a route which differs at both its central and western sections. The use of these six people consequently did not form sufficient use of the full route to be taken into account over the period. Thus, two people made use of the application route over the deposit land (albeit with a slight deviation at its centre) over the period. One of these people used it daily, and one 5-10 times per year.
2. Use over part of the period 1988-2008 was made by a further seven people. Of these, two people did not mark the application route and their form does not suggest they have used it, hence their use cannot be taken into account. One person whose use started in 1991 refers to having made less use than twice weekly of the section D-B and that there was a break in their use when they did not have a dog to walk. Two people state that their use (from 1996) comprised use of part of the route monthly and the remainder annually, or less than monthly. The remaining two people used the route monthly from 1995 or daily from 1998.
3. The user evidence consequently demonstrates minimal use of the application route over the deposit land during the first half of the period 1988-2008, which increased to a limited number of people during its second half. The frequency of use of three of these people varied according to the section of route used, some people made only light use of the route, and one person records a break in use of undefined length. Furthermore, the route lies at the edge of a large residential area in the town of Andover, where a greater level of use may be expected. Thus, both the number of users and the intensity of recorded use do not reflect this suburban locality sufficiently to demonstrate actual enjoyment of the route over the deposit land by the public over the period 1988-2008. It is consequently necessary to identify any further dates which may have formed a bringing into question of the public’s right.
4. The 2018 deposit and declaration were preceded by the 2008 deposit and declaration. Thus, the period 1998-2018 does not fall for consideration as a potential period of use because it was interrupted by the 2008 deposit. Similarly, whilst the DMMO application in September 2020 potentially formed a bringing into question, the period 2000-2020 was interrupted by the 2008 and 2018 deposits. As a result, no further statutory periods are applicable over the deposit land.
5. As the evidence for a public footpath fails in respect of the application route over the deposit land according to the statutory requirements, it is necessary to consider the matter at common law. A case under common law must show dedication by a legally capable landowner and acceptance by the public of that dedication.

*Common law dedication: route over deposit land*

1. The 2008 and 2018 deposits covered the land over the period 2008-2020 and therefore it is necessary for any potential period of common law use of the full route over the deposit land to have occurred prior to 25 September 2008.
2. The 2008 deposit states that the landowner has owned most of the land affected by the application route since at least 1979. There is nothing before me to suggest any lack of a capacity to dedicate over the period 1979-2008.
3. A beneficiary to the estate of the previous landowner recalls that the deposit land contained cattle until 1989-1990, and was fenced off “well beyond” the early 1990s. They additionally recall having put up barbed wire to fence the field, with the intention of marking the boundary and keeping people out, at some point during the mid-late 1990s to 2010. They recall that signs were put up stating that it was private land into the 2000s, but that these were removed. The witness states that the previous landowner had no intention at any time to dedicate a path over any of the land, and took steps like fencing or using barbed wire to stop access.
4. A further beneficiary recollects that cattle grazed in the field until the late 1980s/early 1990s, and that the field was cut annually for hay thereafter. They state that they can recall people contacting them about the field for reasons such as the cattle being out, camping or fires in the field. They state that they made some frames “about 15 years ago” for signs to be put in telling people it was private land.
5. A witness statement is provided from a worker for the former landowner from 1990 until his death. Whilst his statement is not signed or dated, he states that the field was used for hay and fenced off until the 1990s, and that over the last 15 years he has told people he saw that it was private land when cutting the field twice a year. He found fence posts and cut barbed wire when visiting the field in 2021.
6. A UEF corroborates the cutting of hay once or twice a year, but states that the witness spoke to the farmer sometimes, and believed that they did not mind dogs and walkers.
7. Seven people used the application route over the deposit land (although three of these people “cut the corner” east of point B) over the ten-year period 1998-2008. Two of these people used the route daily, one person used it twice weekly but with less use of D-B and a break in their use, one person used it monthly, two people used part of it monthly and part less often, and one person used it 5-10 times per year.
8. Thus, almost half of those who used the route over the period 1998-2008 cut the corner at the centre of the application route, making use of a single route less defined. Furthermore, three people used some sections of the route more than other sections and there was a break in the use of one of these, reducing the frequency over which some parts were walked. A greater intensity of use of either the application route or the “cut corner” route may be expected to be shown given the route’s location. As a result, the evidence does not clearly establish usage of either route over the deposit land.
9. For these reasons, use of the full application route over the deposit land during the period 1998-2008 was not sufficiently intensive, and there is insufficient evidence of acquiescence on the part of the landowners over the period, to raise the inference of dedication at common law.
10. As there are differing levels of use of discrete sections of the application route I shall additionally consider whether either statutory or common law dedication of a public footpath is reasonably alleged to have occurred over either of those sections.

*Statutory and common law dedication: route B-E*

1. Nine people used section B-E of the route over the deposit land during the statutory twenty-year period 1988-2008. One additional person may have used the section over that period, but their frequency of use and routes taken are insufficiently clear for their use to be taken into account at face value.
2. Two of the nine did not provide a frequency of use, so that their level of use cannot be assessed sufficiently to contribute to a potential period of dedication. Of the remaining seven, two people’s use was daily, one twice weekly, one monthly, two people used the western half of the section monthly and the eastern (X3-E) less often or annually, and one person used the section 5-10 times per year.
3. Five of the nine people cut the corner east of point B, so that use of the full route was not demonstrated by all users over the period. Use of either resulting route between B-X3 is insufficient in intensity to demonstrate actual enjoyment of the route by the public, taking the route’s edge-of-town location into account. The intensity of use of the section X3-E similarly does not demonstrate actual enjoyment of the section. Thus, use between points B-E over the statutory period was insufficient to clearly establish use by the public of either route. As I have found above, no further statutory periods are applicable over the deposit land.
4. The period and users to be considered for potential common law dedication of section B-E are the same as at paragraph 27 above, with one of the seven identified users having used section B-E more than D-B. The identified lack of use of a single route and the limited intensity of use similarly apply to a consideration of potential common law dedication over B-E. Use of the section over the period 1998-2008 was consequently not sufficiently intensive to show acceptance by the public.
5. Furthermore, the identified evidence above suggesting a lack of landowner acquiescence in the public use of the route prior to the 2008 deposit additionally suggests that there may be insufficient evidence of acquiescence on the part of the landowners for the dedication of section B-E at common law.

*Statutory and common law dedication: route D-B (Shepherds Row-Highlands Road)*

*Eastern half of route D-B*

1. The 2008 and 2018 deposits covered the eastern half of the land crossed by the route D-B over the period 2008-2020. The 2008 deposit consequently brought public use into question in respect of that eastern half, with a resulting statutory twenty-year period of 1988-2008 arising for consideration.
2. One person used the section of route regularly over the period, one person daily and one person 5-10 times per year. The number of users and the intensity of recorded use consequently do not reflect the suburban locality sufficiently to demonstrate actual enjoyment of the route by the public. Whilst the DMMO application in September 2020 potentially formed a further bringing into question, the period 2000-2020 was interrupted by the 2008 and 2018 deposits. As a result, no further statutory periods are applicable.
3. Any potential period of common law use of the section must be prior to 25 September 2008 due to the effect of the first deposit and declaration. The ten-year period 1998-2008 shows the most intensive use, by eight people on foot. Of these, two people used it daily, one person twice weekly, three people monthly and one person 5-10 times per year. One person’s frequency was described only as “regularly”, and therefore cannot be quantified here.
4. The frequency and duration of this use suggest that the landowner is likely to have been aware of it, however the identified landowner evidence above raises uncertainty on the issues of acquiescence in the public use of the route prior to the 2008 deposit, and whether use was made by force. There is consequently a conflict of evidence concerning whether the owner of the eastern half of route D-B intended to dedicate it as a public footpath in respect of any period of common law use prior to September 2008, and whether that use was as of right.

*Western half of route D-B*

1. The land crossed by the western half of route D-B (between Shepherds Row and the northern extent of the play area) was not included in any of the landowner deposits or declarations. Thus, the DMMO application date of 20 September 2020 formed a bringing into question of the public’s right to use that part of the application route, giving a statutory twenty-year period of 2000-2020.
2. Seven people record use on foot over this period. Two people’s use was daily, three monthly, one 5-10 times per year and one person “regularly”. Whilst this is not a high level of recorded use, it is sufficient for use to be reasonably alleged to have been by the public over the period.
3. Turning to whether that use was “as of right”, there is some evidence of the cutting of barbed wire which may have been on the land owned by the estate of the former landowner. However, the wire’s location and whether it has been cut are unclear in the photographic evidence provided. In any case, the land owned by the estate does not include the western half of route D-B. The evidence before me consequently does not suggest that use was made by force. The evidence for that section additionally indicates that use was without secrecy and without permission.
4. It is considered that the western half of route D-B is owned by Test Valley Borough Council. As part of that land is shown as a play park, the question of its status and whether public use of the application route across it was “by right” rather than “as of right” is likely to be relevant. Nevertheless, there is no evidence currently before me that such an issue would prevent use from being reasonably alleged to have been as of right.
5. No potential interruption is apparent from the evidence as a whole. There is minimal evidence before me of any lack of intention to dedicate the western half of route D-B as a public footpath.

*Conclusion on user evidence*

1. The evidence for a public footpath fails in respect of the full application route or section B-E only, according to the statutory and common law requirements. There is a conflict of evidence concerning whether the owner of the eastern half of route D-B intended to dedicate it as a public footpath in respect of any period of use prior to September 2008, and whether that use was as of right. A potential period of qualifying use under the statutory provisions has arisen in respect of the western half of route D-B, and the status of that land is likely to be relevant.

*Documentary evidence*

*Highway handover map 1929*

1. The application route is not marked as a route considered to be publicly maintainable.

*Ordnance Survey map 25 inches to 1 mile 1940*

1. The application route is not depicted on this document and the affected land is shown as open fields and a wooded area.

*Highways maintenance map 1946*

1. The application route is not marked as a route considered to be publicly maintainable.

*Parish map 1950, Objections book, Definitive maps 1954-1964*

1. The application route is not recognised or alleged to be a public right of way in these documents.

*1971 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. Worn paths cross the field, one of which approximately corresponds to part of the application route.

*1984 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. Worn paths cross the field, one of which approximately corresponds to part of the application route. An accompanying acetate overlay has been annotated with arrows indicating the field, and the note “grazed by cattle and used by locals”.

*1991 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. Worn paths are visible across the field but are less apparent in the vicinity of the application route than on the previous aerial photographs.

*1997 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. Only one path appears clearly across the land, which does not correspond to the application route.

*2000 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. Two paths appear clearly across the land but do not correspond to the application route.

*2005 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. A number of paths are visible, including one which corresponds approximately to part of the application route near point B.

*2008 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. A number of paths are visible, including one which corresponds approximately to part of the application route near point B.

*2017 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. A number of paths are visible, including one which corresponds approximately to most of the application route.

*2019 aerial photograph*

1. Most of the affected land appears open, although a hedgerow is present around part of the play area near point D. A number of paths are visible, including one which corresponds approximately to part of the application route.

*Conclusion on documentary evidence*

1. The submitted maps and objection book do not suggest the existence of a path or unrecorded public rights over the application route.
2. The likelihood of use of a route resulting in a worn path visible on aerial photography may vary according to factors such as weather conditions, land use and the level of footfall. The time of day when a photograph was taken may additionally influence whether it is possible to discern a worn path or not. Furthermore, it is not possible to be certain whether any of the use of those paths was by animals, or whether people using the paths were doing so in exercise of any private or permissive right. For these reasons, I give the aerial photography limited evidential weight.
3. The 1984 aerial photograph is accompanied by minimal contemporaneous user evidence and the provenance of the associated note concerning use by locals is unknown, making it difficult to assess the author’s likely knowledge of whether the use referred to was by the public. For these reasons, the note attracts only minimal evidential weight.
4. The aerial photographs start to show evidence of a continuous worn path in the vicinity of the Order route from 2017, when the land was protected from the acquisition of rights by the section 31(6) documents. They additionally show varying worn routes over the period 1971-2019.
5. The later aerial photographs show a worn path over the approximate eastern half of route D-B. However, this type of evidence has limitations in the ascertainment of unrecorded public rights, for the reasons set out above. Thus, they provide some limited support for the evidence of use occurring prior to 2008 which is considered above.

**Other Matters**

1. I acknowledge the submission that the collection of user evidence in summer 2020 was hindered by effects of the coronavirus pandemic. Nevertheless, the Council’s decision was taken in April 2022, almost two years after this. Additional evidence may be submitted following a DMMO application and the effects of the pandemic had decreased over that period, reducing barriers to the collection of additional evidence. Therefore I give only minimal weight to the suggestion that an allowance should be made for this factor in assessing the sufficiency or otherwise of the user evidence.

Conclusion

1. Where, as for section D-B of the application route, there is a conflict of credible evidence and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, I should find that a right of way is reasonably alleged to subsist and make a direction accordingly.
2. I am satisfied that there is sufficient evidence to reasonably allege that a public footpath has arisen through common law use of the eastern half of route D-B prior to September 2008, and through statutory dedication of the western half of route D-B (which was unaffected by the statutory deposits and declarations) over the period 2000-2020. The evidence in respect of section B-E is insufficient to reasonably allege that a public footpath has arisen over that part of the route. Thus, having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in respect of section D-B of the application route only.

**Formal Decision**

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Hampshire County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to add a public footpath between points D and B shown on the attached “Location Plan A”. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*C Beeby*

INSPECTOR

COPY - MAP NOT TO SCALE

