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| **Appeal Decision** |
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| **by A Behn Dip MS MIPROW**  |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 2 June 2023** |

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| **Appeal Ref: FPS/X2600/14A/11** |
| * This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981(the 1981 Act) against the decision of Norfolk County Council (NCC) to make an order that did not include certain sections of the appeal routes, under Section 53(2) of that Act.
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| * By application dated 5 September 2016, Mr I Witham on behalf of the Open Spaces Society claimed that two routes from Cromer Road to Bodham Woods and from Cromer Road to Bodham Footpath No.1 on Bodham Common, should be added to the definitive map and statement for the area as public footpaths.
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| * The application was refused, in part, by Norfolk County Council and the appellant was formally notified of the decision on 11 April 2022.
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| **Summary of Decision: The appeal is partially 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 the 1981 Act, based on the papers submitted. In this case, I have not visited the site, but I am satisfied I can make my decision without the need to do so.
2. In writing this decision I have found it convenient to refer to points marked on the NCC plan showing the application routes, and I therefore attach a copy of this plan.
3. The appellant, Mr I Witham, requests that the Secretary of State directs NCC to make a definitive map modification order to record the section of Route 1, from B-C, and Route 2 as shown on the attached map, as public footpaths.
4. On 11 April 2022 NCC consented to make an Order adding part of the claimed Route 1, section A-B, on the attached map, to the Definitive Map and Statement as a public footpath. NCC declined to make an Order for Section B-C of Route 1 which runs across Bodham Common, or for Route 2 which runs across land owned by The Forestry Commission (TFC).
5. In their statement of case dated 25 August 2022, NCC concluded that for Route 1 section B-C, that public use was ‘by right’ between 2004-2016, and so public use ‘as of right’ could not be demonstrated for the full twenty-year relevant period of 1996- 2016. For Route 2, NCC concluded that as the land had belonged to the Crown since the late 1940’s the provisions of Section 31 of the Highways Act 1980 (the 1980 Act) do not apply. NCC also concluded that there was no evidence of dedication of either of the routes as highway under common law.
6. The papers before me indicate that there are two landowners whose land is crossed by the routes under appeal. The owner of that part of Route 1, section B-C, was evidenced on the Bodham Inclosure Award Map of 1810 as the trustees of the poor of Bodham. The land is shown as unregistered, but has been claimed and administered by Bodham Parish Council, for over 50 years. The parish council accept the claimed route to be public and have never taken any action to challenge or deny access to users of the path. TFC are the owners of the land across which Route 2 passes and do not accept the route to be a public right of way due to permissive access being granted to all Forestry Commission land during the 20th century, and public access being dedicated under the Countryside and Rights of Way Act 2000 (the 2000 Act).

**Legal Framework**

1. The original application was made under Section 53(2) of the 1981 Act, which requires the surveying authority, (in this case NCC) 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. Where no public right of way is presently recorded, 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…”.*
3. 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], and later clarified in the case *R v Secretary of State for Wales ex parte Emery* [1998]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 be demonstrated it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.
1. At this stage, I need only be satisfied that the evidence meets Test B, which is the lesser test. Both tests are applicable when deciding whether an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant.
2. For documentary evidence, section 32 of the 1980 Act requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.
3. For user evidence, section 31 of the 1980 Act is relevant. This requires consideration as to whether 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. If so, the way is 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 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
4. Alternatively, if the case is not made out under statute, the evidence may be considered under the common law. In this case the issues to be addressed would be 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.

**Main issues**

1. Use of the claimed routes by the public does not appear to be in dispute, but more so whether use by the public gave rise to a presumption of statutory dedication under the provisions of the 1980 Act or an inference of dedication at common law. The focus in this case appears to be on whether use of Route 1, part B-C raises a reasonable allegation of rights being established prior to the statutory provisions of public rights of access on Common Land coming into force through the 2000 Act; and for Route 2, whether the evidence infers dedication under common law.

**Documentary Evidence**

1. NCC researched a number of sources of historical documentary evidence; Faden’s Map of Norfolk 1797, the Inclosure Award of 1810, Bryant’s Map of Norfolk 1826, and the 1841 Tithe Map for Bodham but they did not reveal any support for public rights of way of any antiquity.
2. NCC also investigated Ordnance Survey (OS) Mapping. The 1882 OS County Series 1st edition map and all subsequent OS maps show Route 2 as a track. Route 1, part B-C is first shown on the 1905 OS County Series 2nd edition map, albeit NCC consider the route over Bodham Common at its northern end to show a slightly different alignment. It is then shown on its current alignment on the 1972 OS map.
3. Bodham Common itself is registered as common land. Registration was applied for by Bodham Parish Council in 1967 and finalised on 1 October 1970 being given the register unit number CL21. The OS mapping illustrates the land parcel as a common since 1882.

Reasoning

***Statutory Dedication***

*When the status of the claimed routes was brought into question*

1. With no previous events that would bring the rights of the public into question, it is accepted that for the purpose of statutory dedication, the submission of the application by the appellant in September 2016 is sufficient to serve as the calling into question of Route 1. Thus, the relevant period for this appeal is 1996-2016.
2. It is accepted by all parties that due to the ownership by the Crown of the land over which Route 2 passes, public rights cannot be established through statutory dedication under the1980 Act.

*User evidence*

1. Seventeen user evidence forms were provided by the appellant over the course of the application and appeal, all stating use of both routes, with earliest use dating back to the late 1940’s and 1950’s.
2. Use appears to be frequent, many quoting weekly or monthly use, mostly on foot. The routes used were always the same and, in several instances, formed part of a wider journey. No-one was ever stopped, given permission to use the routes, or told that the routes were not public, and no one reported any gates, stiles, or obstructions, except for a gate at the northern termination of Route 2, which prevented vehicular traffic entering the woods but allowed pedestrian use. There was also a sign at this location requesting dogs be kept on a lead.
3. Following consultation in 2017, a member of High Kelling Parish Council evidenced that he personally used the routes in question and often saw others, especially dog walkers. He had spoken to one or two older local residents, who said the routes had always been viewed as footpaths.

*Landowner evidence*

1. Landowner consultation on the application was undertaken by NCC for the entirety of both routes. For this appeal, only the landowners relating to the declined routes are considered.
2. Bodham Parish Council have managed Bodham Common for many years and accept that the claimed Route 1, part B-C, is public, further stating they have never challenged users or denied access across the land.
3. TFC do not accept that Route 2 is a public right of way on the basis that access to their land is by permission only. They refer directly to the 2000 Act, which dedicated public access to its freehold land, coming into effect from June 2005 for Bodham Woods. TFC also refer to The Forestry Commission Byelaws, UK Statutory Instruments 1982 No. 648 (SI 1982 No 648) which set out provisions for public access to forestry commission land, and they further stated that permissive access had been allowed within Bodham Woods since its acquisition by them in 1948.

*Conclusions on Statutory dedication* *for Route 1 part B-C*

1. Route 1, part B-C, runs across registered common land. Under the 2000 Act the public were given a right of access for open air recreation across such land, the commencement for this particular common, coming into effect on 19 September 2004. Subsequently any recreational use from this date is considered ‘by right’ as opposed to ‘as of right’ and as clarified by the 2000 Act must be disregarded when considering the dedication of a way as highway.
2. There is much difference of opinion between the two parties as to the ‘purpose of use’ of Route 1 by the users who submitted evidence forms. NCC regard their use as mostly recreational in nature, whereas the appellant submits that more than half of the users do not actually specify their use was recreational and so it cannot be assumed that it was. It seems that the basis of this dispute is that if use were not ‘recreational’ and the motive for use was specifically as ‘a highway’ then statutory dedication could still be achieved for the relevant period.
3. It is unclear as to the purpose of use for several of those submitting evidence forms and it is not a question that is asked on the evidence forms provided. Therefore, it is a difficult and subjective matter to determine what constitutes recreational use and what does not. Nevertheless, from the papers before me I am inclined to agree with NCC that in the absence of a specifically documented purpose, use was likely to be predominantly recreational by nature, due to the rural location of the route. This being the case, there is insufficient usage to provide evidence of statutory dedication for the relevant period of 1996-2016.
4. Given that there was no general right of public access to common land prior to the 2000 Act, any usage of the route before September 2004 could give rise to a reasonable allegation of dedication, as contended by the appellant. As there is not a sufficient event before me that allows investigation of an alternative 20-year period, I will deliberate the matter at common law.

**Common Law**

*Route 1, part B-C*

1. It has been established that the application for this part of Route 1 fails under the requirements of the 1980 Act, therefore I will consider dedication under common law. An inference that a way has been dedicated at common law may be drawn where the actions or inaction of a landowner who had the capacity to dedicate, expressed or implied that they intended a way to be dedicated; and where there is evidence of acceptance by the public. The onus rests with the person claiming the right of way to show that the evidence as a whole, can infer the intention to dedicate.
2. It is accepted that although the land over which the route runs is unregistered, it has been claimed by the Parish Council and administered by them for many years. Indeed, it was the Parish Council that sought to have the common registered in 1967. There is no evidence that the landowner did not have the capacity to dedicate.
3. Although there is no physical positive action by the Parish Council to imply dedication as submitted by NCC, there is also no negative action to disabuse the public of the belief that the way had been dedicated. The Parish Council fully acknowledge and express acquiescence of long use of this route by the public and furthermore state they never challenged use or denied access to users. I consider this sufficient to imply dedication.
4. Prior to when Bodham Common was designated as access land in 2004, there is evidence of long and regular use by 9 of the users who submitted evidence. Use was twice weekly for some, weekly for others and two stated bi-monthly use. It is clear from the user evidence considered earlier under statutory dedication, that use was ‘as of right,’ without force or secrecy and without permission. In a rural area such as this, I consider the usage sufficient evidence of acceptance of the route by the public.
5. Although OS mapping is not evidence of public rights, the section B-C of Route 1 is shown as existent on the ground since 1905, albeit the line differs slightly from that shown on the 1972 map. Photos from the site visit, show a very visible path on the same line, connecting to Bodham Footpath No.1. This adds credibility to the claimed usage and longevity of the route.

*Route 2*

1. The appellant accepts that the provisions of the 1980 Act do not apply to Crown Land and resultantly that rights cannot have been acquired through statutory dedication. However, Mr Witham feels that the evidence raises a reasonable allegation of rights being established at common law.
2. The appellant draws attention to the linear nature of the strip of land forming Route 2 and considers that the nature of the land only facilitates passing and repassing, as opposed to the right of access to ‘roam’ freehold forestry commission land, as granted by TFC in June 2005, under the 2000 Act.
3. I accept the applicant’s view that, in practical terms, the strip of land facilitates access to the Bodham Woods, rather than being of a width to afford ‘roaming,’ however it is the case that TFC dedicated access to all of their freehold land and the width of any section of the land is of no consequence, as access has been granted over the entirety.
4. Turning to the period before June 2005, TFC state the land has been in their ownership since the late 1940’s. It is the case that SI 1982 No 648 set out public access provisions and byelaws for all forestry commission land, illustrating access was permissive. Prior to 1982, TFC state there was permissive access granted over Bodham Wood commencing from their acquisition of the land in 1948, although there is no documentation before me evidencing this.
5. Even in the absence of documentation confirming permissive access from acquisition by TFC until the SI 1982 No 648, only three of the user evidence forms indicate use prior to 1982. One indicates use approximately every three weeks, one states weekly use, and one is unspecific, stating ‘many times’ over a period from the ‘late 1940’s /1950’s and later’. I do not consider this user evidence to be sufficient to raise an allegation of the subsistence of a right of way.
6. The documentary evidence discussed earlier in this report illustrates that Route 2 was not shown on any historic mapping until the 1882 OS First Edition County Series Map where a track leading to a sand pit in Bodham Wood was shown. It was then shown on all subsequent OS mapping. Albeit this shows the existence of a route on the ground since 1882, it is not evidence that the route held public rights.

*Conclusions on Common Law dedication*

1. I find no evidence in the representations before me that would inevitably defeat the claim that a right of way has been established at common law over Route 1, part B-C, prior to common land access provisions coming into effect in September 2004.
2. Regarding Route 2, dedication under common law fails in the period post 1982, due to the dedication of public access under the 2000 Act and the preceding provisions detailed in SI 1982 No 648. As a whole, there is insufficient evidence to establish dedication at common law prior to SI 1982 No 648.

Overall Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed for Route 1, part B-C, but dismissed for Route 2.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Norfolk 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 modify the definitive map and statement for the area by adding a public footpath shown on the plan below as Route 1 and running between points B and C, Bodham Common to Bodham Footpath No.1. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

A Behn

 **Inspector**

