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| **Appeal Decision** |
| **by Charlotte Ditchburn BSc (Honours) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 September 2023** |

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| **Appeal Ref: ROW/3320151** |
| * 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 Derbyshire County Council (‘the Council’) not to make an Order under section 53 (2) of that Act.
* The application dated 22 May 2019 was refused by the Council on 09 March 2023.
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| * The Appellant claims that the definitive map and statement of public rights of way should be modified by adding the footpath 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’). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. The appeal has been determined on the papers submitted.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 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’).

Main Issue(s)

1. The main issue in this case is whether a public right of way subsists or can be reasonably alleged to subsist over the Appeal route.

**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. 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. Part of 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.

Reasons

***Documentary evidence***

1. The applicant partly relies upon documentary evidence in the form of Ordnance Survey (‘OS’) maps and satellite images. Such documents can reveal the physical presence of a path at particular times, but they do not assist in establishing if the path was used by the public.
2. In this case, the OS mapping does not assist the applicant in any event. The OS 6” map of 1888-1913 shows the route as a physical feature but not on the alignment of the Appeal route and the OS 1” Map of 1955-1961 shows the physical presence of a route but does not give any evidence as to its status.
3. Promoted walks including the route have been published in The Village Trails 4 in Erewash Morley book and The Derbyshire Portway, Pilgrimage to the Past, A Walking Guide book. The Village Trails 4 publication shows a path to the north of the Appeal route, there is no indication as to the status of the path. There is also a description of the mound alongside the path but there are no indications as to whether the path in question is the Appeal route or Footpath 22 which also runs alongside the mound. The Derbyshire Portway Pilgrimage book shows a path to the south of the mound and describes the route as a ‘track’, it is reasonable to accept this shows an inference of use on foot along the route.
4. The satellite images show a line broadly along the claimed route which is consistent with the presence of the path, but no dates are provided for these images. The additional modern day OS maps also show a path along the Appeal route. They help to demonstrate the existence of a path from 1888 to 1961, but not its status. Little weight can therefore be attached to the documentary evidence beyond it verifying that the line of the path existed during that period.

***Statutory Dedication***

*Evidence of public use*

1. Twelve User Evidence Forms (UEFs) have been submitted in support of the claim and in addition four statements describing use of the claimed route have been submitted. These describe use of the route from 1949 to 2019.
2. In 1982 a gate was replaced by a stile at Point A on the map, there is no evidence contained within the user evidence that suggests that usage of the route was prevented as a result of this and there is no mention of any other acts by the landowner that would call in to question the use of the route by the public. In 2014, the landowner submitted a declaration under Section 31(6) of the 1981 Act, and therefore this is the date that the status of the claimed route was brought into question, thus the relevant period under Section 31(1) of the 1980 Act is 1994-2014.
3. Three of the users claimed to have used the route throughout the 20 years before the landowner declaration and seven for part of that period. One person had ceased using it before 1994. People had generally used the route on foot, with two of the users using it on horseback and pedal cycle. Most people had used the route on a weekly basis or more frequently. Most people also stated that they had seen others using the route.
4. All those providing evidence of use stated that they had never been obstructed before 2019 or challenged in their use of the route and that they have never seen any signs on the route to suggest that it was not a public right of way.
5. An objection to the claim made on behalf of the owner of the land crossed by the claimed footpath states that a sign was placed on the route. Photographic evidence has been submitted of a sign, said to have been erected in 2002, stating ‘PRIVATE LAND No Public Right of Way’.
6. Although the presence of such signs might usually be sufficient to bring public use of a path into question and/or indicate a lack of intention on the part of the landowner to dedicate it for public use, this would be dependent on the signs being placed in a location visible to members of the public using the path.
7. In this case, not one of the users of the path specifically recalled seeing a sign. The landowner states that not long after erecting the sign it was vandalised. In light of this it seems possible that signs were not visible to users of the claimed route for some or all of the 20 year period before 2014.

*Conclusions regarding statutory dedication*

1. Overall, it is my view that the available evidence of public use of the claimed route on foot in the period from 1994 to 2014 could raise a presumption, in accordance with the provisions of the 1980 Act, that it has been dedicated as a public footpath. However, there appears to be some doubt about whether there is a definite route to the south of the mound, it appears users may have used the claimed route as well as an additional route to the north of the mound.
2. On the basis of all the information available to me it is my view that there is no incontrovertible evidence that a public footpath cannot be reasonably alleged to subsist over the claimed route.

***Common Law***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
2. In this case, there is evidence of public use of the claimed route over a longer period than 20 years predating 2014. On the other hand, it is also possible that a sign may have been in place before 2003. However, in view of my conclusions regarding the statutory dedication of the route, it is not necessary to pursue the possible inference of its dedication at common law any further at this stage.

###### 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 to the 1981 Act Derbyshire 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 to the definitive map and statement the public footpath proposed in the application dated 22 May 2019 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 his powers under Schedule 15 of the 1981 Act.

Charlotte Ditchburn

Inspector