

|  |
| --- |
| **Appeal Decision** |
| **by Nigel Farthing LLB**  |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 04 January 2024** |

|  |
| --- |
| **Appeal Ref: ROW/3325911** |
| * 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 Staffordshire County Council (SCC) not to make an order under Section 53(2) of that Act.
 |
| * By application dated 22 June 1990 Cheddleton Parish Council (the Applicant) claimed that evidence had been discovered which (when considered with all other relevant evidence available) shows that a right of way which is not shown on the definitive map and statement (DMS) subsists or is reasonably alleged to subsist over land in the area to which the map relates.
 |
| * The application was refused by SCC on 23 June 2023 and the Appellant was formally notified of the decision on 27 June 2023. On 13 July 2023 the Applicant gave notice of appeal against the decision of SCC not to make an Order.
* In writing this decision I have found it helpful to refer to points on the claimed routes marked on the appeal map. I therefore attach a copy.
 |
| **Summary of Decision: The appeal is allowed.** |
|  |

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) on the basis of the papers submitted. In this case I am satisfied I can reach a reliable decision without visiting the site.
2. The Appellant requests that the Secretary of State directs SCC to make a definitive map modification order under Schedule 15 of the 1981 Act to record the routes which are the subject of this appeal as footpaths.
3. I have before me the application made by the Applicant on 22 June 1990 together with the evidence submitted in support of the application and subsequently. In addition, I have the SCC investigation report and statement of reasons, the appeal and SCC’s response. I have considered all these documents in forming my conclusions.
4. The appeal concerns a principal route between Deep Hayes and Crown Point (shown as points A and B on the attached map), and a cul-de-sac spur from point C to Deep Hayes Reservoir at point D. I will refer to these routes individually as A to B and C to D and collectively as the appeal routes.

Main issues

1. The main issue in this case is whether evidence has been discovered which is sufficient to show, on a balance of probabilities, that the appeal routes, which are not currently recorded on the DMS, have the status of public footpaths, or that it is reasonable to so allege.

**Legal framework**

1. Section 53(2) of the 1981 Act requires the surveying authority (in this case SCC) to make orders to modify its definitive map and statement in consequence of certain specified events as set out in Section 53(3).
2. Sub-section 53(3)(c)(i) describes one such event as “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 …".
3. The statutory test to be applied to the evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made notwithstanding that for the Order to be confirmed subsequently only the higher test will apply.
4. Accordingly, if I am satisfied that the appeal routes are reasonably alleged to subsist the appeal should be allowed. The test for a reasonable allegation to arise is that there is some credible evidence in support and no conclusive evidence against the existence of the claimed right.
5. The application is supported only by evidence of use. Section 31(1) of the Highways Act 1980 provides that “Where a way over 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 shall 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”.
6. An inference of dedication can arise at common law where the evidence is sufficient to infer actual dedication by the landowner. No minimum period of use is required.

**Reasons**

1. For an order to be made under section 31(1) it will be necessary for the evidence to give rise to a reasonable allegation that the appeal routes have been used by the public, for a continuous period of at least 20 years and that such use has been undertaken as of right. Even if the Applicant is able to satisfy these requirements the application would still fail if the landowner can establish that during the relevant 20-year period a lack of intention to dedicate was demonstrated.

The 20-year period

1. The relevant 20-year period is calculated retrospectively from the date when the entitlement of the public to use the appeal routes was brought into question. In this case there is no evidence of any overt challenge to the right of the public to use the appeal routes. In these circumstances the date of making the application is to be taken as the date of challenge. The application was made on 22 June 1990 and thus the relevant 20-year period is 1970 to 1990.

Use by the public for a full 20-year period.

1. Use must be by a sufficient number of individuals to represent use by the public. There is no requirement for a minimum number of users and what is appropriate can vary according to the context and circumstances of the case. There is however a requirement that the appeal routes have been used sufficiently throughout the full 20-year period, but there is no requirement for individuals to have used the routes for the whole period.
2. There are two elements to the appeal routes, the principal route, A to B and the cul-de-sac spur C to D. The evidence of use of the two elements differs and I shall consider separately the sufficiency of the evidence for each.
3. The user evidence comprises completed user evidence forms, some submitted with the original application in 1990 and some subsequently. The evidence is not all easy to interpret. The forms submitted with the original application do not have accompanying maps because of which it is difficult to be certain as to the precise route the witness is referring to having used. A further batch of forms have been copied on one side only, thus omitting the answers to certain questions. These factors make it difficult for me to reach firm conclusions about the extent of use, but I am mindful that at this stage, for the reasons outlined above, it is only necessary for me to find that the evidence gives rise to a reasonable allegation.
4. The report considered by SCC when refusing the application places undue weight upon whether or not individual witnesses used the route in question for the full period 20-year period 1970 to 1990. One example is at paragraph 20 where it is stated “*User 11 claims to have used the alleged route from 1938 - 1988, which exceeds twenty years but does not cover the relevant twenty year period”.* Whilst what is said is strictly correct, it does not give credit for the fact that the user does give evidence of 18 years’ use within the relevant period. Similarly at paragraph 21, “*User 22 alleges to have used the route from points A to B but not C to D. They state to have used the route in the previous 10 years, which would be from 1980 - 1990, which does not meet the requisite 20-year period*.” Again, this would seem to dismiss the relevance of 10 years qualifying use for the period 1980 to 1990. In the summary the author of the report says at paragraph 78 “*In relation to the section marked A to B on the map, a significant number of people have provided evidence that they have used the route, however none of the users can show that they have used the route for the full relevant twenty year period and none of the users provided evidence that they used the route on a regular basis.”*
5. There is no requirement for a user to have used the appeal route or routes for the whole 20-year period. All use within the relevant 20-year period is relevant to an assessment of whether the routes have been used by the public.
6. The evidence of use of the section A to B is significantly greater numerically than that of C to D. A number of the witnesses who attest to having used the route A to B state that they have done so for long periods, with six stating upwards of 50 years use and a number more than 20 years, although not corresponding directly with the 20-year period under consideration. A number of the users who have used the route for a long time have done so infrequently, but there are long users whose use is described as ‘regular’, ‘often’ or ‘very often’.
7. Recognising that the quality of the user evidence is imperfect, I am satisfied that there is sufficient evidence of use of the route A to B throughout the 20-year period for me to find that the cumulative value is sufficient to amount to a reasonable allegation of use by the public.
8. The evidence of use of the section C to D is substantially less than for A to B, although the nature of the user evidence forms is such that it is not readily apparent that witnesses are necessarily saying that whilst they used A to B, they did not use C to D. The evidential threshold to give rise to a reasonable allegation is low and whilst the evidence of use of this section would not be sufficient to satisfy me on a balance of probabilities, it is sufficient to demonstrate that the public did use this route and there is no incontrovertible evidence to suggest to the contrary. On this basis I find that the extent of use of the section C to D is sufficient to satisfy the reasonable allegation test.

Use as of right

1. Use is not as of right if it is undertaken by force, with permission or secretly. In this case there is no evidence that use was undertaken secretly. There is some suggestion that a sign or signs stating ’Private Land’ were displayed but it is not clear exactly where these were, when they were present and in what context. My impression is that any signs were relevant only to the route C to D.
2. There is evidence that stiles and a kissing gate were in place on the appeal routes. The presence of these might suggest complicity on the part of the landowner in public use of the routes.
3. When the application was submitted in 1990 four landowners were identified. One of these, the owner of Crown Point Farm, stated that they were owner occupiers. They had not given permission for public use of the appeal route over their land but were aware that it was so used and had done nothing to prevent or discourage such use. The stated owner of Old Park Farm was in fact a Settled Land Act tenant for life who also had not given permission for use of the route but was aware of public use and had not sought to prevent it. Both of these individuals, when completing the landowner evidence forms, considered the appeal routes to be public rights of way.
4. The remaining two owners were SCC and a tenant of part of that land, being Park Farm. The tenant acknowledged use by the public and had taken no steps to prevent use.
5. The position of SCC is less straightforward. Their initial response to the proposed application in 1988 and 1990 was that the main route, A to B, would be a useful addition to the public network, but disputed whether the spur, C to D, could have been used as of right for the necessary period as it was part of a waymarked route within the Country Park and thus use was permissive. I have been provided with no detail of the alleged permissive scheme for use of routes within the Country Park, nor how this was communicated to the public.
6. Subsequently SCC objected to both of the appeal routes being recorded as public rights of way on the grounds that further investigation suggested that between 1972 and 1980 access was controlled by Stoke on Trent Youth and Community Sailing Club and that access to the public was denied.The only evidence to support this assertion is contained in a memo from SCC stating that access was denied to the public between 1972 and 1980.
7. The assertion that use of the appeal routes was denied to the public between 1972 and 1980 is at odds with the evidence of the users and the other landowners. The suggestion that use was permissive is similarly not consistent with the evidence contained in the user evidence forms. In neither case does the assertion amount to an incontrovertible answer to the claimed public rights. Accordingly, I find it is reasonable to allege that use of the appeal routes by the public was use as of right.

Lack of intention to dedicate

1. A landowner can rebut a statutory presumption of dedication by making an overt demonstration of a lack of intention to dedicate in a manner that would come to the attention of users of the route.
2. In this case none of the user evidence forms describe signs, obstructions or challenges or any other matters that caused the user to believe their entitlement to use the appeal routes was being contested.
3. The only evidence which might be advanced in support of an argument that the landowner demonstrated a lack of intention to dedicate is that contained in the memo previously referred to. The memo does not state how the Sailing Club communicated to the public that their use was prohibited. This evidence falls a long way short of amounting to an incontrovertible answer to the application.

Common Law

1. Given the findings that I have made in relation to presumed dedication pursuant to section 53 of the 1981 it is not necessary for me to consider the position at common law.

Summary and conclusions

1. There is sufficient evidence of use of both appeal routes for it to be reasonably alleged that a statutory presumption of dedication arises. There is no sufficient evidence of a lack of intention to dedicate, or of any other reason that would prove conclusively that the appeal routes should not be recorded as public footpaths.

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, Staffordshire 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 the area by adding Footpaths between points A and B and between points C and D.
2. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act

Nigel Farthing

 **Inspector**