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| **Appeal Decision** |
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| **by Charlotte Ditchburn BSc (Honours) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date:11 January 2024** |

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| **Appeal Ref: ROW/3323714** |
| * 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 Oxfordshire County Council (‘the Council’) not to make an Order under section 53 (2) of that Act.
* The application dated 25 January 2010 was refused by the Council on 2 February 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 along Paradise Road 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 1981 Act.
2. The appeal has been determined on the papers submitted. I have not visited the site, but I am satisfied I can make my decision without the need to do so.

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 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 subsists or is reasonably alleged to subsist over land in the area to which the map relates.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act 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 [1998]* (‘Emery’).
4. 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. Roche LJ also held that *“Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication.”*
3. User evidence has been submitted in support of the claimed route. Section 31 of the Highways Act 1980 (the 1980 Act) relies on a statutory presumption of dedication as a highway where it has been actually enjoyed by the public as a right of way and without interruption for a full period of twenty years. The date when the public’s rights to use the route was brought into question would need to be established. I would then need to determine if use by the public occurred for a twenty year period prior to this that is sufficient to raise a presumption of dedication. If this was the case, I must then consider if there is sufficient evidence that there was no intention on the part of the landowners to dedicate public rights during this period.
4. Under common law, an inference that a way has been dedicated for public use may be drawn when the actions of the landowners (or lack of action), indicate that they intended a way to be dedicated as a highway and where the public have accepted that dedication. Use by the public can be evidence of the intention to dedicate; this use should be as of right without force, secrecy, or permission. There is no fixed period of use at common law and use may range from a few years to several decades, based on the facts of the case. The more intensive and open the use, the shorter the period required to raise the inference of dedication. The burden of proof lies with the claimant to demonstrate that the evidence is sufficient to indicate an intention of dedication.
5. I need to consider if the documentary and user evidence provided is sufficient to infer the dedication of public rights over the claimed route at some point in the past. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan, or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as highway.

Reasons

***Documentary evidence***

*Estate, Commercial and Ordnance Survey (OS) Maps*

1. The appeal route is not shown on early commercial mapping including Richard Davis 1797, Thomas Jeffery 1766-7 or Greenwood 1822-23.
2. A copy extract of an estate map of 1802 gives locations of gates in place at the junction with Deanfield Road and The Lodge, near the southern end of the appeal route and junction with Footpath 29. Submissions state that the gates were in place until the 1950s. The original map was not provided with the documentation from Oxfordshire County Council (OCC).
3. Bryant’s Map 1823-4 shows the route as a “lane” then continuing as a bridle road forming part of a through route from what is now Gravel Hill, labelled “Paradise” linking to “Pack and Prime Way” and ultimately to the “Lodge or Bottom Ho Fm”, south-east of Badgemore House. In Bryant’s key, a ‘lane’ was a category or route that featured between ‘Good Cross or Driving Roads’ and ‘Bridleroads’.
4. OS maps of various scales between 1879 and 1989 show the appeal route on its current alignment showing the physical existence of the route.
5. Bartholomew’s maps of 1902, 1920 and 1941 show the claimed route on its current line with double solid edges. OCC advises that the key indicated it was a *‘inferior roads, not recommended for cyclists’* on the 1902 map, *‘inferior roads and not to be recommended’* on the 1920 map and *‘other road’ (i.e. neither “good”, “secondary” nor “serviceable”)* on the 1940 map.
6. Bartholomew’s maps and OS maps since the late 19th century carry a disclaimer advising that the representation of a road, track, or footpath on it is not evidence of public rights. These maps show the physical existence of the claimed route and are suggestive of public rights, including for cyclists on Bartholomew’s maps, but it could also be argued that they are private routes.
7. Rotherfield Court Sales Particulars 1912 refer to Paradise Road, but they refer to the property being approached by: “*a winding carriage drive flanked on one side by a belt of woodland, and on the other by a clipped yew hedge, and guarded by an entrance lodge built of red brick with tiled roof and containing 5 room. There is a Secondary or Back Drive, also guarded by a 5-roomed Entrance Lodge”* this indicates that Paradise Road was not considered to be part of the sale.

*Henley Tithe Map and Award 1843*

1. The Henley Tithe Map 1843 shows the appeal route with double solid edges coloured yellow. Other proven public routes are coloured yellow.
2. The purpose of Tithe maps was to identify titheable land that was capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of routes. Showing the claimed route in the same manner as known public highways is suggestive of public rights, but not status.

*Finance Act Records*

1. The Finance Act Map shows the appeal route forming part of plot 1485 and coloured yellow. The Finance Act documents do not offer any proof of the existence of a public right of way over the appeal route.

*The Oxfordshire County Council (Definitive Map and Statement for the Former Administrative County of Oxford) Modification Order 1985*

1. The above Order was made by the County Council following an application by The Chiltern Society in the 1980s. The effect of the Order was to add the route of what is now recorded as Public Footpath No 29 to the Definitive Map and Statement. This Order route commenced at the western end of Paradise Road. The original applicant has since passed away, but his ‘application’ was that the route of (what is now) Footpath No 29, and also the continuation along Footpath No 6 to Valley Road should be recorded as public bridleway. The County Council made an Order to add only a footpath between the end of Paradise Road and Footpath No 6. It is unclear why.
2. The Chiltern Society confirms that the reason the original applicant did not include the section of Paradise Road was because he did not have details of what was on the List of Streets for the former Henley Borough Council (which had held a highways agency for minor roads until 1974, and were excluded from the old, pre-1974, county council Road Map) and so he believed that it was a public road (and, therefore, did not need to be claimed as a public right of way).

*Definitive Map Records*

1. The Council have confirmed that the application route was not included on the original definitive map and no evidence has been found of its inclusion on any draft maps, statements or surveys.

*List of Streets*

1. The appeal route does not appear on the Council’s Lists of Streets from 1950, 1970s or the current List of Streets.

*Published Walking Routes*

1. Guide to Henley-on-Thames by Emily Climenson depicts the appeal route in the same manner as other roads. Walks around Henley-on-Thames by Faith Wishlade, published by Chilterns AONB and Oxfordshire County Council Services, 2001, Walk 7; directs walkers along Paradise Road, which is described as ‘residential’. These publications are promoting routes for the public to use and there is nothing to indicate that permission is required.

*Conclusions on the Documentary Evidence*

1. The documentary evidence indicates the existence of the appeal route since the early 1800s. Some later maps are suggestive of public rights, including for cyclists. The documentary evidence shows some evidence of higher rights but taken as a whole, there is not sufficient evidence of the appeal route being of a higher status.

***Statutory Dedication***

*When was the claimed route called into question?*

1. When relying on presumed dedication, a twenty-year period of enjoyment by the public as of right and without interruption needs to be demonstrated. The date when the public’s use of the claimed route was brought into question needs to be established. Use was not clearly challenged before the application was submitted in 2010 which would establish a twenty-year period between 1990 and 2010. The application would have clearly brought the status of the route into question, there is conflicting evidence regarding whether any challenges were issued prior to the submission of the application.
2. Earlier challenge dates have been suggested by the landowners although the effectiveness of these challenges needs further examination as discussed above.

*User Evidence*

1. Thirty-two user evidence forms were submitted in support of the appeal route. Six of the users from the relevant period refer to some of their use of the route being to access school/college either as a pupil, parent or member of staff. The dates given for this are given by four of the six fall outside of the relevant period.
2. These forms show use of the appeal route between 1938 to 2010. Thirty-two people used it on foot, six on a bicycle and five in a vehicle. Use appears frequent with most people claiming use frequently for recreational purposes or to reach places in the locality. No one recalls being challenged or given permission to use the appeal route. Six people refer to signs or notices on the claimed route, erected in 2009. Use appears to have been open without secrecy or force.

*Landowner Evidence*

1. Under Section 31(6) of the 1980 Act, landowners can deposit a map and statement with the relevant council to show any ways they admit have been dedicated as highways. Then they may make a statutory declaration to the effect that no additional ways over the land have been dedicated since the deposit.
2. The landowners do not regard the appeal route as a public right of way and have not tolerated use by the general public. They state to have routinely challenged anyone using the appeal route who is not connected to the residents of Paradise Road or Henley College. Two statutory declarations under Section 31(6) of the 1980 Act were deposited with OCC in 2021, they cannot act retrospectively and so do not demonstrate a lack of intention to dedicate during the relevant period.

*Obstructions*

1. Only one user mentions an obstruction of lockable posts near 'Elmbank' but these were not marked on the appended map nor any further details provided.

*Notices*

1. A notice is present on the appeal route which is said to have been erected in 2009. The route is signed *“private road – authorised access only”.*
2. I need to consider how this notice would have been understood by members of the public. The sign does not make it clear that there was no intention to dedicate a public right of way. Reference to ‘private’ does not preclude the existence of public rights and many rights of way cross private land. By referring to a road, the notice may be interpreted by users as being directed towards motor vehicles not walkers, cyclists, or horse riders.
3. With only eleven users mentioning the sign, most of the path users do not recall seeing notices on the route.

*Conclusions on the User Evidence*

1. The user evidence indicates use by the public as of right, without challenge, secrecy, force, permission, or interruption for a period of seventy-two years between 1938 and 2010 on foot, bicycle and motorised vehicle. This is contested by the landowners who say that public use was limited and with permission, they have challenged use and have taken action to prevent the dedication of public rights. I have considered above that the notice did not explicitly state there was no public right of way or that the public had permission to use it.
2. Even if these events were found to have called use of the claimed route into question, there is evidence of enjoyment by the public dating back to 1938 which could be sufficient to raise a presumption of dedication for most of the claimed challenges.
3. The disputes regarding permission, challenges and intention of the notices cannot be resolved from the written submissions before me. A significant amount of user evidence is provided in support of the appeal route, which at face value appears credible. There is no incontrovertible evidence to demonstrate a lack of intention to dedicate by the landowners.

*Overall Conclusions*

1. The documentary evidence is not sufficient alone, but I find that the user evidence meets the Section 31 test. Therefore, there is no need to consider the user evidence in terms of common law.
2. Having regard to the above, I find there to be conflict in both the documentary and user evidence. Some of the documentary evidence suggests vehicular rights and there is evidence of use by bicycles and vehicles, but this is limited. The application is for a footpath and there is sufficient user evidence to support these rights. Therefore, an Order should be made on the grounds that a right of way can be reasonably alleged to subsist. If objections are made there would be an opportunity for the conflicting evidence to be tested more thoroughly and the issues determined at an inquiry.
3. The documentary evidence is not sufficient alone. I find the user evidence meets the Section 31 test, therefore, there is no need to consider the user evidence in terms of common law.

###### 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 Oxfordshire 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 the public footpath proposed in the application dated 25 January 2010 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