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| **Appeal Decision** |
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| **by Vicki Hirst BA (Hons) PG Dip TP MA MRTPI** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date:23 April 2024** |

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| **Appeal Ref: ROW/3316645** |
| * 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 Leicestershire County Council (‘the Council’) not to make an Order under section 53 (2) of that Act.
* The application dated 26 June 2020 was refused by the Council on 08 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 a footpath between Loughborough Road & Sibson Road, Birstall, Leicestershire.

**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 application relates to a route between Loughborough Road (Point A on the map) extending in an easterly direction to the north-east corner of the bowling green (Point B on the map) and then in a north-easterly direction to Sibson Road (Point C on the map) in Birstall, Leicestershire.
3. The appeal has been determined on the papers submitted. I have not visited the site, but I am satisfied in the circumstances of the case that I can make my decision without doing so.
4. 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

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. 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. The appeal is supported by both documentary and user evidence. For documentary evidence, section 32 of the Highways Act 1980 (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 or not a way has been dedicated as a highway.
4. In respect of user evidence the 1980 Act 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 is deemed to have been dedicated as a highway. This is unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use it was brought into question.
5. Alternatively, if the case is not made out under statute, 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

***Historical and Documentary Evidence***

1. The appellant and Council have provided a number of historical maps and photographs.
2. The early Ordnance Survey (OS) maps from 1920, 1956 and 1966 provided by the Council do not indicate the physical presence of the claimed route. However, the 1930, 1950 and 1952 OS maps appear to show part of the route from Point A to the end of the cricket ground at Point B. The 1965 OS map shows a bold line for the full distance of the claimed route. The current OS map only indicates a path between Point A to the centre of the recreational ground and then following a southerly direction to School Lane and from Point B to Point C. All the maps show the land as containing either allotments, playing fields, and cricket ground with tennis courts and a pavilion.
3. The aerial photograph from 1969 provided by the Council shows a clearly defined path between Point A and the centre of the playing fields by the tennis courts and between Points B and C. Whilst the Council contends the full extent of the path between the middle of the playing fields and Point B is not shown, it appears to me that there is a faint indication of the route between Points B and C. Similarly, the 1991 aerial photograph indicates the physical presence of most of the route, albeit less distinct between the centre of the playing fields and Point B.
4. The 1999, 2000, 2006, 2011, 2014, 2017 and 2018 aerial photographs all indicate the full extent of the path.
5. The extracts from the Birstall Parish claim maps do not show the claimed routes. The 1952 and 1957 definitive maps do not show the claimed route as a public right of way but do indicate the presence of the path as in the 1930, 1950 and 1952 OS maps. Both show a path to Sibson Road but on a different alignment to the claimed route. The full route is not shown on the 1980 Draft Review Map and is not on the current definitive map but is shown on the OS base maps. The Conveyance document for the playing fields does not identify a public right of way but that does not negate a path being subsequently claimed under the relevant legislation.
6. The undated google map extract also shows the entire route as a dashed line and the photographs indicate the presence of parts of the route.
7. In conclusion the submitted documentary evidence strongly indicates the physical presence of a path between Point A and the centre of the playing fields from as early as 1930. The remainder of the path is less distinct until later years with some discrepancies in the route between Points B and C. There is some ambiguity in the maps as the current OS map does not show the link between the centre of the playing fields and Point B, although the aerial photographs from at least 1999 strongly indicate its presence.
8. In any event, the evidence is not determinative as to status. As such I find the historical and documentary evidence provided does not show that a public footpath is reasonably alleged to subsist on the claimed route. It is therefore necessary to consider whether the use of the claimed path can be presumed to have been dedicated in accordance with the provisions of the 1980 Act or inferred to have been dedicated at common law.

***Statutory Dedication***

*Date when the public use was brought into question*

1. The application was made on the basis that the right to use the claimed route was brought into question on 24 March 2020 when the owners of the land, Birstall Parish Council, erected gates at Points A and B of the claimed route. The relevant 20-year period was therefore considered to be 24 March 2000 to 24 March 2020.
2. However, Birstall Parish Council contends the path was prohibited from use during the Annual Gala which has taken place on a yearly basis since 2000. The appellant disputes whether this closure actually occurred in the manner claimed and whether, even if it did, it amounted to calling the use into question or an interruption of the use resulting in a lack of intention to dedicate the path. Nonetheless, there appears to be consensus that the Annual Gala and any associated closures of the path did not take place until 2000.
3. Whilst the Council took account of the period prior to 2000 in its considerations on the basis that the closure of the path for the Gala could comprise a calling into question of the use, it found the user evidence to be insufficient to show a path subsisted either pre-2000 or from 2000 - 2020. The appellant has provided further user evidence as part of the appeal in relation to a 20-year period between 1980 and 2000 should the Annual Gala event be taken into as a calling into question of the route.
4. Given the respective views on the later period, I have therefore firstly taken the relevant period to be 1980 – 2000. In the absence of use within this period being conclusive I shall then consider the use during the period 2000 – 2020.

*Evidence of use – 1980 – 2000*

1. 19 user evidence forms were submitted with the application. Whilst I note the Council’s correspondence in relation to the accuracy of the route on some of the forms, taking the evidence as a whole with regard to the details in the replies, I am satisfied that the replies were based on the claimed route. Of those received, seven users state that they used the route between 1980 and 2000 (and most of these used the path for a number of years prior to 1980). I have disregarded one as the path was not used between 1984 and 2000. An additional five used the path from during the 1980s until 2000 (and beyond).
2. Those who used the path during the relevant period used it regularly and frequently. They used it for a variety of purposes including pleasure, walking dogs and accessing the village, shops and the recreation ground/cricket and bowls club. All state that they saw many other people using the path and their use was never prevented nor was it given permission. None remember any signs on the route. The path is consistently referred to as being surfaced with tarmac and a few understood that maintenance was carried out by either Birstall Parish Council or the County Council.
3. The Council has made no comment on the additional information provided with the appeal in its response. This evidence was largely collected through social media, but I am satisfied that it provides relevant evidence relating to the use of the subject path prior to 2000. A further 11 people demonstrate use during the whole period between 1980 and 2000 with a large number of others demonstrating use during parts of that period. The evidence corroborates that provided within the user evidence forms in that the route was used by the public at large on a regular basis for accessing the village, school, or recreational facilities. None recall any locked gates on the route.
4. I am satisfied that the evidence before me is sufficient to demonstrate that the subject route has been used by the public at large on a regular basis between 1980 and 2000. I am satisfied that during that period the evidence shows such use was without interruption or obstruction.
5. However, the Council contends that the use of the path was “likely” to have been with permission rather than as of right. It does not question whether the path exists but whether it’s use has been permissive. It also questions whether Birstall Parish Council had any intention to dedicate the path as a public right of way.
6. From the evidence before me there is no dispute that Birstall Parish Council own the playing fields which the path crosses and that it has done so for many years. I also note the reference to the Council minutes dated 8 May 2020 which state that the public have a right to use the playing fields, sports ground and play areas, but it is private land that the public are permitted to use.
7. Whilst this minute post-dates the relevant period, the Council asserts that as the path is within the grounds of the playing fields this statement would apply to the claimed route. However, the user evidence before me strongly indicates use of the path for the purposes of accessing the local village, school and surroundings together with the recreational facilities. As such it is not a route providing sole access to the recreational facilities owned by Birstall Parish Council. Whilst Birstall Parish Council may have tolerated the use of the path over its land to access the wider surrounds, this in itself does not equate with permission. Furthermore, I have no evidence that signs were displayed suggesting the use of the path was permissive. The Council concedes that it is unclear as to whether the permissive nature of the alleged path has been communicated to the public.
8. There is some discrepancy in the user evidence as to whether Birstall Parish Council or the County Council have maintained the path. However, even had Birstall Parish Council maintained it, I do not find this in itself to be demonstrative in itself that its use was therefore with permission.
9. With regard to the intention to dedicate the path, reference is made to the locking of two gates at night. However, it is unclear as to the dates these were locked. Nevertheless, the evidence shows that the gate at the Loughborough Road entrance remained unlocked. I do not find the locking of the two gates to be conclusive in indicating Birstall Parish Council was restricting the manner in which the claimed route was used. Furthermore, the Public Spaces Protection Order is inconclusive as to whether it related to the path. In my assessment it would seem likely that this was more generally applied to the playing fields as a whole rather than seeking to control crime and anti-social behaviour on the path alone.
10. Overall, I do not find there to be sufficient evidence to demonstrate that the use of the path was with permission, nor that there was no intention by the landowner to dedicate the right of way.
11. I have taken into account Birstall Parish Council’s objections. However, these are largely concerned with the interruption of the use of the route resulting from the Annual Gala and which took place post 2000. Comments including those in relation to the implications for Birstall Parish Council as landowner should the path be found to subsist, anti-social behaviour and health and safety issues are not pertinent to my considerations having regard to the legal tests within the relevant Acts.
12. I am satisfied that there is sufficient user evidence to reasonably allege that there has been use of the claimed route by the public, as of right, for an uninterrupted period of 20 years between 1980 and 2000. As such, I do not find it necessary to consider the period from 2000 – 2020 further.
13. In light of my findings on a statutory basis, there is no need for me to consider the claim at common law.

###### Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude there is a conflict of evidence, but no incontrovertible evidence that the right of way could not be reasonably alleged to subsist. The appeal should therefore be allowed.

###### Formal Decision

1. The appeal is allowed. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Leicestershire County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the Definitive Map and Statement for Leicestershire County Council to add a public footpath as proposed in the application dated 26 June 2020 within three months of the date of this decision.
2. 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.

Vicki Hirst

Inspector