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| **Appeal Decision** |
| **by Claire Tregembo BA(Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 May 2024** |

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| **Appeal Ref: ROW/3335581** |
| * 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 St Helens Borough Council not to make an Order under section 53(2) of that Act.
* The application dated 14 November 2023 was refused by the Council on 27 December 2023.
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| * The appellant claims that the definitive map and statement of public rights of way should be modified by adding bridleways in Whiston Wood 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).
2. The appeal has been determined on the papers submitted. I have not visited the site, but I am satisfied that 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 occurrence of specific events cited in section 53(3)
2. 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 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* [1996] 4 All ER 367 (*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 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 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 right to use the routes 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 landowner to dedicate public bridleways 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. At this stage, I need only to be satisfied that the evidence meets test B, the lesser test.

Reasons

1. The land has been owned by the Secretary of State for Environment, Food and Rural Affairs (Defra) since 2001 and is managed by Forestry England (FE). The provisions of the 1980 Act only apply to land owned by a government department if there is an agreement between them and the Highway Authority that they shall apply. There is no evidence of an agreement between Defra and St Helens Borough Council (the Council). Therefore, dedication under section 31 of the 1980 Act could not have occurred after 2001. However, dedication of the paths after 2001 can still be established under common law principles.

*User Evidence*

1. The application was supported by 22 user evidence forms showing use between 2000 and 2023. There is no evidence of twenty years use before 2001 to reasonably allege presumed dedication under section 31 of the 1980 Act. Therefore, I need to consider if there is sufficient evidence to show dedication under common law.
2. Most horse riders used the paths at least once a week, with others riding it monthly and a couple of people daily. After 2005 at least six people used the paths on horseback every year with 14 people using them in 2020. The horse riders appear to have used all the paths as part of a series of loops within Whiston Wood to get the most riding out of the relatively small area. Photographs of horse riders using the paths are provided which show groups of four or five riders, some with walkers accompanying them. Most of the riders and those walking with them are wearing high-visibility clothing.
3. None of the path users report access controls that prevented use. Two people recall fallen trees across one of the paths but state they were cleared a few days later.
4. None of the path users were challenged when riding the paths. Notices at both entrances state ‘Forestry Commission’, ‘Whiston Wood’ ‘Part of the Mersey Forest’, and ‘No Motorcycles Allowed’. There is no indication that horse riding is not permitted or that use of wood is with permission. The appellant refers to the Mersey Forest website which states Whiston Wood is a community woodland open for everyone to enjoy. Use appears to be as of right without permission, force, or secrecy.

*Intention to Dedicate*

1. FE states the land was acquired in 2001 and subsequently planted as a community woodland. The intended use was for public access on foot and a circular permissive footpath was installed for that purpose. They have never seen any evidence of horse access or encountered horses on the land and there are no connections to public bridleways. The St Helens Forest Plan summarises the proposals for managing six woodlands including Whiston Wood. It states each woodland has a good network of paths providing good, safe access all year round. There is no mention of horse access or bridleways in the Forest Plan, and they have not permitted horse riding in Whiston Wood.
2. I have not been provided with a copy of the Forest Plan so I can only make comments on the wording provided by FE. I do not consider the wording ‘good network of paths’ indicates who could or could not use them. It does not state the paths were footpaths or for use on foot only. The term ‘paths’ could indicate footpaths, bridleways, cycle paths, or a mixture of path types. The limited extract from the Forest Plan does not refer to the paths being permissive. In my view, the lack of reference to horse access or bridleways in the Forest Plan does not mean they were not permitted. The Forest Plan and letter indicate there was an intention to provide public access to the woods.
3. FE states the community woodland was for public access on foot with permission. However, they do not provide any evidence to show how this was communicated to the public. The notices at the entrance points to Whiston Wood clearly state that motorcycles are not allowed but there is no reference to other users or permission. The notices do not indicate the paths are permissive, only for use on foot, or that horses are not allowed. I consider this suggests FE accepted the public would use Whiston Wood and that use may be other than on foot. However, they only took action to challenge use on motorcycles.
4. The Council advises that two gated vehicular access points have existed since at least 2009. Alongside the gates are 1.1m wide pedestrian access points. They also advise that it may be possible for horse riders to access Whiston Wood at point A, but Google images suggest this was not possible in 2009 due to a bus timetable positioned in the gap.
5. Google images are provided which show metal vehicular access gates with a gap to the side and low wooden posts with gaps between them. At Point A, there also appears to be a wide gap between the bus shelter and the wooden posts. Although the Council does not believe the gaps are wide enough for horse riders to gain access to Whiston Wood, the user evidence provided indicates they can.

*Overall Conclusions*

1. There is no incontrovertible evidence to demonstrate a lack of intention to dedicate bridleways within Whiston Wood. The letter from FE and the Mersey Forest webpage indicate Whiston Wood was provided for public use. FE does not appear to have taken action to make it clear to the public that use was only on foot and only with permission. The only challenge to use is directed at motorcycle riders.
2. Whilst there may not have been any overt acknowledgment of dedication of the paths, I consider the lack of action to challenge horse riders and the acquiescence of use is sufficient to reasonably allege an inference of dedication of the paths within Whiston Woods as public bridleways under common law. The evidence of use is also sufficient to show acceptance of rights of way by the public on horseback.

**Other Matters**

1. Reference is made to the Council taking a very short time to determine the application, the lack of statement explaining how the decision was made, limited action taken by the Council to investigate the application, and delays in adding it to the Register of Applications under section 53(5) of the 1981 Act. The investigation process and time taken to determine applications is a matter for the Council and I am not able to comment on these matters. I can only consider if the evidence before me is sufficient for an Order to be made.

###### 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 of the 1981 Act, St Helens Borough 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 public bridleways in Whiston Wood, as proposed in the application dated 14 November 2023 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 their powers under Schedule 15 of the 1981 Act.

Claire Tregembo

INSPECTOR

**Application Plan for Bridleways in Whiston Wood**

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