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| **Appeal Decision** |
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| **by Charlotte Ditchburn BSc (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 September 2024** |

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| **Appeal Ref: ROW/3333346** |
| * 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 Buckinghamshire Council (‘the Council’) not to make an Order under section 53 (2) of that Act. * The application dated 23 April 2016 was refused by the Council on 24 October 2023. |
| * 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 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 (DMS) 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 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’).
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 of right 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

***Statutory Dedication***

*When the right to use the way was brought into question*

1. In order to calculate the relevant 20 year period, it is necessary to establish the point at which the public’s use of the route was called into question. There is no dispute between the parties that the route was physically obstructed in 2015 when fencing was erected. The latest possible 20 year period is therefore 1995-2015.
2. However, there is unequivocal evidence that the landowner made a deposit under Section 31(6) of the 1980 Act, dated 28 January 2014. Consequently, there was a clear lack of intention to dedicate on the part of the landowner from the aforementioned date forward. I therefore intend to use 1994-2014 as the relevant 20 year period in this case.

*Documentary evidence*

1. No documentary evidence was submitted with the original application. The Council carried out a thorough review of additional documentary evidence which consisted of Ordnance Survey (OS) maps. It is not necessary to repeat all of that information again here. What is germane is that no routes are shown on the historic OS maps other than those currently recorded on the DMS.
2. The documentary evidence does not therefore provide any material support for the existence of a public footpath along the entirety of the claimed route during the relevant 20 year period.

*Evidence of public use*

1. Some 29 user evidence forms (UEFs) were submitted, 21 of the UEFs show use over the full 20 year relevant period, claiming to use all or part of the route frequently.
2. Claimed use of the appeal route covers a period from 1975 to 2016 (the date of the application). Use was recreational and for pleasure, to go dog walking and wildlife watching. One UEF failed to state the exact years of use attesting to using the route from ‘childhood to present’, without stated dates of use, this UEF shows potential use within the relevant period but there must be doubt regarding when they used the route. One UEF states to have been a tenant and another user claims to have used the route via force, Sara Perry states “I have accessed via holes cut in the fence”, therefore this use is not as of right.
3. Whilst most use described is on foot, there is also claimed use by seven users on bicycle, two on horses with one claiming non-motorised vehicle use; although no details were provided about what kind of non-motorised vehicle was used. Whilst none of the riders were challenged, the frequency of their use and the number of users was low. I would not regard this as sufficient to reasonably allege the existence of public rights higher than on foot.
4. Many users referred to seeing other people using the appeal route, and none indicated the presence of notices or having been challenged or obstructed, other than Sara Perry, in their use during the relevant 20 year period.

*Wandering at will*

1. The Council rejected the order on the grounds that the witnesses used a significant number of specific and defined routes within a very confined area, indicating the public generally wandered anywhere over the land, rather than using linear public rights of way.
2. There is some evidence of users wandering off the path. Simon Bird states “there has been open access for many years”, Ellen Hawes states there is “free access across the whole field”, Lyne Smith states “I was told it was common land for everybody to use it” and Emma Young states “we were able to traverse the fields without obstacle”. With regards to width, seven users state that there was no defined width as it was the whole field, with Linda Derrick stating, “It was as wide as the field as you were not constrained to a pathway”.
3. The Order map itself shows a network of inter-linking paths making up the appeal route. The evidence points to some parts being used far more than others. The picture emerging is of other routes in use besides that claimed. This does not necessarily equate to wandering when witnesses also followed other routes. A small proportion clearly did wander e.g. where their dogs strayed. That was by no means the evidence of all.
4. Most UEFs show that they followed the path, defining which points they travelled between. It meant using connecting sections with the option to follow another path at points of intersection. People were still using the appeal route and connecting with other paths depending on their destination. I conclude that the routes do have the requisite essential characteristics of a highway.

*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 landowner does not regard the appeal route as a public right of way and have not tolerated use by the general public. Fencing and a locked gate were installed by the landowner in 2015. A statutory declaration under Section 31(6) of the 1980 Act was deposited with the Council in 2014, they cannot act retrospectively and so do not demonstrate a lack of intention to dedicate during the relevant period.

*Conclusions regarding statutory dedication*

1. The public’s right to use the appeal route was brought into question in 2014. During the 20 year period 1994 to 2014, use appears to have been as of right and without interruption, with no evidence of contrary notices or challenges, there is clear evidence that the landowner had demonstrated a lack of intention to dedicate by way of lodging the Section 31(6) deposit and declaration with the Council in 2014. However, there is no evidence of any lack of intention to dedicate the appeal route (or parts of it) on behalf of any landowner prior to 2014.
2. Whilst I do not consider that Test A has been met, I consider the balance tips in favour of a reasonable allegation that a public right of way on foot subsists (Test B). Having reached this finding there is no need for me to address the common law.

***Overall Conclusions***

1. Having regard to the above, I find there to be conflict in the user evidence with regards to alignment and use by pedestrians, cyclists, horse riders and non-motorised users but this is limited. The application is for a footpath and in my judgement the evidence suffices to support the rights for footpath status. Therefore, an Order should be made on the grounds that there is sufficient evidence to indicate an intention of dedication. 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.

###### 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 Buckinghamshire 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 23 April 2016 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