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| **Appeal Decision** |
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| **by Susan Doran BA Hons MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 January 2025** |

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| **Appeal Ref: ROW/3345070** |
| * 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 Hertfordshire County Council not to make an Order under Section 53(2) of that Act. |
| * The Application dated 16 August 2021 was refused by Hertfordshire County Council on 30 April 2024. |
| * The Appellant claims that the appeal route from Footpath 70 running around the perimeter of the cricket and rugby fields to Footpath 54 Radlett should be added to the Definitive Map and Statement as a Footpath. |
| **Summary of Decision: The appeal is allowed in part** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under section 53(5) and paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (‘the 1981 Act’).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made by Graham Temple (‘the Appellant’), in collaboration with The Open Spaces Society, and supported by The Radlett Society, The Ramblers, The Open Spaces Society and The Elstree and Borehamwood Green Belt Society.

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 specifies that an 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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.
3. As made clear in the High Court in the case of *Norton and Bagshaw* (R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]),this involves two tests:

**Test A.** Does a right of way subsist on a 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 (R v Secretary of State for Wales ex parte Emery [1998]) that there may be instances where conflicting evidence was presented at the schedule 14 stage. 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. The evidence adduced is both documentary and user evidence. Section 32 of the Highways Act 1980 (‘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 is appropriate, before determining whether a way has been dedicated as a highway.
3. As regards claimed use by the public, section 31(1) of the 1980 Act provides that *“Where a way over any 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 to 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”* and section 31(2), that “*The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice … or otherwise”*.
4. Dedication may also be examined under common law whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth, or permission). There is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades, and no particular date from which use must be calculated retrospectively.
5. The Appellant’s grounds of appeal are as follows:

* Hertfordshire County Council (‘the Council’) refused the application in part as some of the land crossed by the claimed route is owned by Aldenham Parish Council (‘the Parish Council’) as public open space. Therefore, public use of the land is ‘by right’, that is the public already has a legal right to use it and further rights cannot be acquired through 20-years use. The Applicant was not made aware of this, and whilst inclined to accept this information, seeks independent confirmation of this.
* The Council was incorrect in basing their decision on a strip of land crossed by the claimed route as being owned by the Cricket Club. It is unregistered land owned by the Phillimore Trust.
* The Council was incorrect in concluding most of the use was on the registered land due to natural and occasional obstructions and the width claimed to have been used. Further, they were incorrect in finding most of the use was on land owned by the Cricket Club and their implied permission applies to the whole of the route on the land they own and manage. The section of unregistered land is a public right of way based on over 20-years use and should be recorded as such.
* Signage displayed by the Cricket Club is on land in their ownership and does not refer to the unregistered strip of land alongside.
* The fence was illegally erected by the Cricket Club on land they do not own, without planning permission, and a section has subsequently been removed.
* Measurements and photographic evidence demonstrate most of the use has not been on the registered land.

**Reasons**

1. The appeal route follows the edge of two cricket fields and a rugby field linking Footpaths 70 and 54, passing alongside the pitches and railway fencing, and through trees. The land is owned by the Parish Council and Radlett Cricket Club except for a strip of land approximately 10 metres wide to the east of the main and southern cricket fields.

***Documentary evidence***

*Conveyances and Deeds*

1. A 1937 conveyance between Lucy Phillimore and Miles Brunton concerned the sale of a parcel of land to be used as a cricket ground or for other sport or recreation purposes. A ‘Right of Way’ and ‘Public Footpath’ are marked on the plan, but the appeal route is not. As use of the land was not specified to be by the public, the Council concluded any use by the public would be ‘as of right’ unless there was evidence to the contrary.
2. A 1938 Plan of the conveyance of land to the Parish Council concerns land acquired from Lucy Phillimore either side of the land described above in the location of the appeal route. A contemporary deed between the Parish Council, County Council and County Council of the Administrative County of London refers to this plan and outlines various covenants. These included the land being for the purposes of public open space by reference to the Open Spaces Act 1906. The appeal route is not shown, and since the land was to be used as public open space, the Council concluded any use of it by the public would be ‘by right’, that is the public would have a legal right to use the land, so additional rights could not be acquired through 20-years use.
3. Since 1939, the fields have been registered as King George’s Fields and protected by Fields in Trust which requires the main use of such spaces to be for outdoor recreation with permanent public access, here as public playing fields. Accordingly, the Council concluded that public use of the land would be by right, not as of right.
4. The Appellant understands the Phillimore Trust often retains a ‘ransom strip’ to enable community enjoyment of such areas when conveying land, and this strip, which the appeal concerns, has been used by the local community, except where obstructed by cricket nets, or waste vegetation.

*Aerial photographs 2000-2020*

1. A photograph from 2000 shows sections of the appeal route as a worn track on the ground, and similar evidence is provided in a 2010 aerial photograph which shows practice nets in place in the southern cricket field. The same is true of the 2015 photograph which shows equipment on or close to the appeal route in the main cricket field. The 2020 image shows a mast in the southern cricket pitch potentially obstructing the appeal route.

***User evidence***

1. In June 2018 the Cricket Club installed a fence blocking the appeal route, following which an application was made to add it to the DMS as a footpath, supported by evidence of use contained in 64 user evidence forms (UEFs). Claimed use was from 1975 to 2023, with all users walking the whole of the route without permission. Signs referring to use by dogwalkers were interpreted as implying they were allowed to walk there. Frequency of use varied from daily to weekly with some using it monthly or less often, and 59 individuals using the appeal route for part or all the 20-year period 1998-2018.
2. On occasions the appeal route had been obstructed, for example when certain cricket matches were being played, by equipment or grass cuttings (which could be walked around), and the practice net on the southern cricket pitch requiring some users to avoid it by walking on the pitch side for a period of time.
3. Notices were in place on both the Parish Council and Cricket Club land. On the former the signs requested that dogs be kept under control and off the pitches and concerned dog fouling. Similar messaging was in place on the latter towards the edge of the main cricket pitch, adding that the ‘ground is private land’. Some challenges were reported and those dated concern the period following the obstruction of the appeal route in 2018 and were made by representatives of the Cricket Club.
4. The appeal route was described as between 1 and 10 metres in width, mainly as 2 metres wide with a pinch-point between the rugby and cricket pitches where it narrowed to 1-1.5 metres.
5. Although the Council concluded there was considerable evidence of open use of the appeal route, public use of the southern cricket field and rugby field was ‘by right’ and not ‘as of right’.

***Landowner evidence***

1. Radlett Cricket Club own the main cricket field and lease the southern one from the Parish Council and have allowed or tolerated people walking around the ground but have closed it off, when necessary, for example when there is an entrance fee to view matches. Such interruptions, requiring the ground to be blocked by temporary fencing and or stewards, have occurred on occasions in 1993, 1999, 2013, 2015-2019, 2021-2023. The notices referred to above (paragraph 20) were put up in 2014.
2. The Council took legal advice about the Cricket Club’s actions and determined the interruptions during the relevant period were significant and indicative of use by permission. Further that the notices implicitly grant permission by prescribing terms by which the public can use the route, for example, ‘all dogs must be kept on a lead at all times’. This, the Council concluded, affected that section of the appeal route alongside the main cricket field as the 2014 notices laid out the terms by which people must adhere to use the route, and the Cricket Club exercised their right to temporarily revoke the permission by way of occasional closures. Therefore, use of this section was by permission.
3. The rugby field is leased from the Parish Council by the Tabard Rugby Football Club and is designated as playing fields by King George V Playing Fields Trust (now managed by Fields in Trust). On occasions from 1992-2005 and since 2017 access to the appeal route would not have been possible due to events taking place. Signs directed towards dog walkers were installed in 2021. Similarly, the Council concluded public use on this land was ‘by right’.
4. The Parish Council is aware of use by the public but comments that other than the main cricket field walkers do not follow the route but walk all around the fields. The appeal route has been obstructed on occasion by tree and infrastructure works. Again, the Council concluded public use of this land was ‘by right’.

***Unregistered land***

1. The strip of unregistered land alongside the railway is excluded from the conveyances (paragraphs 13 and 14) and may be owned by the Phillimore Trust or the Phillimore Estate. It appears, however, that Network Rail has confirmed ownership of the strip of land, although this is disputed by the Appellant as it is inconsistent with Land Registry records.
2. The Council concluded the openness of the land, the presence of vegetation including large trees, cricket apparatus and the width users claim to have walked suggests the majority of use has not been on the unregistered land. The Cricket Club also asserts to managing and using the strip of land as if it were in their ownership.

***Analysis***

1. As regards the Appellant’s first ground of appeal, since both the rugby field and southern cricket field were conveyed in 1938 under specific terms to, and are owned by, the Parish Council as public open space under a number of statutory provisions, I concur with the Council that use of the appeal route over this land is ‘by right’ and not ‘as of right’. This is supported by the *Barkas* case (R (oao Barkas) v North Yorkshire Council[2014]) whichprovides that where land is held as public open space by a local authority use is by right not as of right, and further rights cannot be acquired over it. It follows that the public has a right to use the land over which the appeal route passes on the rugby field and southern cricket field.
2. Turning to the second ground of appeal, ownership of the unregistered strip of land appears to be uncertain. The Appellant maintains it is owned by the Phillimore Trust, but the Council comments the Phillimore Estate may be the owner. Network Rail also claims ownership, though no documentation to this effect has been provided. There is no evidence to suggest the Cricket Club owns the land. However, they say the strip has been managed by them up to the fence installed alongside the railway, as if they owned it. In addition, all entrances to the ground have been closed off by temporary fencing and/or stewards during matches where an entrance fee is payable, including at the boundary of the main cricket field and rugby field and at Salter’s Field on the southern cricket field. I consider this further below. A more permanent fence to block the entrance was installed at the boundary of the main cricket and rugby fields in 2018 (paragraph 18).
3. The Appellant’s third and sixth ground concern the alignment or position of the appeal route, which they maintain follows the unregistered strip of land. The Council determined the application map was insufficient to accurately show the claimed path’s alignment. Through a combination of aerial photographic evidence showing a worn line on the ground, overlaying land registry plans, observations on site, the width claimed to have been used (up to 10 metres) and consideration of the most likely route most walkers will have followed based on natural behaviour, the Council determined its alignment as predominantly within the registered land. Accordingly, the Council maintains use here amounts to implied permission given the actions of the Cricket Club, including the placing of notices. They acknowledged some use of the unregistered land but comment it is mostly impassable due to vegetation and obstacles such as cricket equipment. I consider the obstructions on the unregistered land may be regarded as temporary such that the public deviate around them to continue their journey. It is not clear if they were in place throughout the 20-year period, and there is some indication that some were moved suggesting they were not placed to interrupt or challenge access. Further, the Cricket Club does not own the strip of unregistered land, although it says it manages it.
4. The Appellant has provided measurements to demonstrate the appeal route’s alignment within the strip of land based on a land registry plan and taken on the ground. I acknowledge the Council’s point that land registry plans contain caveats as regards providing reliable measurements, and scaling from them. However, the Appellant maintains users have followed the strip of land unless encountering dumped grass clippings, waste material and so on, requiring them to walk around the obstructions. Further, that it is the strip of land which the application concerns, although they acknowledge some people may walk on the registered land. Given the conflict of whether users followed the registered or unregistered land, or both, in my view it is not possible to determine where the public walked without testing the user evidence. Nevertheless, if it were the case that the alignment follows the strip of unregistered land the possibility of a presumption of dedication through use as of right arises. However, if it follows the registered land or a combination of the registered and unregistered land, then I concur with the Council that the appeal would fail due to implied permission by the landowner and/or that sections of the route lying within the unregistered land would form unconnected cul-de-sacs.
5. During the 20-year period (1998-2018), closure of the boundary between the rugby field and main cricket field (and of access to the southern cricket field) occurred once a year in 1999 and between 2013 and 2017, then twice in 2018. Some UEFs refer to this. Nevertheless, use continued, and these temporary events do not appear to have been sufficient to bring into question the public’s right to use the way. Where these closures affected land in the Cricket Club’s ownership, I consider such actions capable of demonstrating an interruption to use by the public, an implication that use was by permission, and/or a lack of intention to dedicate a way. However, I consider the situation is less clear as regards the unregistered land which the Cricket Club does not own. There is nothing to suggest they were acting on behalf of the landowner in closing off the strip, albeit they say they manage the land. This could be significant if it were concluded that the appeal route does follow the unregistered strip of land.
6. The fourth ground concerns the signs put up by the cricket club. I regard the signage as ambiguous. It refers to the land being private. However, most public rights of way cross land in private ownership. Reference to dogs being kept on a lead can be interpreted as the landowner acknowledging use by the public. Further, I interpret them as affecting the registered land, not the unregistered land.
7. The fifth ground of appeal, concerning the fence being erected in 2018 without planning permission, is not relevant to whether a public right of way subsists or is reasonably alleged to subsist, and I comment no further about it.
8. Having regard to the above, I find that Test A has not been met. However, there is a conflict of evidence. I am satisfied that Test B has been met and an Order should be made in respect of part of the appeal route in relation to the main and southern cricket fields.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in part.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Hertfordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to modify the Hertfordshire County Council Definitive Map and Statement by adding a Footpath as shown on the plan attached to the application dated 16 August 2021 between the south easterly corner of the southern cricket field, and the boundary between the main cricket field with the rugby field. 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.

S Doran

**Inspector**