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| **Appeal Decision**  Papers on file |
| **by Claire Tregembo BA(Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 07 May 2025** |

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| **Appeal Ref: ROW/3349893** |
| * 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 South Tyneside Council not to make an Order under section 53(2) of that Act. * The application dated 25 July 2022 was refused by the Council on 16 July 2024. |
| * The appellant claims 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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Procedural 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.
3. I have mentioned various points shown on the appeal map in my decision. For ease of reference, a copy of this map is appended to the end of my decision.

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 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 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 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. Photographs, documents, and maps have also been submitted in support of the application. I need to consider if the 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.
6. At this stage, I need only to be satisfied that the evidence meets test B, the lesser test.

**Reasons**

1. The appeal route runs over land which was originally a shipyard and dock complex which closed in 1982. In the mid-1990s redevelopment of the area commenced with the properties between points X and B being completed by 2001 and the rest of the land being developed as the Garlands call centre (Garlands) in 2007 and 2008. Garlands was converted into apartments between 2016 and 2018.

***Documentary Evidence***

*Photographs and Digital Images*

1. Aerial photographs from 1996 show a fence across the appeal route at point A and other fencing which prevents access to points B, X and Y. Part of the appeal route south of point A is obstructed by a sea-filled inlet. Aerial photographs from 1997 and 1998 show the same situation with additional excavation works and obstructions along the appeal route. Photographs from 1998 also show fencing, obstructions, and excavation works preventing access to the appeal route between points B and X.
2. An aerial photograph from 1999 shows a path laid out between point B and the northeast corner of the inlet at point X but it does not continue to point A. However, the land appears to be open with no fencing or obstructions preventing access.
3. Google Earth aerial images show the properties between section X and B were completed by 2001 with a wide path provided between B and the northeast corner of the inlet at point X. The rest of the appeal route appears to be level with no fencing to prevent access. The situation appears to be the same in 2005 and 2006, although there now appears to have vegetation over it.
4. Aerial photographs from July 2007 show fencing across the appeal route at point A and the northeast corner of the inlet at point X. Fencing continues alongside Long Row preventing access to the Garlands site between points A and X. The appeal route between points X and B appears to be open and available for use.
5. Photographs from 2008 also show the same fencing with construction vehicles and storage containers also obstructing the appeal route. Garlands is under construction with scaffolding erected around the buildings.
6. On the 2008 Google Earth aerial image, Garlands appears to be complete with a parking area alongside section Y to A. There is a path provided between the northeast corner of the inlet at point X and point A. The situation is the same in 2012 and 2015. Google Earth Street View images dated May 2009 show no obstructions across the appeal route at point A.
7. Stills from a YouTube video taken on 17 December 2016 show Heras fencing around Garlands between points A and X. This fencing obstructs the appeal route at point A and the southeast corner of the inlet at point X. A newspaper article dated 6 February 2017 about converting the Garlands into luxury flats includes a photograph showing Heras fencing and other photographs from December 2016 and 2017 also show a fence across the appeal route the southeast corner of the inlet at point X.
8. On the 2017 Google Earth aerial image there appears to be fencing around Garlands and the car parking area between A and X. This fencing obstructs the appeal route at points A and the southeast corner of the inlet at point X.
9. On zoomed in Google Earth aerial images from 2015, 2017, and 2018 bollards can be seen at point B but on the 2021 image there appears to be a barrier behind them. Google Earth Street View images dated August 2014 and August 2015 show there are only bollards and no gates or fencing across the appeal route at point B. An aerial photograph dated July 2017, and a photograph dated 17 August 2017 only shows a bollard at point B. However, another photograph dated 30 November 2017 shows a Heras fence panel here.
10. There is no fencing across the appeal route between Garlands and the river in photographs taken in April and August 2017. Photographs taken of work on the conversion of Garlands into apartments taken on 18 December 2017 also do not show fencing here. Additional photographs taken on 13 September 2019 clearly show several fences across the appeal route between the apartments and the river. The 2020 and 2021 aerial images show fences across the appeal route at various points between Y and X has it is landscaped as gardens. The car park has been taken up.
11. Path users provide photographs of the appeal route when they were using it, but most are not dated.

*Local Development Framework South Shields Town Centre (LDF) and Waterfront Area Action Plan Proposal Map 2008*

1. Policy SS3 in the LDF (adopted in November 2008) aims to improve accessibility to the waterfront and town centre including creating and improving pedestrian/cycle routes to, and alongside the river to facilitate a continuous riverside walkway/cycleway. The Waterfront Area Action Plan Proposal map shows proposed footpaths/cycleways along the appeal route.

*English Coast Path Documents*

1. The report on the proposed England Coast Path: South Bents to Amble, (the ECP) submitted to the Secretary of State for Environment, Food and Rural Affairs on 24 March 2017, states the trail generally follows existing walked routes. The appeal route is shown on map 1h as *‘trail using other existing walked routes’* and is labelled SBA-1-S031. A bollard is indicated at point B which would be retained. The report states *‘the landward boundary of the coastal margin is to coincide with landward edge of the pavement as shown on’* the maps. A table describing sections of the ECP states section SBA-1-S031 has a block paving surface with no exclusions or restrictions proposed. The Order for this section of the ECP was made on 5 July 2018 and the route was signposted as the ECP.

*Correspondence*

1. An email dated 23 October 2017 from PGS Law LLP to the Council’s Development Services asks if they can confirm that the appeal route is not an adopted footpath or highway as their client is intending to purchase apartment 1, block 1 and intends to keep this area closed and never open it to the public. This purchase appears to include the appeal route between section X and B. The map with the response shows the appeal route was not owned or adopted by the council.

*Guided Walk Publications*

1. A guided walk, River Tyne Trail: Sources to Sea by Peter Donaghy and John Laidler includes the appeal route. From the road at Captains Wharfe you *‘turn left, passing some modern office accommodation on your right. Continue downstream to the end of the river path where you reach a car park. Bear right to pass South Shields Sea Cadets premises’*. A date is not given but the car park is still shown on the 2017 aerial photograph.
2. Walk 1 South Shields ‘Roman’ along the River by the Health Walk project includes the appeal route. It states it runs from Long Row *‘crossing over the old docking areas to join the riverside… continue along the riverside path, proceeding straight past Comical Corner* [near point A] *and the South Shields Sea Cadet building’*.
3. A 2021 Ramblers guided walk called the Tyne and Wear Heritage Way also includes the appeal route. It states the route *‘continues close to the river, passing a number of inlets, formerly dry docks’*.
4. The documentary evidence provides evidence of when the appeal route was available or obstructed and its physical existence between 1996 and 2021. The guided walks indicate those producing them consider the route to be public. However, the documentary evidence does not provide sufficient evidence to indicate the existence of public rights.

***Statutory Dedication***

*When was the claimed route called into question?*

1. Various photographs and video stills show the appeal route between points A and X was obstructed or fenced off between 2007 and 2008 and again between 2016 to 2017 when construction works were undertaken.
2. The director of England & Lyle Ltd. who acted for the developer of Garlands states the site was fenced off between February 2007 until August 2008, and their agent at Artisan Architectural indicates a similar period of closure. However, most of those using the appeal route do not refer to the works in 2007 and 2008 when Garlands was constructed. This would suggest that access was maintained in some form whilst development occurred.
3. A statement from the managing director of Key West No. 3 Ltd. states they acquired the land and fenced it off to prevent public access in December 2016 including at point A and at the southeast corner of the inlet at point X. They also erected signage and round-the-clock security including guards. A prerequisite of their insurance was to enclose the site and prevent public access. The health and safety advisor, architect, civil engineer, and solicitor for the conversion of Garlands also state this area was fenced off from December 2016. Some path users refer to the site being fenced off when Garlands was converted to apartments, although several assumed this was a temporary closure due to the construction works. Residents of the apartments state the gardens were divided by fences when they first occupied the site in early 2018.
4. The solicitors for the apartment owners and occupiers, claim the application route was blocked off at point B in December 2016. The former Managing Director of Key West No. 3, the health and safety advisor, architect, civil engineer, and solicitor for the conversion of Garlands also claim it was fenced at point B in September 2017 to prevent public access. The solicitors email from 2017 suggests this area was already enclosed and would not be reopened. The owner of the land also claims it was fenced off from September 2017 and some path users refer to it being closed by a locked gate in 2017 or 2018. A photograph shows a temporary fence panel here in November 2017 but the Google Earth images from 2018 do not show any obstructions here and the path users indicate permanent fencing was not erected until February 2020. This fence is shown on the 2021 Google Earth image.
5. I consider use of the appeal route was called into question in December 2016 when fencing was erected at two points along the appeal route to prevent public access. Therefore, I consider the relevant twenty year period of use is December 1996 to December 2016.

*Evidence of use*

1. Evidence of use was provided by over 90 people showing use between 1984 and 2020. Use was predominantly between 1999 and 2020. Most of the user evidence was not submitted on the Council’s user evidence forms and some of the forms and letters submitted contained limited information with some people not even stating when they used the appeal route. There is limited evidence of use by the public before 1999 with only eight people indicating use. The evidence they provide has limited detail, so it is not clear as to the alignment used or the frequency of use before 1999.
2. A report by Airphoto Services interpreting the aerial photographs states that ground works were being undertaken between 1996 and 1999 which included heavy active construction and remodelling works which raised the ground level by 1 to 2 metres. They consider it would not have been possible to access the appeal route until March 1999 at the earliest. Furthermore, part of the appeal route south of A was a waterfilled inlet between 1996 and 1998 so did not physically exist.
3. The aerial photographs and other documents suggest part of the appeal route was fenced between February 2007 to August 2008. Some path users state they did not use the appeal route during the construction of Garlands, but others state it was still available.
4. It is clear from the documentary evidence that it would not have been physically possible to use the appeal route prior to March 1999. This means it was not possible to use the appeal route for the first few years of the relevant twenty year period. The documentary evidence also suggests use of the appeal route was interrupted between February 2007 and March 2008. Therefore, I do not consider there is sufficient evidence to show a presumption of dedication under Section 31 of the 1980 Act.

***Common Law***

1. As I have concluded above that use of the appeal route does not satisfy the requirements for dedication under statute, I will consider dedication at common law.
2. There is no evidence of express dedication of the appeal route, but dedication can be inferred by actions (or lack of action) from the landowner to indicate they intended to dedicate a highway. The public must accept this dedication, and their use can be evidence of an intention to dedicate.
3. The aerial photographs shown a path was provided along the appeal route between point B and the southeast corner of the inlet at point X in 1999 which was extended to point A following the construction of Garlands in 2008. The path appears to have been constructed as part of the adjacent developments. The LDF indicates the Council’s desire to have a waterfront walkway, and this may be why the paths were provided.
4. The appeal route was designated as part of the ECP in 2018. It seems unlikely that Natural England would have proposed, enacted, and signposted a national route without consulting the landowner. Although use after 2018 when the ECP was enacted would have been *‘by right’* use before 2018 would not have been.
5. I consider it unlikely that the landowners did not know about the LDF, the setting out of the appeal route, or the designation, promotion, and signing of it as part of a national trail.
6. It has been suggested that there was no landowner with the capacity to dedicate due to mortgages or tenancy agreements but no copies of these have been provided. Landowners can still dedicate rights of way if they have the agreement of the lender or tenant. Furthermore, any tenants of Garlands are likely to have been aware of the appeal route when leasing the building due to its existence and use.
7. However, there appears to have been a period between 2014 and 2016 when the land was held by receivers meaning there were no landowners with the capacity to dedicate.
8. The user evidence shows section B to X was used from 1999 until at least 2018 by over 90 people with many of them using it throughout the full period. Use appears to be very frequent with many using it at least daily or weekly. The user evidence also shows use of section X to A throughout the same period although some of the path users indicate they did not use it during the construction of Garlands. Following the provision of a path between X and A, the user evidence indicates use by over 90 people many of whom used it at least daily or weekly. Some path users led health walks along the appeal route. Use appears to be open, without force, secrecy, or permission.
9. Several guided walk publications include the appeal route. Those producing these publications were unlikely to have included the appeal route unless it was available for use, and they believed it carried public rights. The report on the ECP indicates the appeal route was available for use and was being used by the public.
10. Path users refer to street lighting and maintenance by the Council and a Council email confirmed they maintained in the belief that they were responsible.
11. Part of the appeal route appears to have been fenced off during the construction of Garlands between February 2007 until August 2008 although the user evidence suggests some form of access may have been maintained. However, fencing a site whilst development works are undertaken is to ensure site safety rather than for the purpose of preventing the dedication of a public highway. The user evidence does not indicate any other challenges, obstructions, or notices indicating permission or denying public rights until 2016. Therefore, there appears to be extensive, uncontested use of section B to X for at least 19 years and section X to A for at least eight years after the construction of Garlands with additional use before it was built.
12. I consider there is a reasonable allegation of inferred dedication of the appeal route under common law due to the high level of use by the public and the provision of a path which was made available to, and used by the public. I consider this would still be the case even with a shorter period of user between 2008 when section A to X was provided and 2014 when the landowners went into receivership. There is no evidence the landowners took any action to make the public aware that they did not intend to dedicate a public right of way along the appeal route until at least 2016. Furthermore, the landowners do not appear to have objected to the designation of the appeal route as part of the ECP.

**Other Matters**

1. Document showing the history of the dockyards, photographs, and information about public art were also provided. These documents do not provide evidence of use of the appeal route or provide information on its existence. The public art is on land to the south of the appeal route at Captains Wharf.

###### 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, South Tyneside 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, as proposed in the application dated 25 July 2022 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

**Appeal Plan**

**Map of claimed route
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