



Appeal Decision

by Charlotte Ditchburn BSc (Hons) MIPROW

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 10 October 2024

Appeal Ref: ROW/3342703

- 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 West Berkshire District Council ('the Council') not to make an Order under section 53 (2) of that Act.
- The application dated 29 November 2022 was refused by the Council on 26 April 2024.
- 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 dismissed.

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

3. 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).
4. 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.
5. 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').
6. As made clear by the High Court in Bagshaw and Norton this involves two tests:
7. Test A - Does a right of way subsist on the balance of probabilities?

8. 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.
9. 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.*"
10. 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*".
11. 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 right to use the route is 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.
12. 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.
13. 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 a highway.

Reasons

Documentary evidence

14. The only documentary evidence submitted with the application was a Finance Act map. The Council carried out a thorough review of additional documentary evidence which consisted of commercial maps, tithe map, Ordnance Survey (OS) maps, handover map, aerial photographs, Parish Survey maps, Definitive Map records, and further Finance Act documents. It is not necessary to repeat all of that information again here. What is germane is that there was no route shown along the appeal route on the documentary evidence prior to 1925.
15. Documents such as OS maps can reveal the physical presence of a path at particular times, but they do not generally assist in establishing if the path was used by the public. In this case, the OS mapping does not assist the applicant in any event. The OS maps up to 1912 do not show the appeal route, the 1912 map shows part of the route as a physical feature but not on the alignment of the Appeal route. The OS maps after 1925 show the physical presence of a route but do not provide any evidence as to its status.
16. The Finance Act 1910 imposed a tax on the increase in land value, which was payable when the land changed hands. Maps were produced to show taxable land following a survey by the Board of Inland Revenue. It was a criminal offence to make false statements to reduce tax payments. The existence of public rights of way over land reduced its value and the liability for tax so were recorded in the survey. The Finance Act map shows the Appeal route included within parcel numbers 501 and 529. The valuation book shows 529 as part of Prosperous Farm with all fields belonging to that farm being valued together, with a deduction for Public Rights of Way or User shown for the farm. Parcel number 501 lists a deduction for Public Rights of Way or User in the valuation book. The valuation book does not indicate which rights of way are referred to.
17. A survey was carried out under the National Parks and Access to the Countryside Act 1949 to identify routes to be recorded on the DMS. The 1950 Parish Survey map shows the Appeal route coloured purple in the same way as other footpaths in the area, but the schedule sheet for Footpath 55 has a handwritten note by the County Surveyor of 'DO NOT COPY'. There are no details of why this route was omitted and no records of the decision being formally challenged have been submitted. The route has never been recorded as a public right of way on the DMS.
18. The documentary evidence does not therefore provide any material support for the existence of a public footpath along the entirety of the claimed route.

Statutory Dedication

When was the claimed route called into question?

19. When relying on presumed dedication, a twenty-year period of enjoyment by the public as of right and without interruption needs to be demonstrated. The date when the public's use of the claimed route was brought into question needs to be established. Use was not clearly challenged before the application was submitted in 2022 which would establish a twenty-year period between 2002 and 2022. The application would have clearly brought the status of the route into question.

User Evidence

20. Four User Evidence Forms (UEFs) have been submitted in support of the claim. One of the UEFs shows infrequent use during the relevant 20 year period and this UEF describes use of an alternative route at the western end to bypass overgrown vegetation. Two UEFs provide evidence of use outside of the relevant period. One UEF does not provide a time period in which they used the route, 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 during this period. Two of the users also lived on the landowning estate which casts doubt about whether their use was as of right, with one user working there for 33 years from 1965 with one UEF referring to using the route for shooting with permission from the landowner. I therefore attribute less weight to these two UEFs due to their connection with the land.
21. I do not regard one user's infrequent use to be sufficient evidence of public use, therefore, the evidence of use is not sufficient to raise presumption of dedication for the full relevant period.

Landowner Evidence

22. I must also consider whether the landowner has taken any action to rebut the statutory presumption of dedication. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path. In this case there is nothing to suggest any owner has taken such steps.
23. Overall, I find no evidence of any action, taken by the landowner, to demonstrate that there was a lack of intention to dedicate the Order route.

Conclusions on Statutory Dedication

24. I have concluded that there were no actions taken by the landowner during that relevant period of 2002 to 2022 which could be considered sufficient to convey to the public that there was intention to dedicate a public right of way over the Appeal route, I have further concluded that there is not sufficient evidence of use as of right and without interruption to give rise to a presumption of dedication.

Common Law

25. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intend a way to be dedicated as a highway and where the public have accepted it.
26. In this case there is some evidence of public use from 1970 onwards and no substantive actions by the landowners that would indicate a lack of intention to dedicate it as a public right of way before 2001. However, given my findings that the use was insufficient during the relevant 20 year period and that use was limited outside of this period, this does not necessarily imply dedication as the landowner may not have known about its use.
27. I do not therefore believe that dedication of the Appeal route can be inferred at common law.

Conclusions

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

Formal Decision

29. I dismiss the appeal.

Charlotte Ditchburn

Inspector

Inkpen, Sanham Fir Belt/Hornhill. User Evidence Form Map.

Including public rights of way on West Berkshire Definitive Map

Scale on A4 paper: 1:5000

29/06/2022

West Berkshire Council

Sanham Green

Hornhill Cottages

Hornhill

Track HUNG/39/1

HUNG/31/2

INKP/5/1

Old Anvilles

Public Footpath

Public Bridleway

I hereby confirm that the route I have marked on this map is the route referred to on the accompanying user evidence form (use lettering to show reference points if necessary)

Name: N. J. PIKE

Signed: N. J. Pike

Date:

A5

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