
Appeal Decision

by Peter Millman BA

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 12 June 2017

Appeal Ref: FPS/Q2500/14A/4

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of Lincolnshire County Council ("the Council") not to make an Order under Section 53(2) of that Act.
- The Application, dated 8 September 2014, was refused by the Council on 11 January 2017.
- The appellant, Mr Iain Angus, claims that an Order should be made to add a footpath to the Council's Definitive Map and Statement between Westborough Lane and the bridle path bridge in Long Bennington, together with access paths from Winter's Lane and Sparrow Lane.

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 to the 1981 Act.
2. I have not visited the site of the claimed footpath but I am satisfied that I can make a decision without the need to do so.

Main issues

3. Section 53(2)(b) of the 1981 Act gives surveying authorities (such as the Council) the duty of making modification orders following certain events. The event in this case would be as described in Section 53(c)(i), *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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...* The specific event in relation to evidence of use of a way is set out in Section 53(3)(b), which is *the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.*
 4. The event described in Section 53(3)(b) relates to the test in Section 31 of the Highways Act 1980 ("the 1980 Act"), which reads as follows: *(1) 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*
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that period to dedicate it. (2) 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...

5. For the statutory test to be satisfied, therefore, it must be shown that there is a way, and that it is of the appropriate character. The public must have used the way, and this use must have been as of right, i.e. neither by force, secretly, or by revocable permission, actual or implied. The use must have been without interruption, and in order to determine whether there has been use for a full period of 20 years, it must be decided when the right of the public to use the way was brought into question. Finally, if the other aspects of the test have been met, there must be consideration of whether there is sufficient evidence that during the 20 year period there was no intention on the part of the landowner that the way should be dedicated.
6. The test for 'subsists' is the balance of probabilities. The difference between the tests of 'subsists' and 'reasonably alleged to subsist' (paragraph 3 above) in cases based on user evidence was clarified in the case of *R v Secretary of State for Wales, ex parte Emery* [1998]. In his judgment Lord Justice Roch stated: *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 Section 31 [of the 1980 Act], 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 either 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 by the public could not give rise at common law to any presumption of dedication.*
7. As well as the statutory test, there is a common law test for the dedication of public rights of way. The common law test is based on the fact that public rights of way are, generally speaking, dedicated by the owners of the land across which they run. There is very rarely evidence of an express dedication. There is none in this case. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.
8. The Council should therefore have made an order if it had discovered evidence, or had evidence presented to it, which showed that it was at least reasonable to make an allegation that public footpath rights existed over the appeal route.

Reasons

Background

9. The linear village of Long Bennington lies on the western side of the river Witham, which flows roughly northwards in a meandering course. The land on the eastern side of the river is agricultural. The alleged public right of way starts at the southern end of the village, on the eastern side of a bridge over the river, at a junction with a public footpath and a public bridleway which is accessed from Church Street. The claimed path runs in a generally northerly direction for a considerable distance along the eastern bank of the river to end at Westborough Lane at the northern end of the village. About two thirds of the way along the route the Witham is crossed by a bridge made of old railway

sleepers (generally referred to as 'the sleeper bridge'). The alleged right of way includes a spur which crosses this bridge then bifurcates, one short branch leading to Winter's Lane, the other to the already existing footpath 2 and Sparrow Lane. The eastern bank of the river is also used by anglers from two angling clubs.

10. There is no historical documentary evidence of a public footpath along the eastern bank of the river. The application depends upon evidence of use of the route by members of the public, and actions (if any) taken by the owners of the land it crosses in response to this use.

The statutory test

The date when use was brought into question

11. The Council considers that use of the route by members of the public was brought into question on two occasions. In 2014 one of the landowners made a declaration under section 31(6) of the Highways Act 1980 admitting which public rights of way he accepted as crossing his land, and denying the existence of any others. The declaration was recorded in the publicly available register of such documents. The Council considers that notices on site advertising this declaration brought the public's use of the claimed route into question and precipitated the application. I agree that that is likely, but in any case, section 31 of the 1980 Act (as amended) provides for the date of a modification order application to be taken as the date of bringing into question. The first 20 year period (see paragraph 4 above) will therefore be from 1994 to 2014.
12. The Council also considers that a public meeting in 2004 organised by Long Bennington Parish Council, which considered the possibility of making an application for a modification order to add a footpath on the eastern bank of the Witham might have brought public use of the appeal route into question. The Council sent the Parish Council an application pack. No formal application for an order was made, but user evidence forms were probably distributed locally after the meeting. In my view the lack of evidence about whether the same route was claimed and how many people attended the meeting means that it cannot be shown that the right of the public to use the route was brought into question in 2004.

Whether there is a clearly identifiable way

13. If this appeal is to be allowed and I am to direct the Council to make an order, it must be possible to specify with reasonable accuracy the route which is to be the subject of the order, so that it can be depicted on an order map and described with some precision in a written statement. The Council states that the application for an order failed, and the appeal must fail, partly because a single route used by a sufficient number of members of the public could not be identified. In particular, the Council argues, several routes were used where the path crossed or bypassed a weir (at point I on the map attached below), a gate in a fence which crossed the path moved position more than once, and the route between the sleeper bridge and Winter's Lane changed between 1999 and 2005, as evidenced by aerial photography.
14. Although the applicant showed a single line on the map attached to his application, his detailed witness statement noted that in 2000 there was a change in the route he used to cross the weir. Another witness statement

(made in support of the application) noted: 'There has always been a fence below the weir. I have never tried to go through or over the fence because it looked too dangerous; we've gone into the field and cut through the woods to the drain.' Other witness statements in support record yet more ways in which the weir was crossed or avoided and different routes which were used to get from point I to Westborough Lane. It does not appear from the evidence that there was one route which was more generally used than any other.

15. I conclude from this evidence (and from other evidence supplied by supporters of the application) that the appeal must fail with respect to the part of the route between points E and I (see map below). It is possible to record a cul-de-sac right of way where it leads to a point of interest such as a river bank, or, in this case a weir, but evidence considered below (paragraphs 29 and 33) makes it clear in any event that a barbed wire fence impeded access to the weir to anyone walking along the river bank from E.
16. The appellant's witness statement describes two fences which crossed the river bank at C and D. Concerning the fence at D, he stated that a gate in it, which some people used rather than climbing over the fence, moved 'up and down the fence line over the years'. This evidence of a moving gate is corroborated by other statements made in support of the application.
17. Although I have seen no evidence of the distance between the various positions of the gate in the fence, it is clear that a single line of use cannot be identified for a route between B and E. Witness statements, as well as information provided by the grazing tenant of the fields, make it clear that at least some dog walkers were in the habit of leaving the river bank to walk in the adjacent fields.
18. Many user evidence forms and witness statements record that on the eastern side of the sleeper bridge at E there was, for many years, a gate, or a gate used as a fence which was fastened shut. Witness statements record that some people climbed over it, while others mention jumping down from the bridge to the eastern river bank before they got to the gate, or swinging round it to get past. It is not possible to tell, from most user evidence forms, which alternative was taken. The difference between the routes followed at this point was probably small, but nevertheless from the information provided it would not be possible to define or describe in words the line of a route that was generally followed by the public.
19. The Council, in its 'Recommendation Report' refers to aerial photographs showing a change in route between E and F, but no detail is given and I do not, therefore, take this into consideration.
20. Overall, the line of the alleged right of way is clear for almost all its length, but at I and D and between I and J there are significant differences which would make it impossible to draw a single line on an order map or describe a single route for the purposes of a definitive statement.
21. For this reason I conclude that the appeal must fail, and although there is therefore no need to consider the remainder of the statutory test and the common law test, I shall do so for completeness.

Whether there was use by the public for a full period of 20 years

22. Consideration of use in this and the following section assumes, for the moment, that there is a single identifiable route.
23. In his appeal statement, the appellant argues that, "by 'the public' the statute merely means that people must use the way in their capacity as members of the public". He concludes that use by one person only will satisfy this test. I do not accept that argument. Section 31 of the 1980 Act does not define what 'the public' means in quantitative terms. However, there is clearly a difference between use of a route by 'the public' and use by one or two individuals, and in each case a view must be taken of whether use of the route has been by enough people with sufficient frequency to stand for 'the public'. In a sparsely populated rural area, where paths are used infrequently, it will probably be the case that use by fewer people will represent use by 'the public' than would be the case in a town, for example.
24. The application for a modification order was supported by 11 completed user evidence forms, one of which was subsequently withdrawn. A further 18 forms were received later, supplemented by further evidence from users after the appeal process had begun. The Council prepared a chart showing use of the various sections of the route during the relevant 20 year period by 27 people, i.e. excluding those who completed forms or provided evidence of use after its decision not to make an order. Taken at face value, this shows that 3 people were using the whole of the appeal route in 1994, while a further 3 were using parts of it, the numbers gradually increasing so that by 2004 while only 3 people were using the whole route, 15 were using parts, and by 2013 8 people were using the whole route and 27 parts of it. Most people recorded frequent use, often daily, and referred to the route being in regular use by others. The section A-E was used by all 27, and E-F-G by almost all. Other sections were used by fewer people, and I-J by fewer than half.
25. In my view, the evidence of use in the first 3 or 4 years of the 20 year period would not have been quite enough to demonstrate use by the public. More would have been expected in a fairly large village such as Long Bennington. Further evidence of use, however, has been provided. Taken together, it seems to me just sufficient to support a conclusion that use of the whole of the claimed route apart from I to J was by 'the public' throughout the 20 year period.

Whether use was as of right and uninterrupted

26. Use of a route which is 'as of right' is use which is *nec vi, nec clam, nec precario*; in other words uncontentious, open, and not based on any licence from the owner of the land. There is no allegation that use of the appeal route was not open, nor that it was generally based on licence or permission. The Council, however, argues that use was contentious, in that walkers had to climb over or avoid fences at various points. Contentious use may be by force, for example by breaking down a fence, but it is also well-established that use which continues in opposition to a clear indication by a landowner, for example by a notice or a barrier, that he does not want it to do so will be contentious. In this case the only notices on the route appear to have been those directed at anglers, informing them that fishing was private.
27. I accept the appellant's argument that structures across a route, for example stiles, do not of themselves indicate that its use involving crossing the

structures is contentious. I accept that stepping over a low post and rail fence to use a route might not render the use contentious. This does not mean, however, that a barrier must be made impossible to climb or circumvent in order to make it clear that access is opposed.

28. The evidence of structures across the appeal route comes from witness statements in support of the application, and from completed user evidence forms. Some of this evidence is confusing, for example some people stated that the fences, which were post and rail fences, across the route at C and D did include or had included a stile, others that they did not or never had. At D, 22 completed user evidence forms noted a structure, of which 14 recorded a fence and 5 a stile, while one recorded a gate in the fence which had changed position. It seems to me rather less likely that a witness would forget a stile if one had been there than remember a stile if one had not been there. One witness statement, from someone who had used the route since 1994, recorded: 'The fences across the path between the rickety [sleeper] bridge and the concrete bridge [these include the fences at C and D] have always been there. There have never been any steps or stiles in either of the fences. The fences have been a bit rickety to get over but I would just step over them because I have quite long legs.'
29. There is much clearer evidence that for much or all of the relevant 20 year period there was barbed wire across the route south of the weir at I, barbed wire across the route at Westborough Lane and a gate or similar structure which had to be climbed or circumvented at the eastern end of the sleeper bridge at E.
30. I conclude from the evidence discussed in this section that use of the appeal route between E and I and between E and F and G was contentious during the period 1994 to 2004. Use from A to E was probably not contentious, but it would have been necessary to pass a barrier at either E or I or retrace one's steps to A.
31. I cited the case of *Emery* in paragraph 6 above, where Roch LJ referred to a *conflict of apparently credible evidence*. The appellant argues that the judge did not say that use of a route had to be 'as of right' and that therefore all that had to be shown to make out a reasonable allegation of the existence of public rights was credible evidence of use, whether or not as of right. The judge, however, did say that there had to be credible evidence of actual enjoyment of a way 'as a public right of way'. This carries the very clear implication that use must have been as of right. The difference between the facts in *Emery* and the facts in this case (both of which concern an alleged right of way by a river used for fishing) is that in *Emery* there was a conflict between the evidence of unhindered use put forward by the appellant and the evidence of challenges to use put forward by the landowner, whereas in this case, the evidence that use may have been contentious is provided by the statements of users of the route and not by the landowner.

Whether there is sufficient evidence that there was no intention during the 20 year period to dedicate a public right of way

32. Evidence which might be sufficient to show that the landowner had no intention to dedicate a right of way to the public consists of the maintenance of barriers across the way at various points mentioned above.

33. The appellant noted in his witness statement: 'There is a structure across the river bank just below the weir. It has always had a thin strand of barbed wire which looped down. I would just step over the barbed wire to continue up the footpath to the weir and beyond to Westborough Lane. Mr Fearn's first herdsman put more substantial pieces of wood there, but that did not stop the cattle going through it and ending in the weir. This happened 7 or 8 years ago [i.e. 2006-7]. The herdsman then mounted the girder to the posts holding the wooden barrier and barbed wire.' I noted what another witness stated about this fence at paragraph 14 above.
34. A witness who had used the appeal route since 2007 noted that there had been a gate at the eastern side of the sleeper bridge at E, 'always locked but path accessed from side of bridge.' Another witness wrote of the eastern side of the sleeper bridge, 'A wooden fence was put up across the far side of the sleeper bridge, probably 10 or 15 years ago to keep the livestock in the fields. It was only 3 or 4 feet high. People would either climb over it or hold on to it and swing around the side of it.'
35. In some circumstances it might be that these actions would be insufficient to show a lack of intention to dedicate a public right of way, but in this case access had to be provided to anglers to reach the river bank. It seems to me that in this case the maintenance of barriers at C, D and E would allow fishermen to reach the bank, albeit not necessarily with very great ease, but would indicate to the public that their passage was being discouraged. There seems little doubt that the barrier at I was erected with no intention of making it possible for the public to access the weir.
36. I conclude that there is sufficient evidence of a lack of intention to dedicate public rights of way on the appeal route.

Conclusion on the statutory test

37. I conclude that the applicant has, as far as the complete route is concerned, failed to produce (see paragraph 6 above): *credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years*, in that there is not a way, clearly defined throughout its length, and even if it were, it has not been enjoyed as of right. In addition there is credible evidence of a lack of intention to dedicate a public right of way. The statutory test is failed.

The common law test

38. Although the Council did not consider the common law test (paragraph 7 above), the appellant devotes half a sentence to it in the final paragraph of his appeal, stating that: 'there is adequate use of the routes to raise the initial inference of dedication at common law,...'.
39. For reasons given above, i.e. that there is not a clearly identifiable route, that use was not as of right, and that no other evidence supports the view that a landowner intended to dedicate a right of way to the public, the common law test is failed.

Conclusion

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

Other matters

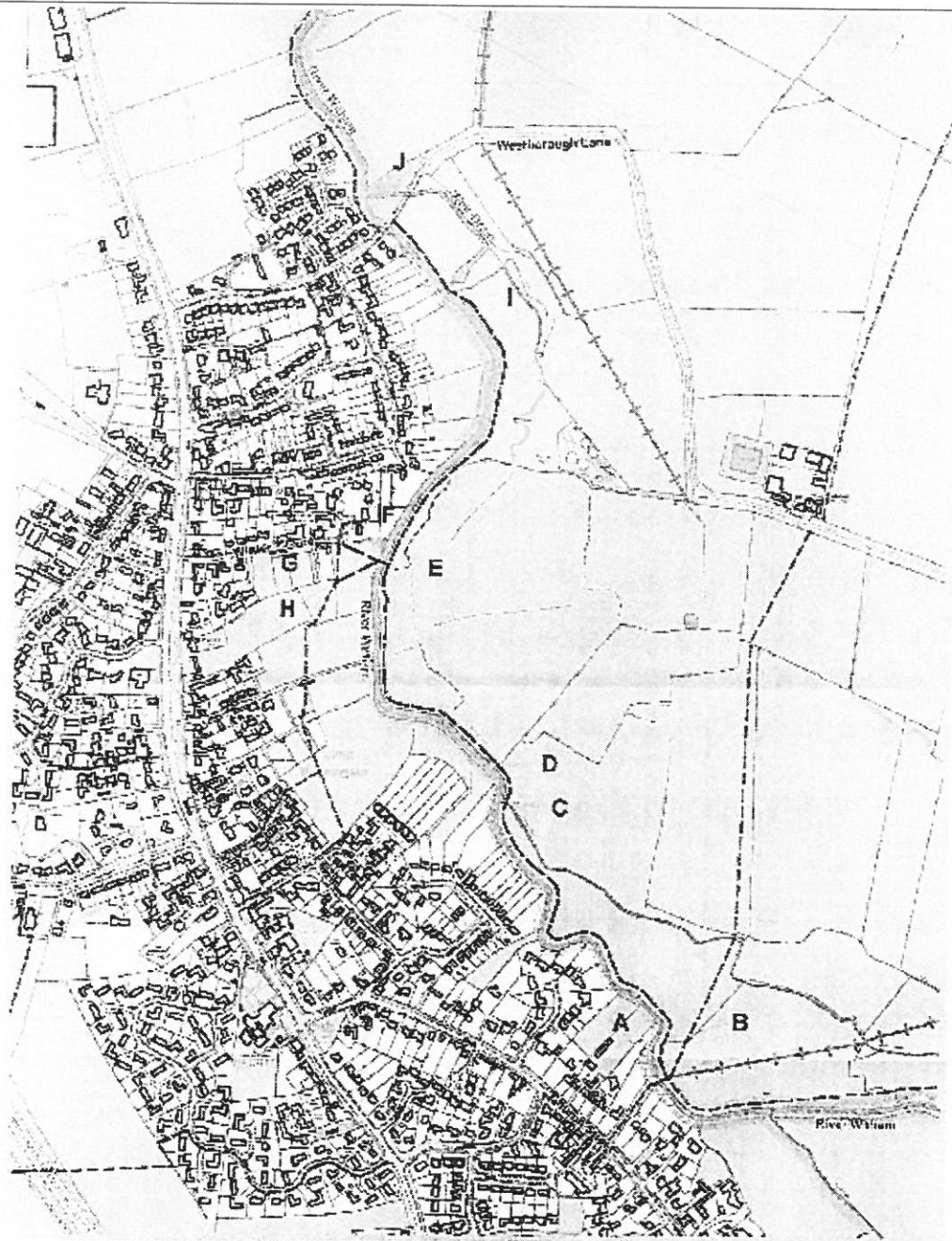
41. It is clear from the evidence that there has been plenty of use by the public of the fields on the eastern side of the Witham at Long Bennington. One witness wrote: 'It's been an active area which has been curtailed by the erection of fencing at the trailer bridge'. Another stated: 'On the days that I was working I'd probably just go over the wooden bridge and go down the river bank and loop around a couple of the fields and then come back'. A tenant farmer noted that there was dog excrement all over his fields: 'Too many people seem to think that being given access to land via a footpath means the entire field becomes a dog exercise area and dog toilet allowing them to roam anywhere they like...'. Widespread roaming in an area, however, cannot give rise to a public right to use a linear route.
42. It is also clear that many people feel that denial of public access to the eastern side of the river is a great loss to the village. The modification order process, however, cannot take into account such matters as the need for recreational space.

Formal Decision

43. The appeal is dismissed.

Peter Millman

Inspector



Countryside Officer, RA 4116, Executive Director for Environment & Economy, County Offices, Redwings, 1 Park, N1 1YJ.

	<p>Plan showing the Application Route and the features within the vicinity of it</p>	<p>Key.</p> <ul style="list-style-type: none"> Application Route Public Road Public Railway Restricted Byway
	<p>Ref: DM/037/14/010 BENNINGTON ET AL</p>	
	<p>Date: 07.12.2016</p>	
	<p>Scale: 1:5,000</p>	

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