



Appeal Decision

by Grahame Kean B.A. (Hons), Solicitor HCA

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

Decision date: 14 February 2022

Appeal Ref: FPS/Q2500/14A/15

- The appeal is made under Section 53(5) and Paragraph 4(1) of the Wildlife and Countryside Act 1981 (the "1981 Act") against the decision of Lincolnshire County Council (the "Council") not to make an order under s53(2) of that Act.
- The Application dated 10 September 2018 was refused by the Council on 16 November 2020.
- The Appellant claims that the definitive map and statement for the area should be modified by the addition of a Footpath over parcels of land known as Hobblers Hole and Newt Hollow in Long Leys, Lincoln to link Public Footpaths 3 and 6 in the City of Lincoln.

Summary of Decision: The appeal is dismissed.

Preliminary matters and history of the application

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. The appeal is based on user evidence and has been determined on the papers submitted. I have not visited the site, but I am satisfied that I can make my decision without doing so.
3. If I consider that an order should be made paragraph 4(2) of Schedule 14 enables me on behalf of the Secretary of State to "*give to the authority such directions as appear to him necessary for the purpose*".

Main issue

4. The main issue is whether the available evidence shows that, on the balance of probabilities the appeal route (route) is a public footpath which should be recorded by way of a modification to the Definitive Map and Statement (DMS).

Legal framework

5. 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 subsists which is not shown in the map and statement or is reasonably alleged to subsist over land in the area to which the map relates.

User evidence

6. For a claim that a right of way exists based on user evidence under s31 Highways Act 1980 (the 1980 Act), the evidence must demonstrate that use
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has occurred over a defined route for at least twenty years prior to the date at which the public's right to do so was brought into question. If the user evidence suffices to raise a presumption that the route was dedicated to the public, the presumption is rebuttable if there is sufficient evidence to demonstrate that, during that 20-year period, there was no intention by the landowner to dedicate.

7. Landowners may make use of a statutory right under s31(6) Highways Act 1980 to deposit with the appropriate council a statement and plan showing admitted public rights of way and subsequently to make a declaration that no additional rights of way over it have been dedicated since the date the plan was deposited. In the absence of proof of a contrary intention, the deposit and declaration are deemed to negate the intention of the owner or successors in title to dedicate additional ways as a highway.

Common law

8. There is also a common law test for the dedication of public rights of way, based on the fact that such public rights may be said to have been dedicated by the owner of the land through which the claimed route runs. There is rarely evidence of an express dedication and none in this case. Dedication may be presumed if there is evidence from which it may be inferred that the landowner has dedicated a right of way and the public has accepted the dedication. There is no fixed user period required at common law, therefore the shorter the period, the more onerous a task it may be to show dedication by the landowner and acceptance by the public of that dedication, than dedication by statute.

Reasons

9. The Council refused to make an order, considering the evidence not to be sufficient reasonably to allege that a public right of way existed over the route.
10. The application was to add to the DMS a footpath that runs over parcels of land known as Newt Hollow (a local wildlife site) and Hobbler's Hole and would link Public Footpaths 3 and 6. The parcels of land have been left to grow wild and the footpath is a narrow, trodden path that runs through them.
11. The owners of the land over which the route goes, are Lincoln City Council (Lincoln City) and Lincoln Wildlife Trust (LWT). Both interested parties made representations against the making of an order by the Council as the Order Making Authority and in this appeal.
12. LWT owns Newt Hollow and resubmits copies of the statements and declarations under s31(6) Highways Act 1980 and Commons Act 2006 and repeats its objection that the making of an order would be a disposal of charity land. Lincoln City owns Hobbler's Hole and the northernmost area of land over which the route meets PF3. It objects that a public right of way could not have arisen due to the way the land, over which the route goes, is held.

Documentary evidence

13. Ordnance Survey aerial images ranging from 1971 to 2006 and a 2014 planning application to construct a skate park and enhance Hobbler's Hole for recreational purposes, indicate the existence of a path used as such in the

location of the route. A similar inference may be drawn from the 2018 Natural England MAGIC map, images from Google and the Council survey of the route in 2019. However this evidence shows no more than that a path has existed along the route and is inconclusive as to whether a public right of way exists.

14. No documentary evidence has been supplied that supports the existence of a historical public right of way.

User evidence: the date the right of the public to use the way was brought into question

15. Before I consider the user evidence it should be noted that it is necessary to determine when the alleged right of way was brought into question so that the statutory period of twenty years can be calculated up to that date. There are two possibilities in this appeal. Firstly, it is said that the right was brought into question in 2014 when LWT completed the process of lodging a statement, map and subsequent declaration with the Council under s31(6). The second date advanced for consideration is 2018 when application for an order was made.
16. I am satisfied from the information available that the necessary formalities in the s31(6) process were observed. The completed process including the declaration provides sufficient evidence of a lack of intention to dedicate, and to bring the right of the public to use the route into question as at 2014.
17. I note that the question arose whether there was compliance with the Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013 (SI 2013/1774) (the Regulations), which prescribe the requirements as to the form such applications to deposit maps and statements must take and other procedural requirements. The Regulations do not state that the register has conclusive effect and the effect of failure properly to register a validly deposited map, statement or declaration is not stated. However the statutory wording of s31(6) is clear that:

"...declarations in valid form¹ ... are in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."
18. The Regulations replaced earlier regulations under which the map and statement were deposited, however the declaration was made when the Regulations were in force. Nonetheless I am satisfied that the requisite notices were placed on the land that would have made the public aware of the landowner's lack of intention to dedicate the route as a public right of way.
19. Therefore the twenty-year period should be computed retrospectively from when public rights were first brought into question in 2014, i.e. 1994 to 2014.
20. However I do not quite agree with the Council's analysis of the "qualifying years of public use" of the route with regard to the period 1994 to 2014. The Council says that due to the statement being deposited in 2011, the "last 4 years of public use" do not qualify. The implication is that the statement was sufficient on its own to evidence the landowner's lack of intention to dedicate the route.

¹ The words "in valid form" were inserted with effect from 13 February 2004 (see SI 2004/292).

21. I consider that in this appeal the initial deposit, although some indication of the landowner's intentions, is not sufficient evidence to satisfy what is generally referred to as the proviso in s31(1). Evidence of overt acts sufficient to show the public at large that the landowner had no intention to dedicate will generally be required. The deposit was an initial but inchoate act within the statutory process, and at that stage would probably have necessitated a proactive inspection of the register in order to reveal anything pertinent to the landowner's intentions.²
22. With regard to the later date advanced of 2018, it is unnecessary to consider that further, not least since it follows that no twenty-year period of continuous uninterrupted use could fit into the period between 2014 and the present day.
23. Also, since the original application the appellant has supplied further UEFs going back to the 1920s and it remains possible that there is sufficient evidence of public use prior to completion of the s31(6) process for deemed dedication to have occurred. Any twenty year period prior to the bringing-into-question-date will suffice.

User evidence: the UEFs

24. 10 user evidence forms (UEF) were submitted with the application and a further UEF shortly thereafter. On appeal a further 7 forms were submitted. Not all witnesses are required to demonstrate personal use of the appeal route for the whole of the twenty-year period, but the evidence should collectively demonstrate that the use had occurred throughout that period.
25. However, even taking into account the expanded periods within which a twenty year uninterrupted period of user might be said to have taken place, the user evidence is low, both as to how many people were using the route and how frequently. One of the original UEFs referenced a different route. As to the remaining 10 forms, none records using the route on a daily basis and only two showed a continuous period of use between 1994 and 2014 (they also showed continuous use extending back to 1985/6). The rest indicate a use of the route from 2008-2014 (x2), 2006-2014 (x2), 2005-2014 (x2), 2002-2014 (x1), and 2003-2014 (x1 save for the year 2008).
26. As to the further UEFs latterly submitted, they seldom show overlapping user periods, but reference disparate periods that range from 1930-1939; 1956-1964; 1963-1968; 1968-1972; 1973-1993; 1975-1979; and 1997-1992. Only two or three are recorded as using the route at the same time. None of the additional witnesses reports daily or weekly use. None has marked on a plan the route used and whilst each states the route used was that supplied by the appellant, it is not confirmed what other ways may have been used, whether the route was deviated from, or whether its line had altered over time.
27. Overall the number of witnesses and frequency of use is still low, notably so in my view, having regard to the fact that the route is in an urban setting and fairly densely populated. I am not satisfied from this user evidence that it is of sufficient quality and quantity that it can reasonably be alleged that a public right of way has come into existence on the route for any uninterrupted period

² Indeed as the commentary in the Encyclopaedia of Highways Law and Practice at 2-066.2 would suggest, a claim might (depending on the circumstances) be entertained based on a common law implied dedication, relying on a lesser period occurring between the original deposit and the subsequent declaration.

of twenty years prior to 2014, such as would satisfy the requirements set out in s31 of the 1980 Act.

28. Similarly, at common law and having regard to the same information available to me, the usage is of such a sporadic and infrequent nature that it would not be likely to make the landowner aware of the potential claim of right such as would show dedication and acceptance by the public of that dedication.

Other matters

29. The quality of user required to establish a public right of way is the same both under s31 and at common law in the sense that it must be open, uninterrupted and as of right.
30. I have had regard to the other matters raised by the interested parties, but in light of my findings above it is unnecessary to go into those matters in any detail. The "cul-de-sac" argument depends for its success on establishing that part of the route cannot give rise to public rights of passage because, it is said, it runs through land that is held under Open Spaces Act 1906. As such anyone walking this part of the route does so "by right" as opposed to "of right".
31. Now, it is true that recreational land laid out for public use by a local authority with the requisite powers, would be used by the public "by right" rather than as of right, as discussed by the Supreme Court in *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31. And from what I have read it is arguable that some part of the affected land, which here concerns the Hobblers Hole parcel of land, is held under the 1906 Act. However reliance is placed on a chain of evidence including the proper interpretation of a deed of conveyance and the application of case law, (not to mention consideration of the successive local governance entities and their management of the land in question) on which it would be preferable to hear further evidence and argument before reaching any firm conclusion thereon.
32. Similar considerations would apply to the contention that the LWT land, which I read is land held for charitable purposes, may not be susceptible to dedication as a highway, whether at common law or, applying the provisions of s31(1) which carves out an exception to the statutory twenty year rule in the case of "*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*".
33. Ownership of land by a charity is not itself a bar to dedication. I appreciate that an argument may be founded on the construction of the governing documents and the lack of ministerial consent where required, although there is the hurdle to overcome of establishing that, if it were a question of the "disposition" of land for the purposes of the Charities Act 1960 as amended, there was truly such a disposition in the way in which public rights of passage commonly arise in a prescriptive manner.
34. One can see a tension between what would ordinarily be supposed to be a conscious act of disposing of an interest in or over land that is held on trust for public purposes, having considered all the caveats that rightly apply to its alienation on the one hand, and the passive acceptance of emerging rights of passage for the general public on the other (indeed conscious acceptance of what has emerged, by which I mean dedication in this sense, may be inferred from the circumstances, rather than explicitly proven).

35. Further, s31(8) would have to be considered (as it probably would in the case of the Lincoln City land) since it provides another exception to the statutory rule in the case of a body in possession of land for public or statutory purposes to prevent dedication if the existence of a highway would be incompatible with those purposes. If the land can be used for its charitable purpose consistently with the alleged right of way, there is no bar to dedication, but the test is one of fact.
36. Of course, whether dedication would preclude LWT from using it for the purpose for which it is held is a nice point, given what the organisation is striving to achieve in the interests of what is perhaps a wider range of stakeholders than the users of a path who but for these considerations would quite legitimately wish to walk through this very particular wildlife area, although as I understand it the path is currently a permissive path. However, and as with the other matters highlighted, they are unnecessary to decide in this appeal.

Conclusion

37. Taking all the evidence together I consider that it is not reasonable to allege that a right of way exists over the claimed route.

Formal Decision

38. The appeal is dismissed.

Grahame Kean

INSPECTOR