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Mr D Martin
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Your Ref:
Our Ref: FPS/E0535/14A/1
Date: 8 October 2013
09 OCT 2013

Dear Sir

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION S14
Cambridgeshire County Council
Refusal to add a Public Footpath from Garden Fields to Bradmere Lane,
Little Shelford

I enclose for your information a copy of the Inspector's decision on this Appeal.

Also enclosed are two leaflets entitled *Our Complaints Procedure* and *Challenging the Decision in the High Court*.

Please note that this decision can only be challenged by applying to the Administrative Court for a judicial review.

If you have any queries about the enclosed decision, please contact the Quality Assurance Unit at the following address:

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An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully

Jean McEntee
(Rights of Way Section)

APPdesp



Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 09 OCT 2013

Appeal Ref: FPS/E0535/14A/1

- 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 Cambridgeshire County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 3 August 2010 was refused by Cambridgeshire County Council on 2 May 2013.
- The Appellant, Little Shelford Parish Council, claims that the appeal route from Garden Fields to Bradmere Lane, Little Shelford, should be added to the definitive map and statement for the area as a footpath.

Summary of Decision: The appeal is allowed

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. In this decision I have found it convenient to refer to a plan forming Appendix 2 of the Report on the Application¹ produced by Cambridgeshire County Council (the Council). It shows the appeal route between point A, High Street, following Garden Fields to point B where it crosses a bridge over the Parish ditch, point C, the location of a boundary hedge, point D, the boundary between land owned by Mr Fordham and Professor Hopper and point E, its junction with Footpath 4, Bradmere Lane.

Main issues

4. 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 the occurrence of specific events cited in Section 53(3).
5. Section 53(3)(b) of the 1981 Act states that an order should be made to modify the Definitive Map and Statement where it can be shown that a period of time has expired such that the enjoyment by the public of a path during that time raises the presumption that the way has been dedicated as a public path.
6. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made following the discovery of evidence which, when considered with all other

¹ Report prepared for consideration on 28 March 2013

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...". As made clear in the High Court in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* (Norton and Bagshaw) this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B.

7. The application relies on claimed use by the public. The user evidence must be considered against the requirements of Section 31(1) of the Highways Act 1980 (the 1980 Act) which 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*".
8. If Section 31 of the 1980 Act is inapplicable, then the question of dedication must also be examined in the context of common law. At common law 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), however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

Reasons

9. The Council concluded that the public's right to use the appeal route was brought into question in 1975 when the landowner put up a barrier across the bridge at point B. Some users found the route obstructed in 1975 or 1976, whilst use by others continued, with obstructions not encountered until the 1980s or as late as 2003. However, I agree with the Council that it is reasonable to take 1975 as the date of bringing into question, giving a 20 year period of 1955 to 1975. Given the obstructions encountered after 1975 it is unlikely that a later 20 year period could be established.
10. Twenty-five user evidence forms were submitted with the application and the Council interviewed 18 of the claimants. Sixteen people claimed use of the

appeal route during the period 1955 to 1975, 4 throughout the 20 year period and the remainder for shorter periods. Collectively, the claimants demonstrate continuous use over the period to be considered.

11. Claimed use is for recreation, consistent with use as a footpath, and appears to be as of right, without force, carried out openly and without permission. There is nothing to suggest use was interrupted during the relevant period, or that users were challenged by any landowner. Frequency varies with most users claiming use at weekends, monthly or occasionally. The Council estimated that at any one time during the 20 year period between 8 and 10 people used the appeal route and they were using it between about 3 and 5 times a week, but that this was insufficient to raise a presumption of dedication.
12. With regard to a contrary intention, the evidence adduced is that users were not seen during the 20 year period and the way was not available as a through route as it was blocked by a substantial hedge supplemented by barbed wire at point C.
13. Ordnance Survey maps dating between 1885 and 1973 have been provided and show that tracks have existed along all or latterly parts of the appeal route providing access to fields and allotments located along it. However, whilst showing the features that physically existed, the maps do not assist in terms of the existence or otherwise of public rights over them. Aerial photographs dating between 1946 and 1997 also confirm the existence of worn tracks on the ground but are inconclusive as to the existence or otherwise of public rights over them, but it is not clear whether or not there was a way through at point C.
14. The Council points to a lack of reference to the appeal route in Parish Council Minutes, and also that Footpath 4, Bradmere Lane, was claimed by the Parish Council in the early 1970s as a cul-de-sac path to the Parish ditch/former clay pit/village dump: had it been considered to continue beyond point E then it would have been claimed by the Parish Council at the time. This suggests the Parish Council did not consider it was a public right of way at the time, but is not conclusive evidence that the appeal route was not used by the public.
15. Two references in the Parish Minutes may be relevant. One refers to a request to Mr Stanley in 1976 that parishioners be allowed to continue using the footpath at the end of Bradmere. However, this is ambiguous as it could refer to a different route the use of which, it suggests, was permissive. A second reference in 1979 is to the Garden Fields bridge being overgrown, a reference to point B. The Minute records that the Council felt unable to help, as it was on private ground. This may reflect the fact the Parish Council owned Garden Fields, but not the bridge. That the state of the bridge was brought to the Parish Council's attention may support its use by the public, but if so it is not clear why no action was taken to address the matter with the landowner, unless it was not considered to be public right of way.
16. Considered as a whole, claimed use extends back to 1927 (and continues to 2003 notwithstanding obstructions and verbal challenges after 1975) with most claimants beginning their use as children, some ceasing to use it when they left school, others continuing into adulthood. Frequency of use varied with most claiming weekly or monthly use, and some used it with their families at weekends. Others moved away but used the appeal route on occasions when they returned. The user evidence supports the reputation of the appeal route as considered to be available for public use and may be relevant in terms of the

common law approach for the years up to 1975, subject to access being available at point C.

17. The user evidence appears credible and points to use of the appeal route having been enjoyed as of right (without force, secrecy or permission) and without interruption. None found their way blocked at point C. The consistency in claimed use over a long period suggests that the way had the reputation of being public. Although the level of claimed use may not be regarded as high, in the context of the rural location and local population size at the time I consider it just sufficient to raise a presumption of dedication, and/or for an inference of dedication to arise. Claimants also refer to other users having been seen or encountered when using the claimed route. In addition, many claimants refer to seeing people working on the land suggesting that the landowner was aware of public use. Set against this is the evidence of a landowner that there was no way through the hedge at point C until he created a means of access to join his existing landholding with land he had purchased in 1975; and that he had not seen people using the way.
18. I conclude that test A has not been met. However, there is a conflict of credible evidence between the claimed use and the evidence of a landowner. It follows, in my view, that test B has been met and it is reasonable to allege that a public right of way subsists.

Conclusion

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

Formal Decision

20. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Cambridgeshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Cambridgeshire County Council to add a public footpath from Garden Fields to Bradmere Lane as proposed in the application dated 3 August 2010. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

S Doran

Inspector