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# Appeal Decision

by **K R Seward Solicitor**

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

Decision date: 6 December 2018

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## Appeal Ref: FPS/Q2371/14A/22

- The 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 Lancashire County Council not to make an Order under Section 53 of that Act.
- The application dated 11 September 2017 was refused by Lancashire County Council on 16 March 2018.
- The appellants claim that the definitive map and statement for the area should be modified by adding a restricted byway from Glenburn Road around the rear of Lathom High School to Summer Street.

**Summary of Decision: The appeal is allowed subject to the claimed route being described as a footpath rather than a restricted byway.**

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## 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 Wildlife and Countryside Act 1981. I have not visited the site, but I am satisfied that I can make my decision without doing so.
2. A copy of a map prepared by Lancashire County Council showing the claimed route is attached for reference purposes.

## Main Issues

3. Section 53(3)(c)(i) provides that an order to modify the definitive map and statement shall be made where evidence is discovered which (when considered with other relevant evidence available) 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.
4. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*<sup>1</sup> an Order should be made if either of two tests is met:  
  
A: does a right of way subsist on the balance of probabilities?  
  
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.
5. Therefore, the main issue is whether on the balance of probabilities a restricted byway subsists or is reasonably alleged to subsist.

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<sup>1</sup> (1994) 68 P & CR 402

## **Reasons**

6. The application route follows a hard surfaced road through the grounds of Lathom High School. It connects with the public highway in Summer Street to the north of point D and with a cycle route to the north and west of point A.

## ***Documentary evidence***

7. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other 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 is justified by the circumstances.
8. The applicant produces an extract of the Ordnance Survey ('OS') map of Skelmersdale and another for Stanley/Ashurst. The edition dates and scale are not shown on either map. Neither clearly shows the route although this may be due to poor print quality. Screen shots from online maps and aerial photography show the school buildings and the route. Whilst confirming its existence as a physical feature, they do not assist with its status.
9. The Council has undertaken more extensive analysis of historical maps and provided relevant extracts in its report to the Regulatory Committee in March 2018. The route is not shown on the OS map from 1960 prior to development of the land nor, according to the Council, is it shown on earlier versions. It did not appear in aerial photography images from the 1960's.
10. The applicant maintains that there has always been a road/path in this location since the Glenburn Colliery was in existence. The route was then 'pushed' south to allow for the school sports hall to be built. The school itself opened in 1969. From the applicant's own account the route cannot have been along the current alignment prior to the construction of the sports hall. A road called Summer Street appears on the 1960 OS map crossing the land which became the school site, but the alignment differs from the claimed route.
11. The applicant suggests that the path is an extension to Summer Street, being an old public highway. When an Order was made by the Secretary of State for the Environment on 26 September 1972 to extinguish public rights along Summer Street, including a section to the east of point D, no mention was made of the claimed route. This may be because the route did not exist at that time as the Council suggests.
12. The first document in which the route is visible is the Tawd Valley Park landscape plan of 1974. It appears as part of a longer route linking the Park to Glenburn Road. It is shown wide enough to be a vehicular access.
13. The Park was created as part of the new town development and the route appears to be shown on the Skelmersdale New Town Basic Plan 1975 (produced by the applicant) as part of a longer dotted line. The Council says that the plan is indicative of an intention to construct a longer route, of which the claimed route formed part, but it is unclear if it was intended as a permissive path or to be dedicated as a public path. Without further information, I have no reason to dispute that analysis.
14. The route appears on the OS map (scale 1:2500) drawn up in 1983, published

- in 1985, and is annotated as Summer Street. The route is visible as a road in an aerial photograph from 1988.
15. A leaflet published by the Council in 2013 titled 'Ormskirk-Skelmersdale Cycle Leaflet' shows a cycle track passing close by point A, but circling around the north of the school instead of to the south. Thus, the claimed route was not identified as a part of the existing or proposed cycle track network at that time. The applicant produces a photograph showing white painted lines on the ground in front of one barrier which he describes as 'give way' lines for cyclists, but the image is not sufficiently clear to draw that inference.
  16. Another map of Tawd Valley Park, which featured in a leaflet produced by West Lancashire Borough Council of three trails within the Park, marks a route by a blue dotted line denoting a wheelchair accessible path. Roads are shown differently. It is in approximately the same position as the claimed path and is described as going from Summer Street to Glenburn Road. The Council says that the plan must post-date 2015 because Lathom High School is marked and prior to that date it was known by another name. It seems inconceivable that the Borough Council would have published the map unless the route was part of a trail open to the public providing access to the Country Park at least on foot. I do not have the whole leaflet to see if there are any details that elaborate on the status of the trails, but nothing has been brought to my attention.
  17. A further undated map of Tawd Valley Park produced by the applicant again shows the route by a dashed line to denote a 'path' leading to a 'track' marked as Summer Street. The text refers to the Park in the context of offering a 'relaxing walk' intimating that the route to it is available on foot only.
  18. A sign is displayed near to both gates which reads 'Alternative footpath around the front of the school, follow arrow.' By referring to an 'alternative' footpath, the applicant submits that users are given a choice as the language suggests either path can be used.
  19. If there is a choice, it is directed at pedestrians only because the signs refer to a 'footpath' which could only be used on foot. Indeed, this is supported by the email of 15 March 2017 from the School to the applicant which says that "Access to the land between the back of the school gates and the start of the school fields is always accessible by pedestrians". The obstruction by gates is stated to be for the reason of preventing vehicle and motorbike access to safeguard students and staff. The explanation seems to indicate that pedestrians could still access the route or use the alternative route which was available to all users. The signage does not acknowledge the existence of a restricted byway.
  20. Drawing this all together, there is documentary evidence that a route along the alignment of the claimed route physically existed from 1974 onwards. However, its status is uncertain. There is some evidence from the Tawd Valley Park maps of a route used on foot, but not enough in itself to support a public footpath. There is a lack of documentary evidence to support the claimed status as a restricted byway. Neither of the two tests is met based on the documentary evidence.

### ***The 2006 Act***

21. As this appeal is concerned with a possible unrecorded vehicular route, it is necessary to have regard to the provisions of section 67 of the Natural Environment and Rural Communities Act 2006 which extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions.
22. None of those exceptions apply here. Therefore, if any rights for mechanically propelled vehicles had been established along the claimed route then they would have been extinguished as a result of the 2006 Act.

### ***Evidence of users***

23. There were 5 user evidence forms submitted to the Council in support of the application. One further user evidence form was submitted with the appeal. The route was used for the purposes of pleasure, including dog walking, and to access the shops, vets, doctors surgery, work and to visit family/friends.
24. The earliest use was said to begin in 1949 with weekly use on foot until 2005, but with no use during the 1970's when the school was being built. As the documentary evidence indicates that the route did not physically exist along the current alignment until 1974, it seems improbable that the use was of the same route throughout that time. The dates do not appear to correspond with the school being opened in 1969, but the later period of use must have been at a time when the claimed route was available.
25. One user began using the route on foot daily in 1970 until 2017. The applicant himself used the route from 1983 until 2017 on foot weekly and by cycle monthly. Another person used the route monthly by mobility scooter between 1988-2017. Someone else used it on foot only on a monthly basis from 1995-2016 whereas another used it between 1996-2017 on foot weekly and by cycle on a monthly basis.
26. Thus, all six users claim to have used the route regularly over many years with most use from 1996 onwards.

### ***Section 31 of the Highways Act 1980***

27. Where, as in this case, there is evidence relating to usage of the claimed route section 31 of the 1980 Act is relevant. It provides that where a way over any land, other than a way of such 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. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
28. Metal barriers have been erected across the claimed route at points B and D on the attached map. There is a 'No entry' sign on the barrier at point B. A sign on the fence next to the gate at point D advises 'private School Grounds, Trespassing or causing a nuisance may result in prosecution.' The school confirmed to the Council that the gates are usually kept padlocked.
29. Some of the users claim use of the route up to the present day or 2017 suggesting that pedestrian access was still gained in spite of the barriers. Users

indicate that the barriers were erected in December 2016. I take this as the date when the right of the public to use the route was called into question although it is possible that in relation to pedestrian use there may be an alternative 20 year period ending at the date of the application i.e. September 2017.

30. Whilst five of the users noticed others using the route on foot, horseback and cycle, only two claim to have cycled the route monthly. Everyone else used the route as a walker. Two users say that the route has been used by motorised vehicles, but no application is made for such use. The applicant refers to the school lifting the barriers to allow motor vehicles to park at the rear of the sports hall during and after school hours. As the occupier, it would be entitled to allow the use of the land as it so wishes without public rights being created.
31. Along a restricted byway the public has a right of way on foot, on horseback (or leading a horse) and in/on vehicles other than mechanically propelled vehicles. This includes cycles and horse-drawn vehicles, but not motorised vehicles.
32. With only two users claiming cycle use on a monthly basis, the user evidence for a restricted byway is not very strong. Bearing in mind the limited frequency by some users, the amount of use over the relevant period falls short of supporting a finding that a footpath instead is reasonably alleged. The Council was not wrong in stating that there is no minimum or maximum number of user evidence forms that must be submitted. There is no fixed amount of user evidence prescribed in order to show that a public right of way subsists. However, there must be sufficient evidence to allow the conclusion to be drawn that a right is reasonably alleged in the circumstances.
33. To my mind whichever 20 year period is considered the amount of cycle use emerging in the user evidence forms does not suffice to support a restricted byway use under section 31 or a lesser type of public right of way. As the applicant intimates, there may be many more people who have used the route, but that evidence is not before me.

### ***Common law***

34. At common law consideration is required over whether the use of the route and the actions of the landowner has been of such a nature that the dedication of the route by the landowner as a public right of way can be inferred.
35. Maps of the Tawd Valley Park provide a clear steer that it was recognised as part of a route to the Park which was likely to have been available to the public on foot if nothing more. The maps are quite recent. It seems improbable that the Borough Council would have published a brochure with a walking trail along the claimed route without the County Council being aware. The route is depicted as wheelchair accessible which is consistent with one user claiming use by mobility scooter. This could be indicative of a public right on foot. If it is a permissive path there is no indication of that in terms of signage or other evidence. Whilst the path appears wide enough to cater for other forms of traffic, there is no documentary evidence to support a restricted byway.
36. Very little evidence of cycle use is produced. Six users claim regular use on foot over a significant period of time albeit the pedestrian use is quite limited in terms of numbers and frequency.

37. Consideration is required of the totality of evidence in order to establish whether a right of way is reasonably alleged to subsist. The collective evidence produced is insufficient to infer dedication as a restricted byway at common law, but there is more and better evidence to support a public footpath. Whilst the user evidence of pedestrian use is limited, it is supported by some documentary evidence of a footpath. There is a lack of any evidence prior to the erection of the gates of action taken by the owners of the land to discourage such use. Indeed, its inclusion in leaflets as part of a path to the Tawd Valley Park could indicate that pedestrian use is encouraged. When taken together it strengthens the case sufficiently to satisfy the test that a public footpath is reasonably alleged to subsist at common law.

### ***Other matters***

38. In its capacity as the landowner, the Council objects to the creation of a restricted byway on the grounds that it would adversely affect development potential and the future value of the landholding. Neither factor is relevant in assessing the position at common law. The Council Officer's report made clear that objections from the Council and School were to be disregarded.
39. Any delay in repairing a burst water main located along the path between the two barriers due to the restricted access is a separate matter that cannot influence my decision.

### **Conclusion**

40. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does not show that on the balance of probabilities a restricted byway which is not shown in the map and statement subsists or is reasonably alleged to subsist.
41. However, when the available evidence is considered as a whole and account is taken of both the documentary and user evidence, I am satisfied that on the balance of probabilities a footpath is reasonably alleged to subsist.

### **Formal Decision**

42. The appeal is allowed subject to the claimed route being described as a footpath rather than a restricted byway and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Lancashire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a footpath on the route proposed in the application dated 11 September 2017. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*KR Seward*

INSPECTOR