



## Appeal Decision

by Alan Beckett BA, MSc. MIPROW

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

Decision date:

25 JUN 2013

### Appeal Ref: FPS/L3055/14A/7

- 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 Nottinghamshire County Council ('the Council') not to make an Order under section 53(2) of that Act.
- The Application dated 8 December 2008 was refused by the Council on 24 January 2013.
- The Appellant claims that the definitive statement for Newark and Sherwood plus Mansfield should be modified by adding a public bridleway between Peafield Lane, Clipstone and public bridleway No. 8 Clipstone via a route known as New Buildings Drive.

### 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.
2. This appeal has been determined on the basis of the papers submitted.

#### Main issues

3. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that an 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 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 by the High Court in the case of *R v Secretary of State for the Environment ex parte Norton and Bagshaw*, this involves two tests at the schedule 14 stage:

**Test A** - Does a right of way subsist on the 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 right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

4. In a case where reliance is placed upon evidence of use by the public to support the claim that a public right of way subsists or is reasonably alleged to

subsid, that user evidence must be considered against the requirements of section 31 of the Highways Act 1980 (the 1980 Act). Section 31 (1) provides:

*"Where a way over 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 actually been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it".*

Section.31 (2) of the 1980 Act adds that:

*"The period of twenty years referred to in subsection (1) 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 such as is mentioned in subsection (3) or otherwise".*

5. The main issue in this case is whether the available evidence demonstrates that a public right of way subsists over the claimed route (test A above) or whether the evidence is sufficient for the Appellant to reasonably allege that a public right of way subsists (test B).

## **Reasons**

### **Documentary evidence**

6. The application to the Council was made on the basis that the public had enjoyed access over the claimed bridleway for a considerable period of time. Nonetheless, the Council had consulted a number of documentary sources to determine how the claimed route had been depicted through time and to consider whether those sources provided evidence of the reputation of the route as a public right of way.
7. The documentary sources consulted by the Council demonstrate that the claimed route has been an identifiable feature in the landscape since at least 1835. Sanderson's Map of that date shows the route as forming part of 'Coach Road' lying within the pale of Clipstone Park. The Ordnance Survey map of 1840 and the Clipstone Tithe map of 1841 both show the claimed route but provide no indication of its status. The 1896 deposited plans of the Lancashire Derbyshire and East Coast Railway record the claimed route as a 'road' in the ownership of the Duke of Portland. With the exception of a minor section of the claimed route at its junction with Peafield Lane, the 1910 Finance Act map shows the whole of the appeal route as being in private ownership.
8. The Parish Schedule for Clipstone produced in 1953 as part of the survey of public rights of way under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) does not record the claimed route as a public right of way. The survey map for the neighbouring parish of Warsop recorded the existence of a sign near the Parliament Oak which read '*Private Road Tress will be prosecuted*'; the same map noted that the Divisional Surveyor considered New Buildings Drive to be a private road.
9. In summary, the documentary sources consulted by the Council do not demonstrate the existence of public rights over the claimed route prior to the 1953 survey. The non-existence of public rights prior to 1953 does not preclude the possibility that such rights have subsequently come into existence through use by the public. It is to the evidence of use that I now turn.

***The date on which the right of the public to use the claimed path was brought into question***

10. The Council considered that public use of the route had been brought into question in 1998 by the erection of lockable barrier gates near to the Parliament Oak. Mr Parkhouse (the Appellant) contends that as a gap through which pedestrians, cyclists and horseriders could pass was left between one of the gateposts and the fence which surrounded the Parliament Oak, the erection of the barriers had no impact upon public use. It is Mr Parkhouse's contention that public use was brought into question in 2008 when the fencing around the Parliament Oak was renewed and the gap between that fencing and the barrier gateposts was closed.
11. It is common ground that in 1998 two metal swing barriers had been erected across the northern end of the appeal route. The landowners have stated that these barriers were erected to combat fly-tipping and to prevent unauthorised vehicular access to their farmland. Mrs Glennie, the landowner who erected the barriers did not own the Parliament Oak or the land immediately adjacent to it<sup>1</sup> and the barriers were erected wholly on her land. Consequently, following the erection of the barriers a gap existed between the western gate post of the barrier and the Parliament Oak.
12. It is Mr Parkhouse's case that prior to 1998, the public had unfettered access to the full width of the northern end of New Buildings Drive and to the Parliament Oak land. When the barriers were locked shut, pedestrians and others made their way round the side of the barrier between the gatepost and the Parliament Oak.
13. Forty UEFs were submitted in support of the application to add the route to the definitive map. Question 16 of the UEF relates to the existence or otherwise of gates along the route. In response to this question, 18 respondents stated that there had been a gap at the side of the barrier through which they had walked. In the written record of interviews with a number of respondents, in response to the question *'has the barrier at the Parliament Oak end of the route prevented access to New Buildings Drive?'* 10 respondents noted that access had remained possible by passing round the side of the gate.
14. On the face of it the barriers erected in 1998 do not appear to have had any material impact upon use of the appeal route; the user evidence suggests that whilst walking along the centre of the drive from Peafield Lane would have been prevented when the barriers were locked, a means of access past those barriers remained.
15. The Council considered that the case of *R v Secretary of State for Environment ex parte Blake* was applicable in this case. In *Blake*, Walton J held that *"It would be impossible ever for a landowner to prevent the acquisition of a right of way over land...by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way round and then ...claim that they were using the way; whereas what had happened in fact was that they were acknowledging the existence of the obstruction...by their very actions to avoid it"*.
16. I consider that the Council was correct in its application of Walton J's findings in *Blake* to this case. Although there was no physical boundary between Mrs

<sup>1</sup> The Parliament Oak was owned by Welbeck Estates but is now owned by the Sherwood Forest Trust

Glennie's land and the Welbeck Estate / Sherwood Forest Trust land, to walk on the Parliament Oak land to avoid the barrier is the kind of deviation that was at the heart of the *Blake* case<sup>2</sup>. Although users had made use of a small section of land owned by a third party, that deviation occurred over land that was wholly separate from the claimed route.

17. Given that there was no physical boundary between Mrs Glennie's land and the Parliament Oak land and that a means of access to New Buildings Drive remained possible after 1998, it is not surprising that an application was not made at that time to record the route as a public right of way. However, the evidence suggests that those members of the public who sought to use the route after the erection of the barriers modified their means of access by either walking round the barrier, or by ducking underneath it as Mr Parkhouse did. Consequently, it is likely that at least some users would have understood that unimpeded access along New Buildings Drive was being questioned.
18. I am of the view that despite continued access along the claimed route after 1998 having been possible, the erection of the barrier would have made some users aware that their right to do so was being brought into question.

*Evidence of use prior to 1998*

19. As noted above, 40 UEFs were submitted in support of the application. Of these, 28 users claim to have used the appeal route throughout the 20 years prior to 1998; seventeen of those respondents claim to have used the route for periods in excess of 30 years. The earliest claimed use was in the late 1920s with five other users claiming to have used the route from the 1940s. Frequency of use ranged from daily use to monthly use with 13 respondents having used the lane solely on foot, 14 on foot and with a pedal cycle, and 1 on foot and on horseback. With the exception of one respondent who provided no answer, all those who completed a UEF recalled seeing other people walking, cycling or riding a horse when they were using the route.
20. There is a significant body of evidence of regular and frequent use of the appeal route throughout the 20-year period which ended in 1998.

*Evidence regarding permission, challenges and signs*

21. None of those who completed a UEF recalled being challenged as to their presence on the route at issue. Whilst some recalled meeting people engaged in agricultural activities on the land and exchanging pleasantries, none recalled being told to leave or that they had no right to be on the land. There is nothing within the user evidence to suggest that permission to walk, ride or cycle along New Buildings Drive had been sought.
22. The owner and the tenant of the land submitted that permission to access New Buildings Drive had been given to members of the local shoot and to two livery stables operating from Cavendish Lodge. In addition, a model aeroplane flying club had permission to fly from one of the fields adjacent to the drive and held the combination of the lock on one of the barriers at the north end. Furthermore, it was submitted that when people were found on the land who the owner or tenant did not know by sight, they were told that the land was private but permission to remain was given if it was considered appropriate.

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<sup>2</sup> In *Blake*, the users had entered an adjacent field and walked within that field and the re-emerged onto the claimed path in order to circumvent a locked gate



23. The evidence regarding use with or without permission is conflicting; permission has been granted by the landowner to some people and the tenant has questioned some people regarding their presence on the land. However such challenges do not appear to have been made to those users who provided evidence by way of a UEF.
24. The UEFs do not suggest that any prohibitory signs had been erected along the claimed route. There is evidence from the 1953 parish survey that a sign had been present at the Parliament Oak end of the route which read '*Private Road Tress will be prosecuted*', but there is no evidence before me regarding the date at which the sign disappeared or that it had ever been replaced.
25. Reference was made in the UEFs to a dilapidated sign at the southern end of the claimed route; one respondent claimed that the sign was 'unreadable' whilst another stated that the sign carried 'no message'. The landowner submitted that the old illegible sign at the southern end of the claimed route had indicated that New Buildings Drive was private land. Photographs of this sign show that the only legible script on this notice was the word 'CAVEND' along with an arrow; the Council thought this might be a sign indicating the existence of the nearby Cavendish Lodge. The evidence of the parties with regards to the existence of signs, the wording of those signs and the interpretation of those words is also conflicting.
26. The landowner claimed that it was common knowledge that there was no public right of way over New Buildings Drive and submitted a petition containing the signatures of 156 people to that effect. The landowner stated that the signatories were those who knew the area well and had visited the land many times to participate in recreational activities from local livery stables, shooting, beating and picking up and flying model aeroplanes.
27. There is a body of evidence to show that the public have enjoyed uninterrupted access to the claimed route throughout the 20-year period which ended in 1998. The petition suggests that there is equally a body of people who consider that the route is not a public right of way.
28. Whilst the evidence regarding permission and signs is in conflict and there is a conflict between those who claim there is no right of way along New Buildings Drive and those who claim there is, the evidence submitted by the landowner simply demonstrates a different view of the question as to whether or not a public right of way subsists along New Buildings Drive; no incontrovertible evidence has been submitted by the landowner which would inevitably defeat Mr Parkhouse's application.
29. Consequently, following the guidance of the court given in *Norton and Bagshaw*, the Appeal fails against test A, but succeeds against Test B as no incontrovertible evidence has been submitted by the landowner to demonstrate that a public right of way could not be reasonably alleged to subsist.

#### Status

30. The application was made for the addition of a public bridleway. The evidence of use is primarily of use on foot and with a pedal cycle; use with a pedal cycle on a route which has no recorded status would give rise to a right of way for non-mechanically propelled vehicles if it gave rise to anything (section 68 (2) of the Natural Environment and Rural Communities Act 2006); that is, as a Restricted Byway.

31. Taking the user evidence at face value suggests that a Restricted Byway could be reasonably alleged to subsist. However, the application and appeal were made on the basis that a public bridleway could be reasonably alleged to subsist, and I will determine the appeal on that basis. There is evidence of use on horseback but the evidence is limited to two members of the public, although a number of users stated that they had seen horses being ridden on the claimed route. I consider that at this stage, sufficient evidence of equestrian use has been submitted for Mr Parkhouse to reasonably allege that New Buildings Drive is a public bridleway.

### **Conclusion**

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

### **Formal Decision**

33. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Nottinghamshire 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 Newark and Sherwood plus Mansfield to add a public bridleway as proposed in the application dated 8 December 2008. 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.

*Alan Beckett*

Inspector