



The Planning
Inspectorate

4/05 Kite Wing
Temple Quay House
2 The Square
Bristol
BS1 6PN

Direct Line: 0117 372 8626
Customer Services: 0117 372 6372
Fax No: 0117 372 6241
e-mail: clive.richards@pins.gsi.gov.uk

APPENDIX B
31 AUG 2011
OF BROMLEY

Mr Duncan Gray
London Borough Of Bromley
Bromley Civic Centre
Stockwell Close
Bromley
KENT
BR1 3UH

Your Ref: AD(T&H)DDG/F32/280
Our Ref: FPS/G5180/14A/1 & FPS/W2275/14A/2
Date: 30 AUG 2011

Dear Mr Gray

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION S14

London Borough Of Bromley

Council's refusal to modify the Definitive Map and Statement to upgrade Route 280 to Bridleway status

&

Kent County Council

Council's refusal to modify the Definitive Map and Statement to upgrade Footpaths SR331 and SR332 to Bridleway status

I enclose herewith a copy of the Inspector's decision on the above-mentioned appeals.

For your information, you will also find enclosed 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:

Quality Assurance Unit
The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Tel: 0117 372 8252

http://www.planning-inspectorate.gov.uk/pins/agency_info/complaints/complaints_dealing.htm

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



Yours faithfully

Clive Richards
Rights of Way Section

APPdesp la

6/11/2014 10:10:10



Appeal Decision

by **Helen Slade MA FIPROW**

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

Decision date: **30 AUG 2011**

Appeal Ref: **FPS/W2275/14A/2 ('Appeal 1')**

- 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 Kent County Council not to make an Order under section 53(2) of that Act.
- The Application dated 29 November 2005 was refused by Kent County Council on 18 January 2010.
- The Appellant claims that a Definitive Map Modification Order should be made to show as a bridleway part of a route currently recorded as Footpath SR331 and the whole of the route currently recorded as Footpath SR332 from the county boundary south of Grays Farm to Pilgrims Way, near Westerham.

Summary of Decision: The appeal is allowed.

Appeal Ref: **FPS/G5180/14A/1 ('Appeal 2')**

- 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 the Council of the London Borough of Bromley not to make an Order under section 53(2) of that Act.
- The Application dated 30 November 2005 was refused by the London Borough of Bromley on 20 September 2010.
- The Appellant claims that a Definitive Map Modification Order should be made to show as a bridleway the route currently recorded as Footpath 280 between Grays Farm and its junction with Footpath SR331 on the county boundary, near Westerham.

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 decision covers two appeals affecting one route: the first appeal relates to the application for the southern, and longest, section of the route which lies within the jurisdiction of Kent County Council ('the County Council'); the second appeal relates to the application for the northern section of the route which falls within the London Borough of Bromley ('Bromley'). The evidence for both parts of the route is the same and the principal investigation and decision on the application was made by the County Council, who liaised with Bromley throughout. Bromley subsequently reached its own decision, based on the report produced by the County Council and in line with the County Council's conclusions.

3. In a similar way, the County Council has taken the major role in responding to the appeal; Bromley has submitted a letter concurring with the County Council's submission, and adding a short submission in relation to evidence provided by third parties. I have therefore considered the appeals as one, for the most part, but expressed a separate determination in each case.
4. I have not visited the site but I am satisfied I can make a decision on the appeal without the need to do so.

Main issues

5. In considering the evidence and the submissions, I have taken account of the relevant parts of the 1981 Act, the Highways Act 1980 ('the 1980 Act'), of Department of Environment Circular 1/09 and of relevant court judgments.
6. Since the appeal routes are already shown on the Definitive Maps for both county areas, I must apply the criteria set out in Section 53(3)(c)(ii) of the 1981 Act which states that an order should be made on the discovery of evidence which, when considered with all other available evidence, shows that a highway shown in the map and statement as a highway of a particular description ought to be shown there as a highway of a different description.
7. Section 31 of the 1980 Act states that where a way over any land has been enjoyed by the public as of right, and without interruption, for a full period of 20 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. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question. Section 31 of the 1980 Act was thoroughly reviewed by the House of Lords in *R (on the application of Drain and Godmanchester TC) v SSEFRA* [2007] ('*Godmanchester*').
8. It is also possible for public rights to be established at common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be inferred or alternatively that express dedication can be shown to have occurred.
9. The test I must apply is the balance of probabilities.

Reasons

The Applications

10. Kent County Council reached a decision on the application under delegated powers. The report, signed on the 12 January 2010, includes an appendix setting out in detail the reason for the recommendation to refuse the application. The conclusion of the report analyses the evidence against the criteria of Section 31 of the 1980 Act and then, at paragraph 68, addresses the question of whether or not a public right of way has been reasonably alleged to subsist. This is the test set out in Section 53(3)(c)(i) of the 1981 Act.
11. Since the application was to show, at a different status, a right of way which already existed on the definitive map and statement, the correct test to apply would have been that set out in Section 53(3)(c)(ii), which I have detailed in paragraph 6 above. In other words, that the evidence must show, on the balance of probability that the claimed higher rights exist, and not merely that there must be a reasonable allegation that they do.

12. Kent County Council found that the application did not meet even the lower test set out in Section 53(3)(c)(i), and therefore their decision would have been the same had they applied the correct test. However, for the avoidance of doubt, in reaching my determination of this appeal I have applied the test as set out in what I understand to be the relevant section of the 1981 Act: i.e. Section 53(3)(c)(ii).

Documentary evidence

13. The claim is based on user. The applicant has made no reference to any historical mapping or other documentary evidence. I agree with the County Council that the historical documentary evidence, which they report having consulted, does not assist with determining whether or not bridleway rights have been dedicated.¹
14. The only documentary evidence which might be of relevance is that which relates to the procedures followed in preparing a definitive map and statement as a consequence of the requirements of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act'). The County Council refers to this process but has not submitted the documentation to which it refers.
15. According to the County Council, Westerham Parish Council objected to the original designation of the route from Grays Farm as a 'CRF'. The objection was apparently upheld and the route recorded as a footpath. The County Council's report suggests that the commonly understood meaning of CRF was 'Private cart road used mainly as a footpath' as set out in the guidance from the Open Spaces Society ('OSS') at the time, and the County Council relies on this to demonstrate that the route was never previously considered to be more than a footpath. In fact, the OSS guidance, which was issued to accompany Government Circular No.81 in 1950, defines the term in rather different terms. In Section 4 of the guidance, where the use of symbols is discussed, it describes the term CRF as meaning 'Public Carriage or Cart road or Green (unmetalled) Lane mainly used as a Footpath'².
16. The term CRF carried no legal weight and such routes did not appear officially on Definitive Maps and Statements; the three categories which had to be recorded were footpaths, bridleways and Roads Used as Public Paths (or RUPPS).
17. In the absence of any detailed information about the objection made in the 1950s to the proposed designation of the route as a CRF, I can place very little weight on the evidence either way. Although the appeal by Westerham Parish Council in this particular case is reported to have been upheld, I do not think it would be right to draw the conclusion that the route in question had never previously been considered to be anything other than a footpath. Clearly there had been a school of thought that it was a public carriage or cart road, even if that view did not prevail.
18. This may explain the applicant's recollection of a signpost at the Grays Farm end of the route indicating the route as a bridleway. Whilst it would not be right to take this as evidence that the route definitely carried a higher status than a footpath, it does lend weight to the evidence of use. Nevertheless, the fact remains that at the time that the Definitive Map and Statement was first

¹ No copies of the documentary evidence referred to in the County Council's report have been submitted.

² My underlining

produced, the route was recorded as a public footpath. However, that does not preclude the presumed dedication of the route at a higher status at a later date through usage, a matter which I now address.

User Evidence: Section 31 of the 1980 Act

The date on which the right of the public to use the way was brought into question

19. In this case there does not seem to be any fundamental disagreement that the use of the path in question, on horseback, was brought to a halt by the locking of gates and that this occurred in the mid- to late-1970s. It therefore seems, on the face of it, to be surprising that it is only now that the application and the appeal are being considered. However, the appellant explains that since she retired in 2000 she has made a number of similar applications, and I therefore infer that the lapse in time was due to the lack of opportunity on her part to prepare such an application, rather than any more recent event calling the use into question.
20. I therefore agree with the County Council that in the absence of a precise dating, the year 1977 is a reasonable time to choose based on the circumstantial evidence of the change in land-ownership at that time. Mr Warde, the principal landowner, acknowledges that he locked the gates at that time to prevent access by travellers. The applicant indicates that she was told that the gates were locked to prevent theft. Whatever the reason, it is acknowledged that the locked gates halted use on horse-back. The date would also be consistent with the explanation put forward by the appellant that the change took place at the time that the North Downs Way was implemented as a National Trail. The Definitive Statement (supplied by the County Council) indicates that Footpaths SR706 and SR707 were created by a public path agreement with Mr Warde as part of the North Downs Way in 1977. One of these paths connects to the appeal route and one is in close proximity to it.
21. Several of the user witnesses refer to the placing of logs across the line of the route during the early part of the 1970s. The County Council has taken this as a clear example of the landowner's lack of intention to dedicate the route as a bridleway but does not appear to have considered whether or not this might also have been an event which called the public's use of the way into question. The judgement in *Godmanchester* indicated that in most cases an action sufficient to demonstrate a lack of intention to dedicate a route would also call into question the right of the public to use it.
22. However, only one of the witnesses gives any indication that the presence of the logs deterred her from using the path (Elizabeth Smith); the other witnesses who refer to the logs merely took a small diversion around them, regaining the route on the other side of the nearby gate.
23. Whether the logs could be considered evidence of the lack of intention to dedicate the route, or indeed whether they constitute an interruption to continued use, I deal with below. The applicant, Mrs Hayes, clearly was not put off by the logs and use of the route by one or two people at least continued for a few more years. I therefore conclude that the existence of the logs, whatever else they may represent, could not be said to have brought into question the use of the way on horseback.

24. I therefore agree that it was the locking of the gates which brought use by equestrians into question, and the relevant period of 20 years is therefore 1957-1977.

Whether there has been use of the way by the public as of right and without interruption for a full period of 20 years

25. Seven user evidence forms were submitted with the original application, and a further two were submitted by the applicant during the County Council's investigation. The evidence of use has been analysed in tabular form by the County Council and included as an appendix to their decision report. The appellant has made no criticism of that summary. The summary is based on the statements obtained by interviewing some of the original user witnesses, and on the written evidence submitted by the remainder.
26. Two further witness evidence forms were submitted during the course of the appeals, but these were not considered by either the County Council or Bromley during their investigations. The two forms were returned to the appellant and I agree with the County Council that it is not appropriate for them to form part of the appeal, although they could be considered in the future as part of a new application.
27. The pictorial representation of the user evidence (in bar-chart form) shows that during the relevant period of 20 years, the number of riders using the route varied from 3 (at the beginning of the period) to 1 (in the last couple of years), peaking at 5-7 riders for most of the period between 1959 and 1971. The frequency of use varied considerably: one person reckoning to have used the path only four times a year, mainly in the good weather, and others using it several times a week. Use in connection with two local riding schools or liveries was mentioned by five of the witnesses, and the presence of such establishments would undoubtedly suggest to me that at least some use of the way on horseback was more likely than not.
28. The witnesses' evidence bear a high degree of consistency without suggesting that there has been any attempt to manipulate the evidence. Several of the witnesses have been interviewed by the County Council and, bearing in mind the period over which they are attempting to recall events, their evidence is quite detailed.
29. Only one of the witnesses claims to have used the route throughout the whole of the relevant 20 year period: Patricia Crothers. The remaining witnesses contribute lesser periods of use which, when taken together, span the years in question. However, the evidence of Pat Crothers, who was interviewed, contradicts markedly with the evidence of the other witnesses in that, despite claiming to be one of the most frequent users, she makes no mention of either the logs obstructing the route in the early 1970s or the locked gates in 1977. Indeed she claims that she continued to use the route until 1981, at which time she ceased using it because she no longer had a horse. She gives a clear description of the route and so, whilst I am have no reason to believe that she never rode the route at all, I would suggest that she may be mistaken in her recollections about how long she rode it. Her evidence needs to be treated with a degree of caution.
30. As the County Council points out, few of the people who now own land in the vicinity, including the main affected landowner, are in a position to provide much contrary evidence, since their connections with the land post-date by

some considerable margin the date at which usage on horse-back ceased (1977). Mr Lee Ringrose, who was resident at John Grooms Children's Home on Pilgrims Way from 1975 was very young (five years old) at the time, and states that he did not recall any tracks going over North Banks other than a footpath, which even now is infrequently used. The claimed level of usage on horse-back would not have resulted in intensive use, even during the middle years of the relevant 20 year period, and had dropped away considerably by 1975. I think it unlikely that a five year old child would have been particularly aware of the occasional equestrian use of a path which was a recognised footpath anyway. Furthermore, the section of the route that passes what was then the Children's Home is described by the user witnesses as being metalled, and therefore unlikely to reveal evidence of use on horse-back in terms of hoof-prints. I do not dismiss his evidence, but I place little weight on it.

31. There is thus little or no evidence to contradict the user witnesses' claims, even when reducing the weight to be given to the evidence of Pat Crothers. Nevertheless, the evidence suggests relatively low levels of use albeit on a regular basis by some people.

'The Public'

32. There is no case law which definitively addresses the question of what is meant by the term 'the public' in relation to Section 31 of the 1980 Act. There is no information in the statute to indicate that there is a requirement for a certain volume of users to be demonstrated. I accept the County Council's view that it is necessary to show that the use of the way has been by the public, but I can find no evidence to suggest that those using the route in this case were not representative of 'the public'. I therefore consider that the evidence demonstrates use by a group of people who are capable of representing the public, however small in number.

'As of right'

33. There is no evidence that, during the relevant 20 year period, use of the way was secretive. Some of the user witnesses recall their use being acknowledged by the occupiers of Grays Farm, and of waving to people. There is no evidence to contradict this.
34. There is no evidence of user by permission. The County Council indicates that young riders hacking out with the Riding School would not have been aware of whether or not they had been given permission to use the route. Whilst this is true, no evidence has been submitted to indicate that permission was given, and in the absence of such evidence there are no grounds to infer or presume that it was.
35. Several of the user witnesses make reference to the presence of logs across the route in the early 1970s. The diversion made to avoid such obstructions does not appear to have been of any magnitude. The witnesses refer to using a gate slightly to the north of the line of the footpath and continuing on their way. In the absence of any evidence of damage caused as a result of the deviation, this does not seem to me to qualify as user by force, and I am satisfied that, during the relevant period of 20 years, the evidence suggests that the use of the way that took place on horse-back was as of right.

'Use without interruption'

36. The County Council considered that the placing of the logs across the route constituted an interruption to use since riders had to deviate to avoid them. The evidence of use suggests that riders simply avoided the immediate obstruction and continued on their way.
37. Since the logs could have constituted an obstruction to the public footpath which was already recorded and acknowledged, it seems to me that the riders would simply have been following an alternative route, for a very short distance, before regaining the line of the path in the same way that users on foot may have had to do.
38. However the evidence of the user witnesses is consistent that they did deviate through a gate slightly north of the definitive line of the path, and thus it must be accepted that use of the claimed way during the latter part of the relevant 20 year period was subject to a deviation, and that this deviation was an interruption in fact – albeit ineffective in preventing use of the way altogether and of a very minimal nature. Indeed it is even possible that the logs could have been jumped (as Mrs Hayes points out in her appeal submissions) and that not everyone was actually interrupted.
39. There is no evidence as to who placed the logs across the route, or why they did so. Neither is it entirely clear what form this obstruction took – whether it was a large pile of logs randomly placed, or whether they were neatly stacked. If the former, it could be argued that they were there by default, and not with the intention of blocking the way to equestrians. If the latter, such an intention to interrupt use might be a more reasonable interpretation.
40. In considering this issue I am guided by the judgement in *Fernlea Estates Limited v City and County of Swansea and The National Assembly for Wales* [2001] EWHC Admin 360 ('*Fernlea*'). In that judgement it was considered that the dumped building materials and trenches which caused people to deviate slightly from the claimed route did not amount to an interruption of the kind envisaged by Section 31 of the 1980 Act.
41. Since use of the claimed route in the case I am considering continued otherwise unhindered for a few more years, I conclude that it cannot be unequivocally inferred that there was an intention to interrupt the use of the way by equestrians. It was certainly ineffective in doing so and caused only a minor deviation. Guided by the judgement in *Fernlea* I do not consider that the logs can be considered to have been an interruption to the required 20 year period of use for the purposes of Section 31 of the 1980 Act.

Whether there is sufficient evidence of a lack of intention to dedicate a bridleway

42. For landowners who wished to avail themselves of a means of preventing the presumed dedication of rights of way, provision was made for the deposition of maps, statements and statutory declarations in the Rights of Way Act 1932; and repeated in subsequent Highways Acts (1959 and 1980). It was not necessary for landowners to be aware of the use of a way for them to take advantage of these provisions; they were devised to provide landowners with pre-emptive measures. These measures were not utilized by the landowner in this case until 1994, when Mr Warde made an initial deposit and statement. The County Council states that no follow-up statutory declaration was made, although a further deposit was made in 2000. However, these depositions are

irrelevant to the appeal since they were made after the relevant 20 year period and cannot therefore provide sufficient evidence of a lack of intention to dedicate a bridleway during that time.

43. Mr Greenlees evidence is rather vague. He says he was involved with the running of Grays Farm between 1955 and 1970 in 'minor and major ways'. Recollections of his uncle's approach are at odds with the evidence of the user witnesses and the precise level of his involvement is not clear. I therefore cannot place a great deal of weight on his evidence, although I have no reason to doubt its veracity as far as it goes.
44. In my view, the statements regarding the land-use of the bank and the fields have no bearing on whether or not there was an intention to dedicate a bridleway over the appeal route. There must be many hundreds of bridleways throughout the country as a whole which pass through grazing land, and I place no weight at all on the argument that the presence of cattle on the bank would have been incompatible with the dedication of a bridleway.
45. Likewise, the origin of the track is immaterial. What is at issue is how it has been used since it was established and what demonstrable action was taken, if any, to disabuse the public that there was any intention to dedicate it as a bridleway.
46. The County Council considered that placing logs across the route was a clear indication of a lack of intention to dedicate a bridleway. As the route was already recognised as a public footpath, any logs placed on the route would have been a technical obstruction to the footpath, and the avoidance of the obstruction by diverting from the route would have been a legitimate action for pedestrians. Whether forcing such a diversion on equestrians qualifies as evidence of a lack of intention to dedicate the route seems to me to be a matter of fact and degree, depending on the extent of the diversion and the effectiveness of the obstruction.
47. I have already concluded that the logs were ineffective in preventing use altogether, and that use of the way on horse back continued for a few more years. The deviation was also very minor. Under the circumstances I cannot find that the placing of the logs is sufficient evidence of a lack of intention to dedicate, and there is no other evidence which fulfils this requirement.

Conclusion on Section 31 of the 1980 Act

48. Although the evidence suggests a relatively light level of use, it must be remembered that the relevant period is some time ago, making it more difficult to find witnesses who are still available. However, there is nothing to suggest that the user witnesses do not represent 'the public', and no evidence that shows unequivocally that the claimed use did not take place throughout the relevant 20 year period. The evidence supports that the user was as of right, and I have concluded that there is no evidence to support any interruption to that use.
49. I acknowledge that the distance in time presents a similar difficulty for those seeking to rebut the evidence of use, but find nevertheless that there is insufficient evidence of a lack of intention to dedicate a bridleway during the relevant period. The intention of the landowner after 1977 is immaterial.

50. I therefore conclude that, on the basis of the evidence before me and on the balance of probabilities, a public bridleway can be deemed to have been dedicated over the appeal route.

Conclusion on Appeal 1

51. Having regard to these and all other matters raised in the written representations I conclude that the available evidence shows that the part of the appeal route which is currently shown on the Definitive Map as Footpath SR332 and part of Footpath SR331 ought to be shown as a bridleway. The appeal should be allowed.

Conclusion on Appeal 2

52. Having regard to these and all other matters raised in the written representations I conclude that the available evidence shows that the part of the appeal route which is currently shown on the Definitive Map as part of Footpath 280 ought to be shown as a bridleway. The appeal should be allowed.

Formal Decision (Appeal 1)

53. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Kent 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 Kent County Council to upgrade the appeal route, being Footpath SR332 and part of Footpath SR331, to Bridleway. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Formal Decision (Appeal 2)

54. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act the London Borough of Bromley is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the Definitive Map and Statement for the London Borough of Bromley to upgrade the appeal route, being part of Footpath 280, to Bridleway. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Helen Slade

Inspector