

Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 07 March 2017

Appeal Ref: FPS/U1050/14A/9

- 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 Derbyshire County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 2 November 2011 was refused by the Council on 13 September 2016.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath (shown by A - B on the plan appended to this decision).

Summary of Decision: The Appeal is dismissed.

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 1981 Act.
2. This appeal has been determined on the basis of the papers submitted.

Main Issues

3. 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 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. In arriving at my conclusions I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the High Court in the *Bagshaw and Norton*¹ case.
5. 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 *Bagshaw and Norton*, this involves two tests:

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

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.

6. Where it is claimed that a public footpath has come into existence through long use, the claimant is required to demonstrate that there has been uninterrupted use by the public for a period of not less than 20 years prior to the right to do so being brought into question. Furthermore, such use has to have been 'as of right'; that is, without force, secrecy or permission. If the user evidence can be said to satisfy these tests, then a presumption arises that the way has been dedicated as a public footpath. This is however, a rebuttable presumption, and can be defeated if there is sufficient evidence to show that during that 20-year period there was no intention on the part of the landowner to dedicate such a public way.

Assessment of the available evidence

7. The application was made following an incident when a walker was injured by a golf ball whilst on the Goose Lane section of the claimed footpath. A claim was made for compensation as it was believed that the injured party was on a public right of way; however it was subsequently demonstrated that the route was not shown in the definitive map and statement. There is some anecdotal evidence that around the same time members of the public had been involved in altercations with golf club staff over their use of the claimed path and that the golf club had undertaken works to obstruct the route.
8. The available evidence suggests therefore that public use of the claimed route was brought into question in November 2011, either by the events which took place on site, or by the application made to add the footpath to the definitive map and statement. Consequently, for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period of use is 1991-2011.
9. Twenty seven user evidence forms were submitted in support of the application; of these eighteen respondents claimed to have used the appeal route for periods of time ranging from 31 to 60 years. The user evidence forms are however inconsistent in the description of the route used and whilst the majority of respondents describe walking along Goose Lane towards the golf club, the route described varies between users with some leaving Goose Lane at footpath 17 and some continuing to the car park of the golf club. From here the respondents describe walking on to Codnor Castle either by crossing the car park as per the claimed path or by walking in front of the club house and along Castle Drive.
10. Sixteen of the plans attached to the user evidence forms show the appeal route by means of a broad pink line which appears to be the same pen which drew the route at issue on the original application form. Of the 16 maps marked with a bold pink line, 9 showed no other routes, 6 showed other routes in addition to the pink line, 1 showed a network of paths in the area along with the pink line, only 3 respondents marked the appeal route independently without any

- other route, whereas 7 others showed the appeal route (or part of it) along with other routes or a network of paths in the area.
11. The marking of the plans with multiple routes in addition to the appeal route is of little assistance in determining whether the appeal route has been enjoyed by the public for the required period which would raise a presumption of dedication as it is by no means certain that the evidence of use contained within the forms relates to the appeal route or to those other routes claimed to have been walked.
 12. In order to clarify the witness evidence, the Council circulated a questionnaire to the 27 respondents who had completed a user evidence form and received 11 replies. The respondents were asked to describe the path they had used in detail and to complete a fresh plan showing where they had walked. This exercise resulted in seven different answers being provided by the respondents as to the path they had used.
 13. Two respondents described the claimed path along with a route in front of the Club House and along Castle Drive; two described a route along Goose Lane and in front of the Club House and along Castle Drive but not the claimed path. A third respondent described only the claimed route whereas the responses from a fourth related to other paths in the area. Two other respondents described the claimed path and the existing public footpaths which connected to it and two more described the claimed route along with three other routes. The final respondent described a route along Goose Lane then in front of the Club House which veered off southward as opposed to walking along Castle Drive.
 14. Seven respondents reported having been verbally challenged by golf club staff with some of those challenges coinciding with the attempts made by the golf club to obstruct access along Goose Lane.
 15. The owner of the golf course submits that the course has been in his family's ownership since 1979 and his ground staff has always been instructed to redirect anyone found on the land that was not on a public right of way. Verbal challenges made by the ground staff are regularly met with abuse by walkers. The owner cast doubt upon the veracity of the claims that the public had walked the path for substantial periods of time as the land had been subject to open cast mining in the 1960s and the land around the car park had been fenced during the 1980s and 1990s. It was also contended that walkers attempting to cross the course were unlikely to follow the claimed route as it crossed the car park and where they were more likely to be seen and challenged.
 16. As part of the management of the course additional signposts have been erected to direct the public along the rights of way which cross the land and where appropriate, 'private land' signs have also been erected. In 2004 the owner made a section 31 (6) deposit and statutory declaration as to the extent of rights of way which cross the property; this was renewed in 2014; the claimed path was not recognised as a public right of way.
 17. The greenkeeper for the golf club submitted that he had been in his post for 25 years and that when he had commenced work his job description had included a requirement to ensure that trespassers were redirected back to the public footpaths which crossed the site. The number of trespassers had been quite low until around 1998 when the course was redesigned and landscaped which

made it a more attractive place to walk. All the greenkeeping staff were instructed to challenge trespassers and direct them to the public rights of way. Very few walkers had been seen crossing the car park and most walkers avoided or sought to avoid contact with club staff.

18. Although there is some evidence that the claimed route has been walked by members of the public, the recollections of respondents as to where they have walked when crossing the golf course is confused and unclear as to the frequency or duration that the claimed route has been walked or even whether the evidence of use relates to the claimed route. The plans attached to the user evidence forms and the supplemental plans received following the Council's attempt to clarify the initial user evidence show that a multitude of routes had been walked and the frequency and duration of use of the claimed path remains unclear.
19. Although many respondents claim to have walked along that section of Goose Lane to the east of footpath 17, there is no consistency as to which route had been used with only a handful of users demonstrating that they had crossed the car park and along a field boundary to the junction of footpath 26.
20. The evidence of use of the claimed route during the 20-year period which ended in 2011 is insufficient to raise a presumption of dedication of the route as a public footpath. Even if the evidence had been sufficient to satisfy the requirements of section 31 (1) of the 1980 Act, the statutory deposit made by the landowner in 2004 provides sufficient evidence of his lack of intention to dedicate a public right of way over the claimed route. This is in addition to the evidence of challenges made by the greenkeeping staff which is corroborated by some of the user respondents.
21. One of the grounds of appeal was that the Council had failed to give consideration to an earlier period of use; the Appellant contended that the claimed route had been enjoyed by the public for a longer period than the 20-years which ended in 2011 with the majority of respondents claiming to have used the path for more than 31 years.
22. This does not alter the fact that the evidence of use is confused and unclear as to the route which the respondents have used. There is also evidence of challenges having been made to trespass over the land since at least 1989 and that the land was subject to open cast mining in the 1960s. There are therefore a number of possible dates from which an earlier 20-year period of use could be calculated, however, the user evidence adduced would remain confused, uncertain as to which route the evidence related to and insufficient to raise a presumption of dedication.
23. On the evidence before me, a claim made under s31 of the 1980 Act would fail as there is sufficient evidence that the landowner had no intention to dedicate a public footpath. Consequently the appeal cannot succeed against either Test A or Test B as set out in paragraph 5 above as it would not be possible for the Appellant to reasonably allege the existence of the claimed footpath.

Conclusion

24. Having regard to these and all other matters raised in the written representations I conclude that the Appeal should be dismissed.

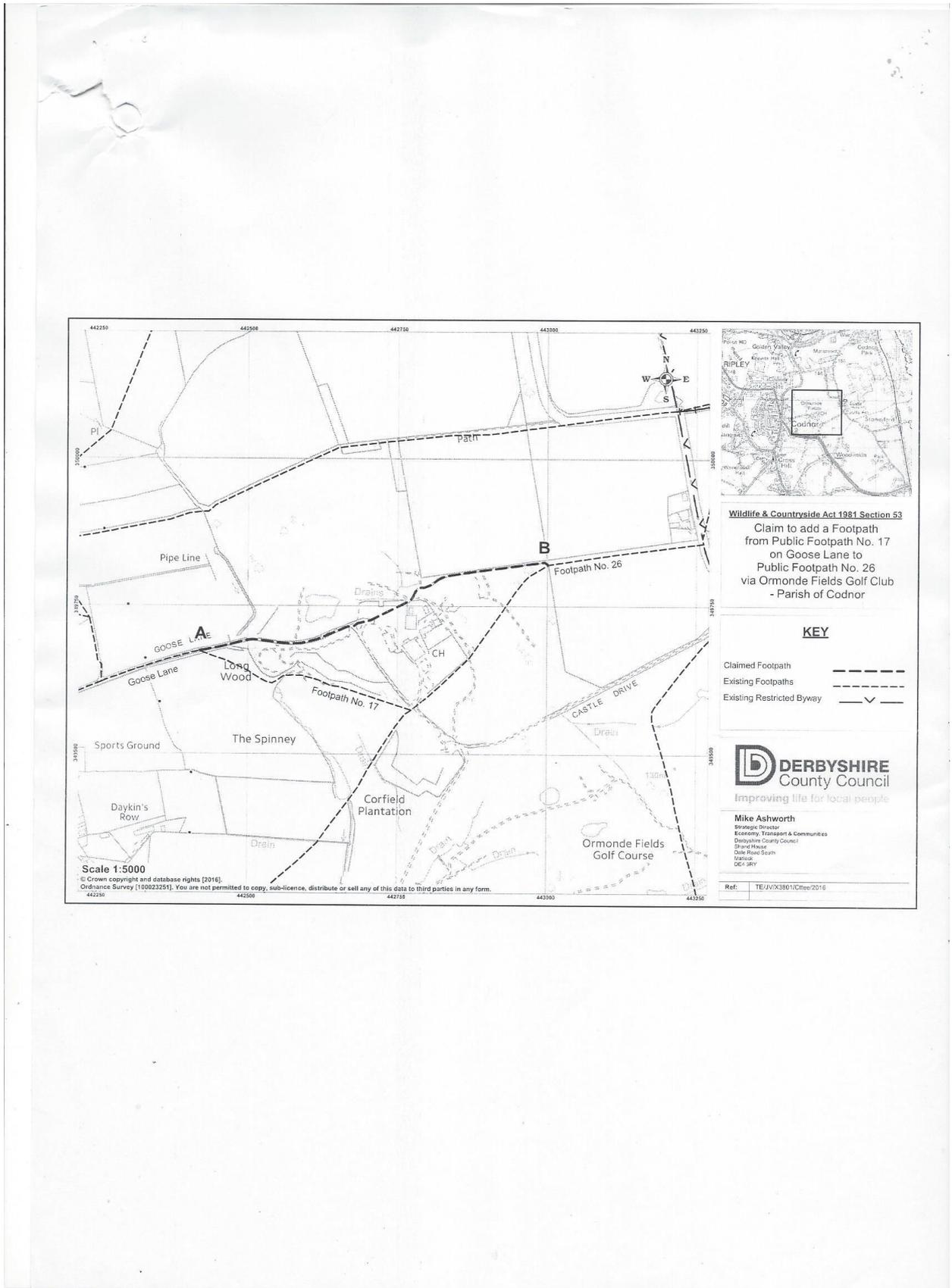
Formal Decision

25. The Appeal is dismissed.

Alan Beckett

Inspector

APPENDIX



Map not to original scale