Report to the Secretary of State for Environment, Food and Rural Affairs

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Date: 23 AUG

WILDLIFE AND COUNTRYSIDE ACT 1981

REPORT INTO AN APPEAL BY MRS M COMBER

AGAINST THE DECISION OF HAMPSHIRE COUNTY COUNCIL

NOT TO MAKE AN ORDER UNDER SECTION 53(2)

IN RESPECT OF

CLAIMED PUBLIC BRIDLEWAYS AT BROXHEAD COMMON, HEADLEY

File Reference: NATROW/Q1770/529A/05/64

Case Details

- This appeal is made by Mrs M. Comber under Schedule 14, Paragraph 4(1) of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of Hampshire County Council ("the Council") not to make a modification order under section 53(2) of that Act.
- The application, dated 8 January 1999 was refused by notice dated 1 November 2005.
- The Appellant claims that four routes running over Broxhead Common in the parish of Headley should be added to the definitive map and statement as public bridleways.

Recommendation: I recommend that the appeal be dismissed.

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on the above mentioned appeal made in accordance with Paragraph 4 of Schedule 14 to the 1981 Act.

2. All of the evidence in this case has been submitted in documentary form and includes witness statements, maps, photographs and letters. I have not visited the site but am satisfied that I can make a recommendation without the need to do so.

3. This report consists of a description of the routes, the material points made in the submissions, an assessment of the evidence against the relevant criteria and my conclusions and recommendation.

4. The evidence and submissions of the parties generally address the claimed routes as a whole and I shall adopt the same approach unless reference is made in the submissions or the documentation to a specific route. A plan produced by the Council showing the location of the claimed routes is attached to this report. For clarity, all of the points referred to in this report relate to those shown on the attached plan.

Description of the Routes

5. The claimed routes cross land forming part of Broxhead Common ("the common"). The routes in question commence from the junction with Bridleway 4 at point G and proceed to the junction with Bridleway 46 at point F and then on to point E. From point E, there are two spurs running firstly to the junction with the A325 Road at point C and the second one proceeds via point D through to the junction with Bridleway 54 at point A. An additional Spur runs between point D and the C102 Road at point B.

The Case for the Appellant

The material points are:

6. The application is based upon use by members of the public and Section 31 of the Highways Act 1980 ("the 1980 Act") is applicable. If Section 31 of the 1980 is not satisfied, consideration should be given to dedication at common law. The relevant period in relation to statutory dedication is calculated retrospectively from the date that use is first brought into question; therefore, there is no specific start date. The date that the claimed routes were first brought into question is 1999 when the application for a modification order

was submitted. It is not felt that the signs erected in 1993 were sufficiently clear in their wording or visibility to bring the claimed routes into question. The notices asking riders to keep to the bridleways were insufficient given that the routes of the actual bridleways were not well signed.

7. In relation to the claimed routes, the Council are not correct in concluding that there is insufficient evidence of use. In terms of the G-F-E route, the G-F section remains in regular use today and, whilst the F-E section is overgrown with heather, it could be used if the gorse bush at point F were removed. The E-C route remains useable but is overgrown near to point C. The E-D-A route is too overgrown for use by horse riders between points E and D; however, it could be used by pedestrians. The fact that an alternative route nearby was used between points E and D due to the growth in vegetation is not an interruption of use. An interruption means the actual and physical prevention of the public's use of a way such as a locked gate or the erection of a notice denying the existence of a right of way and not overgrown vegetation or fallen trees. A request was made to the Council in 1984 to clear the E-D section but no reply was received from the Council. Finally, it is possible to proceed between points B, D and A, and this route is regularly used.

8. Twelve user evidence forms have been submitted from members of the public, which were accompanied by signed maps showing the routes they used and these correspond approximately with the lines of the claimed routes. Horse riders do not tend to wander and in this locality there is very little available choice due to the narrow area and topography of the land.

9. Aside from the Appellant, none of the horse riders cited by the Council stated that they used the claimed routes. The letters from these people do not impact upon the evidence submitted from the twelve people who have completed a rights of way evidence form. The letter from the Appellant was actually referring to the lack of a public bridleway from the north side of the common in order to access the existing bridleways.

10. There is written evidence from a former landowner stating that for the forty year period the common was within the family's ownership it was believed that horse riders were entitled to use it for air and exercise. Another letter from the late Mr Ellis stated that twenty-three tracks could be counted on Broxhead Common in 1965 and all of these were used by horse riders. In addition, the C-E route is coloured brown on the tithe award plan and is also shown on a Greenwood map and the Ordnance Survey maps of 1868 and 1910.

11. A letter sent by the landowner to the Appellant in 1992 was not a clear public declaration of a lack of intention to dedicate. The case of *R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs 2005 ("Godmanchester")* outlined that whether a lack of intention to dedicate has been demonstrated is dependant upon the facts in each case. Even if the letter were viewed as constituting more than a minor act by the landowner, there is sufficient evidence of use prior to 1992 to find that the claimed routes were dedicated at common law.

12. Following agreement being reached for the enclosure of 80 acres of the common, a lease was completed and one of the conditions in the lease relates to the public having a right to *"air and exercise"* and this would include a right for horse riders unless there were specific instructions to the contrary. In support, it was found in the case of *R v Secretary of State for the Environment ex parte Billson 1999 ("Billson")* that the term *"air and exercise"* included horse riding. In addition, Section 15 (b) and (c) of the Countryside and Rights of

Way Act 2000 ("the 2000 Act") applies in relation to a right of access for horse riders in connection to routes across the common by virtue of the High Court ruling regarding the common and the subsequent lease of 1978.

The case for the Council

The material points are:

13. The report of 19 October 2005 to the Council's Regulatory Committee contains references to the available evidence and details the reasons why officers recommended that the application be refused.

14. There are two possible dates that the claimed routes were first brought into question. Firstly, there was the placing of signs to the north of Bridleway 46 in approximately 1993 by the manager of the site or, secondly, the application for a modification order that was submitted in 1999. In either case, there has not been continuous use of the same routes for a period of twenty years.

15. The Appellant acknowledges that use of the claimed routes to the north of Bridleway 46 was prevented by overgrown vegetation in the 1980's. There is evidence from horse riders and landowners that access was denied to Bridleway 46 from the north and west for a period of at least three years as a result of natural forces. Horse riding to a limited extent did commence again but it was not on the routes that were used prior to a hurricane in 1987. The Appellant confirms that this was the case by marking a route coloured yellow on the map sent in with her appeal, which is described as *"path used to circumnavigate E-D which had become overgrown with gorse"*. There is no sign of this path on the ground today. In relation to a route between points B-D-A, this is a very narrow path which implies that it is little used by horse riders. Further, this route has only appeared in recent years and differs from the route claimed.

16. In relation to the claimed route to the south of Bridleway 46, there is confusion regarding the route that is claimed. All of the plans attached to the rights of way evidence forms show the route used; however, this is a generalized line on a small scale map which is not helpful in determining the extent of the route used. On a map that accompanies the Appellant's written statement, the routes she used are represented by orange lines. In relation to the land between Bridleways 4 and 46, there are three routes shown and none of these correspond to the maps submitted with the user evidence forms.

17. The 1971 Ordnance Survey map does not show any paths or tracks to the south of Bridleway 46. Three aerial photographs of the area which were taken in 1971, 1984 and 1991 show that there were numerous tracks south of Bridleway 46 and that the location of these altered over a period of time. In addition, none of the worn tracks correspond with the G-F route. The aerial photographs suggest numerous routes were used over that part of the common and horse riders varied their route according to circumstances.

18. Overall, the claimed use by horse riders was to wander over the common rather than to proceed between highways. Whilst horse riders would have used routes between scrub and trees, there are numerous routes in the locality, some of which have altered over time according to vegetation growth and land management.

19. The Appellant has alleged that the public have acquired bridleway rights over the common through unimpeded use prior to 1965. This issue was dealt with by an Inspector in 1997

when considering a modification order to upgrade Footpath 54 to bridleway status and he found that meandering equestrian use of tracks across the common would not have created a bridleway over any particular route.

20. There is a lease between the landowner and the Council which provides for incidental use of the common by the public for air and exercise. The lease does not give horse riders a right of access over the common. There are other clauses in the lease which place a duty on the Council not to permit any activity which would damage the landowner's interest and this could be interpreted as including the establishment of additional public rights of way. Should the term *"air and exercise"* encompass use by horse riders, then this is evidence against dedication of the claimed routes as the *Billson* case found that public use was by way of permission and not as of right. Further, there is no evidence that the public have acquired a right of access by virtue of Section 15 of the 2000 Act as none of the relevant criteria apply in this case.

21. A letter of 6 October 1992 from the landowner provides specific evidence that he had no intention of dedicating bridleway rights across the common. The *Godmanchester c*ase held that a letter from a landowner denying the existence of a right of way did not have to be brought to the intention of users of the way in order to be effective in preventing presumed dedication from arising. The *Godmanchester* case is relevant to the circumstances in this case.

Conclusions

Introduction

22. Bearing in mind the foregoing submissions, I have come to the following conclusions, reference being given in square brackets to earlier paragraphs where appropriate. In considering the evidence and the submissions, I have also taken into account the relevant legislation and court judgements.

23. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made on the discovery of evidence which, when considered with all other relevant evidence available to the authority, shows that:

    "a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist".

24. It was made clear in the case of *R v Secretary of State for the Environment, ex parte Bagshaw and Norton 1994 ("Bagshaw and Norton")* that 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 it must be reasonable to allege that one does subsist.

25. The cases of *R v Secretary of State for Wales, ex parte Emery (1998*) and *Todd and Another v Secretary of State for Environment, Food and Rural Affairs 2004* reaffirmed the judgement in the *Bagshaw* and *Norton* case.

26. The user evidence should be considered against the requirements of Section 31 (1) of 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.

In addition, Section 31(2) specifies 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 such as is mentioned in subsection (3) below or otherwise.

27. If Section 31 of the 1980 Act is not satisfied, the possibility of dedication at common law should be considered. There is no period specified during which the public should have used a way in order to demonstrate dedication at common law. However, it requires consideration of three main issues: whether during the relevant period the owner of the land in question had the capacity to dedicate a public right of way, whether there was expressed or implied dedication by the owner and finally, whether there is evidence of acceptance of the dedication by the public.

Assessment of the evidence

28. The Council have supplied details of two events which could have brought the claimed routes into question [14]. In comparison, the Appellant believes that the claimed routes were first brought into question when the application for a modification order was submitted [6]. From the details provided, I consider it likely that the claimed routes were first brought into question in 1999 following the submission of the application for a modification order and the user evidence forms. Whilst the placing of the signs mentioned by the Council could have brought the way into question, in this case, none of the users appear to have been aware that their right to use the claimed routes were being brought into question by these signs.

29. In order to establish a public right of way under Section 31 of the 1980 Act, it first needs to be demonstrated that there has been actual use of the claimed way for a period of twenty years retrospectively from the date that the public's right to use the way was first brought into question. Having regard to my conclusion above [28], I consider that the relevant period in relation to all of the claimed routes would be between 1979 and 1999.

30. Twelve rights of way evidence forms have been submitted in support of use of the claimed routes. The use specified by these witnesses was solely of a recreational nature. The witnesses have all submitted a plan showing the routes they used; however, I find that the routes marked on the plans do not necessarily always correspond with the claimed routes. In most cases, the differences are of a minor nature and could be due to the inexperience of the witnesses in plotting the routes in question onto a plan.

31. The plans accompanying the evidence forms can be broken down as follows: 11 witnesses used a route encompassing points G-F-E, 12 witnesses used a route encompassing points E-C, 12 witnesses used a route encompassing points E-D-A and 7 witnesses used a route

encompassing points D-B. Whilst at face value the use in connection with all of the routes would appear to span the whole of the relevant period, no details were provided in relation to the use by the witnesses of the specific routes. Therefore, it is not possible to be certain about the period and frequency that each route was used by the witnesses.

32. I consider that the current availability of the claimed routes is immaterial to whether they were assessable between 1979 and 1999. The parties dispute whether the public have wandered across the common or proceeded along the specific claimed routes [8 and 18]. In terms of the statement made by an Inspector [19], this was in relation to another case and not based upon the evidence submitted in relation to this appeal. The 1984 and 1991 aerial photographs for the area do show a number of worn tracks across the common that could be indicative of use not being confined to the claimed routes. Whilst the existence of other routes in the vicinity of the claimed routes would not necessarily prevent them from being dedicated as public rights of way, it would need to be established that the public have consistently followed a defined line throughout the relevant period.

33. The witnesses generally state that the routes they used had not altered during the period of their use. However, there are references in the submissions to routes being inaccessible for fairly substantial periods of time due to natural forces and growth in vegetation [7, 15 and 18]. In addition, statements have been made to suggest that the vegetation growth has led to the actual lines of the claimed routes being unavailable during the relevant period. A statement made by the Appellant on 10 May 2005 states that she stopped using the claimed routes to the north of Bridleway 46 in the mid 1980s. The Appellant further confirms that she has continued to proceed between Bridleways 4 and 46 but she used several routes between these bridleways. One of the reasons given by the Appellant for the lack of use was the growth in vegetation. The 1984 and 1991 aerial photographs do not show the existence of worn lines along significant portions of any of the claimed routes.

34. Although the user evidence forms provide evidence of use throughout the relevant period, I consider that the evidence as a whole raises considerable doubts regarding whether the public have consistently used the claimed routes during the relevant period.

35. The *Godmanchester* judgment held that a lack of intention to dedicate would usually require an overt and contemporaneous act on the part of the owner of the land which sufficiently demonstrates the intention of the owner not to dedicate a right of way. In addition, a landowner's intention does not necessarily need to be brought to the attention of the members of the public likely to use a way. Although there is no need for a landowner to publicise his intention not to dedicate to users of a claimed way, a landowner would find it difficult to prove a lack of intention to dedicate in the absence of evidence of an overt and contemporaneous act.

36. There are some references in the evidence to signs asking for people to keep to the bridleways and also the presence of small signs with a red line through a horse shoe. In this case, the signs asking people to keep to the bridleways may not have been an effective indication of a lack of intention to dedicate. The Appellant has referred to the lack of signs generally in the area to denote the public bridleways [6] and it is quite likely that people may have believed that routes were designated bridleways when this was not the case. In terms of the *"horse shoe"* signs, the photographs and details supplied by the parties would suggest that they were limited in size and their locations.

37. The claimed routes cross land which has been leased to the Council since 1978 and this tenancy has been in place throughout the relevant period. The lease provides for the common to be used as a local nature reserve along with incidental use by the public for air and exercise. It is disputed by the parties whether the incidental use encompasses use by horse riders [12 and 20]. Further, the Council refer to a clause in the lease which places an obligation on the Council not to permit anything to be done in connection with the common which could constitute a nuisance, annoyance or damage to the land [20].

38. In my view, the reference in the lease to incidental use of the common (Clause 2 iii) does not appear to be limited only to pedestrians and it could equally relate to horse riders. Further, I can see nothing in the lease that prohibits use of the land by equestrians as is the case with use by vehicles (Clause 2 vi). In addition, I do not consider that horse riders using the land in question would necessarily constitute a nuisance, annoyance or damage to the landlord or his property (Clause 2 ix). However, the provision in the lease for incidental use of the land for the purposes of air and exercise, whether as a pedestrian or equestrian, would be a permissive right revocable on the expiry of the lease and as such I do not believe that it could lead to the acquisition of a public right of way over the land in question.

39. A letter was sent on behalf of the landowner on 6 October 1992 to the Appellant. One of the issues raised in the letter involved the Appellant using a route on the western side of the common as a bridleway; which the landowner considered to be illegal. The letter also referred to the possibility that an injunction would be sought to stop this behaviour should it happen again. A copy of this letter was sent to the relevant Parish Council's, the Council and the Ombudsman.

40. As stated above [35], a landowner does not necessarily have to demonstrate a lack of intention to dedicate to users of a claimed way. In this case, the landowner did make a statement in writing to the Appellant regarding equestrian use of route on the western side of the common. It is not clear whether the landowner was referring to all of the claimed routes; however, the claimed routes do appear to proceed wholly or mainly over the western part of the common.

41. The letter of October 1992 was sent to a user of the claimed routes and the interested local authorities during the relevant period. Therefore, I consider it to be an act that was both overt and contemporaneous in nature. In addition, I have seen no details to suggest that the landowner's objection to equestrian use of certain routes across the common changed between 1992 and the end of the relevant period.

42. Having regard to the doubts that I have expressed regarding use of the claimed routes during the relevant period, I consider it unlikely that the user evidence is sufficient to demonstrate use of any of the claimed routes during the relevant period. In particular, a lease has operated for the whole of the relevant period which provides for public access for air and exercise. There is no apparent limitation in terms of use by horse riders; however, I consider that the lease would constitute a permissive right of access in relation to use of the claimed routes. In addition, the landowner's letter of October 1992 indicated an unwillingness to dedicate a route or routes crossing the western side of the common. Therefore, I do not believe that any of the claimed routes have been dedicated in accordance with Section 31 of the 1980 Act.

43. In relation to the question of whether dedication of the claimed routes has occurred at common law, prior to the commencement of the lease in 1978, there is no evidence to

indicate that any of the routes have been expressly dedicated. Therefore, consideration should be given to whether or not it can be implied from the evidence that the claimed routes have been dedicated as public bridleways.

44. The Appellant has referred to the depiction of the A-C route on four Nineteenth Century maps [10]; however, copies of these have not been supplied. From the details provided, this documentation alone would not demonstrate that this route was considered to be a highway. If the Appellant's interpretation of these maps is correct, they could be used to support the other documentary or user evidence.

45. In relation to the letter sent by Mr Ellis on 8 November 1965 to the Council [10], he was writing on behalf of Headley Parish Council during the period that consideration was being given to the routes to be included on the original definitive map for the area. He refers to use of twenty-three tracks across the common by pedestrians and horse riders for a great number of years and recommended that the main tracks be added to the definitive map as bridleways. It is not clear whether any of the routes proposed for inclusion on the definitive map by the Parish Council were the claimed routes. Nor does the letter provide specific details regarding actual equestrian or pedestrian use of the claimed routes.

46. The reference to correspondence in relation to a former landowner [10] actually states that the writer's late husband's family owned the common between 1906 and 1960. Whilst this would imply some personal knowledge regarding the area, it was not necessarily conveying the views of the landowner. The extract further states that certain paths were used freely by horse riders. However, this extract was expressing support for the routes proposed for inclusion on the definitive map and not the routes that are the subject of this appeal.

47. A copy of a 1946 aerial photograph has been supplied but I find this to be inconclusive as to whether it shows any evidence of the physical existence of the claimed routes. A 1959 aerial photograph does show numerous worn tracks to the north and south of Bridleway 46; however, aside from possibly the B-D route, none of the worn tracks shown correspond with the claimed routes. The 1971 Ordnance Survey map only shows a track on the line of the B-D route and a path from point A through to a point between points D and E. The aerial photograph of the same year provides an indication of a worn route between points B and D and possibly over parts of the A-D-E route. There are some signs of worn tracks to the north and south of Bridleway 46 but none of these appear to correspond with the G-F-E route.

48. Eight of the user evidence forms provide evidence of use prior to 1978. This use mainly commenced from the mid 1960s; however, two of the witnesses state that they began using the claimed routes in 1940 and 1955 respectively. The witnesses do not provide any indication regarding the degree and frequency of their use of the specific claimed routes.

49. Overall, from looking at the documentary evidence, aerial photographs and user evidence forms, I do not consider that there is sufficient evidence from which it can be inferred that any of the specific claimed routes have been dedicated at common law.

Overall conclusion

50. Having regard to all of the evidence submitted by the parties, it follows in my view, that the appeal fails under Tests A and B referred to above [24], as I do not consider that, on the

balance of probabilities, the tests found in Section 31 of the 1980 Act have been met, or that dedication can be presumed to have occurred under common law.

Recommendation

51. I recommend that the appeal be dismissed.

Mark Yates

INSPECTOR