

Wildlife and Countryside Act 1981

Definitive Map and Statement held by the London Borough of Sutton

Report from the South London Legal Partnership to Sutton London Borough Council (“the Council”) on an application for a modification order under the provisions of the Wildlife and Countryside Act 1981 (“the 1981 Act”) with a Recommendation.

INTRODUCTION

1. This is an application made to the Council for an Order under section 53(2) of the 1981 Act to add a route from Benhilton Gardens to Oak Avenue Sutton to the Definitive Map and Statement held by the Council under Part 3 of the 1981 Act as a public footpath.
2. The application is made on the basis of the actual use of the route by the public over a period in excess of 20 years in an open and unforced manner but without the express permission of the owner. The application must be considered by the Council in accordance with section 53(3)(c)(1) of the 1981 Act, i.e. an order would be made on the basis of the discovery by the Council of evidence which (when considered with all other relevant evidence available to it) shows that a right of way, being a public path that is not shown on the Definitive Map and Statement, subsists or is reasonably alleged to subsist.
3. The criterion is whether the evidence discovered by the Council, when considered with any other evidence available to it, shows, on a balance of probabilities, that a public right of way along the route the subject of the application subsists and should therefore be added to the Definitive Map and Statement. From the evidence submitted to the Council the basis of the application appears to be section 31(1) of the Highways Act 1980 (“the 1981 Act”) rather than dedication at common law. The evidence submitted in support of the application is attached hereto as Annex A and the representations in opposition to it as Annex B.
4. The statutory approach under the 1990 Act requires that consideration is first given to whether or not there has been actual use of the claimed route by the public on foot as if of right and without interruption over the

period of 20 years immediately prior to its status being brought into question. This raises a presumption that the way has been dedicated as a public footpath. If so consideration must then be given to whether during this period the landowner demonstrated a lack of intention to dedicate the route as a public right of way sufficient to rebut the presumption.

5. If the common law should be relevant the Council would need to be satisfied that during any relevant period the owners of the land in question had the capacity to dedicate a public right of way, that there was express or implied dedication by the owners, and also that there is evidence of acceptance of the claimed right of way by the public. I do not consider that this is so in the light of the evidence but I have mentioned it in case the Council's decision is the subject of an appeal and the issue is raised in the course of such appeal.

EVIDENCE

6. In support of the application 12 forms in standard format for applications of this nature have been submitted, 10 from residents of Benhilton Gardens and two from residents of Hunting Gate Mews, which is a cul-de-sac leading from Benhilton Gardens. Each of these forms evidence the actual use of the path for varying periods but all in excess of 20 years and for as long as 40 years in one case.
7. The route passes over a footpath of about 2 metres width at its northern end and thereafter follows Dovercourt Road as far as Oak Avenue. Dovercourt Road is an unmade road giving access to houses on either side.
8. The residents of Dovercourt Lane have objected to the addition of the route to the Definitive Map as set out in Appendix B but have provided no evidence to counter that in support of the application, which testifies to the actual use of the way in excess of 20 years. There is no evidence that any steps have been taken, for example the display of a notice, indicating to users that the road is private and that there is no right of way over it.

LEGAL BACKGROUND

9. Under section 31(1) of the 1980 Act a way is presumed to be dedicated as a highway if it has been actually enjoyed by the public as of right, and without interruption, for 20 years and is not of such a character that public use cannot give rise to a common law presumption of dedication.
10. The section 31(1) presumption applies unless there is sufficient evidence that there was no intention during the 20 year period to dedicate it. The 20 year period is calculated from the date on which the existence of the highway is brought into question - section 31(2), in this case when part of the route was blocked as a result of building works at 5 Dovercourt Lane.
11. Use "as of right" means use without force, secrecy or permission (*R v Oxfordshire County Council, ex parte Sunningwell* [1999] UKHL 28) a decision of the House of Lords concerning registration of village greens but where the same legal principles apply. In *Sunningwell* it was confirmed that a landowner's mere acquiescence in, or toleration of, the use of the land, did not constitute permission. This means that a use of a way "as of right" can still exist even if the landowner knows about the use and does nothing about it. In *Powell and another v Secretary of State for Environment, Food and Rural Affairs and another* [2014] EWHC 4009 (*Admin*) the High Court held that if the actual use is of sufficient quantity and suitable quality then the tripartite test should be applied.
12. For the purposes of section 31 of the 1980 Act interruption of the public's enjoyment of the way must amount to interference with the enjoyment of the right of passage. Temporary interruptions and blockages of a route, or a slight variation of the route, will not necessarily amount to an "interruption" that is sufficient to rebut the presumption that a way has been dedicated as a highway (*Fernlee Estates Ltd v City and County of Swansea and the National Assembly for Wales* [2001] 24 EG 161).
13. A landowner's lack of intention to dedicate must be communicated to the users of the way. In *Re (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, the House of Lords held that (1) to rebut the statutory presumption of deemed dedication under section 31(1) of the HA 1980, the landowner needs to communicate its lack of intention to dedicate to the public through overt acts, and (2) the landowner's lack of intention to dedicate does not have to be continuously manifested during the whole

of the 20 year period. It is sufficient if there is no intention at some point during that period.

14. An objective test is used to establish whether there was no intention by the landowner during the 20 year period to dedicate land as a highway. The test is whether a reasonable user of the path would have understood that the landowner intended to disabuse the user of the notion that the path was a public footpath (*Godmanchester*).

ANALYSIS

15. In order to succeed under section 31(1) of the 1980 Act it is necessary for the public to have had enjoyment of the way in question for a full period of 20 years without interruption. In this case there is unchallenged evidence of the use of the route by the public for in excess of 20 years.
16. There is also a common law approach to dedication when it is necessary to see if the actions of the landowner of the route in question indicate an intention to dedicate. Common law dedication would normally be inferred from the actions of a landowner coupled with use by the public, where this has openly occurred for no fixed period of time but to an extent that it must have come to the attention of the owner who took no steps to stop it. In this case there is no evidence as to who owns Dovercourt Lane or the path at the northern end. The owners of properties abutting Dovercourt Lane will have express or implied rights of access but this does not connote ownership of the soil of the lane. It is therefore not considered that common law dedication is applicable.

RECOMMENDATION

17. For the reasons set out above I recommend that the route described in this application is added to the Definitive Map and Statement.

Dated this 18th October 2021

George Chesman

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Communities & Environment Team

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