

Claimed footpath from The Freehold to Carpenters Lane, Hadlow

A report by the Divisional Director of Environment and Waste to the Kent County Council Regulation Committee on 29 November 2007

Recommendation: I recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by adding a Public Footpath running between The Freehold and Carpenters Lane at Hadlow.

Local Members: Mr. R. Long

Unrestricted item

Introduction

1. The County Council has received an application to modify the legal record of Public Rights of Way, known as the 'Definitive Map and Statement', by adding a route at footpath status running between The Freehold and Carpenters Lane at Hadlow.

Procedure

2. The County Council is the 'Surveying Authority' for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 1st April 1987. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review. The Countryside Access Objectives and Policy document (dated July 2005) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date.
3. Applications to modify the Definitive Map of Public Rights of Way are normally made under section 53(5) of the Wildlife and Countryside Act 1981, which enables any person to apply to the surveying authority for an order to modify the Definitive Map and Statement by adding, removing, upgrading or downgrading a route.
4. The procedure for dealing with such applications is set out in Schedule 14 of the 1981 Act: it states that the County Council must investigate the matters stated in the application and, after consulting with every local authority whose area includes the land to which the application relates, decide whether or not to make the order to which the application relates. There is, however, nothing set out in law as to the exact specification of the investigation process and this may vary depending upon the circumstances of each individual case.

The application

5. The application has been made by Mrs. M. Davidson on behalf of the local Residents Association, known as the 'Freeholders Association' ("the applicant"). The applicant has applied for an Order under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area by adding at Public Footpath status a route running between The Freehold and Carpenters Lane at Hadlow.

6. In support of the application, the applicant has provided six user evidence forms completed by local residents as well as a further 16 letters of support. The application also includes various photographs showing the claimed route and what is said to be the remains of an old stile on the claimed route.

Description of route

7. The route subject to the application (“the claimed route”) runs in a generally south-westerly direction from its junction with Carpenters Lane for approximately 250 metres to its junction with The Freehold (opposite property number 18). The path crosses an area of land which forms a central island and is bounded on three sides by a residential street also known as ‘The Freehold’. The fourth side is bounded by Carpenters Lane. This ‘island’ consists of several discrete areas, including a (metalled) pub car park and allotments (owned by the Parish Council). The remainder of the land is either cultivated, covered in vegetation or left fallow.

MAPPING EVIDENCE

In order to ascertain whether there is any documentary evidence to support the application, I have, as part of the investigation process, interrogated the following historical maps:

First Edition Ordnance Survey 1:2500 Map and Book of Reference (circa 1860)

8. The First Edition 25” Ordnance Survey Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights, but do provide useful information as to the existence of the routes on the ground at that time.
9. The First Edition OS Map for Hadlow (dated October 1868) shows the The Freehold as a rural hamlet away from the main village of Hadlow. It is labelled ‘Fairfield’ and shows the land at the centre of The Freehold as being undeveloped (no footpath is depicted) and numbered 243, which appears in the Book of Reference as ‘Houses, yard, gardens, etc. (4.028)’.

Finance Act 1910 and Valuer’s Field Book

10. The Finance Act 1910 Maps and Valuer’s Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer’s Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for Public Rights of Way admitted to exist at the time by the landowner.
11. In this case, the Finance Act map also shows The Freehold marked as ‘Fairfield’. The land at the centre of the Freehold is shown colourwashed red and numbered 268 but no path is shown.

12. In the Valuer's Field Book, the land is described as 'Hadlow Freehold called Haugh Field... land let in small plots to tenants as gardens to their houses'. There is no deduction for Public Rights of Way.

Parish Maps (1950) and Draft Maps (1952)

13. In consequence of the National Parks and Access to the Countryside Act 1949, which required County Councils to prepare a Definitive Map of Public Rights of Way, Parish Councils submitted maps and statements showing the rights of way within their parish. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Parish Map.

14. The Parish Map of Hadlow (dated 1950) does not record a Public Right of Way over the claimed route, nor does the Draft Map of Hadlow (relevant date 1st December 1952).

Definitive Map (Relevant date 1st December 1952)

15. The National Parks and Access to the Countryside Act (1949) required County Councils to survey all land over which a Public Right of Way was alleged to subsist and prepare a map showing these routes. The first Definitive Map and Statement of Public Rights of Way for the County of Kent was published with a relevant date of 1st December 1952.

16. The route does not appear on the original Definitive Map for the County of Kent and nor is it shown on any subsequent editions.

DOCUMENTARY EVIDENCE

In addition to the historical mapping consulted above, I have also interrogated the following documents:

Inspector's report regarding the Village Green application

17. The Wildlife and Countryside Act 1981 requires that when investigating such applications, the County Council must consider 'all other relevant evidence available'. In this respect, I have considered the evidence which was put forward in the recent non-statutory Public Inquiry into the application to register the land as a new Village Green. Although this was an application concerning another area of legislation (the Commons Registration Act 1965), relevant evidence was heard and presented during the course of the Inquiry in respect of the claimed footpath. Since much of this evidence was subject to cross examination or provided in the form of Statutory Declarations, I am able to attach a good deal of weight to this and have done so. In particular, I have had regard to the findings in the Inspector's report at paragraphs 243-250 under the heading 'pathways' (attached at Appendix C).

18. The evidence presented at the Public Inquiry in relation to the claimed footpath suggested that it was part of a network of pathways on the site laid out between allotment plots, presumably to provide access and facilitate movement around the site. The Inspector accepted that such a pathway existed was not in dispute and

that there had been some use of the claimed route, predominantly by residents for whom it would have been convenient as a short cut (i.e. those who lived immediately opposite the route) and those holding allotments on the land.

19. What was not so evident (and indeed there was much debate at the Inquiry itself) was the extent of the actual use of the pathway and, in particular, the date at which a gap in the hedge (providing access to the path at the Carpenter's lane end) had been blocked up. The landowner gave evidence to the effect that the land was cleared and the hedgerow trimmed in March 2004, after which time measurements were taken on the land to assist with the ordering of fencing. This fencing was erected (thereby blocking off the path) in May 2004, as well as five notices indicating that the land was 'private property'; these quickly went missing and were replaced on a number of occasions during the course of 2004 and 2005.
20. However, evidence was also given that use of the pathway in earnest had ceased prior to the erection of the fencing in 2004 as there had also been an earlier challenge to use by way of the planting of a hawthorn hedge in the gap in the early 1990s by the landowner's father (who owned the land at that time). The Inspector found from the evidence available that the gap must have been blocked off for some considerable time before 2004 and concluded that the hawthorn hedge must have been planted in 1993/1994.

Photographs

21. A number of photographs were presented in evidence at the Public Inquiry and these are helpful in showing the route over a period of time. It is evident from these photographs that the character of the land at the centre of the Freehold has varied considerably over the last two decades. Copies of the relevant photos are attached as Appendix D and can be summarised as follows:
- *Photograph 1* is an aerial photograph from KCC's own records (dated 1990) and clearly shows the land subject to intensive cultivation. It is possible to make out a gap at the Carpenter's Road end of the path but there is no visible trodden trackway along the claimed route.
 - *Photograph 2* shows Mrs. Rutherford with her son standing on the claimed route. This image is undated but it is evident due to the size of the trees in the far background of the image (beyond the houses) that it was taken a perhaps few years prior to photograph 3 (i.e. the late 1980s). However, crucially, the image shows how overgrown the claimed route was as it passed over the allotments.
 - *Photograph 3* shows Mr. Rutherford senior standing on the claimed route. At the Inquiry it was suggested that photograph would have been taken in the early 1990s but prior to 1994 (when the cat in the photograph died). This shows a clearly visible path along the alignment of the claimed route.
 - *Photograph 4* is an aerial image showing property numbers 12 to 19 The Freehold and was taken in about 1997. By this stage, Mr. Rutherford's part of the land was no longer cultivated, having been cleared and become grassed over, and the claimed path had become merged into the adjoining land.
 - *Photographs 5 and 6* were taken by Mr. Rutherford in November 2003 (prior to the fencing off of the land) in relation to a proposed planning application. Photograph 5 shows Mr. Rutherford's land and once again there is no evidence of a worn track. Photograph 6 shows that there does not appear to be any gap in the hedge leading onto Carpenter's Lane.

CONSULTATIONS

Tonbridge and Malling Borough Council

22. Tonbridge and Malling Borough Council has been consulted but no response has been received.

Hadlow Parish Council

23. Hadlow Parish Council was consulted but no response was received.

County Councillor

24. Mr. R. Long was consulted and supports the proposal.

Borough Councillors

25. Cllrs. Anderson and Sergison were consulted. No response has been received.

User Groups

26. The local Ramblers' Association Representative, Mr. D. Wetton, was consulted and supports the application on the grounds that although the route is not likely to be used organised rambles, it would be beneficial to have legitimate public access to the heart of the Freehold to gain access to festive events organised by the local community. Mr. Wetton has local knowledge of the area, having lived in the village for over 30 years, and is aware that many of the residents of The Freehold use the network of paths on the central area of land either to access their allotments or to walk into the village centre.

USER EVIDENCE

27. In support of the application, six user evidence forms were submitted, along with a number of letters of support from local residents. These are summarised at Appendix E. The earliest evidence of use is in 1948, with use apparently continuing until 2004 when the landowner erected fencing around the section of the land in his ownership.

LANDOWNER

28. The majority of the land over which the path runs is currently owned by Mr. J. Rutherford who acquired the land in 2002 from his father, Mr. R. Rutherford. Mr. Rutherford senior purchased the land in 1983 from Mr. H. Neal, who had owned it since 1976. There is no information regarding ownership prior to 1976. A plan is attached at Appendix F showing the extent of Mr. Rutherford's land ownership.

29. Mr. J. Rutherford has objected to the application on the following grounds:

- That the path evolved through the private usage of a small number of people who lived in the Freehold and used the route to gain access to their allotment plots;
- That the entrance to the path was blocked up in the early 1990s by the planting of an impenetrable hawthorn hedge;

- That the cultivation of vegetables, gooseberry bushes and marrows would (at times) have been planted over the line of the path, thus forming a natural barrier; and
- That even if the path had been used as suggested by the applicants, such use would have been at best sporadic and isolated.

30. As the path exits onto The Freehold at its southern end, it traverses what is known locally as the 'ransom strip'. This is a strip of land of approximately two metres in width which separates the land at the centre of the freehold from the road itself. The origins of this are unknown and it has not been possible to trace the owner of this so called ransom strip. This has no direct bearing on the application, save to mention that, when the application was made, the applicant correctly sought the County Council's permission to post notices to the unknown landowner (as required by schedule 14 paragraph 2(2) of the Wildlife and Countryside Act 1981).

LEGAL TESTS

31. Section 53 of the Wildlife and Countryside Act 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates, it shall, by Order, make such modifications to the Map and Statement as appear requisite.

32. Section 31 of the Highways Act 1980 states that 'where a way over any 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 been actually enjoyed by the public as of right and without interruption for a full period of twenty 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'. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

33. Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. In **Mann v. Brodie (1885)**, Lord Blackburn considered that where the public had used a route "*for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of their belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was*", i.e. the dedication of a way as a Public Right of Way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

Analysis

34. As there is no mapping or documentary evidence in support of the claim, the application rests solely on user evidence. Hence, in determining whether a right of way is reasonably alleged to subsist, it is necessary to have regard to the provisions contained within section 31 of the Highways Act 1980 (outlined above).

35. The first step is to identify the date upon which the right of the public to use the route was first brought into question. In this case, the landowner fenced the section of land in his ownership (including the claimed footpath) in 2004 and since this time it has not been possible to walk the claimed route in its entirety without having to climb over the fencing. At this time, notices were also erected along the fence line indicating that the land was 'private property'.
36. Whilst this action clearly brought the right of the public to use the route into question (and indeed was a clear indication that the landowner, at that time, had no intention to dedicate the route to the public) it was also suggested at the Public Inquiry that the right to use the route was first challenged in 1993/94 when the gap in the hedgerow at the Carpenter's Lane end of the claimed path was blocked due to the planting of a hawthorn hedge by the then landowner, thereby preventing public access. This is documented in further detail at paragraphs 245/246 of the Inspectors report (at Appendix C).
37. As such, if I were to take 2004 as the date upon which the right of the public to use the route was first brought into question, then there would not be a clear twenty year period of unhindered usage which could give rise to presumed dedication under section 31 of the Highways Act 1981. I have therefore taken 1993 as the date upon which the right of the public to use the route was first brought into question ('the date of challenge') and have considered very carefully the period 1973 to 1993 ('the material period') in my investigation.
38. At first glance, the user evidence appears to suggest that the claimed route has been in use for a number of years (at Appendix E). However, closer inspection of the evidence reveals that there are a number of potential problems. For example, of the six users who submitted user evidence forms, only four have used the route during the material period (two of whom were members of the same family) and five out of the six witnesses either themselves rented allotments on the land or had family members who did so. A number of letters of support have been received from local residents claiming to have used the route but many of these letters lack the specific detail required to build up a clear image of the use of the route.
39. There is also a serious issue regarding the accuracy of some of the user evidence and its applicability to the actual route in question. For example, one of those residents writing in support of the application stated that he had always used the path without hesitation since the mid-1980s. At the Public Inquiry, the same witness indicated that used the route two to three times per month to go to the corner shop [which closed in the early 1990s] and described the route he took as running along the south-western edge of the car park, then diagonally across to a gap in the hedge. This clearly refers to a different route.
40. The shortfalls in the quality and detail of the user evidence are, however, irrelevant given that there is a much wider issue of concern regarding the type of use of the claimed path. As mentioned above, many of those claiming to have used the route also held allotments on the land (in some cases immediately adjacent to the claimed path) and as such these people would, by necessity, have had a right of access. This presents significant difficulties in determining whether their use was attributable to a private right of access to the allotments or to a public right of passage between two highways. More importantly, it presents problems in terms of

assessing whether the use of the path would have appeared to the landowner as being that of a member of the public asserting a public right of passage.

41. There exist strong judicial precedents in this respect. In **Hollins v. Verney (1884)**, it was held that no actual user can be sufficient to satisfy the statute unless the use is sufficient enough to carry to the mind of a reasonable person (e.g. landowner) that a continuous right of enjoyment is being asserted and ought to be resisted. This sentiment was echoed by Lord Kinnear in **Folkestone Corporation v Brockman (1914)** who considered that “...while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee”. Finally (and more recently), in a case known as **Godmanchester (2007)**, Lord Hope stated that “I do not agree that use of the way by a handful of local residents is sufficient to amount to the assertion of a public right”.
42. For presumed dedication to occur, therefore, it should be obvious to the landowner that the route is being used by the public at large. It is not sufficient that the route was open to a particular class of person [e.g. to the residents of a particular street, to their visitors or to allotment holders]; it must be shown that the route was being used by the public at large or, at the very least, by a representative sample of the wider community. Indeed, as was held in the case of **Poole v Huskinson (1843)**, ‘there may be a dedication to the public for a limited purpose, but there cannot be a dedication to a limited part of the public’.
43. I accept that in many cases, by far the predominant use of a route is likely to be by the residents of the local community and indeed this has also been acknowledged in case law: In **R. v Residents of Southampton (1887)** it was held that ‘user by the public must not be taken in its widest sense... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge’. However, in my view, the claimed path subject to this application only serves a limited purpose for a very limited number of households and although the claimed route would have provided a convenient short cut for those living immediately opposite (i.e. nos. 16 to 19 The Freehold), the majority of the use during the material period would have been by those seeking to gain access to allotment on the land and not by the public at large. Furthermore, in terms of frequency of use, only one of the witnesses (who also had an allotment adjacent to the path) stated that they had used the claimed route on a weekly basis, with the others stating ‘occasional use’: in my view, this would certainly not have been sufficient to bring to the attention to the landowner the fact that the path was in regular usage by members of the public.
44. The issue of the use of the land by the local residents was considered in the Inspector’s report concerning the application for Village Green registration. For land to be registered as a Village Green, it must be shown that use of the land was by the residents of a locality, or by the residents of a neighbourhood within a locality. The Inspector concluded that the vast majority of the land at the centre of the Freehold was from those residents of the Freehold itself and the only evidence of use from people living outside of The Freehold was from those visiting the Freehold by specific invitation and not spontaneously frequenting the land as a place to indulge in lawful sports and pastimes. She concluded that one street (i.e. The Freehold) was not sufficient to constitute the necessary ‘locality’ required to satisfy

the definition of a new Village Green. If the use of the land by the local residents is not considered sufficient enough to constitute use by residents of a 'locality', it is very difficult to reach a conclusion that use of the claimed path by the same residents can constitute use by members of the public.

Conclusion

45. As stated above, section 53 of the Wildlife and Countryside Act 1981, provides that the Highway Authority may make an Order to modify the Definitive Map and Statement if it is shown that the right of the public to use a route (which is not already recorded) is 'reasonably alleged to subsist'.

46. Although the claimed path does link two highways (The Freehold and Carpenters Lane), in practice, the claimed route is a cul-de-sac leading only to The Freehold. Such use of the path as exists is therefore considered to be private in connection with access to the allotments or nos. 16 to 19 the Freehold, rather than by the public at large exercising a *public* right of way. Therefore, I have not been satisfied from the evidence presented by the applicant and that adduced from my own subsequent research, that the legal tests set out in section 31 of the Highways Act 1980 have been met or that a Public Right of Way is reasonably alleged to subsist along the claimed route. Nor have I been able to find any evidence during my investigations of dedication at Common Law.

RECOMMENDATION

47. I therefore recommend that the County Council informs the applicant that it is not prepared to make an Order to modify the Definitive Map and Statement by showing at footpath status a route running between Carpenters Lane and The Freehold at Hadlow.

Accountable Officer: Linda Davies - 01622 221500 - linda.davies@kent.gov.uk

Background documents: The main file is available for inspection at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact Miss Melanie McNeir on 01622 221628.

Background documents

APPENDIX A – Plan showing the claimed route

APPENDIX B – Photographs showing the claimed route (dated November 2007)

APPENDIX C – Extract from Inspector's report regarding Village Green application

APPENDIX D – Old photographs taken between 1990 and 2003

APPENDIX E – Summary of user evidence in support of the application