



Appeal Decision

by **Barney Grimshaw BA DPA MRTPI (Rtd)**

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

Decision date: 31 July 2017

Appeal Ref: FPS/Q1445/14A/2

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Brighton and Hove City Council not to make an Order under section 53(2) of that Act.
- The Application dated 11 March 2014 was refused by Brighton and Hove City Council on 14 March 2017.
- The Appellant claims that a route running along the northern and eastern boundaries of land known as 'The Paddock', Marine Drive, Brighton should be added to the definitive map as a footpath.

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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map submitted with the application showing the claimed route for reference purposes.

Main issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered 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. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible evidence that a right of way cannot be

reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

5. Some of the evidence in this case relates to usage of the claimed route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states 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 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
6. Common law also requires me to consider whether the use of the route and the actions of the landowner have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.

Reasons

Documentary Evidence

7. The applicants refer to a drawing titled, "*BOROUGH OF BRIGHTON, LAND AT THE CLIFF MARINE DRIVE BRIGHTON*", prepared by the Borough Estates Surveyor and dated 1989. This shows the land known as 'The Paddock' coloured pink and a strip of land on the line of the claimed footpath coloured green and annotated '6'0"' in two places. The plan has no key but the applicants suggest that the green coloured land represents the claimed footpath. On behalf of the council it is stated that the strip of land was coloured green by the applicants and that it is not known why the drawing was prepared.
8. An Ordnance Survey (OS) map dated 1980 shows a strip of land bounded by solid lines running along the eastern side of The Paddock but stopping short of and not linking to Marine Drive. It also runs roughly one third of the way along the northern boundary of The Paddock westwards from the north-east corner. Similar information is shown on a Land Registry plan relating to The Paddock (drawn on an OS base) and on a plan prepared in connection with an application for residential development of The Paddock in 2006. This latter plan annotates the strip as '*Existing footpath*' and proposes that it should be surfaced with concrete block pavers.
9. Although these plans appear to show a route of some sort it does not link with any other route at either end. It is accordingly difficult to conclude that what they show might be a public right of way.
10. Copies I have seen of aerial photos said to be taken in 1944, 1946 and 1950 are by no means clear and although they do not show the claimed path they could not be relied upon to conclude that it did not exist. Photos taken in 2000 and 2007 are clearer although it is still not possible to discern whether or not the path was present when they were taken.
11. A plan said to have been used in the survey carried out in connection with the Finance Act 1910 does not show the claimed path but appears to show a footpath running diagonally across The Paddock. I have seen no other information from the survey to indicate whether or not any deduction of value

in respect of rights of way was applied. A similar diagonal route also appears to be visible on the 2000 aerial photo.

12. A current OS map shows a footpath following a similar route to the claimed path but this does not indicate the existence of public rights over the route.

Conclusions regarding the Documentary Evidence

13. In my view, the documentary evidence that is available does not indicate whether a public footpath subsists over the claimed route although some of it suggests that all or part of the route may have existed on the ground for some time.

Statutory Dedication

14. In 2012, 'Private Property' signs were erected in The Paddock and these appear to have brought public use of the claimed path into question and led to the submission of the application for it to be added to the definitive map. Prior to that, in 2010/11, the route had been obstructed for a period of around 18 months as a result of major engineering works being carried out by Southern Water.
15. Eleven User Evidence Forms (UEFs) have been submitted in support of the claim. These describe use of the route from 1955 until 2014. Nine people claimed to have used the route throughout the 20 year period ending in 2012 and two for part of that period. If the period of 20 years ending in 2010 when the engineering works obstructed the route were to be considered this would make no difference to the number of users.
16. The frequency of use claimed by five people was weekly or more often. One person claimed to have used it 6 to 12 times per year but others either did not state a frequency or described their use as 'often', 'frequently' or 'various'. All users stated that they had not been obstructed or challenged in their use before the Southern Water engineering works commenced.
17. On behalf of the council it is pointed out that all the UEFs were completed by people who live in the immediate vicinity of The Paddock. In my view this does not necessarily preclude their use from being regarded as use by 'the public' as required by the 1980 Act. Some paths by their nature and location are only likely to be used by people from a limited local area but this does not prevent them becoming public rights of way.
18. Statements made by Stephen White, who has been employed on the maintenance of paths in the area since the late 1990s, and Jonathan Jose, a valuer employed by the council since 2006, suggest that the claimed path was overgrown and impassable before 2013. The path then began to be mowed by council staff at the request of local residents 'as a favour'. Prior to that only the recorded public footpath, FPB89, on the western side of The Paddock had been maintained.
19. Applicants point out that the claimed route is linked to Marine Drive by way of steps at the southern end of the path which have clearly been present for a long time. They argue that construction of the steps would have been pointless other than to act as part of the claimed path. On behalf of the council it is suggested that the steps might simply have been constructed to facilitate access to The Paddock.

Conclusions regarding statutory dedication

20. Evidence of use of the claimed path is somewhat limited and not entirely consistent with other evidence. Nevertheless, on the basis of all of the information available to me it is my view that on the balance of probabilities there is no incontrovertible evidence that a public footpath cannot be reasonably alleged to subsist over the claimed route.

Common Law

21. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
22. In this case, there is some evidence of public use of the claimed route over a longer period than 20 years, although the evidence of use before the 1980s is very limited. However, in view of my conclusions regarding the statutory dedication of the route, it is not necessary to pursue the possible inference of its dedication at common law any further at this stage.

Conclusion

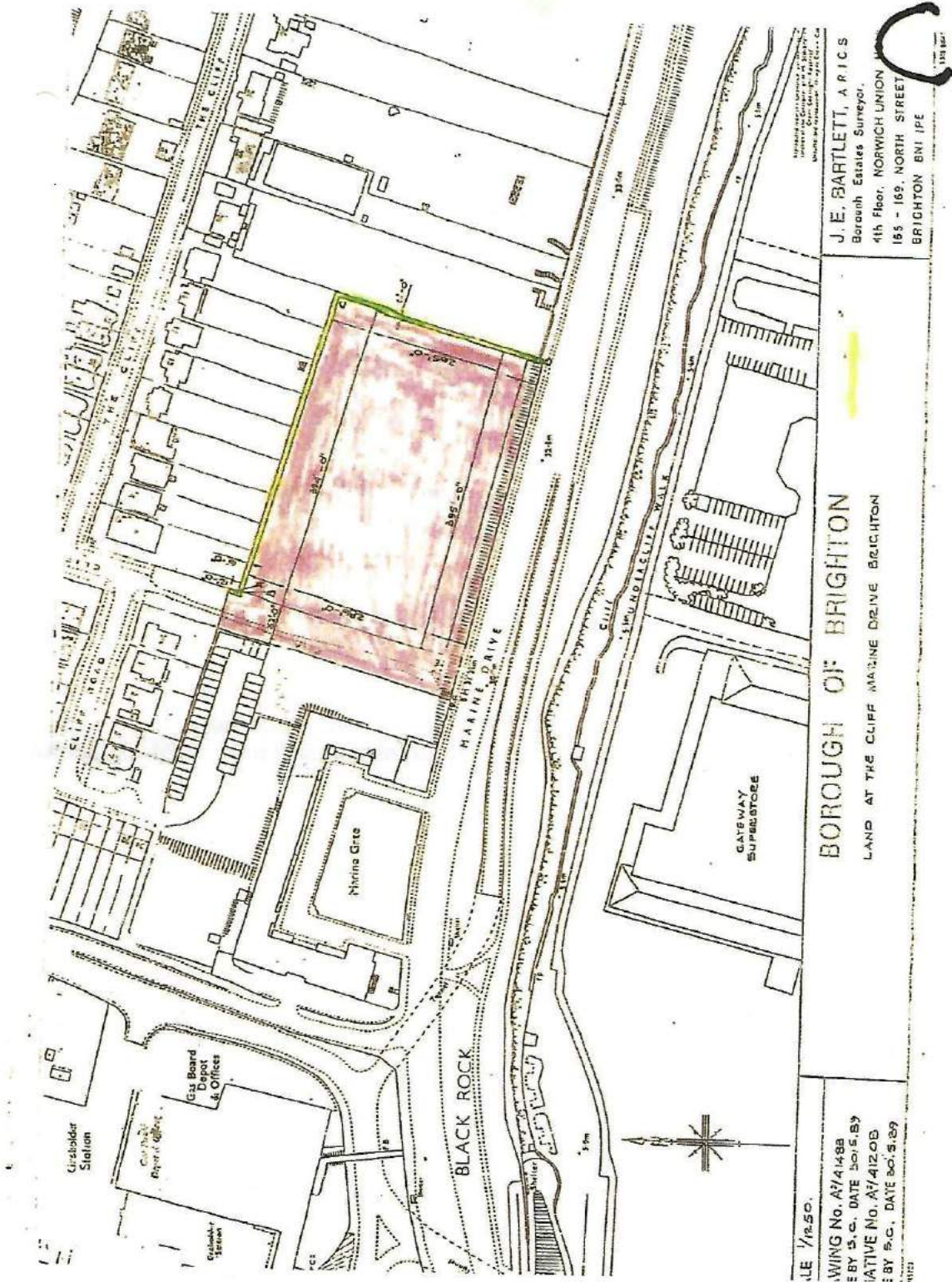
23. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities it is reasonable to allege that the claimed route is a public footpath. The appeal should therefore be allowed.

Formal Decision

24. The appeal is allowed and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act
25. Brighton and Hove City Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement to add a public footpath, as proposed in the application dated 11 March 2014. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Barney Grimshaw

Inspector



J. E. BARTLETT, A R I C S
 Borough Estates Surveyors,
 4th Floor, NORWICH UNION
 185 - 189, NORTH STREET
 BRIGHTON BN1 1PE

BOROUGH OF BRIGHTON
 LAND AT THE CLIFF MARINE DRIVE BRIGHTON

SCALE 1/2500
 DRAWING No. A7/4/1488
 MADE BY S.C., DATE 30.5.89
 REVISION No. A7/4/208
 MADE BY S.C., DATE 30.5.89

Map not to original scale