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| **Appeal Decision** |
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| **by J Burston BSc MA MRTPI AIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 23 June 2023** |

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| **Appeal Ref: ROW/3305237** |
| * 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 Devon County Council (‘the Council’) not to make an Order under section 53 (2) of that Act. * The application dated 24 June 2020 was refused by the Council on 30 June 2022. |
| * The Appellant claims that the definitive map and statement of public rights of way should be modified by adding the footpath as shown on the plan appended to this decision.   **Summary of Decision: The Appeal is allowed.** |
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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. The appellant, requests that the Secretary of State directs Devon County Council (the Council) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a public footpath.
3. The application was considered by the Council in its Rights of Way Committee Report ref CET/22/17, dated 30 June 2022. The recommendation in this Report was that “*a Modification Order be made in respect of the proposal for a footpath between Whitwell Lane and Holyford Lane, Colyton*.” However, at the meeting it was resolved that “*that no Modification Order be made in respect of the proposal for a Footpath between Whitwell Lane and Holyford Lane, Colyton*.” The minutes of the Committee Meeting state that:

*“The Committee considered a report of the Director of Climate Change, Environment and Transport regarding a proposal about a claimed footpath between Whitwell Lane and Holyford Lane, Colyton, points A-B on the proposal map HIW/PROW/22/10.*

*The recommendation was for an order to be made to record a footpath in respect of the application. This was based on assessment of the evidence.*

*There was debate, discussion and questions regarding historic use of the footpath and related signage at different points in time. Some of the strongest user evidence was from the 1950s to 1980s but there was also information regarding more recent permissive signage.”*

1. This appeal relates to the Council’s decision not to make an Order.
2. I have not visited the site, but I am satisfied that I can make my decision without the need to do so. Accordingly, the appeal has been determined on the papers submitted.
3. 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 Courts in the cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] (‘Bagshaw and Norton’) and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367 (‘Emery’).

Main Issue

1. Section 53(2) of the 1981 Act requires a surveying authority to make orders to modify its definitive map and statement in consequence of certain events specified in Section 53(3). One type of event is set out in sub-section 53(3)(c)(i): “*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 …*".
2. The evidence in this case comprises a combination of claimed use of the route by local people up until October 2017 and documentary evidence. In respect of the former, 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.
3. For usage to be “as of right” it must have been peaceable and not obtained by force, secrecy or permission. Such use by force, includes for example stepping over a fence which obstructs the claimed route, is not sufficient to establish user for section 31. 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.
4. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability? (Test A) or has a right of way been reasonably alleged to subsist? (Test B). For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.
5. It is also open to me to consider whether dedication of the way as a highway has taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.

Reasons

***Statutory Dedication: Section 31 of the 1980 Act***

*When the right to use the way was brought into question*

1. In order to calculate the relevant 20-year period, it is necessary to establish the point at which the public’s use of the route was called into question. The calling into question will normally involve some overt action on the part of the landowner sufficient to bring home to the public that their right to use the way is being challenged. This could include the erection of notices or barriers, obstructing the route and bringing this to the attention of the public or by the deposit of a Statutory Declaration under the Highways Act 1980 section 31(6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit.
2. The evidence before me sets out that the land on which the route passes was sold in 2014. The new landowner padlocked the gates and removed the stile to access the route in question in 2016. However, this did not prevent the public from using the path as the stile rails remained in place and this is documented in the user evidence. The landowner then erected notices in 2017 which warned of the closure of the path due to dog attacks on livestock. These notices were mentioned in the user evidence and appeared to dissuade people from using the route. The use of the path reduced significantly after 2017.
3. I conclude that the erection of notices, referred to in many of the user evidence forms, brought into question the right of the public to use route, providing a 20-year period of 1997 to 2017.

*Evidence of public use*

1. Fifteen user evidence forms (UEFs) were submitted with the original Schedule 14 application. A further fifteen forms were submitted during the informal consultation process and one from the 1970’s Definitive Map review. The Council also refer to a number of emails that were received from people who claimed to have used the route but did not submit evidence forms.
2. The UEFs show use of the route from 1963 through to 2022. With some five people using the route throughout the entire relevant period. The route used was to the west of the clay pits, as opposed to the east of the clay pits as depicted in the documentary evidence. Frequency of use varied with four users stating that they used the path daily to 4 times per week. Four users claimed weekly use and six users claim monthly use. Ten users claimed use every few months, with two users claiming to have used the route once a year.
3. Claimed use was on foot to access nearby paddocks, to use a fishing pond, to avoid walking along roads and as a short cut to Seaton. This use was without interruption or challenge with no notices or obstructions encountered prior to 2017. Indeed, many UEFs mention seeing waymarkers on either end of the route as does the Council’s own inspection circa 1971.
4. The present landowner suggests that the appeal route has been difficult to use or impossible as the ground gets waterlogged and obstructed by crops such that use by the public cannot have occurred as claimed. Furthermore, any use of the route has been permissive. Whilst no UEFs mentioned that the route had been obstructed, several did refer to the route being a ‘permissive path’ and that signs relating to this had been positioned on either end of the route. I accept that a number of users did state that they sought permission from the Landowner to use the route, mainly because they were using the route to access their livestock or to use the fishing pond along the route and as such I have discounted this use. Nonetheless, a significant number of users did not have direct permission and used the path because they had seen other people use it, it had been waymarked, and its use was ‘local information’.
5. Most Permissive Path schemes involve a formal, legal, agreement between the council and the landowner which details the length of time for which the path is to be provided, when and under what circumstances the path may be closed and ultimately outlines the steps required by either party to terminate the agreement. No such agreement is before me although I note that the previous landowner did draft a Creation Agreement with the Council, but this was never executed.
6. I agree with the Council that there is a conflict of evidence, but there is no proof that the alleged use cannot have taken place as claimed; I consider that there is sufficient evidence to reasonably allege that there has been use of the route concerned by the public, as of right, for an uninterrupted period of 20 years dating back from 1997.

*Whether there has been sufficient evidence during that period of a lack of intention to dedicate*

1. Since dedication can only be effected by the owner of the land, any lack of intention to dedicate must likewise emanate from the landowner. Even though the landowner has stated that the route was obstructed or impassable during the relevant period of 20 years and was only ever a permissive route, no incontrovertible evidence has been submitted to demonstrate that such a lack of intention to dedicate the appeal route was ever sufficiently communicated to the public who were using the way. The event which brought the issue home to the public was the erection of signs to stop the use.
2. Consequently, in the relevant period of 20 years preceding the erection of the signs, I find that even if it had been the intention of the landowners that no right of way be dedicated, that fact is not supported by sufficient evidence.

*Documentary Evidence*

1. The Council has provided a number of Ordnance Survey Maps, dated 1887, 1889, 1904, 1906, 1938, 1943, 1946, 1949, 1958, 1960, 1963, 1966, 1970 which show a route roughly corresponding with the application route, albeit following an alignment to the east of the old clay pit, depicted with the annotation ‘FP’. The Ordnance Survey Maps dated 1809 and 1898 do not show the route, however given the scale of the maps, at 1 inch to the mile, footpaths would not normally be shown. Whilst I accept that the evidential weight of the OS maps will be limited, they provide support for this route historically being part of the local public highway network.
2. The route is not shown on either the Colyton Tithe Map 1843 or the Bartholomew’s Maps of 1902, 1923, 1943. However, this is not unusual given the scale of the maps and the purpose for which they were produced.
3. The aerial photographs dated from 1946 to 2015 show various sections of the route as a well-worn path, however a continuous route is not shown.
4. The Parish Council minutes provide a comprehensive history of the rights of way in the area. It is suggested that the route in question appears in the 1952 minutes as a route inspected by the Council as well as in the 1953, 1954 and 1955 Inspection minutes. The route is not recorded in the 1967 inspection minutes. In December 1965 the minutes record the discussion about the dangerous state of the footbridge on the application route and that the Parish handyman would prepare an estimate to put the bridge in order. This would appear to suggest that the Parish Council thought they had a public duty to maintain the bridge.
5. The Definitive Map Review process commenced in 1969 but was never completed. The Parish Council were consulted and provided maps which included the application route for inclusion in the Definitive Map. The notes from the Council’s Highway’s Officer titled ‘Colyton – inspection routes’ states that “*Whitewell Lane – new 36 A – Agree – already signposted and well used – suggest it goes west of the pit. Signposted as FP*.” During a further review in 1989 – 1992 the Parish Council again put forward the application route for inclusion in the Definitive Map. A file note written by the Council states “*very well used but seems to have little evidence*” and “*no user evidence*” against this proposed route. The Council’s schedule of proposed routes, dated 1991, includes the application route. The landowner agreed to the Council’s suggested ‘Creation Agreement’ in 1992, but this was never completed. The drafted route included a section to the west of the old clay pit as recommended by the Council Officer, which varies from the route shown on the historic maps.
6. Walk 6 of the ‘Exploring the Coly Valley’ booklet includes the application route. The book was prepared by the Parish Path Partnership Warden and a Ramblers Association Representative. The application route is not included in the diagram depicting the rights of way network in the area, but the supporting text to Walk 6 highlights that the route was waymarked.
7. Taken individually, none of the above documentary considerations are in themselves conclusive. However, when looked at together and taken in the round, the documentary evidence builds a picture of a route that can be considered as reasonably alleged to subsist from at least the late 1800s.

*Common Law*

1. In the light of my findings on a statutory basis, I do not need to examine the situation at common law, but I note that the claimed usage dates back a considerable period overall, exceeding the 20 years required for a statutory claim.

**Conclusions**

1. Having regard to these and all other relevant evidence available, I conclude that there is a conflict of evidence, but no incontrovertible evidence that the rights of way could not be reasonably alleged to subsist. The appeal should therefore be allowed.

###### Formal Decision

1. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Devon County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the public footpath proposed in the application dated 24 June 2020 and shown on the plan appended to this decision to the Definitive Map and Statement.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.
3. I allow the appeal.

J Burston

Inspector

