
Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 21 January 2016

Appeal Ref: FPS/J1155/14A/10

- 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 28 April 2008 was refused by the Council on 7 July 2015.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a footpath (shown by L – M – N on the plan attached to this decision as Appendix A).

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 1981 Act.
2. This appeal has been determined on the basis of the papers submitted.

Main Issues

3. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence 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.

Reasons

4. 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 High Court in the *Bagshaw and Norton*¹ case.
5. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that an Order should be made on the discovery of evidence 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

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

the area to which the map relates. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the 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 right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

6. No evidence of use of the appeal route was submitted with the application to modify the definitive map and statement, and the Appellant relies wholly on the documentary evidence adduced in support of the claim that the route is a public right of way.

Documentary evidence

7. The appeal route is shown on the 1806-07 Ordnance Survey surveyors drawings as part of a through route between the village of 'Combe Rawleigh' and the road on 'Combe Rawleigh Hill'. The appeal route is shown in the same manner as other roads in the immediate vicinity and is shown as a through route on the 1809 first edition one-inch Ordnance Survey map. The depiction of the appeal route on these early nineteenth century Ordnance Survey maps demonstrates the existence of a through route between Combe Raleigh and St Cyres' Hill at the time the maps were surveyed although no conclusions can be drawn from these maps as to the status of the route depicted.
8. The map of Devon produced by Greenwood in 1827 shows the appeal route as a 'cross road' between Combe Raleigh and St Cyres' Hill. The depiction of the route as a cross road suggests that the cartographer considered the appeal route had some form of public status and was one which could be used by those purchasing a commercially made map as an aid to travel.
9. The Awliscombe Tithe Map of 1840 shows the westernmost part of the appeal route as an ungated enclosed road or track where it crosses the parish boundary into Combe Raleigh. The 1841 Combe Raleigh tithe map shows the western end of the route over St Cyres' Hill as being enclosed and coloured ochre as is the road into Combe Raleigh from point N. These two sections are coloured in the same way as other roads in the area with no apportionment number. The land between these two enclosed sections carries the apportionment number 334 which is described as 'common' owned by Mary Bernard and occupied by Henry Godsell.
10. The tithe map does not show a route through apportionment 334. Given the depiction of a through route on maps produced before and after the tithe map, the absence of any such route from the tithe record does not demonstrate that such a route did not exist, although no conclusions can be drawn as to status from the tithe documents.
11. The first edition 25-inch Ordnance Survey map of 1887 shows the appeal route as an unenclosed track running to the east of Laurel Plantation through OS parcel 225. The path is shown in this manner until it reaches an enclosed section which runs over St Cyres' Hill to point L. The appeal route is shown in a similar manner on the second edition 25-inch map of 1903 and on the

- 1959/1960 edition of the map. These maps show the continued existence of a through route for the majority of the twentieth century although they are silent as to the status of the route shown.
12. A list of highways in Combe Raleigh produced by the Honiton District Highways Board is undated; the Appellant submits that it dates from the middle to late nineteenth century whereas the Council submits that it was produced in the late nineteenth or the early twentieth century. The list is broken down into two sections; first '*Highways*' and secondly, '*other highways in parish*'. The appeal route is described in the latter group as '*Combe Raleigh Church to level 828 on St Cryes 2200 yards*'. The Ordnance Survey levelling point shown on the 1887 25-inch map adjacent to point L corresponds with the level given in the Highway Board list. The length of the route between Combe Raleigh Church and point L described in the Highways Board list also corresponds to the length of the appeal route and its continuation to the village. The route being described as an '*other highway*' is the appeal route and provides evidence as to the reputation of the route as being public at the time the list was compiled.
 13. The Finance Act 1910 map shows the western enclosed section of the appeal route excluded from adjacent hereditaments whereas the unenclosed section runs across land shown to be part of hereditament 8. Under the heading of '*Fixed Charges, Easements, Common Rights and Restrictions*' the Field Book reads '*Parish road to St Cyres Hill – Honiton water supply pipe line*'. The Charges, Easements and Restrictions which affected the market value of the fee simple were assessed as £75 for rights of way which ran through fields 311, 353 and 225; this figure was also entered in the reduction in site value due to '*public rights of way or user*'. The Appellant submits that the annotations in the field book and the reduction in site value on account of a public right of way through parcel 225 demonstrates that the appeal route was considered to be public at the time of the survey. The Council submits that without additional evidence as to what information the field book entries were based upon it is not possible to infer an earlier dedication of the appeal route as a public right of way.
 14. The record of a parish meeting on February 9 1934 shows that consideration was given to which routes should be shown on a map of public rights of way under the Rights of Way Act 1932. The meeting considered the list of routes which had been compiled by the parish in 1913 and suggested that three other paths should be added to the 1913 list which were considered in February 1934 to be established rights of way. The appeal route was not included in this list but a route described as running through fields 352, 260, 264, 265, 266, 267, 242, 243 and 225 was included. The Appellant submits that this path can be traced on the Ordnance Survey map as a path which connected to the appeal route in field 225 and which must have been accessible from the appeal route. Whilst this route could be said to connect with the appeal route at point M, equally the parish meeting could have considered that M – N formed part of this other path as opposed to being part of a separate route leading to St Cyres' Hill.
 15. The appeal route has not appeared in the maps of maintainable highways produced by the Council as the highway authority, nor does the appeal route appear in the current list of streets. A Devon County Council boundary stone is located at point N which marks the extent of the highway maintained by the Council; the (undated) highway authority records describe the maintainable

highway as being a spur from the village to the waterworks gate. That the appeal route has not been maintained or is not maintainable by the highway authority does not mean that public rights cannot or do not subsist over it.

16. The appeal route was not included in the survey of public rights of way conducted by the parish meeting in 1950 and was not included in the draft, provisional or definitive maps. This suggests that any reputation the route had as being public had been lost by the middle of the twentieth century.
17. The landowner submits that the appeal route was a private path and was not open to the public. The landowner also submits that gates at points L and N have been locked and that a further gate at the eastern end of the enclosed section across St Cyres' Hill was also locked. The landowner states that the gate at N carried a notice stating 'no entry' and that the gate at L carried a notice stating 'private no entry'. The Appellant disputes these claims and submits that whenever the appeal route has been walked the gate at L has been unlocked and open as has the gate at the eastern end of the enclosed section. Furthermore, there had not been a gate or notice at N but a locked gate approximately 200 metres south-east of N had at one time been present across the maintainable highway.

Conclusions

18. With the exception of the 1841 Combe Raleigh tithe map, the nineteenth and early twentieth century mapping consistently shows the existence of a through route between the village and the public road on St Cyres' Hill. Although the maps demonstrate the continued existence of the appeal route through time they do not assist with a determination of the status of the route.
19. Two documents suggest that during the late nineteenth and early twentieth centuries the appeal route had the reputation of being a public way of some description. The Honiton District Highways Board listed the appeal route amongst '*other highways in parish*' which suggests that the route was considered to be public; however, as it was not listed as a '*highway*' it may not have been considered to be a public carriageway. The site value of hereditament 8 was reduced by £25 due to existence of a public right of way through field 225; the only route shown in field 225 on the Ordnance Survey base map is the appeal route. This route is also described as the '*parish road to St Cyres Hill*' in the Field Book although if the route had been considered to be a public carriageway, it is likely that it would have been excluded from the assessment of hereditament 8.
20. Any reputation the Appeal route had as a public right of way appears to have faded during the middle part of the twentieth century as the parish meeting in 1934 did not consider the appeal route to be a public way at that date. The appeal route is not recorded as being publicly maintainable in any of the modern highways records. The omission of the appeal route from the parish survey in 1950 and from the draft, provisional and definitive maps also provides evidence that the appeal route was not considered to be a public right of way when the parish survey was conducted.
21. There is therefore some evidence which sits in the scale in support of the Appellant's claim but equally there is evidence which is either neutral or which sits in the opposite scale; consequently the appeal fails against Test A set out in paragraph 5 above.

22. Whilst I acknowledge that there is evidence of reputation both for and against the appeal route, Test B found in *Bagshaw and Norton* requires an initial assessment to be made as to whether there is conflicting evidence and whether there is any incontrovertible evidence that the claimed public right of way could not subsist. In this case there is a clear conflict between those documentary sources which provide evidence of the reputation of the route as a public right of way and those which do not. However, I have not read or seen any evidence which demonstrates incontrovertibly that a public right of way could not subsist over the appeal route.
23. Consequently, I conclude that the appeal succeeds against Test B set out in paragraph 5 above as the evidence adduced is such that it is reasonable for the Appellant to allege that a public right of way subsists over the appeal route.
24. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

25. 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 to modify the definitive map and statement for Devon to add a public footpath as proposed in the application dated 28 April 2008. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector

APPENDIX A

