



Appeal Decision

by Susan Doran BA Hons MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 28 June 2016

Appeal Ref: FPS/A2470/14A/1

- 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 Rutland County Council not to make an Order under section 53(2) of that Act.
- The Application dated 20 August 2010 was refused by Rutland County Council on 14 January 2016.
- The Appellant claims that the appeal route from Wood Lane, Wardley to Leicester Road, Ayston following Footpath B79 (in part) should be added to the definitive map and statement for the area as a bridleway and/or upgraded to a bridleway.

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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. Additional evidence has been submitted by the Appellant during the appeal process, and I have taken into account all the material available to me in reaching my decision.

Main issues

4. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (DMS) under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
 5. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made following the discovery 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...*". In this regard, the cases of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1995] and *R v Secretary of State for Wales ex parte Emery* [1998] clarified that the statutory test to be applied to evidence at this stage involves two questions: does a right of way subsist on a balance of probabilities, or is it reasonable to allege on the balance of probabilities that a right of way subsists? In considering whether a right of way subsists there must be clear evidence in favour of the Appellant and no credible evidence to the contrary. However, in considering whether a right of way is reasonably alleged to subsist, if there is a
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- conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist, and accordingly an order should be made¹. This is the test applicable to that part of the appeal route not currently shown on Rutland County Council's (the Council) DMS, between Wood Lane and Footpath B79 in Wardley Wood.
6. Section 53(3)(c)(ii) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows, *"that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description"*. This is the test applicable to that part of the appeal route which is already shown on the Council's DMS, Footpath B79 (part), between the route described above in Wardley Wood and Leicester Road. The standard of proof required is the balance of probability.
 7. It is possible that applying two different tests to the two sections of the appeal route may result in only part of it meeting the minimum standard necessary to trigger the making of an order, notwithstanding that the same evidence is under consideration. Such an outcome is not raised in the submissions, and I am not aware of any guidance in this eventuality.
 8. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
 9. The user evidence must be considered against the requirements of Section 31(1) of the Highways Act 1980 ("the 1980 Act") which provides 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 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"* and Section 31(2), that *"The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice ... or otherwise"*.
 10. If Section 31 of the 1980 Act is inapplicable, then the question of dedication must also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

¹ The higher test would need to be satisfied in order to confirm an order, if made

Reasons

11. The appeal route commences at the south eastern end of Wood Lane and proceeds in a generally north easterly direction through Wardley Wood before crossing several fields to emerge onto the Leicester Road. Wood Lane, which is recorded on the DMS as a public bridleway, connects Wardley Wood with the eastern end of Wardley village. To the north-east of the appeal route is the village of Ayston and to the east, the market town of Uppingham. The appeal route passes through Wardley, Beaumont Chase and Ayston.

Documentary evidence

12. The Appellant's case is that the appeal route formed part of a longer public route with Wood Lane and is an ancient pre-inclosure way serving as a cart road for collecting timber from Wardley Wood, access to the former common of Beaumont Chase, and access to Uppingham, the nearest market town where livestock fairs were held.

Estate Maps

13. Two maps of the Manor of Wardley, the Boyville Brudenell Estate Maps, provide the earliest depiction of part of the appeal route. One is a coloured version and shows Wood Lane as part of the road linking to the village, coloured light brown, leading to Wardley Wood. Within the Wood are broad linear features, coloured green, equating to the later "Ridings" seen on the 1845 Wardley Tithe Map (see below). Along the boundary with Beaumont Chase are named roads, including Aston Road, which equates with the position of the appeal route, and Candlemakers Road. The appeal route is not shown as a continuous feature through the Wood. The 'missing' section coincides with an area called Steeping Sale Plain on the Uppingham and Beaumont Chase Inclosure Map of 1804, which the Appellant suggests was less densely wooded at the time so did not require a Riding through it, a 'plain' meaning an extensive (almost) level, usually treeless area of land.
14. Whilst these maps have no key, it is possible, as the Council concluded that the named roads were public highways of some sort, although no firm conclusions can be drawn as to their status or that of the Ridings from these maps.

Inclosure records

15. The parishes of Wardley and Ayston were not subject to the parliamentary inclosure process.
16. The Uppingham and Beaumont Chase Inclosure Map of 1804 shows part of the appeal route crossing Beaumont Chase marked as a 'Private Road', together with its land area. It coincides with the route marked "Aston Road" on the Manorial Map described above. In addition, the Inclosure Map includes Wardley Wood, seemingly regarded as forming part of Beaumont Chase rather than Wardley. Transcripts from the Award show that the Commissioners set out the route from the boundary with Ayston Parish across Beaumont Chase to the entrance into Wardley Wood as a private carriage and drift road, 30 feet wide. It was awarded for the use of the proprietors of that part of the Chase and Wardley Woods. In addition, Wardley Woods was awarded to George Fludyer, including the Ridings therein. These are shown in a similar manner to the earlier Manorial map with the route marked as Candlemakers Road appearing more prominent, although the Inclosure Map shows a link from it to the 'Private Road'. The Appellant considers it must have been public so as to link with

other parts of the appeal route. However, the setting out in the Award of part of the appeal route as a private one for use by owners of the land does not lend itself to the conclusion it was intended to include public rights.

17. There appears to be some uncertainty as regards the powers of the Inclosure Commissioners in relation to Wardley Wood, as identified by the Appellant, at a time when the landownership changed three times over a short period coinciding with the Inclosure process.
18. The Lyddington Inclosure Award 1804 also refers to Beaumont Chase and gave the Commissioners powers to set out public highways and roads through it. However, I agree with the Council that the Award Map includes only a small part of the southern end of Beaumont Chase, and neither it, nor the Award, describe ways relevant to the appeal route.

Ordnance Survey and county maps

19. The earliest depiction of the appeal route in its entirety is found on the 1824 Ordnance Survey (OS) 1-inch map, which together with Wood Lane links Wardley with the Leicester to Uppingham Turnpike Road. The 1884 OS 6-inch map shows the appeal route leaving Wardley Wood as a double dashed line. Candlemakers Road is no longer shown. This could provide some support for the Appellant's case in that, if public, the appeal route would have provided a way to Uppingham once Candlemakers Road had ceased to exist. The appeal route is shown gated at its junction with Wood Lane and Leicester Road, and at other points where crossed by a field boundary. In addition, the route is not annotated as a Footpath, suggesting that if it carried public rights these were of a higher status.
20. The appeal route appears on several county maps. Teesdale's 1829 Map of Rutland showing it and Wood Lane as a 'bye road', and Greenwood's 1825 Map of Rutland, showing it as a cross road, are cited in particular by the Appellant. The Council concluded that County and other maps show some, or all, of the appeal route, but its depiction as a through route is not consistent. I have not been provided with copies of all the maps referred to in the Council's Report. However, in addition to the above, the submissions indicate it appears as a through route on Chapman and Hall's 1831 map (as a continuation of Wood Lane), Bells (1833), Fullerton's (1833/4), Walkers 1836/7 (although this map has no key), Walkers (1846), Hughes (1868) and Lett's 1881 maps (although the latter does not identify what the uncoloured ways, of which the appeal route is one, represent). Only two maps are cited by the Council, Hall's 1833, and Archer's 1835, as not showing it. A Geographia Map, 30 miles around Leicester, based on OS maps and suggested to date to the early 1960s depicts the appeal route as "other roads (subject to a right of way)". As regards whether or not the earlier county maps copied the OS mapping, the Appellant says an examination of them shows they did not record all the routes marked on the 1824 OS map, which itself did not show footpaths.
21. The commercial maps were produced for the travelling public which may imply the routes shown were regarded as having public access at the time. They are insufficient in their own right however, to permit an inference that a route is a highway, nevertheless they provide some evidence of reputation to weigh in the balance alongside the other evidence.

OS boundary remarks and sketch books and Object Names book

22. Wood Lane and the appeal route as far as its exit from Wardley Wood are shown in the 1883 sketch book of Wardley, the Appellant says in the same manner as the public carriageway through Wardley village and the Turnpike Road. The 1883 Boundary Remarks Book shows the appeal route crossing the boundary as a double dashed line, which the Appellant says is comparable to a route in Stoke Dry parish, later recorded as a Road used as a Public Path and latterly as a bridleway on the DMS. The OS Journal of Inspection shows the Boundary Records were exhibited for inspection by the public and advertised in the press in November 1883 and, for Wardley, signed as correct by the Meresman J Goodwin a tenant farmer across whose land the appeal route passes, and by others.
23. However, overall I would agree with the Council that, as with other OS records, these documents provide no evidence as regards the status of the appeal route.

Tithe records

24. The 1845 Wardley Tithe Map shows Wood Lane coloured as far as the entrance to Wardley Wood, from which the appeal route continues by way of double dashed lines braced with areas of adjoining land identified in the Apportionment as "Ridings", owned by George Fludyer. At the parish boundary the appeal route is indicated as continuing and is annotated "to Uppingham". This is coincident with the route marked on the Manorial Map and the Uppingham and Beaumont Chase Inclosure Map. The Appellant provides the definition of "Riding" as a way or road specially intended for persons riding, especially a green track or land cut through a wood or covert, or skirting a wood. The 1850 Ayston Tithe Map shows the remainder of the appeal route open to the Turnpike Road and coloured in the same manner. The appeal route is marked "Road".
25. The Council remarks that the apportionment of a rent charge to woodlands was complex and considers that the lack of rent charge to the Ridings, rather than indicating a public status, reflected that they were barren. However, both public and private roads could be unproductive. As the Council suggests, a heavily used private road could be unproductive, and Wardley Wood has long been a source of timber which would have been extracted along the Ridings. Nevertheless, the annotation to Uppingham on the Wardley Tithe Map is suggestive of public rights, as is the colouring on the Ayston Tithe Map, and this weighs in the balance in favour of the Appellant's case.

Finance Act Map 1910

26. Wood Lane is excluded from hereditaments and the appeal route included within hereditaments for its entire length. The appeal route passes through four land parcels. For hereditaments 722, Wardley Wood, and 728, land between the Wood and Ayston Parish, there are no deductions for public rights of way. There are deductions for hereditaments 27, land at Castle Hill, and 5, land at Ayston Home Farm. For hereditament 27, there is a deduction of £21 for public rights of way which in all probability relates to the appeal route; and for hereditament 5, £48 for public rights of way. However, the latter includes land on the north side of the Leicester Road. There has been no analysis as to whether the deductions claimed are typical of a footpath or bridleway, and in the case of hereditament 5, whether there are other potential routes for which

the deduction may apply in part or in full. As a whole this evidence suggests part of the route has a public status and part does not.

27. The Appellant asserts that if the appeal route were a privately maintained public road it would not be mentioned in the Finance Act records on the basis that "No duty under this part of the Act [section 35(1)] shall be charged in respect of any land or interest in land held by or on behalf of a rating authority". However, this section may refer to those routes shown on the maps as uncoloured and un-numbered that correspond to known public highways.

Sales particulars

28. Sales Catalogues for the Gainsborough Estate dated 1925 and 1926 include (for 1926) a Lot (3) which is crossed by the appeal route. It is otherwise landlocked, yet the details mention no easement to access it, unlike numerous examples provided of other Lots which were sold with the benefit of a right of way over enclosures, for example to a highway. This may weigh in favour of the Appellants case as regards the appeal route enjoying public rights of some sort, perhaps vehicular, as it would be unusual for an easement not to be mentioned if it existed.
29. Title deeds dated 1954 for land crossed by the appeal route refer to a right of way for all purposes granted by conveyance dated 1925 along the existing road. Whilst this would not preclude the existence of a public right of way it is consistent with the reference to a private road in the Uppingham and Beaumont Chase Inclosure Award.
30. A 1955 conveyance for Wardley Wood includes a right of way for all purposes for Wood Lane and the route to Leicester Road. Similarly the 2010 sale of Wardley Wood included the benefit of a right of way over the same routes, whether public or private.

Highways records

31. The Appellant states that both Wood Lane and the appeal route were considered to be a public road, and thus not suitable to be recorded as a public path, when the DMS was being drawn up. No evidence relating to the definitive map process or Parish Council records for this period that may support this assertion have been adduced.
32. An 1985 Side Roads Order for the (A47) Birmingham to Great Yarmouth Trunk Road (Wardley Hill Improvement) marks the appeal route, on an OS base map, as "Grass Road". This appears to be a descriptive term for a physical feature rather than one from which any status may be inferred.

Conclusions on the documentary evidence

33. Prior to 1824 the Appeal route is not mapped as an entire feature. The Manorial Maps point to the physical existence of a way coinciding with part of the Appeal route in Wardley Wood and to a route from the Wood heading towards Aston. The annotation to a destination suggests the existence of public rights, but not of their status. The Inclosure evidence, on the other hand indicates the same part of the Appeal route (to the boundary of Wardley Wood) was awarded as a private road for the use of the landowners. The rides within the Wood, if the Commissioners' powers so extended, were held in

- private ownership. Nevertheless, this would not preclude the possible existence of public rights or of their later acquisition.
34. The appeal route's depiction on most of the commercial maps considered, and on two as a minor highway, together with the Tithe Map evidence of partial colouring and a destination suggest that it was more than just a footpath. The Appellant believes the appeal route became more widely used by the public following the loss of Candlemakers Road and as an alternative route for those travelling between Wardley and Aston or Uppingham, and its market, avoiding the Turnpike Road that would have incurred a cost and incurred a risk of robbery and injury to travellers, as recounted in contemporary reports relating to this section of the turnpike. Whether this was the case requires further evidence before a reliable conclusion can be reached.
35. The Finance Act evidence is conflicting. Where a deduction is claimed it could support the status of public footpath, as already recorded on the DMS, but is not wholly inconsistent, on the available evidence, with the status of bridleway. The Sales documents suggest the existence of a public highway with rights higher than those currently recorded of a footpath.
36. As a whole the evidence points to a route that has existed at least as a physical feature for a considerable time. The evidence though is in conflict: some points to a public route of some kind, more likely higher than that of a footpath, whilst some evidence indicates parts of it were private. Nevertheless, whilst the evidence as regards the status of the appeal route as a whole is conflicting, there is no incontrovertible evidence that precludes the possible existence of a public bridleway along it.

User and other evidence

37. The user evidence in this appeal is limited. A detailed user evidence form was completed by the Appellant claiming use between 1952 and 2010 on foot and horseback. Claimed use varied from weekly, monthly to once or twice a year, sometimes with others. Gates encountered along the route were unlocked, and no signs were seen. Other users seen were mostly on foot. Some evidence of the reputation of the appeal route is provided in that her father, who tenanted some of the land crossed by it, believed and told her it was a road. The subsequent tenant told her that he believed it to be a bridleway.
38. Two other forms contain little detail. One person claimed use between 1927 and 1992 (except for the years 1943-1946) on foot, horse, pony and trap, and believed it to be a bridleway; another claimed use on horseback from 1966 to 1990, also believing it to be a bridleway.
39. Mr Noakes, since 1947, has only ever known the appeal route between the edge of Wardley Wood and across the fields to Leicester Road as a footpath. He believes that, historically, it was used for timber extraction on behalf of the Forestry Commission and has fallen into disuse since 1991.
40. There is insufficient user evidence to consider against the statutory or common law tests outlined above. There are differing views expressed and reported from people associated with the land as to the appeal route's status. As it stands, the evidence of claimed use would only add support to a finding on the basis of the historical evidence that a bridleway subsists and/or is reasonably alleged to subsist over the appeal route.

Conclusions

41. As mentioned above (paragraph 7), the application of different tests to the same evidence for the appeal route may lead to different conclusions. Overall, I consider there is conflicting evidence but no incontrovertible evidence that might preclude the existence of a bridleway along the appeal route. It follows that it is reasonable to allege that a bridleway subsists over that part of the appeal route not presently recorded as a Footpath on the DMS. However, it is a higher test that must be applied to the remainder of the appeal route, in that a bridleway subsists. In my view, the available evidence does not lead to the conclusion that the higher threshold has been met. Accordingly, the appeal should be rejected, or allowed only in part.
42. However, that would result in a length of bridleway ending at a public footpath within the woodland. It seems to me that a pragmatic approach would be for an order to be made for the appeal route as a whole. Then, in the event that objections and representations are made to it the whole of the evidence can be examined, and a finding as regards whether or not a bridleway subsists over the appeal route in its entirety can be reached.

Other matters

43. In its Report on the Application, the Council considered the possibility of a longer route to the County boundary. However, the Appellant states this was not part of the Application, and I have not addressed it in this decision.
44. Mr Noakes' submission referred to matters of suitability and desirability, which whilst important issues are not ones that can be taken into account in considering this appeal.

Conclusion

45. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

46. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Rutland County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Rutland County Council to add a public bridleway from Wood Lane, Wardley to Leicester Road, Ayston following Footpath B79 (in part). 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.

S Doran

Inspector