



Appeal Decisions

by Susan Doran BA Hons MIPROW

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

Decision date: 17 October 2016

Appeal Refs: FPS/J1155/14A/11 & FPS/J1155/14A/17

- These Appeals are 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 not to make an Order under Section 53(2) of that Act.
- The Applications dated 28 April 2008 were refused by Devon County Council on 31 March 2016.
- The Appellant claims that the appeal routes from the Dunkeswell to Honiton Road near Combe House to the minor road at Lower Shelvin Farm should be added to the definitive map and statement for the area as a public footpath.

Summary of Decision: The appeals are allowed

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine two appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied I can make my decisions without the need to do so.
3. The two appeals concern one continuous route from the public highway near Combe House, following the track to and through Ellishayes Farm, then on to the parish boundary between Combe Raleigh to the south and Luppitt to the north, and ending at the public highway west of Lower Shelvin Farm. Since the appeals are for the same route (crossing two parishes) and comprise the same evidence, I have considered them together as one. Therefore, in this decision I have referred to them as 'the appeal route'.
4. Submissions have been made by Devon County Council (DCC), the Appellant, and, on behalf of the owners of the land crossed by the appeal route.

Main issues

5. The Applications were made under Section 53(2) of the 1981 Act which requires surveying authorities (such as DCC) 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).
 6. The relevant event in this case is Section 53(3)(c)(i) of the 1981 Act which specifies that an Order should be made following 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...*".
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7. The case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] held that this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellants 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 way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

The case of *Todd and Bradley v Secretary of State for Environment, Food and Rural Affairs* [2004] clarified that, at the Schedule 14 stage and in reaching my decision, I need only be satisfied that the evidence meets test B. Therefore, if evidence has been discovered which shows that it is reasonable to make an allegation that a public right of way as claimed exists over the Appeal route, then an Order should be made.

8. In this case there is documentary evidence to consider. 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. I note the submissions of DCC regarding the basis on which it considers the appeal should be considered, and those made on behalf of the Landowners as regards whether new evidence has been discovered. I have set out above the tests that I must apply in considering these appeals.

Reasons

Ordnance Survey (OS) and other maps

10. The 1809 OS 1-inch map shows the route leading to Lower Shelvin and the route leading to Ellishayes Farm. These are shown on later 1-inch mapping in 1910, and again in 1919 and 1927. Subsequent map editions of 1937 and 1946 show a connecting route between them which the key shows as either a bridleway or footpath. Similarly, the whole of the appeal route is shown on the 1948 1:25000 map. The connecting route does not appear on OS maps from the 1960s. This is similarly reflected on aerial photographs from this period and later (1946-2007¹) which, although reflecting the date on which they were taken, do not show evidence of a worn line on the ground.
11. Greenwood's 1827 County Map also shows the routes to Lower Shelvin and Ellishayes Farm, although DCC says it may have copied earlier OS mapping. In any event, it is usual for footpaths not to be shown on small scale mapping.
12. The appeal route is shown on the 1887 OS 25-inch map initially as a bounded then unenclosed track to Ellishayes Farm, then annotated as 'FP' where it crosses fields to reach the road at Lower Shelvin. This annotation was used by the OS so that the public may not mistake such a route for one traversable by horses or wheeled traffic. The appeal route also appears on the 1904 25-inch mapping and the 6-inch maps derived from them.

¹ And satellite imagery from 2010

13. Bartholomew's map together with later OS mapping shows the lower part of the route to Ellishayes and, on later maps, its continuation.
14. The weight to be attached to OS mapping is a matter of dispute between the parties, and it is suggested that the appeal route could be a private path for farm workers. OS maps record what the surveyor saw on the ground, and since 1888 have included a disclaimer which states that the representation of a road, track or footpath is no evidence of the existence of a right of way. It is generally accepted this applied to earlier maps as well. There are, however, ambiguities between and even within some of the instructions issued to OS surveyors as regards the recording of ways. The mapping should be considered alongside all other evidence and can be helpful in determining the likely status of routes when considered together with other evidence, although in themselves OS maps are not evidence as to status.

Tithe Maps

15. Both the Combe Raleigh (1841) and Luppitt (1842) Tithe Maps show the respective sections of road (to Ellishayes Farm and Lower Shelvin) in the same manner as other roads depicted. Neither the maps nor the apportionments identify such roads as public. The connecting section between is not shown, although there are gates depicted at field boundaries which could have served agricultural and access needs. However, the purpose of tithe maps was not to show public rights of way. And, in general, footpaths and bridleways were not shown as their effect on the tithe payable was likely to be negligible, although DCC says other paths in Luppitt are depicted.

1910 Finance Act records

16. The appeal route falls within hereditaments associated with Ellishayes Farm and Lower Shelvin on the Valuation Maps. A deduction for a public right of way is recorded in the Field Book for both hereditaments, identified by reference to field numbers. The Appellant contends these are consistent with the appeal route in both hereditaments, there being no other field numbers identified as having a right of way passing through them. DCC appears to agree, but considers that whilst the records suggest it carried some form of right of way, there is no reference to it as a *public* footpath. The Landowners say due to the size of the hereditaments and the other routes shown on the OS base mapping, it is impossible to tell which path the deduction refers to and, if it is the appeal route, it is not specified as public or private.
17. The Field Book entries for both Ellishayes Farm and Lower Shelvin record a deduction against the category 'Public Rights of Way or User' (£50 and £40 respectively), and nothing is recorded against the category 'Easements'. Under the heading 'Charges, Easements, and Restrictions' a 'right of way' is recorded, the monetary value being the same as that given for the public right of way category. If the appeal route were a private right of way for farm workers, as suggested, then I would expect there to have been a deduction recorded against the category of 'Easements'. Further, the OS parcel numbers given for the 'right of way' correspond with those through which the appeal route passes: numbers 1281, 1280 and 1207 for Lower Shelvin, and 175, 171, 73, 72 and 158 for Ellishayes. I consider this is good evidence that the appeal route was acknowledged to be a public footpath when these records were drawn up.

18. There is nothing to indicate that the information recorded in the Field Books was based on that provided by the landowner, or someone acting on their behalf. It is noted, however, that the majority of Form 4s on which such information was provided for recording in the Field Books have been lost or destroyed. The recording of information about rights of way was incidental to the main purpose of the legislation. Nevertheless, whilst the Finance Act evidence for the appeal route needs to be considered with all other available evidence, for the reasons given above it weighs in favour of the Appellant.

Parish records

Combe Raleigh Parish Meeting

19. A series of meetings from 1913 onwards culminated in a Schedule of Public Paths being presented to the Annual Parish Meeting of March 1914. The surveys of the public footpaths in the Parish were undertaken by Parish Councillors and their repair and maintenance was to be at the expense of the parishioners.
20. The Schedule included the appeal route described as "*From road by Woodbine Cottage across field through Ellishayes Barton over three fields to stream leading to road by Shelvin Farm*". The Appellant regards it as significant that the entire length of the appeal route (including that in Luppitt Parish) was regarded as a public footpath. It is accepted that there is no evidence of the basis on which the routes were chosen, or of any consultations regarding them.
21. However, present as a Councillor at these meetings was a Mr Bernard whom the Appellant presumes is the same Mr Bernard who owned Ellishayes Barton at the time of the Finance Act Valuation, and was thus aware of the footpath crossing his land. Accordingly, they contend the Finance Act evidence supports the appeal route having the reputation of a public right of way in 1914. If Mr Bernard was the owner of Ellishayes Farm, it does not necessarily follow that he accepted the appeal route as a public right of way crossing his land. However, there is nothing in these records to suggest that he objected to it, and there is support for such status in the Finance Act records.
22. The Parish records also refer to the Rights of Way Act 1932 (the 1932 Act) and a request for information regarding public rights of way from Honiton Rural District Council (RDC). One of the routes proposed by the Parish in 1934 was the appeal route as previously described. I note that some other paths were removed from the original list and new ones added, whilst the appeal route remained. This suggests those involved gave some consideration to which routes were considered to be public and which were not.

Luppitt Parish Council

23. There are no corresponding lists of footpaths (1913 and 1934) for Luppitt, although this is not necessarily significant: there was no statutory requirement that they be drawn up.
24. Parish Council Minutes refer to repairs to a footbridge between Shelvin and Ellishayes. In 1914 Mr Sage of Lower Shelvin Farm contacted the Parish Council as the footbridge had been washed away: this was investigated and the work paid for. In 1924 the bridge required repair again, and again the bill for the work was settled. No footbridge is marked on the OS maps, although Mr Sage was clear there was one and that it was the responsibility of the Parish

Council to repair or replace it. There is no evidence as to its location, although no other stream or ditch requiring a crossing has been identified on the relevant land. Both DCC and the Landowners suggest the repairs were for the more limited benefit of the farmworkers and/or residents. However, it seems unlikely that public monies would have been spent on a private bridge or footpath.

1949 Survey of Public Rights of Way

25. Combe Raleigh Parish Meeting claimed the appeal route (in their parish) in 1950 as Path 12. The route through Ellishayes Farm itself was not marked on the Survey Map. However, it was described in the Schedule as passing through the Farm and continuing into Luppitt Parish, unlikely to be disputed, was required in the future, and had been maintained in the past by the Parish Meeting. It was believed public as it was shown as a Footpath on the OS map, and (annotated by hand) had been used by the general public for over 20 years. The RDC confirmed the appeal route had been shown on the map prepared under the 1932 Act and should be retained as a public right of way. There is no evidence available as to why it was not included in the Draft Definitive Map. The Appellant suggests it was due to lack of use, and the Landowners that the views of the Parishes and RDC would have been taken into account in the process.
26. Luppitt Parish Council also claimed the appeal route (in their parish) in 1951 as path 40. Similarly it was described as unlikely to be disputed and required in the future. It was believed public due to "records on old minute books" which is likely to be a reference to the minutes described above, although no reference is made to user. Such comments were in accordance with the brevity advocated in the guidance booklet on completing the Survey prepared by the Open Spaces Society. The RDC agreed it should be retained as a public right of way having been shown on the map prepared under the 1932 Act². The Survey form is annotated 'omit' by an unknown hand at an unknown date. Again, there is no evidence available as to why it was not included in the Draft Definitive Map.
27. The evidence from the Survey indicates the appeal route as a whole was considered to be a public right of way both by the Parishes and by the RDC, whose comments on the paths claimed were invited as part of the process. Both were public bodies and their views attract some weight. That the appeal route was not put on the DMS, however, suggests that it was not considered to be a public right of way, despite the evidence from the Parishes and RDC, and weighs against the Appellant's case since its omission was not challenged. Nevertheless, this evidence conflicts with that from the Finance Act and Parish records, and there is no evidence to suggest that any public rights that may have existed were legally stopped up.

Landowner evidence

28. The present Mr Sage of Lower Shelvin Farm believes there has been no public right of way over the appeal route for over 60 years which is consistent with it not having been shown on the DMS. Neither is a bridge over the stream known of. The evidence concerning a previous Mr Sage is described above.

² Although the map sheet did not show the entire route within the Parish

29. The present Mr Sage refers to Parish minutes which show that in 1956 the Assistant County Surveyor attended the Luppitt Parish Council Meeting to reconsider the (1949) Survey. It appears that many of the paths included in the Parish Survey were considered no longer to be used and accordingly were crossed off. This could explain why the appeal route was omitted if it had fallen into disuse. However, this would not negate any existing public rights.
30. Minutes from 1956 also refer to a Mr Osborne who considered the Survey to be a waste of public money. Further footpaths were discussed and many were found to be of no public use and omitted. Mr Sage also refers to landlords being asked if they had any objection to paths that had been omitted over their land being added to the new Map. The Appellant speculates that the landowners and wishes of the local people may have persuaded DCC at the time that the appeal route was no longer needed.
31. The owners of Elishayes Farm believe there has been no public right of way over the appeal route from the late 1950s. Mrs Lane states her late husband's family had lived on and farmed the land since 1933 and had no knowledge of an existing public right of way from that time. The Appellant refers to the route being shown on OS mapping published in 1937, although this derived from a 1930 survey, and to later mapping from 1957/8, published in 1960. Mrs Lane's evidence is contrary to the Survey conducted by the Parish in 1950 which refers to use by the public during that period. There is a conflict between some of the evidence considered above and that of the Landowners.

Conclusions on the evidence

32. The appeal route first appears in the documentary evidence as a continuous route on the 1887 OS map, although as I have concluded above, its status cannot be determined from this evidence alone. Finance Act records include deductions for a public right of way in the relevant hereditaments which appear to be attributable to the appeal route, and support the Appellant's case. This is evidence that was not available when the DMS was being drawn up under the National Parks and Access to the Countryside Act 1949 (the 1949 Act).
33. Records from Combe Raleigh Parish Meeting indicate it was regarded as a public right of way in 1914 and again in 1934 when the RDC requested information on public rights of way. Although the Schedule drawn up and on which it was included is not conclusive evidence as to the existence of public rights over the appeal route, it supports the Appellant's case. Records for Luppitt Parish Council refer to maintenance of the appeal route and it is unlikely that public funds would have been expended on a private right of way.
34. Both parishes claimed the appeal route for inclusion in the DMS and thus both regarded it as public at the time. It is not clear on what basis it failed to be recorded in the DMS.
35. There is disagreement between the parties as to the interpretation of and weight to attach to the evidence. In addition there is a conflict of evidence in particular as regards the Finance Act evidence, Parish Claims and that of the 1949 Act and Landowner evidence, the latter as regards Elishayes Farm.
36. Having regard to the above, I find the evidence insufficient to meet Test A that a public right of way subsists on the balance of probabilities. However, I find there is a conflict of credible evidence but no incontrovertible evidence that a public right of way on foot cannot be reasonably alleged to subsist. It follows

that test B is met and an Order(s) should be made and if any objections are raised then the evidence may be more thoroughly tested.

Conclusion

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

Formal Decision

38. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Devon County Council is directed to make an order(s) under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Devon County Council to add a public footpath from the Dunkeswell to Honiton Road near Combe House to the minor road at Lower Shelvin Farm as proposed in the applications 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.

S Doran

Inspector