

Appeal Decisions

by Alison Lea MA (Cantab) Solicitor

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

Decisions date: 14 December 2016

Appeal Ref: FPS/J1155/14A/13 (Luppitt 13)

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application made on 28 April 2008 was refused by Devon County Council on 17 March 2016.
- The Appellant claims that the appeal route from Old Mill Combe Raleigh (grid reference ST 1676 0285) to the junction with other claimed routes at grid reference ST 1743 0318 should be added to Devon County Council's Definitive Map and Statement as a public footpath. (Route O-P-Q on the attached plan).

Summary of Decision: The appeal is dismissed

Appeal Ref: FPS/J1155/14A/14 (Luppitt 14)

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application made on 28 April 2008 was refused by Devon County Council on 17 March 2016.
- The Appellant claims that the appeal route from Wick Farm (grid reference ST 1710 0382) to Shaugh Farm (grid reference ST 1768 0314) should be added to Devon County Council's Definitive Map and Statement as a public footpath. (Route T-Q-U on the attached plan)

Summary of Decision: The appeal is allowed in part

Appeal Ref: FPS/J1155/14A/15 (Luppitt 12)

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 28 April 2008 was refused by Devon County Council on 17 March 2016.
- The Appellant claims that the appeal route from Higher Wick Farm (grid reference ST 1781 0427) to a minor road at grid reference ST 1722 0246 should be added to Devon County Council's Definitive Map and Statement as a public footpath. (Route S-Q-R on the attached plan)

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 these appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (the 1981 Act).

2. I have not visited the sites but I am satisfied that I can make my decisions without the need to do so.
3. In April 2008 the appellant, Mrs R Kimbell, on behalf of the Ramblers, East Devon Group, submitted a number of applications under Section 53(5) of and Schedule 14 to the 1981 Act in respect of routes in Luppitt and Combe Raleigh parishes. As some of the routes cross the parish boundary duplicate applications were submitted. 8 proposals, namely Proposals 7-11 in Combe Raleigh and 9-14 in Luppitt, were considered in a report to the Council's Public Rights of Way Committee on 17 March 2016. These appeals relate to Luppitt Claim 13 (Claim 7 in Combe Raleigh is the duplicate of this), Luppitt Claim 14 and Luppitt Claim 12. The routes are shown, together with other proposed routes, on a plan prepared by Devon County Council which is attached to this decision.
4. The appellant submitted one comprehensive bundle of evidence in relation to the applications and appeal and some of the documentary evidence is common to all of the routes. However, for ease of reference I shall assess the evidence relating to each application separately, and cross-refer where convenient.

The Main Issues

5. 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 on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
6. As set out in the case of *R v SSE ex parte Mrs J Norton and Mr R Bagshaw (1994) 68 P & CR 402 (Bagshaw)* there are 2 tests and an Order should be made where either test is met:

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 there is a conflict of credible evidence and 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.

7. Section 32 of the Highways Act 1980 (the 1980 Act) provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances. Section 32 is declaratory of the common law.
8. The appellant relies on documentary evidence in support of the claims. The main issue is whether the evidence indicates that rights of way subsist, or are reasonably alleged to subsist, such that orders should be made to add the claimed routes to the definitive map and statement for the area.

9. I note the Council's submissions as to the tests which should be applied to the evidence. However, the tests are those set out above. In respect of a reasonable allegation (Test B) this is a lower threshold than on the balance of probabilities (Test A).
10. I also note the submissions made on behalf of the landowners with regard to the need for there to be a discovery of evidence. However, I am satisfied that evidence, namely, the Finance Act documentation to which I shall refer in my reasoning, has been discovered and that this evidence should be considered with all other relevant evidence available.

Reasons – Luppitt 13

Background

11. The claimed footpath (O-P-Q) starts in Combe Raleigh parish at a minor road at The Old Mill House (shown as Point O on the attached plan). It crosses the parish boundary into Luppitt parish at the River Love and then follows a field edge which has been marked as P1 on the plan. It continues along field boundaries, through Knappy Woodlands until it reaches Point Q. Claimed footpaths 12 and 14 also pass through Point Q and the appellant accepts that Luppitt 13 can only subsist if one or other or part of Luppitt 12 or Luppitt 14 subsists.
12. The appellant states that the claim actually starts at Point P on the Plan rather than at Point O, as Point P is the end of the publicly maintainable highway as shown on the Council's List of Streets. The Council's Boundary Stone, which supposedly marks the end of the publicly maintainable highway, was apparently found lying on the ground at Point O and I am informed that this accounts for the discrepancy. I accept that between Point O and P is a public highway and that there is no suggestion that it should be downgraded to a footpath. I shall therefore limit my considerations to the route between P and Q.

Documentary Evidence

Ordnance Survey mapping

13. Ordnance Survey (OS) Surveyors' drawings from 1806 and the OS 1st edition map show a track leading from Point O to the mill and farm buildings and continuing across the parish boundary into Luppitt. At Point P1 it turns away from the claimed route towards Woodhayes Farm. The same route is shown on the 1910 OS one-inch map, unfenced from P to P1 and then fenced to Woodhayes. It is similarly shown, uncoloured, on the 1919 map, the key to which states that private roads are uncoloured, and on the 1946 edition. The 1948 OS 1:25000 Provisional Edition shows part of Route 13 from the parish boundary to Point P1 as an "other (unclassified) road". As with earlier editions the route then turns away from the appeal route towards Woodhayes Farm.
14. The OS mapping provides evidence of the physical existence of the route between O and P1 since the early 19th century. OS maps were produced to record topographical features and not the status of routes shown. Since 1888 OS maps 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 and it is generally accepted that 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 and the mapping can be helpful in determining the likely status of routes when considered together with other evidence. The fact that the key to the 1919 map states that private roads are uncoloured does not exclude the possibility that a route carrying public rights could also have been shown uncoloured.

Tithe maps

15. The Combe Raleigh Tithe Map 1841 shows a road or track leading to the former site of the mill and farm. Neither the map nor the apportionment identifies it as public. No continuation of a track or path is shown from the mill leat to or across the river on the parish boundary into Luppitt. The Luppitt Tithe Map 1842 does not show the continuation of any track or path on the claimed route although there are gates depicted in the field boundaries on parts of the line of the claimed route which could have served agricultural and access needs.
16. The purpose of tithe maps was not to show public rights of way and, in general, neither footpaths nor bridleways were shown as their effect on the tithe payable was likely to be negligible.

1910 Finance Act records

17. The appeal route falls within the defined hereditament for Woodhayes Farm. No part of it is shown as excluded from valuation. The Field Book shows a total deduction in the value of the land of £50 for "Public Rights of Way or User". The hereditament is a large area of land shown as including a number of tracks and paths and it is not possible to tell to which paths the deduction refers. Nevertheless the "Particulars, description and notes made on inspection" refer to "Rt of Way nos. 1378, 1389, 1408, 1417" and I have no reason to believe that these are other than the OS numbers for the land parcels through which the tracks and paths ran. None of the field numbers referred to is crossed by the appeal route.

Survey of Public Rights of Way

18. The part of the claimed route within Combe Raleigh from P up to the Luppitt parish boundary was included in the survey of public rights of way under the National Parks and Access to the Countryside Act 1949 which was completed in the 1950s. It is claimed as FP15 and is described as "starts from the end of the Unclassified County Road by Collins's Dairy and proceeds eastwards for a distance of 60 yards to the footbridge on the Combe Raleigh/Luppitt parish boundary where it continues as Footpath No 37". It is shown marked 15 on the parish survey map. The grounds for believing it to be public are recorded as "Shown as a footpath on the Ordnance Survey Map" and under "Remarks" are the words "It is considered that this short footpath which leads into the Luppitt Parish should be maintained as a public right of way".
19. The Luppitt parish paths survey describes claimed Footpath 37 as "from County Road at Shaugh Farm proceeds west-south west for 450 yds to Woodhayes Farm past farm buildings and joins BP travelling west, NW and S for 450 yards to river which is Luppitt and Coombe Raleigh boundary. One

footbridge". This description includes the appeal route from the parish boundary to Point P1. However, at Point P1 it heads towards Woodhayes Farm and therefore does not include the route between P1 and Q. The parish survey map shows the route from P1 to Woodhayes Farm and on to Shaugh Farm marked "Del 37" and "deleted 37". The form records the grounds for believing it to be public as "Markings on old survey maps. Used by general public for over 35 years". The form also states that the parish council had repaired the footbridge in the past and the comments of the Rural District Council are that "This footpath is not shown on the map prepared under the Rights of Way Act 1932 as a public right of way. It is suggested that it should be retained as a public right of way."

20. The parish survey map for Luppitt shows the route between P1 and Q with a faint marking "33". However, the figure "33" also appears close to Higher Wick Farm from where a route leads towards Dumpdon Hill and eventually to Point Q. A route with no number is shown leading to Woodhayes Farm. The parish path survey form for Path 33, describes path 33 as "Dumpdon route to Woodhayes. Part common route". The grounds for believing path 33 to be public are stated as "markings on old survey maps" and the comments of the Rural District Council are "not shown on the map prepared under the Rights of Way Act 1932 as a public right of way. It is suggested that it should be retained as a public right of way." The word "omit" appears on the form but it is faint and appears to have been added at a different time to the completion of the form. Path 33 as described does not include the appeal route between P1 and Q.
21. A document headed "Honiton R.D Recommended determinations of Objections" shows that a Mrs Norcott submitted an objection in relation to claimed FP 37 and that it was recommended to "delete part of path from Northern corner of OS 1407 to Shaugh Farm via Woodhayes". The document also shows that the Ramblers' Association and Mrs H.F.Davy objected to the omission of FP33 and it was recommended to "add footpath from Northern corner of OS1407 along NW boundary of OS 1394, into Knappy Woodlands, into SW corner of OS 1377 and along SE boundary thereof to its junction with boundary of OS1388, along NW boundary of OS 1388 to crossing of Path 34, across OS 1378 and 134 to S of Dumpdon Hill and NW to Higher Wick". This description includes the appeal route between P1 and Q. Under "Remarks" is recorded "Suggested routes in lieu of claimed routes: Wick to Shaugh, Woodhayes to Higher Wick, Woodhayes to Wick, Dumpdon Lane to Woodhayes and Path 37".
22. A notice in the London Gazette dated 18 August 1959 records the deletion of part of Path 37 " from Northern corner of OS 1407 to Shaugh Farm, via Woodhayes" . (ie from P1 towards Woodhayes and then to Shaugh Farm and therefore not part of the claimed route). The same notice records the addition of footpath 33 "from corner of OS 1407, along north-western boundary of OS 1394, into Knappy Woodlands, into south-western corner of OS 1377 and along south-eastern boundary thereof to its junction with boundary of OS 1388 along north-western boundary of OS 1388 to crossing of Path 34, across OS 1378 and 1344 to south of Dumpdon Hill and north-westwards to Higher Wick".

23. A letter from the County of Devon to Mrs E Norcott of Woodhayes dated 22 February 1960 states that "Luppitt Parish Council have decided not to proceed with their claim to the above paths (33 and 34) and the Ramblers' Association and Mrs EA Davey have failed to produce evidence of public use. The appropriate Committee of the County Council have therefore reconsidered this matter and have decided to revoke their determination to add these paths to the Draft Map. Both footpaths will therefore be deleted from the map."
24. Neither the draft nor provisional definitive map and statement are available. However, it is clear that no part of the appeal route, including that part within Combe Raleigh, was included in the First Definitive Map and Statement.
25. The appellant states that the evidence shows that it was intended to delete the part of path 37 that ran through Woodhayes and replace it with the creation of an alternative route, numbered as the continuation of path 33, between P1 and Q. The appellant goes on to submit that Combe Raleigh footpath 15 and the part of footpath 37 from the parish boundary to P1 were never "legally deleted" and that path 33 from P1 to Q does not "appear to have gone through the correct process of the time for their legal deletion from the Modified Draft map" and therefore that they remain a public right of way.
26. The evidence shows that the appeal route from O to P1 was claimed and therefore it seems that at that time it was considered by the parishes and the rural district council to be public. In particular I note the reference to use by the public for 35 years and to the parish council repairing the footbridge. The views of these public bodies and the maintenance responsibility, which is unlikely to have been undertaken unless the parish council considered it to be public, attract some weight.
27. However, the fact that this part of the route does not appear on the First Definitive Map suggests that it was not considered to be a public right of way despite the views of the parish and rural district council. The reasons for this are not known but there is no evidence to suggest that the comments of the parish councils as recorded on the forms were not properly taken into account or that the officers of the county council failed to comply with necessary formalities. Overall the evidence available falls far short of that necessary to displace the presumption of regularity.
28. The continuation of the route from P1 to Q does not appear to have been claimed but was proposed as an addition "in lieu" of a claimed path. The basis for this is unclear but there is no evidence of any irregularity and the fact that it was considered, added to the draft map and then deleted weighs against the appellant's case.

Highways Records

29. Both older and more recent records show the road leading to the farm and mill buildings recorded as a cul-de-sac. No evidence is provided of the status of the route beyond the mill leat.

30. The minutes of Honiton Rural District Council dated 26 June 1920 record that "Woodhayes Bridge Combe Raleigh" was to be repaired and resurfaced with concrete at a cost of £20. The appellants suggest that this is likely to be the "footbridge" referred to by the parishes in the 1950s survey and that there is no evidence of any other bridges which could pertain to Woodhayes. The landowners refer to evidence from Roger Potbury who moved to Tower View Farm just west of point P in 1955 who states that the bridge at Point P has never had a name and he has never known it to be repaired. The landowners suggest that "Woodhayes Bridge" is likely to be one or both of the 2 bridges situated on the lane running to Dumpdon Hill from the Honiton to Dunkswell Road and provide an extract from the Luppitt Packet of May 2016 which refers to Woodhayes Bridge.
31. From all the evidence available it is not possible to ascertain whether the bridge referred to in 1920 is the bridge at Woodhayes. The fact that a bridge was maintained at that time by the Council is therefore of little assistance.

Aerial photographs

32. An aerial photograph dated 1946-9 shows a section of road leading from O towards P and indications of worn tracks in places. It does not show a continuous worn track along the appeal route. However, the quality of the image is poor and I accept that it is not necessarily the case that a worn line on the ground would be visible. The 2010 google earth image similarly does not show a continuous worn track but it is not claimed that there has been any recent use of the appeal route. I therefore do not find the aerial photographs to be of assistance in this case.

Landowner evidence

33. Mr Page-Turner, the owner of Woodhayes Farm since 1962, states that when he purchased the land it was made clear to him by the owner that there were no public footpaths crossing any of the land. He states that he was informed that there had been a number of private footpaths which were used by farm workers to walk to work and by children to go to school but that in 1962 there was no visible sign of any footpaths.
34. Mr Jackson who has owned part of the claimed route for over 70 years states that the appeal route has not been used in his memory. Similarly Mr Derryman who has owned land in the area since 1957 states that he has not seen any use of the appeal route.

Conclusions on the evidence

35. The appellants appear to accept that the route between P1 and Q did not exist prior to the late 1950s/early 1960s. From the evidence it seems that the Council considered adding it to the definitive map "in lieu" of other paths but that this did not happen. There is no evidence before me which suggests either that the route existed prior to this time or that it was subsequently created.
36. The route from P to P1 was claimed by the parish council. The reasons why it was not included on the Definitive Map are unknown but there is nothing to suggest that it was not properly considered at the time and no evidence

which would displace the presumption of regularity. Although this part of the appeal route is shown on some OS maps this does not mean that public rights exist and there is no other evidence in favour of the existence of public rights.

37. Accordingly I consider the evidence insufficient to lead me to conclude that it is reasonable to allege that on the balance of probabilities public rights subsist and I conclude that neither Test A nor Test B is met.

Reasons – Luppitt 14

Background

38. The claimed footpath U-Q-T commences at a minor road at Lower Wick Farm (Point U) and passes through Point Q to join a minor road at Shaugh Farm (point T). Point T1 is also marked on the plan and is the junction of 3 field boundaries.

Documentary evidence

Ordnance Survey Maps

39. Ordnance Survey (OS) Surveyors' drawings from 1806 and the OS 1st edition map show a short section of track leading from Shaugh Farm at Point T towards T1. It is not shown as connecting with any other track or footpath. Later OS maps (including the one-inch maps of 1910 and 1919) also show a short section of track leading from U but not connecting with any other track or path.
40. The one-inch map of 1946 and the 1:25000 Provisional edition 1948 both show a route leading from the vicinity of Point U to Point Q. At Q the route continues to Woodhayes Farm. A further route is shown connecting Woodhayes Farm and Shaugh Farm which includes that part of the appeal route between Points T1 and T. On the 1948 edition they are marked F.P. This annotation identifies the physical existence of a route at that time, but one which was not suitable for use by horses or wheeled traffic. In accordance with the disclaimer to the effect that the representation of a track or way on the map is no evidence of the existence of a public right of way, it provides no indication as to whether or not the route was regarded as public or private.

Tithe maps

41. The Luppitt Tithe Apportionment 1840 and Map 1842 show gated tracks at either ends of the appeal route, leading into fields and annotated "Road". There are no linking paths across the fields.

Finance Act

42. The appeal route passes through the hereditaments numbered 31 Stockers Farm, 9 Wick Farm, 157 woodland and H1 Woodhayes. A track at Stockers Farm/Lower Wick Farm, part of which forms the first part of the appeal route from Point U, is excluded from any hereditament. This may indicate that it was considered to be public.

43. The field book for hereditament H31 Stockers Farm records a deduction of £10 made in respect of "Public Rights of Way or User". A right of way and deduction of £10 is also listed under the heading "Charges, easements and restrictions affecting market value of Fee Simple" and under the "Particulars, description and notes made on inspection" are the words "Rt of way 1350, 1308". I agree with the appellant that it is likely that the numbers 1350 and 1308 represent the OS field numbers. The appeal route crosses these fields.
44. The Field Book entry provided by the appellants in respect of H9 Wick Farm is incomplete. However, the appellant, Council and landowners all make reference to a deduction of £25 in respect of "Public Rights of Way or User". The documentation provided to me records a deduction of £25 under "Charges, Easements and Restrictions affecting market value of fee simple" and under "Particulars, description and notes made on inspection" states "Rt of Way 1347, 1349". These fields are crossed by the appeal route.
45. 157 Woodland relates to Crown All Wood. The Appellant did not provide a copy of the Field Book in respect of this hereditament but agrees with the Council that no deductions are specified
46. In respect of H1 Woodhayes the "Particulars, description and notes made on inspection" record "Rts of Way nos 1378, 1389, 1408 and 1417" and there is a deduction of £50 for "Public rights of Way or User" , also listed under "Charges, Easements and restrictions affecting market value of fee simple". The appeal route crosses field 1378.
47. The landowners suggest that there is no link between the deductions for "Public Rights of Way or User" and the recording of a right of way through numbered parcels of land. However the sum attributed to "Public Rights of Way or User" and that attributed to "Charges, Easements and Restrictions affecting market value of fee simple" is in each case identical. It seems unlikely that the deduction was made in respect of a public right of user which is generally a non-linear public right and accordingly it seems to me more likely than not that the deductions made were in respect of a public right of way passing through the numbered fields.
48. There is no suggestion that any routes other than the appeal route passed through fields 1308, 1350, 1349 or 1347. A number of routes, including the appeal route, are shown on various plans within field 1378. It therefore appears that deductions may have been made in respect of the appeal route between U and Q, apart from the section in Crown All Wood. With regard to that section, I accept that it was not mandatory to claim deductions for public rights of way and the lack of a claim does not necessarily mean that such rights did not exist. The documentation provided does not provide any assistance in relation to the route between Q and T1 but it appears that the appellant does not claim that that part of the appeal route existed at the time the Finance Act documentation was produced.
49. I accept that 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. However, the majority of Form 4s on which such information was provided have been lost or destroyed. I also acknowledge that the recording of information about rights of way was incidental to the

main purpose of the legislation. Nevertheless, I consider that the Finance Act documentation is supportive of the existence of a public right of way between U and Q.

Survey of Public Rights of Way

50. Luppitt parish path survey forms claim the path numbered 37 from the county road at Shaugh Farm to Woodhayes Farm. This includes that part of the appeal route between Points T and T1. The form records the grounds for believing it to be public as markings on old survey maps and "Used by general public for over 35 years". On the plan, footpath 37 is marked deleted.
51. The appellant has also provided the survey form in relation to path 34 which is described as "To Woodhayes through fields" and is marked "omit". The appellant states that the route appears to go from Point T via T1 to Woodhayes along the same line as 37. However I note from the plan that 34 also appears to be marked at Shaugh Farm and, albeit very faintly, close to Lower Wick Farm. The appellant suggests that this route was added after the original survey map was drawn.
52. Path 37 from the parish boundary to Shaugh Farm via Woodhayes was included on the draft definitive map. However, as stated in relation to Luppitt 13 ¹, there was an objection to it and according to a notice in the London Gazette, part of path 37, including the part between Point T and T1 was deleted. The same notice records the addition of a Path numbered 34 "from Wick to Shaugh, via Crown All Wood following south-western and southern boundary of OS 1378". This would appear to describe the appeal route.
53. However, the letter from the County of Devon to Mrs E Norcott states that Luppitt Parish Council have decided not to proceed with their claim to paths 33 and 34 and that "the appropriate Committee of the County Council have therefore decided to revoke their determination to add these paths to the Draft Map. Both footpaths will therefore be deleted from the map". The appellant states that there is no evidence that a public notice was issued to inform the public of the proposed deletions or of any right of appeal. However, there is no evidence to suggest that officers of the council failed to comply with the necessary formalities and as in the case of footpath 33 in relation to Luppitt 13, the fact that the addition of a path numbered 34 was considered but rejected weighs against the appellant. Similarly the fact that the route from T to T1 was considered as part of route 37 but was not taken forward weighs against the appellant.

Aerial photographs

54. The aerial photograph of 1946-9 shows surfaced roads at each end of the claimed route but does not show a continuous worn track across fields. However, as stated previously, the quality of the image is poor. Similarly the 2010 google earth image does not show a continuous worn track. I note that it is not claimed that there has been any recent use of the route and consider the aerial photographs to be of little assistance.

¹ Paras 21-23

Landowner evidence

55. In addition to the information from the owner of Woodhayes referred to in relation to Luppitt 13² the current owner of Stockers Cottage states that the appeal route had not been used for 23 years. Reference is also made to the size and location of some beech trees in Crown All Wood and the landowners submit that the part of the route which passes through the wood was unlikely to have been used as either a private or public path since from the late 1890s onwards due to the trees. Mr Hooper, who has lived at Higher Wick Farm for over 70 years states that he has never known anyone use the appeal route as a footpath. I note the location of his property in relation to the appeal route and the fact that the appellant does not claim any recent use of the route.
56. The landowners suggest that as the land crossed by the appeal route was part of the Combe Raleigh Estate it is likely that paths and tracks across the land were used for private access for agricultural workers and their families.

Other matters

57. The landowners state that during the whole of the period 1824 to 1920 the Combe Raleigh Estate was the subject of a strict settlement and submit that during this time the land was held by a tenant for life who had no capacity to dedicate public rights of way over the land.
58. I accept that at common law the lack of any owner with the capacity to dedicate could be a bar to a finding of inferred dedication. However, the law relating to settled land is complex and the terms of settlements are by no means identical. The fact that land was subject to a strict settlement does not necessarily mean that there was no-one with capacity to dedicate and in this case I have insufficient information to lead me to that conclusion.

Conclusions on the evidence

59. The OS maps show the physical existence of the part of the route between U and Q in 1946 and 1948. The route between T and T1 is also shown on some maps. In itself this does not suggest that those parts of the route were public and I note that it is possible that they existed for the use of agricultural workers within the Combe Raleigh Estate and that in places the exact line of the route may not have been passable at times.
60. The appeal route is listed in a notice in the London Gazette as an addition to the draft map, but is later referred to in a letter from the County Council as deleted. In the absence of any evidence of irregularity in the Council's consideration of the matter at the time, this does not assist the appellant's case.
61. Against this, the Finance Act evidence shows that deductions were made in respect of a right of way, the location of which appears to be consistent with much of the route between U and Q. Such deductions are consistent with the route being public, although I acknowledge the lack of any deduction in respect of the part through Crown All Wood. Although this information pre-dates the parish council surveys, I note that the parish council claim forms

² Para 33

all refer to routes having been shown on old survey maps, some refer to use by the public, but none make any reference to Finance Act documentation. I also note that the County Council letter which states that the route should be deleted from the draft map refers to no evidence of use having been provided. There is nothing to suggest that the Finance Act documentation now available to me was considered at the time.

62. Taking all these matters into account, I consider that in relation to the part of the route between U and Q there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist. I therefore conclude that it is reasonable to allege that, on the balance of probabilities, a right of way subsists between U and Q. Test B is therefore met in relation to this part of the appeal route.

63. Neither Test A nor test B is met in relation to the route between Q and T.

Reasons – Luppitt 12

Background

64. The claimed footpath (S-Q-R) starts at the minor public road adjacent to Higher Wick Farm. It crosses registered Common on the slopes of Dumpdon Hill and then turn south passing through Point Q to Woodhayes Farm from where it continues south to the minor public road at Point R.

Documentary Evidence

Ordnance Survey mapping

65. Most of the claimed route is not shown on early 19th century mapping. The OS 25 inch to a mile 1st edition map surveyed in 1887 shows the claimed route in its entirety, labelled F.P. in places, as does the 2nd edition 25 inch to the mile map revised in 1903. Smaller scale maps from the early 20th century show a track from the road at Higher Wick Farm leading onto Dumpdon Hill and tracks at Woodhayes Farm but no connecting paths. However, the 1946 one-inch map and the 1:25000 1948 provisional edition show the entire route, in places marked F.P.

66. It may well be the case that the route is omitted from some of the smaller scale maps due to the scale. The OS mapping provides good evidence of the physical existence of the route between 1887 and 1948. However, as previously stated, the maps provide no information with regard to status.

Tithe map

67. No part of the appeal route is shown on the Tithe map for Luppitt parish. Dumpdon Hill is identified as common land and gates are shown in the field boundaries on the line of the route.

1910 Finance Act records

68. The appeal route falls within hereditaments H16 (Commons) and H1 Woodhayes. The Field Book entry for H16 states that the land is common and waste. A deduction is made for "Rights of Common" but there is no deduction for "Public Rights of Way or User". Common Rights are referred to under "Charges, Easements and Restrictions affecting market value of Fee

Simple” but there is no reference to any rights of way. Recorded under “Fixed Charges, Easements, Common Rights and Restrictions” are the words “Rights of Common and probably many rights of way”. The appellant accepts that the part of the appeal route through hereditament H1 cannot be specifically identified in the Field Book.

69. With regard to H1 Woodhayes a deduction of £50 appears to relate to a route or routes through several fields with the OS numbers 1378, 1389, 1408 and 1417. Part of the appeal route from Point Q leading towards Dumpdon Hill is in field 1378, from Point Q to Woodhayes Farm is in 1389 and from Woodhayes Farm to Point R is in fields 1408 and 1417. In some of the fields the various maps show other routes but no other route is apparent in field 1417. The deductions may therefore have been made in respect of a public right of way on the line of the appeal route from where it enters hereditament H1 from hereditament H16 to Point R.

Survey of Public Rights of Way

70. Luppitt parish path survey forms claim the route in various sections, as 33, part of 37 and 36. Path 33 is described as “ Dumpdon route to Woodhayes. Part Common route” and appears to include the part of the appeal route between S and Q continuing on as far as Woodhayes Farm. The grounds for believing the path to be public are stated as “markings on old survey maps” and the comments of the Rural District Council are “Not shown on the map prepared under the Rights of Way Act 1932 as a public right of way. It is suggested that it should be retained as a public right of way”. The word “omit” appears on the form but it is faint and appears to have been added at a different time to the completion of the form.
71. Path 36 is described as “to meet road through grass fields”. This appears to relate to the section of the appeal route from Woodhayes Farm to Point R. The grounds for believing it to be public and the comments of the Rural District Council are the same as in relation to path 33. The form is also marked “omit”.
72. The route also appears to include part of claimed footpath 37 in the vicinity of Woodhayes. This is the route described in relation to Luppitt 13³ in respect of which the form states “used by the general public for over 35 years”.
73. The notice in the London Gazette dated 18 August 1959 referred to previously⁴ lists the addition of footpath 33. However this is one of the routes referred to in the letter to Mrs Norcott in respect of which the Council “decided to revoke their determination to add these paths to the Draft Map”. The notice in the London Gazette also records the deletion of path 37 from the map. No information is available with regard to why path 36 was not included on the Definitive Map.
74. There is no evidence to suggest that officers of the Council failed to consider the claims properly or failed to comply with any necessary formalities and

³ Para 19

⁴ Para 22

the fact that the appeal route was considered and rejected weighs against it being public.

Aerial photographs

75. The aerial photograph of 1946-9 shows surfaced roads at each ends of the claimed route and access tracks around Dumpdon Hill. No continuous worn line is apparent along the appeal route but the quality of the image is poor. Similarly the 2010 google image does not reveal a continuous worn track but recent use of the route has not been claimed. I do not find the aerial photographs of any particular assistance.

Landowner evidence

76. The landowners suggest that as the land crossed by the appeal route was part of the Combe Raleigh Estate it is likely that paths and tracks across the land were used for private access for agricultural workers and their families.

77. Dumpdon Common has been owned by the National Trust (NT) since around 1961. NT did not comment on the application but I note that a statutory declaration has been made under s31(6) Highways Act 1980 which records a lack of intention to dedicate rights of way across the land in its ownership from 1993 onwards. This declaration has no impact on any pre-existing rights. I am also informed that there has been a locked gate across the track since around 1961 and that there have been no complaints from members of the public.

78. Mr Hooper, who has lived at Higher Wick Farm for over 70 years states that he has never known anyone using the route R-Q-S. The evidence of Mr Page-Turner in respect of Woodhayes is also relevant in respect of part of this route.

79. However, the appellant does not claim any recent use of the appeal route. The claim is based on documentary evidence and it is perhaps not surprising if landowners have not seen any use of the route by the public since the 1950s or 60s, given that the route was not recorded on the definitive map.

Other matters

80. As in Luppitt 14 the landowners state that the land crossed by the appeal route was held in strict settlement from 1824 to 1920. However, I have insufficient information to lead me to the conclusion that there was no-one with capacity to dedicate the land as a public right of way during that period.

Conclusions on the evidence

81. The OS maps show the physical existence of the appeal route, marked FP, in 1887. The Finance Act documentation shows deductions being made for a route through hereditament H1 which appears to pass through the same field numbers as the appeal route, one of which appears to have no other route shown within it on any maps. In respect of the other hereditament through which the appeal route passes there is no deduction for any public rights of way. However, it is common land and there is a reference to numerous rights of way. On balance I consider that the Finance Act documentation weighs in favour of the appeal route being a public footpath.

82. The appeal route was claimed by the parish but, for reasons which are not apparent, was not included on the Definitive Map. Although I consider that on its own, this weighs against the appellant, I accept that this does not preclude it from being a right of way.
83. I note that the basis for the parish council claim at that time appears to have been "markings on old survey maps". There is no reference on any of the claim forms to the Finance Act and there is nothing to indicate that any of the Finance Act documentation now provided to me was considered at that time.
84. Having regard to all of these matters I find that there is a conflict of evidence and that it is reasonable to allege that on the balance of probabilities a right of way subsists over the appeal route. Test B is therefore met.

Conclusion

85. Having regard to these and all other matters raised in the written representations I conclude that the appeals in relation to Luppitt 12 and part of Luppitt 14 should be allowed and that the appeals in relation to Luppitt 13 and part of Luppitt 14 should be dismissed.

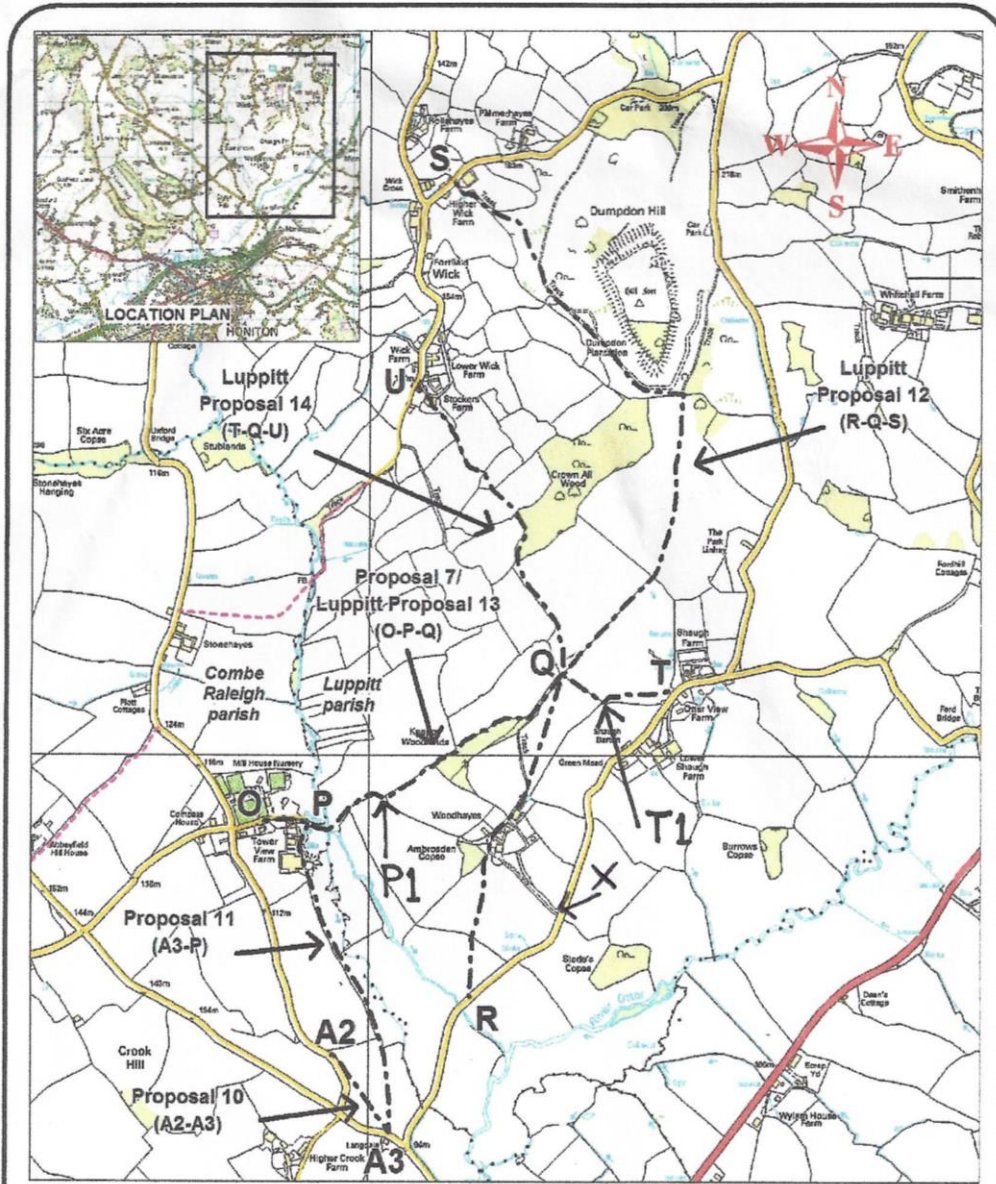
Formal Decisions

86. I dismiss the appeal in relation to Luppitt 13 and that part of Luppitt 14 between Points T and Q on the attached plan.
87. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Devon County Council is directed to make an order or orders under Section 53(2) and Schedule 15 to the Act to modify the definitive map and statement for Devon County Council by adding public footpaths from Lower Wick Farm (Point U) to Point Q, from Higher Wick Farm (Point S) to Point Q and from Point Q to Woodhayes Farm and then south to meet the minor public road at Point R 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.


Alison Lea

Inspector

A



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DEVON COUNTY COUNCIL Definitive Map Review, Combe Raleigh parish Informal Consultations, Proposals 7, 10 & 11 Claimed addition of footpaths		drawing number <u>HTM/PROW/14/82</u> date <u>Jul 2014</u> scale <u>1:12,500</u> drawn by <u>NSC</u>
Notation Claimed footpaths (7, 10 & 11 with Claims 12, 13 & 14 in Luppitt parish) Existing footpaths		 David Whitton HEAD OF HIGHWAYS, CAPITAL DEVELOPMENT & WASTE