

## Appeal Decision

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 17 January 2017

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### Appeal Ref: FPS/J1155/14A/18

- 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 8 July 2016.
- The Appellant claims that the appeal route from a minor road at Luppitt village (grid reference ST 1692 0660) to a minor road north of Meadow Croft (grid reference ST 1646 0578) should be added to Devon County Council's Definitive Map and Statement as a public footpath. The route is shown marked I-J on the attached plan.

### Summary of Decision: The appeal is allowed

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#### Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site but I am satisfied that I can make my decision 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 parish. This appeal relates to proposal 4, the route of which is shown, together with other proposed routes, on a plan prepared by Devon County Council which is attached to this decision.

#### The Main Issues

4. 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.
5. 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.

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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.

6. 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.
7. The appellant relies on documentary evidence in support of the claim. 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 documentation. The main issue is whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the claimed route to the definitive map and statement for the area.
8. 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).

## **Reasons**

### ***Background***

9. The claimed footpath starts at Point I where it leaves a minor public road known as Church Hill. It enters an enclosed tract of land which forms part of an existing right of way (public footpath Luppitt No 1).<sup>1</sup> From where it leaves Luppitt No 1 it crosses a field to meet an enclosed lane. It crosses the lane and then crosses a number of fields to join a minor public road at Point J which is just to the north of Meadow Croft.
10. Although it is not necessary to consider that part of the appeal route which is already a public footpath, none of the evidence relates only to that part. Accordingly for ease of reference I shall refer to the appeal route as the whole of the route between Points I and J.

### ***Documentary Evidence***

#### ***Ordnance Survey mapping***

11. Ordnance Survey (OS) Surveyors' drawings from 1806 and the OS 1<sup>st</sup> edition map of 1809 show a section of track leading from the road in Luppitt village on the line of the claimed route and what is now Luppitt No 1. No continuation of either route is shown.

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<sup>1</sup> Luppitt No 1 is shown on the attached plan between Point I and Point K1.

12. The OS one-inch map published in 1899 after a 1896/7 revision shows the whole of the claimed route as a footpath from Luppitt village to Scottishayes Farm and the OS second edition 25" to the mile map revised in 1903 shows the route with double-dashed lines labelled "F.P". It also shows 3 footbridges labelled "F.B" where the claimed route crosses streams. The claimed footpath is also shown on the 1919 Popular Edition map, on the 1937 Fifth edition one-inch map and on the 1946 New Popular Edition.
13. The OS mapping provides evidence of the physical existence of the route since at least the late 19<sup>th</sup> century. However, OS maps were produced to record topographical features and not the status of the routes shown. Since 1888 they 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. Nevertheless there are ambiguities between and even within some of the instructions issued to 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.
14. Furthermore, I note that Luppitt Footpath No 1 appears on a one inch map for the first time on the 1937 Fifth Edition. Dr Yolande Hodson points out in her book on Popular Maps that the one-inch revision rules of 1936 for the first time stated that not only were paths "habitually used by the public" to be shown but also "mountain tracks and less important paths used by hikers and tourists". Although far from conclusive I note the suggestion that the fact that the claimed route was shown on earlier maps than Luppitt No 1 may mean that the claimed route was at that time considered to be of more importance than Luppitt No 1, particularly given that the latter appears to have been shown only after the change in instruction.

### ***Tithe maps***

15. The Luppitt tithe map 1842 shows the claimed route as a dashed line leading from the track at Luppitt village until it reaches the stream between plots numbered 602 and 683. The showing of public rights of way is not the purpose of tithe maps and, in general, neither footpaths nor bridleways were shown as their effect on the tithe payable was likely to be negligible. However, the fact that the majority of the route is shown is evidence of its physical existence and is not inconsistent with the existence of a public right.

### ***1910 Finance Act records***

16. The appeal route falls within the defined hereditaments of H102 (Dolish) and H19 (Greenway Farm). The field book for hereditament H102 (Dolish) records a deduction of £40 for "Public Rights of Way or User". A right of way and deduction of £40 is also listed under the heading "Charges, Easements and Restrictions affecting market value of Fee Simple". Under "Particulars, description and notes made on inspection" are the words "Rt of Way nos. 686, 792, 794". The appeal route passes through fields with these OS numbers and appears to be the only path shown within field 794.
17. The field book for hereditament H19 (Greenway Farm) records a deduction of £50 for "Public Rights of Way or User". A right of way and deduction of £50 is similarly listed under the heading "Charges, easements and Restrictions affecting market value of Fee Simple " and "Rt of Way nos.

1074, 1070, 964, 922, 949, 953 and 961" appear under "Particulars, description and notes made on inspection". The appeal route passes through field 922 and appears to be the only route to do so.

18. I accept the Council's point that there is nothing to indicate that this information was based on that provided by the landowner, or by someone acting on the landowner's 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 deductions made and the listing of the field numbers through which the appeal route passes is supportive of the existence of a public right of way along the appeal route.

### ***Luppitt Parish Council Minutes***

19. A minute from the Parish Council of 16 October 1907 remarks on the dangerous state of many footbridges and tenders for repairs were invited. At the November meeting 3 tenders were recorded for 3 footbridges including "To Scotshayes". Mr Mansfield's tender was accepted and the minutes of 15 April 1908 record his bill being paid. Footbridges on the claimed route near Scotshayes are shown on various OS maps and the Council does not appear to dispute that the footbridge referred to is on the appeal route.
20. In December 1918 a complaint was made to the chairman of the Parish Council about the dangerous condition of Scotshayes footbridge and a Mr Palmer was asked to do the necessary repairs to Scotshayes and Week bridges. Minutes of May 1919 record that the works were satisfactory and Mr Palmer's bill was paid. Mr Palmer was also paid by the Parish Council for work to Scotshayes footbridge in 1924.
21. A Mr Totterdell was asked by the Parish Council to repair Scotshayes bridge in 1928, 1932, 1942 and 1948 and in each case the minutes record him being paid for his work.
22. In July 1959 a bridge on the Scotshayes path was found to be in need of repair but the parish council decided to take no action until it was found whether the footpath appeared on the provisional definitive map.
23. The Council accepts that the records submitted regarding maintenance or repairs of footbridges on the route during the first half of the 20<sup>th</sup> century suggest that the Parish Council accepted some responsibility for minor repairs and provide some evidence that it may have been considered to be public. Nevertheless it suggests that the maintenance and repairs may have been done under a discretionary power and that the route may have been used by a limited section of local inhabitants rather than the wider public. Reference is made to repairs on footbridges at other locations that may not have been on routes either claimed or recorded later as public footpaths.
24. The parish council minutes do not reveal anything about the power under which maintenance was carried out or the extent of use of the footbridge. They do reveal that public monies were used to repair the footbridge on seven separate occasions over a lengthy period. There is nothing in the minutes to suggest that there was any dissent regarding the acceptance of

this responsibility and in my opinion the maintenance and repair of the footbridge was unlikely to have been undertaken unless the parish council considered it to be on a public right of way.

### ***Survey of Public Rights of Way***

25. The appeal route was shown on the survey map and described on the survey form completed by Luppitt parish as part of the survey of public rights of way completed in the 1950s under the National Parks and Access to the Countryside Act 1949. It was described as "FP52 to Post Office through grass fields and over 2 F.B." The grounds for believing it to be public are stated "mentioned in P.C. minutes". This is consistent with the minutes referring to maintenance and repair of the footbridge. The comments of the Rural District Council are recorded as "This footpath is 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".
26. The form is marked "omit" but it is not known when or by whom this was added. The Council states that the route was not included at the Draft and Provisional map stages for recording on the Definitive Map. It refers to it being "proposed to be omitted without sufficient evidence that it was public". However, no evidence regarding the reason for its omission has been provided.

### ***Aerial photographs***

27. The Council has submitted copies of aerial photographs. These are dated 1946-9 and 2007. Although the lines of some worn tracks are apparent crossing some fields, it is not possible to make out the appeal route. However, the quality of the images is such that in any event all worn lines on the ground may not be visible. Furthermore it is not claimed that there has been any recent use of the appeal route. Accordingly I do not find the aerial photographs to be of assistance in this case.

### ***Landowner evidence***

28. Landowner evidence forms have been completed by 3 owners of land crossed by the appeal route. Although they all state that they do not believe the route to be public and that they have not seen the public using or wanting to use the route, their knowledge relates to recent times only. One of the forms contains a statement from a previous owner, but his knowledge only dates back to 1953. Mr Rosewell of Dolish Farm states that the property has been within his family's ownership since 1923 but provides no evidence other than in respect of the 14 years of his ownership.

### ***Conclusions on the evidence***

29. OS maps show the physical existence of the entire route since at least the late 19<sup>th</sup> century. The Finance Act documentation, as well as showing its physical existence, records deductions being made in respect of a right of way across the relevant hereditaments. The right of way appears to be within the same field numbers as the appeal route and two of those fields appear to have no other route shown through them on any maps. This weighs in favour of the appeal route being public.

30. The Parish Council accepted responsibility for the repair and maintenance of a footbridge on the appeal route between 1907 and 1948 and this is consistent with the fact that the route was claimed as a public footpath by the parish in the 1950s survey. The fact that the Parish Council appears to have believed that the route was public during this period attracts some weight. However, the route was not included on the draft or provisional map. Although the reasons for this are not apparent, it weighs against, but does not preclude, the appeal route from being a public footpath.
31. I note that the basis for the parish council claim was that it was included in parish council minutes. There is no reference to the Finance Act documentation which has now been provided to me and nothing to indicate that it was available or considered when the decision to omit the route from the draft definitive map was made.
32. Taking all of these matters into account, I find that there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist. It is reasonable to allege that on the balance of probabilities a right of way on foot subsists over the appeal route and therefore Test B is met.

### **Conclusion**

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

### **Formal Decision**

34. 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 to the Act to modify the definitive map and statement for Devon County Council by adding a public footpath from a minor road at Luppitt village (grid reference ST 1692 0660) (Point I) to a minor road north of Meadow Croft (grid reference 1646 0578) (Point J) 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.

*Alison Lea*

**Inspector**

