
Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 08 February 2017

Appeal Ref: FPS/J1155/14A/19

- This Appeal, dated 15 August 2016, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Devon County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 28 April 2008 was refused by the Council on 8 July 2016 and the applicant was notified by letter dated 22 July 2016.
- The Appellant claims that the appeal route which runs from a minor road near Hillend Farm to Bridleway 9 in Luppitt parish should be added to the Definitive Map and Statement for the area as a public footpath.

Summary of Decision: The appeal is dismissed

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 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. Submissions have been made by the Appellant, Devon County Council ('the County Council') and by one of the landowners concerned, Mr C G Spiller.
4. This appeal relates to Proposal 7 from a batch of applications made at the same time by Mrs R Kimbell and another, on behalf of The Ramblers, East Devon Group. It is shown running between points O and P on the attached map.

The Main Issues

5. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the County Council) 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. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the DMS where 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.
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7. 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 two 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: It is reasonable to allege that on the balance of probabilities a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a public right of way cannot be reasonably alleged to subsist, then I should find that it is reasonable to allege that one does subsist.

8. 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 only need to be satisfied that the evidence meets Test B to justify the making of an order.
9. 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.
10. The applicant relies on documentary evidence to support this claim. They did not submit any user evidence although one form appears to have been completed latterly by Mrs A E Fry and submitted as part of the County Council's research.
11. I note the County Council's submissions in relation to the tests which are to be applied, but I am satisfied that I have correctly identified and set out the relevant tests above. Test B must, inevitably, require a lower threshold of proof than Test A.

Reasons

Background

12. The claimed footpath leaves a minor road to the south of Hillend Farm (Grid Reference ST17950705) and runs in a westerly direction¹ through fields numbered 544, 546 and 549 as marked on the Ordnance Survey ('OS') 1:2500 map dated 1903. It then crosses another minor road entering field number 635 before crossing the River Love via a footbridge, where it enters Hense Moor (OS parcel number 29), which is registered Common Land. The claimed route then crosses registered Public Footpath 14 (Grid Reference ST17250700) before turning north-westerly and then south-westerly to join registered Public Bridleway 9 (Grid Reference ST17090964) where it terminates.²

What is the evidence which has been 'discovered'?

13. The appellant does not clearly identify the evidence which was discovered and which prompted the application. However, it would seem from the papers on

¹ Not an eastward direction as set out in the description given by the appellant in their appeal statement dated 15 August 2016

² All grid references and field numbers taken from the description given by the appellant

the file that the 'new' evidence is the information contained within the documentation connected with the Finance Act 1910. This information was not available at the time that the Definitive Map and Statement were first prepared in the early 1950s. I have therefore approached this decision on the basis that I am now entitled to take that information into account, together with all other evidence available, whether it has been previously considered or not.

Historical Mapping Evidence

14. There appears to be no dispute between the parties that the claimed route appears on a variety of OS maps to a greater or lesser extent dating back to 1887, when it appears on the first edition of the OS 25" to one mile map.
15. It does not appear on earlier small scale maps produced by either the OS or by other well-known map makers of the period. This is not surprising given the scales of the maps concerned.
16. It has continued to be shown on OS maps, even those at quite a small scale, on the route described in the application.
17. The OS mapping evidence is unlikely to be considered to be new evidence, as it was available at the time when the Definitive Map and Statement were being produced in the early 1950s. Nevertheless, I am satisfied that the mapping evidence shows the physical existence of the route on the ground for over 100 years, but despite its annotation on some maps as 'FP', I take this to relate to its physical characteristics rather than to its public status.

Luppitt Parish Minutes

18. It is not disputed by the County Council that the Parish minute books show that public money appears to have been spend on repairing the bridge across the River Love early in the 20th century, and that the condition of the stiles along the route was discussed more than once by the Parish Council on subsequent occasions. The bridge was repaired in 1908 and the cost was borne by the Parish Council. The stiles were discussed in both 1910 and 1925, although no repairs are recorded as being carried out at public expense. The bridge was further repaired by the Parish Council in 1937; and considered for further repair in 1952 although there appears to have been an issue with the high cost at that time. No further details have been supplied.
19. The County Council considers that the Parish Council would have been able to spend public money on repairing routes which provided access for those persons with common rights on Hense Moor. The appellants disagree, and I am inclined to the same view. The commoners may have been the principle users of the path concerned, but I consider that it is likely that they would have been considered to be representative of 'the public' as being members of the local community. It would be unlikely that the Parish Council would have been able to spend public money on facilities for the benefit only of a limited part of the public.
20. However, these minutes should have been available to the Parish Council and the County Council at the time when the Definitive Map and Statement were being produced in the early 1950s. This evidence is not necessarily new, therefore, although I am able to consider it in conjunction with all the other evidence.

Finance Act 1910 Documentation

21. Whilst this information was not available in the early 1950s, in this particular case it does not help to shed any light on the status of the claimed route. Although the route is marked on the OS base map used for the associated mapping, there is no mention of its existence in the written records relating to the relevant parcels of land in connection with the Finance Act 1910. Despite general references in the information relating to hereditament which included Hense Moor, there is nothing in the documentation which clearly relates to the claimed route.
22. Both the County Council and the Appellant appear to agree on this fact although the appellant considers that the lack of any reference to a path in this location amongst the documentation does not demonstrate that there was no public right of way. Whilst this may be so, it does not help the appellant's case, since there is clearly no positive evidence of a public right of way. The evidence is neutral.

The Definitive Map Process

23. The appeal route was claimed by the Parish Council as a public footpath and identified on the first page of the path survey form by the number 11. It was described as:

"Foot.B to Goulds and Hillend road. Stiles and Gates and gaps"

This information is the same in both the papers submitted by the County Council and those submitted by the Appellant, and also show that the survey form was overwritten with the word 'OMIT'. The information on the reverse side of the form, which indicated that the Rural District Council ('RDC') at the time confirmed that the path had been included on the 1932 Rights of Way map³ and that the RDC suggested that the path should be retained as a public right of way, is also the same in both sets of papers. The survey form was signed by the clerk at the time, O M Clapp.

24. However, I noted an anomaly regarding the evidence of what else was written on the reverse, or second page, of the path survey form. The copy of the second page submitted by Mrs Kimbell states as follows:

"Grounds for believing path to be public – Markings on old survey maps"

The copy of the second page of the survey form submitted by the County Council reads as follows:

"Grounds for believing path to be public – Mentioned in Old Minutes"

25. Having checked this with both parties, it has been confirmed that the correct copy is that supplied by the County Council. Consequently it is clear that the Parish Council minutes had been consulted at the time of the preparation of the DMS in 1951, and the information contained in them must have been taken into consideration at the time the DMS was initially prepared. I must presume that their contents were properly taken into account in reaching the decision to omit the path from the final DMS and that the minutes cannot now be taken as being new or discovered evidence, although it is still relevant to take them into account in considering the evidence as a whole.

³ Now unfortunately not available

26. I note that Mrs O M Clapp was consulted by the Vice Chairman of Luppitt Commons Trustees Committee in 2015 and that she appears now to consider that this path was not a public right of way prior to the 1950s. This of course conflicts with the evidence on the survey form which she signed in 1951, but may be relevant to its subsequent omission from the DMS.

Other Evidence

27. In conducting its own research into the application, the County Council obtained information from a number of landowners in the area, and a completed user evidence form from Mrs A E Fry of Hillend Farm. Although Mrs Fry claims to have used the alleged route on horseback and on foot, none of the other landowners acknowledge any use taking place at all. Since Mrs Fry states that she is a commoner, her use of the path may have been overlooked by them. She would not appear to own any of the land crossed by the claimed route.

Conclusions on the Evidence

28. Section 53(3)(c)(i) requires that there be some discovered evidence, and the implication is that the new evidence may alter the way in which all the other available evidence is interpreted.
29. I accept that the Parish Council minutes would seem to suggest that the claimed route was considered and treated as a public right of way during the earlier part of the 20th century, but the 1951 Survey documents indicate that, although this information was taken into account during the preparation of the DMS, it was not considered by the County Council to support the existence of public rights of way.
30. Paragraph 4.33 of Circular 1/09⁴ states that when considering an application to delete or downgrade a public right of way, there must be new evidence. An order cannot be founded simply on a re-examination of evidence known at the time the definitive map was surveyed and made.
31. I acknowledge that the issue I am examining relates to the question of adding a path to the map rather than deleting one, but it seems to me that there is a general principle here that holds true for any application made under Section 53(3): it cannot be right simply to re-examine the evidence known at the time the DMS was being prepared and come to a conclusion different from the one reached by the County Council at the time, based on exactly the same evidence. The reason why the path was omitted is not now clear, but I must presume, in the absence of any clear evidence to the contrary, that the County Council carried out their duties with proper diligence.
32. In this case, the discovered evidence (in relation to the Finance Act 1910) offers no new insight into the situation that was investigated in 1951, and consequently it is not helpful to the Appellant since it does not provide any evidence to put into the balance when re-examining all the available evidence.
33. The evidence of use presented in the papers is insignificant as it stands, and the Appellant has disregarded it. The information provided by the landowners relates to the lack of usage, and in terms of this application I agree with the Appellant that it is irrelevant.

⁴ Rights of Way Circular – Guidance for Local Authorities version 2 October 2009 published by Defra

34. The evidence contained in the Finance Act 1910 documentation does not conflict with the decision reached by the County Council in 1951, and I therefore find that there is no justification for me to displace the decision reached at that time. No public footpath was found to subsist at that time and no evidence has been discovered to make it reasonable to allege that a public footpath subsists now.

Conclusions

35. Having regard to these and all other matters raised in the written representations I conclude that neither Test A nor Test B is satisfied and the appeal should be dismissed.

Formal Decision

36. The appeal is dismissed.

Helen Slade

Inspector

APPENDIX 1

