



## Appeal Decision

**by Sue M Arnott FIPROW**

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

**Decision date: 12 November 2018**

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### **Appeal Ref: FPS/J1155/14A/21**

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of 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.
- By application dated 1 January 2018 Mrs Kimbell (on behalf of The Ramblers<sup>1</sup>) claimed that a route between the villages of Weston and Buckerell via Deer Park should be added to the definitive map and statement for the area as a public footpath.
- The application was refused by Devon County Council under its delegated procedures and the appellant was formally notified of the decision by letter dated 16 March 2018.

**Summary of Decision: The appeal is dismissed.**

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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 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant, The Ramblers (RA), requests that the Secretary of State directs Devon County Council (DCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a public footpath.
3. For ease of reference in this decision, I shall refer to the points labelled on a plan initially prepared by DCC but subsequently amended by the appellant to identify the route at issue here and submitted with the application for a definitive map modification order in January 2018. This plan shows the western end of the claimed footpath as point I and the eastern end as point J. Intermediate points A, B, C and D have been added by hand.
4. In addition to the submissions from the appellant and DCC, I have before me representations made by, or on behalf of, a total of five property owners affected by the claimed route. I have considered all these documents in forming my conclusions. In this case, I am satisfied I can reach a reliable decision without visiting the site.

### **Main issues**

5. The main issue in this case is whether the available evidence shows that, at some time in the past, a public right of way was established along the full length of the appeal route and still exists today, relying on the accepted legal maxim '*once a highway, always a highway*'.

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<sup>1</sup> The Ramblers' Association (East Devon Group)

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6. Section 53(2) of the 1981 Act requires DCC (as the surveying authority) to make orders to modify its definitive map and statement in consequence of certain events specified in Section 53(3).
7. One type of event is set out in sub-section 53(3)(c)(i): "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates ...*".
8. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify a modification order being made as requested by the appellant.
9. Therefore, for the purposes of this appeal, and in relation to the claimed route, I need only be satisfied that the evidence meets the lesser test.

## **Reasons**

### ***Background***

10. After considering evidence in November 2017, DCC decided not to make a definitive map modification order in relation to a similar route (I-A-C-D-J) which lies to the east of Buckerell and west of Weston.
11. Shortly after this, the appellant submitted an application, relying on the same historical evidence as had been considered two months earlier but instead seeking the addition of a footpath along a different alignment between the same two points (I-A-B-C-D-J). Following DCC's decision made under its delegated procedures, this application was formally rejected by letter dated 18 March 2018.
12. In fact another variation of this route had been considered in 1992 after receiving a claim from The Ramblers that three connecting rights of way existed in the vicinity of the Deer Park Hotel. DCC had declined to take any action in relation to any of these three routes.
13. In lodging this appeal against the decision of DCC not to make an Order in relation to the 2018 application, the appellant submits that the historical documentary evidence previously examined by DCC is sufficient to reasonably allege the existence of a public footpath in 1797. The appellant relies entirely on documentary evidence in the form of an extract from Court records from the late eighteenth century, Ordnance Survey (OS) maps from the end of the nineteenth century and into the twentieth, together with Parish Council minutes from the same period.
14. I propose to start by considering the Quarter Sessions records from that date since this is the foundation upon which the appellant's case rests.
15. Section 32 of the Highways Act 1980 provides for "*any map, plan or history of the locality or other relevant document*" to be taken into consideration when deciding whether or not a way has been dedicated as a highway.

### **Quarter Sessions Records**

16. The Quarter Sessions record book for the area includes details of a diversion order in 1797 relating to part of the appeal route. The appellant submits that this, together with the accompanying plan which clearly identifies the footpaths then at issue, is sufficient to reasonably allege the existence of the public rights of way they refer to.
17. Although colours are faded, the plan shows in yellow routes approaching Deer Park from three directions, each labelled "*Old Foot Path*". Two are shown to reach the road "*From Buckerell*" at points north and north west of Deer Park whilst the third is shown heading south eastwards and labelled "*To Weston Village*". The sections of path passing through what is now the Deer Park Hotel are labelled "*Old Path Claimed*". The plan depicts two other routes in brown, labelled "*New Path*", "*Proposed New Path*" and "*Proposed New Foot Path*".
18. The yellow route broadly equates to the appeal route I-A-B-C-D and the brown route to the previously claimed alternative route between A, C and D.
19. The Court record is signed and sealed in three parts: firstly by the owner of "Deerparke" consenting to the diversion, secondly by the two Justices of the Peace making the order, and lastly by the surveyor who had subsequently surveyed the area, accurately measured the routes and prepared the plan.
20. The appellant submits that it is reasonable to allege that all the routes shown on the 1797 plan marked in yellow and labelled "*Old Foot Path*" and "*Old Path Claimed*" were at that time already public rights of way.
21. It is argued that the purpose of the Order was to make the route "*more commodious to the public*" although it seems clear the owner of Deer Park would also have derived benefits. It notes the Order is signed and sealed by the owner (of most but not all) of the land affected using the words "*through my said lands*", not to his property. It was therefore not a private access.
22. The Order was signed and sealed by two Justices of the Peace who stated they had inspected the existing path, described as "*leading to the hamlet of Weston*" with the implication this was a cross-country through-route for pedestrians to walk between the two villages. They also "*view'd a course proposed for the new Footpath*" before agreeing the old route "*may be diverted and turned*".
23. The applicant highlights the wording of the Order which implies that the path did in fact continue from point D as far as Weston. Further, since the plan shows the appeal route labelled "*Old Path*" extending as far as the public road near Buckerell, it clearly had a 'terminus ad quo' and a 'terminus ad quem', both ends being a place of 'public resort'.
24. However, with there being no evidence of the diversion actually being implemented the appellant accepts that the new path did not legally come into being. It submits that it is therefore reasonable to allege that the original public right of way in 1797 was, and still is, a public footpath.
25. The appellant submits it is inconceivable that the applicant owner of Deer Park would not have consulted with his neighbours had there been any doubt at all over the status of the way. No complaints were recorded at the time so it is safe to assume there was no dispute from neighbours.

26. In response, DCC accepts that the 1797 order offers evidence of the (then) landowner's acceptance of a public right of way but only in so far as his own land was concerned. This could not apply to continuations of the route beyond his property, either to the east towards Weston and westwards to Buckerell, as there is no evidence to support any similar acceptance of the path by adjoining landowners.
27. DCC also highlights the central part of the route proposed for diversion labelled on the 1797 plan as "Old Path Claimed". It submits this suggests there may have been some doubt over the path at that time, either in terms of its status or alignment, thus reducing the weight that should be placed on these records as evidence that the way was then public.
28. The order-making process (then, as now) required the giving of notice to allow anyone 'injured or aggrieved' by the order to come forward. Enrolment of this order was the start of that process but, subsequent to this, the evidence is inconclusive. There are no further references in the Quarter Sessions records to confirm that the new path had been satisfactorily formed. Whilst it is *possible* that adjoining landowners complained and the proposal withdrawn, that is speculation as there is no additional evidence to explain what took place at that time.
29. The appellant refers to the 1992 Committee report in which DCC concluded that the 1797 Quarter Sessions diversion order made the claims then under consideration (including a variation of the appeal route) "prima facie valid".
30. DCC accepts that the conclusion of this report noted that some of these claims were considered to have a prima facie case for further investigation. However the Council does not accept that, on its own, the 1797 documents are sufficient to reach the evidential threshold required to reasonably allege the existence of a public right of way.
31. On this point I agree with DCC. On their face, they do imply that the landowner acknowledged the existence of a public path but use of the words "*Old Path Claimed*" over the central (and what may have been the most controversial) part of the proposed diversion, casts a degree of doubt on that initial deduction.
32. Yet even if the landowner did accept a public right of way along the route shown on the plan in yellow, there is nothing in the Court record to identify the line of the path's continuation to Weston at that time. Indeed I am not wholly convinced that the line shown on the 1797 plan leading westwards toward Buckerell is exactly the same as the appeal route (as shown on OS maps almost a century later).
33. All parties accept that there is no documentary evidence to show the diversion process was ever completed. Whilst this *could* support the appellant's submission that the original path must therefore remain a public right of way, this could only be true if the original proposition - that the way was in fact a public one - is correct. Equally the lack of any further documented reference to the order may be the result of opposition from adjacent landowners, objecting to the suggestion that the path was public. Without further explanation, either scenario seems equally as likely.
34. I recognise that an order enrolled in a Quarter Sessions record has the potential to provide evidence which may be sufficient to reasonably allege the

existence of public path – indeed it might even be enough to show, on a balance of probability, the subsistence of a public right of way. However in this instance the omissions and unanswered questions leave too much room for doubt and I do not accept the appellant’s submission that the 1797 documents alone are sufficient to reasonably allege a public right of way along the appeal route.

35. Nevertheless I fully acknowledge that this might form the basis of a reasonable allegation if supported by other relevant material.

### ***Ordnance Survey maps***

36. In support the appellant relies on the claimed footpath being shown on the OS 6” to one mile map of 1906 which is said to show the appeal route. In addition DCC refers to OS map editions from the late 1800s and early 1900s.
37. The First Edition 1887-8 25” to one mile map shows a footpath from point I via A to Deer Park. It appears possible that the path continued along the appeal route via B and as far as point C. However on the date of survey there was no physical evidence of a path between C and D as now claimed although a route denoted ‘FP’ is shown continuing from D to J.
38. Similar information is portrayed on the Second Edition of the same map published in 1903 and the 6” map of 1906. Thereafter the route does not appear on any OS map.
39. DCC also highlights the short length of path shown on the 1797 plan east of point D heading in the direction “*To Weston Village*” and argues that there is nothing to indicate that in 1797 it continued on the line shown by the OS in 1887. I have already expressed reservations about the correlation between the path shown on the 1797 plan from Deer Park to the Buckerell road and the appeal route I-A. However, of more concern is the absence of any subsequent supporting evidence at all for the direct line between points C and D.
40. This was shown on the 1797 plan as “Old Foot Path”, yet it appears that, at some subsequent time, the path was physically moved onto its proposed route. Whether that was done by partly implementing the order but without completing the legal procedures, or because it was concluded at the time that this was not a public right of way after all, cannot be answered from the available evidence. Either way, it is clear that none of these OS maps support the full length of the appeal route but only parts of it. Also, it must be remembered that OS maps do not offer evidence of the existence of any public right of way along the paths they show.
41. I hesitate to amalgamate the potentially substantive, but actually incomplete and not fully explained evidence from the 1797 Quarter Sessions with the OS maps showing the physical existence of parts of the route some 90 or 100 years later and conclude that they are both referring to the same long lost public right of way; I am not satisfied this is sufficient to reasonably allege the existence of a public right of way.

### ***Other evidence considered by DCC***

42. During its investigation, DCC discovered many other historical documents that could potentially offer evidence of the claimed public path. This included early small scale OS maps and drawings from 1806 to 1809, Greenwood’s map of 1827, a map of the Deer Park Estate in 1837, the Buckerell Tithe Map and

- Apportionment of 1845/1842, a conveyance of the School in 1850 and the records compiled under the 1910 Finance Act. However there is nothing in any of these documents to support the appeal route. Even so, the appellant (rightly) submits this is not evidence that the claimed footpath did not exist.
43. DCC's research uncovered a reference in the minutes of the Buckerell Parish Meeting held in March 1905 in which the condition of the "*footpath leading from Buckerell village to Deer Park*" was raised by the Chairman along with a path leading to Curscombe (which is now recorded on the definitive map.) A committee was appointed to investigate. The minutes of a meeting the following November report that a precept was drawn to pay for work done repairing "*footpaths, bridges, gates, stiles, &c - as ordered by the committee appointed (at the March meeting)*".
  44. The appellant argues it is reasonable to conclude that these minutes referred to the appeal route and that public money was spent on its repair. However there is no further information to clarify whether work was done on the Deer Park path or solely the (now-definitive) Curscombe route.
  45. If the appeal route *was* recognised locally as being a public path in 1905, it is difficult to reconcile that with the records from the 1910 Finance Act which show that none of the various owners of land crossed by this path sought any tax deduction in recognition of a public right of way. In contrast, private rights were claimed over some sections.
  46. The Deer Park path was mentioned in the Parish Meeting minutes again in 1933 when details of "*footpaths and rights of way*" in the parish were being compiled for Honiton Rural District Council, most probably for the purposes of the Rights of Way Act 1932. Six paths were listed for consideration by the Chairman and Clerk, including path number 6: "Buckerell to Deerpark" (most probably the route between I, A and B). However the outcome is not known since no relevant documents have been found in the Rural District Council records.
  47. Yet when parts of the appeal route were considered in the 1951 parish survey in preparation for the first definitive map compiled under the National Parks and Access to the Countryside Act 1949, all were noted as being private paths.
  48. None of the maps inspected which post-date the OS 1906 edition show any sign of a path along the appeal route other than where it coincides with access roads leading to Deer Park. No actual use by the public is claimed in living memory and recollections from landowning families with long-standing knowledge of the area confirm no known use of the route, indeed parts are said to have been inaccessible for decades (at least).
  49. The appellant makes reference to an adjoining route from Deer Park to Weston via Nod Lane, noting that its depiction on OS maps (with shading) suggests a public way. Irrespective of the merits of this as evidence, this route is not the subject of this appeal and I make no judgement on the evidence which may be available to support this or any other route in this vicinity.

### ***Summary and conclusions***

50. Of the multitude of potential sources of information researched in this case, the supporting evidence focuses on three: the 1797 proposed diversion enrolled in the Quarter Sessions records, the OS maps from 1880 through to 1906, and possible references to the appeal route in the 1905 Parish Meeting Minutes.

51. Superficially, it is possible to link these three pieces of evidence in order to conclude that a public right of way along the appeal route exists. However, a more considered approach, removing any assumptions and weighing each item of evidence, leaves many questions unanswered.
52. It cannot be presumed that public money was spent on repairs to the appeal route in 1905 as opposed to the Curscombe path; the 1933 minutes raise the possibility that the path *might* have been regarded as public but the 1951 survey clearly identifies it as private. The Finance Act records are at best evidentially neutral although it is surprising to find no acknowledgement of a public path by any of the landowners if one did exist, especially when private easements were noted. Put into context, I find the limited weight attaching to the 1905 minutes is diminished by other contemporary evidence.
53. The OS maps show there is no doubt that footpaths to Deer Park did physically exist at the end of the nineteenth century from both Weston and Buckerell. The appeal route *could* therefore have existed as a highway leading from road to road at that time, but these maps offer no proof that in this period these paths were open to the public. They could equally have been private.
54. The absence of any mapping support for the appeal route between C and D raises more doubt about the reliability of the 1797 diversion proposal. At first sight, the Court documents indicate recognition by the landowner of an 'Old Foot Path' along the line of the appeal route. Yet the labelling of the sections proposed for diversion as "Old Path Claimed" suggests there was doubt, even in the late eighteenth century, as to whether an old highway did really subsist. The lack of any further confirmation in the Court record (or otherwise) of the fate of the proposed diversion inevitably weakens its evidential value and leads to the conclusion that it was not pursued. With no clear explanation for its abandonment, and given the doubt raised by the "Old Path Claimed" notation, the reliability of this evidence as proof of a public right of way is severely compromised.
55. In reaching my conclusion, I take note of the guidance which stems from the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1995]*,<sup>2</sup> later clarified in *R v Secretary of State for Wales ex parte Emery [1998]*<sup>3</sup>. This advises that when considering whether a right of way subsists, clear evidence in favour of the appellant's case must outweigh any credible evidence to the contrary. However when considering whether a right of way has been reasonably alleged to subsist, if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
56. This leads me to conclude that the evidence before me in this case is a long way short of the standard of proof required to show that, on a balance of probability, a public right of way on foot subsists along the appeal route. Whilst I find no incontrovertible evidence that the claimed right could not have existed, I consider the credible supporting material lacks sufficient cogency to reasonable allege the existence of the public right of way claimed.

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<sup>2</sup> *R v SSE ex parte Bagshaw and Norton (QBD)[1994] 68 P & CR 402, [1995] JPL 1019*

<sup>3</sup> *R v SSW ex parte Emery (QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83*

**Conclusion**

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

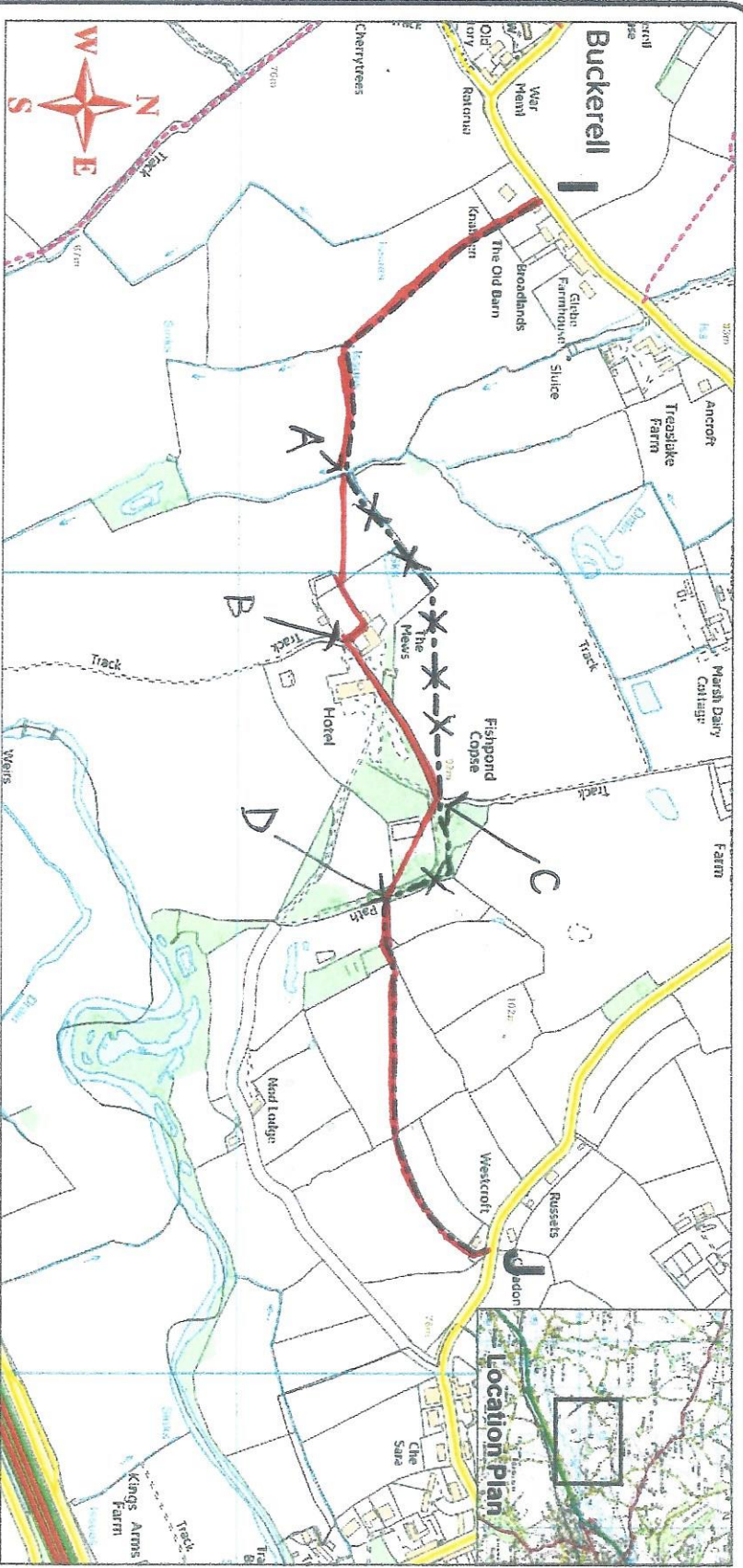
**Formal Decision**

58. The appeal is dismissed.

*Sue Arnott*

**Inspector**





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map ref: SY 1200-1400/1299-1499

**DEVON COUNTY COUNCIL**

Definitive Map Review, Buckerrill parish

**RAMBLERS' Schedule 14 application**

**Informal Consultations, Proposal 3: Claimed public footpath**

**Notation**

Claimed footpath (A-J) (yellow/dotted) via A-B-C-D



**Meg Booth**  
ACTING HEAD OF HIGHWAYS, INFRASTRUCTURE DEVELOPMENT AND WASTE



drawing number **HIW/PROW/17/023**

date **Apr 2017**

scale **1:7500**  
drawn by **NSC**

*Amended  
Dec 2017  
by  
Rosemary  
Kimbell*