The Planning Inspectorate

Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 07 December 2018

Order Ref: FPS/F0114/14A/2

- This appeal, dated 21 April 2018, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Bath & North East Somerset Council ('the Council') not to make an Order under Section 53(2) of that Act.
- The application, made on 9 March 2015, was refused by the Council on 10 April 2018 and the applicant was notified the same day.
- The appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal routes as public footpaths.

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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

2. Although the application was originally made by two parties (Mr Reginald Williams and Mr Howard Griffiths) the appeal has been made by Mr Williams alone with the agreement of Mr Griffiths. Submissions have been made by the appellant (Mr Williams) and by the Council.

3. The application concerned two connected routes, distinguished by the Council in its decision reports as Application Routes A and B. I have retained that distinction in this decision, merely substituting the word 'Appeal' for 'Application'.

The Main Issues

4. The applications were made under Section 53(2) of the 1981 Act which requires surveying authorities 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).

5. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.

6. Another event is set out in Section 53(3)(c)(i) of the 1981 Act and provides that an order to modify the DMS should be made on the discovery by the authority of evidence 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 to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] 68 P & CR 402, and upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064:

- Test A: Does a right of way subsist on the balance of probabilities?
- Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

7. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

8. It is also open to me to consider whether dedication of the way as a highway could have taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way could be shown to have occurred expressly or, alternatively, whether dedication could be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.

9. Section 32 of 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.

10. I must also have regard to advice and guidance issued by the Department for Environment, Food and Rural Affairs ('Defra') and judgements of the courts.

Reasons

Description of Appeal Route A

11. This route commences from a junction with Manor Road (Point A on the map at Appendix 1 to this decision) and proceeds in a generally north-westerly direction for approximately 190 metres to a junction with Appeal Route B (see below). It then continues in a generally north-westerly direction for

approximately 142 metres to a junction with Public Footpath BA27/30 at Point C (see Appendix 1).

Description of Appeal B route

12. This route commences from Point B (its junction with Appeal Route A) and runs in a generally northerly direction for approximately 307 metres to Point D, where it turns easterly for about 249 metres to Point E. It then turns north again, for about 204 metres to meet Public Footpath BA27/27 at Point F. (This is also shown on the map at Appendix 1).

Background

13. The application was made in March 2015 and accompanied by 14 user evidence forms. The applicant alleged that the paths had been used by the general public for many years and formed an important link in the network. Between about 2000 and 2013, the paths had been the subject of payments under the Countryside Stewardship Scheme and that since that time, with the demise of the scheme, local people had managed to raise money each year to pay the landowner for continued access.

14. Mr Williams and Mr Griffiths felt that, as the footpaths had been in general use for a very long time, they ought to be recorded as public footpaths.

15. The Council state that they undertook extensive archival research; carried out a wide consultation exercise; and conducted interviews with as many user witnesses as they could contact by telephone before coming to their decision.

Historical and Documentary Evidence

16. The Councils decision report contains a summary of the historical and documentary evidence that has been examined. The Council concluded that these documents contain no evidence to support the claim for public right over the appeal routes and this is not contested by the appellant. I agree with the investigating officer's conclusion.

17. Since March 2001 when the routes were included as permissive bridleways under a Higher Level Stewardship Scheme ('HLSS'), payment has been made to the landowner for access over them; firstly as bridleways and latterly as permissive footpaths. This is consequently not evidence of the existence of public rights of way.

18. I also note that in October 2014 a deposit, statement and declaration was made under Section 31(6) of the 1980 Act which is sufficient evidence of a lack of intention to dedicate a public right of way over either route since that time, but is not retrospective.

19. Nevertheless, there is nothing in the historical evidence which renders it impossible for public rights of way to have been dedicated prior to the start of payments under HLSS. It is necessary to examine the evidence of use.

Statutory Dedication: Section 31 of the 1980 Act

20. Since the evidence for both routes is drawn from similar source and is similar in nature, I will deal with both appeal routes together.

21. The Council has identified the relevant period of 20 year's use as dating back from March 2001: the start of the HLSS payments. I consider that to be an event which it would be reasonable to take as the date on which the rights of the public to use the ways in question (as public rights of way as opposed to a permissive routes) were brought into question.

22. The Council states that, despite some evidence of user on horseback having been submitted by one person, the overwhelming claimed use taken from the 15[1] user evidence forms was on foot. This covered use of both appeal routes and extended from 1950 to 2018.

23. Having analysed the frequency and volume of the use of the ways concerned, the Council concluded that, although both routes had been used throughout the relevant 20-year period, the level of use detailed in the user evidence forms was insufficient to demonstrate that the appeal routes had been '*actually enjoyed by the public*', and thus there could be no deemed dedication under Section 31 of the 1980 Act.

24. Additionally, although the Council accepted that the evidence suggested that the appeal routes had been used for 51 years prior to the permissive access being granted under HLSS, the usage was not of the character or of sufficient frequency for a rightful inference of dedication under common law to be drawn.

25. The appellant considers that the use of the appeal routes is similar in character to use of other public rights of way in the area and that the Council has not taken sufficient account of the rural location of the paths concerned. He also points out that there is no particular evidential threshold level required for applications of this sort and that it should be proportional to the situation. He considers that the decision to pay the landowner for access under the HLSS demonstrates that there must have been sufficient use of the paths to warrant spending public money in this way, and that the subsequent efforts of the local community demonstrate that there is an on-going demand for use.

26. The Council accepts that there were some users (three) who claimed to use the appeal routes on a daily basis, but there were others whose use was only once a month or so. The pattern was similar for both routes. One user indicated that they used Appeal Route B two or three times a year. The Council concluded that the level of use was commensurate with that of a small number of isolated individuals rather than the 'public at large'.

27. With reference to use of the route by the public, the term is usually interpreted in the sense that it means a group of people who may together be sensibly taken to represent the local community. It is not necessary for there to be any wider interpretation than that, as it is common for public rights of way only ever to be used by local people.

28. Whilst it is clear from the user evidence forms that some people who have completed them are related to other witnesses, there is no suggestion that they are all from the same family or that they do not represent a good spread of the local community. I am satisfied that the user witnesses do represent a

[1] Although the Council refers at this stage of the report to 15 user evidence forms, I can only find evidence of 14 having been submitted.

group of people who could reasonably be termed 'the public' for the purposes of Section 31 of the 1980 Act.

29. In terms of frequency of use, I have examined the user evidence forms and I find that, during any one year of the relevant 20-year period, between 6 and 14 people claim to have used the path at some point during each year. In 1981 at the start of the 20-year period, at least three of them were using it on a daily or weekly basis and two of them on a monthly basis. I do not disagree with the Council's analysis of the number of people using the route on a daily basis or on any other regular interval, but I find that there is no basis for concluding, as they have done, that there has been no, or insufficient actual enjoyment of the ways by the public.

30. I have already concluded that the evidence supports use of the way by the public. There is no statutory minimum level of user required to show sufficiency of use for deemed dedication. In terms of sufficiency of user, Lindley LJ stated in his judgement in *Hollins v Verney* [1884] *('Hollins')* that:

"No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right it not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy: and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute"

31. Lindley LJ was referring to a private right or easement relating to the cutting or collecting of timber, and his reference to statute was the Prescription Act 1832. In the judgement in the Supreme Court relating to *R(oao Lewis) v Redcar and Cleveland Borough Council and another* [2010] UKSC 11, Lord Walker commented on the opinion of Lindley LJ in *Hollins* and said:

"The second sentence of this passage begins with 'Moreover', suggesting that Lindley LJ was adding to the requirement that the use should be continuous. But the passage as a whole seems to be emphasising that the use must be openly (or obviously) continuous (the latter word being used three more times in the passage). The emphasis on continuity is understandable since the weight of the evidence was that the way was not used between 1853 and 1866, or between 1868 and 1881. It was used exclusively, or almost exclusively, for carting timber and underwood which was cut on a 15-year rotational system. The use relied upon was too sparse for any jury to find section 2 of the Prescription Act 1832 satisfied."

32. The evidence which has been submitted in relation to use of the appeal routes does not indicate that there has been any breakage in the use, nor that it has

been exercised at such low levels as to render it sparse. In *Hollins,* the right had allegedly been exercised three times, each separated by a period of 12 years when nothing had been done. There is no comparison with the use of the appeal routes I am considering. The use of the paths increased steadily over the years and, by 1990, up to 12 people claim to have used the paths on a regular and continuous basis.

33. I therefore disagree with the Council's interpretation and find that the evidence of use suggests continuous user by the public as of right of both appeal routes for a period of 20 years dating back from 2001.

34. It is true that the evidence submitted by or on behalf of the present and previous landowners suggests that the appeal routes have been variously gated, ploughed out, or obstructed by barbed wire or waste deposits such that user by the public cannot have occurred as claimed. The users who were questioned on these matters have disagreed, or have said that the obstructions did not prevent them from walking the claimed routes. Any signage appears to post-date the start of permissive access under the HLSS.

35. I agree with the Council that there is a conflict of evidence, but there is no proof that the alleged use cannot have taken place as claimed; I consider that there is sufficient evidence to suggest that there has been use of the ways concerned by the public, as of right, for an uninterrupted period of 20 years dating back from 2001.

Whether there has been sufficient evidence during that period of a lack of intention to dedicate

36. Since dedication can only be effected by the owner of the land, any lack of intention to dedicate must likewise emanate from the landowner.

37. Although the witnesses for the landowner have made statements that the routes were obstructed or impassable during the relevant period of 20 years, no incontrovertible evidence had been submitted to demonstrate that such a lack of intention to dedicate the appeal routes was ever sufficiently communicated to the public who were using the ways. The events which brought the issue home to the public were the instigation of permissive routes as part of the HLSS and the subsequent payments made by local people.

38. Consequently, in the relevant period of 20 years preceding the start of the HLSS agreement, I find that even if it had been the intention of the landowners that no right of way be dedicated, that fact is not supported by sufficient evidence.

Common law

39. In the light of my findings on a statutory basis, I do not need to examine the situation at common law, but I note that the claimed usage dates back a considerable period overall, exceeding the 20 years required for a statutory claim.

Conclusions

40. Having regard to these and all other relevant evidence available, I conclude that there is a conflict of evidence, but no incontrovertible evidence that the rights of way could not be reasonably alleged to subsist. The appeal should therefore be allowed.

Formal Decision

Appeal Route A

41. The appeal is allowed.

Appeal Route B

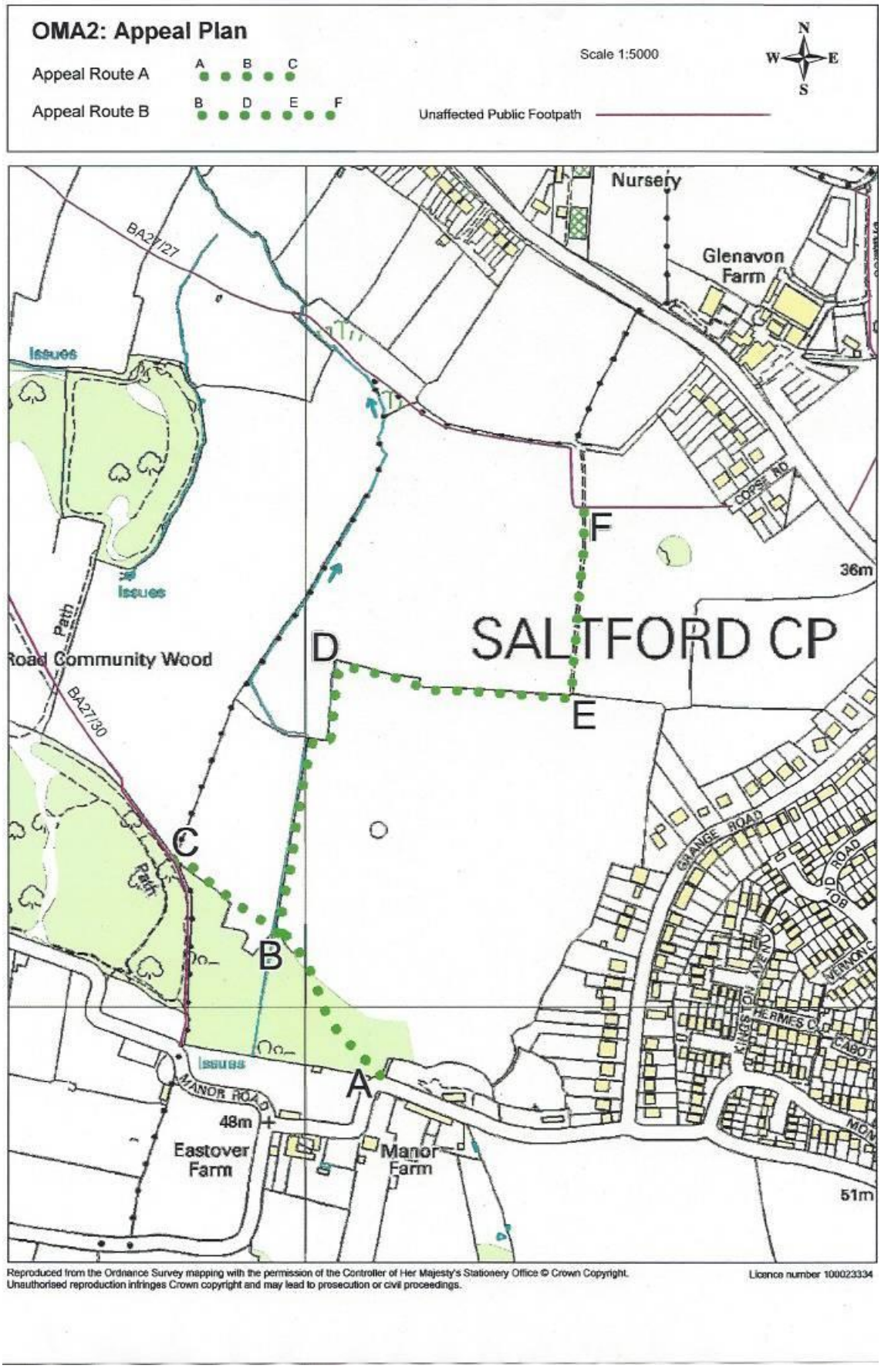
42. The appeal is allowed.

43. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Helen Slade

Inspector

APPPENDIX 1


OMA2: Appeal Plan
Appeal Route A
A B C
Appeal Route B
B D E F
Scale 1:5000
N
W E
S
Unaffected Public Footpath
Nursery
Glenavon Farm
BA27/27
Issues
COPSE RD
F
36m
Issues
Path
SALTFORD CP
D
Road Community Wood
BA27/30
E
C
GRANGE ROAD
B
Path
Issues
A
MANOR ROAD
48m
Eastover Farm
Manor Farm
51m
Reproduced from the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown Copyright.
Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings.
Licence number 100023334