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## Appeal Decisions

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 06 JANUARY 2020**

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### **Appeal Ref: FPS/W1850/14A/3**

### **Appeal A**

- 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 Herefordshire Council not to make an Order under Section 53(2) of that Act.
- The Application<sup>1</sup> dated 14 January 2007 was refused by Herefordshire Council on 3 October 2018.
- The Appellant claims that the appeal route, near Highbridge Farm, Ledbury, should be added to the definitive map and statement for the area as a public footpath.

**Summary of Decision: The appeal is allowed**

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### **Appeal Ref: FPS/W1850/14A/4**

### **Appeal B**

- 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 Herefordshire Council not to make an Order under Section 53(2) of that Act.
- The Application<sup>2</sup> dated 16 January 2007 was refused by Herefordshire Council on 3 October 2018.
- The Appellant claims that the appeal route, near Argus Farm, Ledbury, should be added to the definitive map and statement for the area as a public footpath.

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

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### **Appeal Ref: FPS/W1850/14A/5**

### **Appeal C**

- 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 Herefordshire Council not to make an Order under Section 53(2) of that Act.
- The Application<sup>3</sup> dated 15 January 2007 was refused by Herefordshire Council on 3 October 2018.
- The Appellant claims that the appeal route, near Dinchall Farm, Ledbury, should be added to the definitive map and statement for the area as a public footpath.

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

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<sup>1</sup> Herefordshire Council reference M293

<sup>2</sup> Herefordshire Council reference M292

<sup>3</sup> Herefordshire Council reference M294

2. I have not visited the sites but I am satisfied I can make my decisions without the need to do so.
3. The Appeals concern applications made by the Malvern Hills District Footpath Society ('the Appellant'). I have found it convenient to refer to the Appeal routes by reference to a Location Plan contained in the Herefordshire Council ('the Council') submissions<sup>4</sup>.
4. Appeal A concerns a claimed footpath from the Gloucestershire/Herefordshire County boundary at the River Leadon to the County road, B4216, at Highbridge Farm (points I-H-G-F on the Location Plan).
5. Appeal B concerns a claimed footpath from the County road, B4216, at Highbridge Farm to Donnington Footpath 7 north of Nurdens Farm (points A-B-C-D-E on the Location Plan).
6. Appeal C concerns a claimed footpath from the Gloucestershire/Herefordshire County boundary at the River Leadon to the County road, B4216, south of Dinchall Farm (points I-H-J-K-L on the Location Plan).
7. I note the Appellant is appealing all three applications individually as they are considered to be separate, terminating in different places with only two of the routes overlapping briefly (Appeal routes A and C between points I-H), and that the Council considered them together in a single report. To avoid repetition I have found it convenient to consider the evidence as a whole and then to reach separate conclusions on each Appeal. In reaching my decisions I have had regard to all the submissions made including those of interested parties.

### **Main Issues**

8. The applications were made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
9. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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.

As made clear in the High Court in the case of *Norton and Bagshaw*<sup>5</sup>, this involves two tests:

**Test A.** Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

**Test B.** Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

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<sup>4</sup> Research Report to the Assistant Director, Environment and Place, June 2018, prepared by Balfour Beatty Living Places, Figure 1, Location Plan

<sup>5</sup> R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]

10. The case of *Emery*<sup>6</sup> approved *Norton and Bagshaw*, providing further clarification of the reasonably alleged test at the Schedule 14 stage. It held that where there is a conflict of apparently credible evidence, a public right of way is reasonably alleged to subsist if reasonably accepting the evidence of one side and reasonably rejecting that of the other, the right would be shown to exist.
11. The case of *Todd and Bradley*<sup>7</sup> clarified that, at the Schedule 14 stage and in reaching my decision, I need only be satisfied that the evidence meets test B. Therefore, if evidence has been discovered which shows that it is reasonable to make an allegation that a public right of way as claimed exists over the Appeal route, then an Order should be made.
12. The evidence adduced in all three cases is documentary. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
13. The test to be satisfied is on the balance of probability.

## **Reasons**

### *Estate Maps and Plans*

14. A 1795 Argus Farm plan marks a "Footway" corresponding with the route of Appeal B (A-B-C-D-E), and a track from F-G (Appeal A) marked "To Hazle Mill". There is no key, however an annotation to a destination can be suggestive of a public route. It is noted that footways marked on the plan include both routes now recorded as public rights of way and ones not so recorded. An undated plan, possibly earlier in origin, depicts the route of Appeal B and part of Appeal A (F-G and towards H) annotated "Hazle Mill to Argus".
15. An undated plan of 'Dinch Hill' Farm (possibly contemporary with the Donnington Tithe Map 1858) shows part of the route of Appeal A (I-H-G) annotated "Road from Lower Mill to Ledbury". It is unclear whether colouring on a 1720 Survey of the Manor of Hazle represents part of the route of Appeal A (H-G-F) as a feature or denotes a boundary.
16. The evidential weight of such plans is limited as they were not in the public domain, being drawn up for private purposes. Where prepared by professional surveyors they are likely to be an accurate portrayal of features shown.

### *Ledbury Inclosure Award and Map 1816*

17. With the exception of points H-I, the route of Appeal A is depicted on the Inclosure Map in the manner of a public road. An examination of the map suggests Point H represents the boundary of the land being enclosed at this location. There is no reference to roads in the Award, although it appears that only those routes subject to diversion or stopping up were noted.
18. Inclosure records can provide conclusive evidence of public rights and/or evidence of the existence or repute of a highway. In this case neither the Award, which is said to be silent as regards the status of the Appeal route, nor

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<sup>6</sup> R v Secretary of State for Wales ex parte Emery [1998]

<sup>7</sup> Todd and Bradley v Secretary of State for Environment, Food and Rural Affairs [2004]

the enabling Act have been provided. These may provide evidence of how pre-existing routes (as appears to be the case here) were treated.

#### *County Maps*

19. Henry Price's 1817 map shows a route equating to I-H-G-F (Appeal A) by parallel pecked lines. There is no key to the map, but it is consistent with the marking of a route at this location on the 1816 Inclosure Award. Such maps were drawn up with the travelling public in mind but can include both public and private routes.

#### *Railway and Canal Plans*

20. An 1861 Plan of the Ledbury to Gloucester Railway shows a dashed line passing through Plots 152 and 5 approaching H (Appeal A), but not continuing to I. The 1862 Book of Reference records a 'public footway' in plot 152, but none is recorded for the other plot. Railway and canal records were in the public domain and the high standard of the documents required means some reliance can be placed on them regarding the routes they depict.
21. However, a dotted line on two plans (1791) showing the intended alignment of a canal from Hereford to Gloucester near point I may represent the County boundary rather than a physical feature.
22. Research undertaken by Gloucestershire County Council into the corresponding public footpath, which forms a cul-de-sac at the County boundary (paragraphs 29 and 32), suggests a path here was severed by the canal and later by the railway. A through route was then established between 1903 and 1923, although on a slightly different alignment to that claimed by the Appellant.

#### *Ordnance Survey (OS) Maps*

23. The routes of all three Appeals are depicted on the OS 1<sup>st</sup> Edition Map of 1887 by double pecked lines, annotated "FP", with the exception of part of the route from I-H. All are shown on the 2<sup>nd</sup> Edition Map of 1904. These maps provide good evidence of the physical features in existence at the time of the surveys, and here suggest they had the characteristics at least of a footpath. But OS maps have long carried a disclaimer as regards status<sup>8</sup>. Accordingly, this evidence does not establish whether the routes depicted were public or private.

#### *Finance Act 1910 Records*

24. The Appellant relies mainly on the Finance Act 1910 documentation. From the Map extracts provided it appears the routes of all three Appeals fall within taxable land holdings or hereditaments: Appeal A within hereditaments 1132 and 1145, Appeal B within 1132, and Appeal C within 1145 and 5.
25. The accompanying Apportionments record a deduction of £12 for public rights of way in hereditament 5; £30 in hereditament 1132; and £22 for hereditament 1145. A Field Book entry for Argus Farm (near the route of Appeal B), hereditament 1132, records "5 Footpaths" which the Appellant claims refers to some or all of the routes claimed there. This is on the basis the deductions would have applied to those considered as 'through' or 'destination' paths, ones that would have a public value. For hereditament 1132, the

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<sup>8</sup> Since 1888 to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way

Appellant submits that only 5 or 6 paths would qualify, giving an 83% chance the appeal route was one of those granted tax relief. For hereditament 1145 it is submitted there are 3 through paths, with tax relief granted to 2, giving a 66% chance; and for hereditament 5, 3 through paths with at least one granted relief, thereby giving supportive evidence in favour of the appeal route.

26. Conversely, the Council submits there is no indication which paths were assessed, how the deductions were arrived at, or what factors were considered when calculating the reduction in values that was due. Accordingly, any combination of paths shown on the OS base maps could have given rise to the deductions claimed without the inclusion of the Appeal routes. Further, the Appellant's assessment is conjecture, as no evidence is provided about the basis on which the valuers assessed the paths, and there are no known general instructions to valuers about calculating deductions.

#### *Preparation of the Definitive Map*

27. In June 1951 Ledbury Parish Council claimed the route of Appeal A (I-H-G-F) as a public footpath (Ledbury FP6), part of a longer route. The claim form indicates this was on the basis of 20 years use by the public as of right. No documentary sources are listed and "not known" is recorded as regards an inclosure award. However, following an objection to its inclusion in the Draft Definitive Map, determined in October 1954 following a Hearing, the route of Appeal A was deleted, with Donnington 7a noted as 'impassable'.
28. That part of Appeal A lying in Donnington Parish (I-H) was claimed by the Parish as connecting with Ledbury 6. It too was deleted on the grounds there was no connection with Gloucestershire and no right of way over the railway. A pencil annotation on the Parish Claim Map refers "Argus Farm – no footpaths", although when and by whom this was made is unclear.
29. The objection to the inclusion of the route of Appeal A was made by British Railways. Documents relating to this describe an overgrown and wired up path, insufficient path furniture to provide access, and lack of a visible route. However, the path's continuation was claimed in Gloucestershire and is shown on that County's current Definitive Map (paragraphs 22 and 32).
30. It appears that a visual survey played a part in determining the existence or otherwise of public rights over the route of Appeal A. However, the objection made to its inclusion was considered and determined through due process and there is nothing to suggest the process was flawed. The Appellant argues the decision was reached on inaccurate evidence and draws a distinction between the wording of the report following the 1954 Hearing which records the deletion of the path as there was no connection *with* Gloucestershire and the Parish Claim record there was no connection *in* Gloucestershire. The point being that a continuation had been claimed on the other side of the County boundary, and a meeting of the two Councils had been held to coordinate cross boundary footpaths. Accordingly, they say, that no path was visible in 1954 does not amount to compelling evidence to delete the path when it continued in Gloucestershire, and other sources such as the 1920s OS map were available.

#### *Other records*

31. Neither the Ledbury Tithe Map (1841) nor the Donnington Tithe Map depict the appeal routes.

*Footpath 21 Dymock, Gloucestershire (GDY21)*

32. Footpath 21 terminates at the County boundary (River Leadon), point I (Appeals A and C) being the 'continuation' in Herefordshire. I understand it was allotted as a public footpath under the 1861 Dymock Inclosure Award, seemingly a pre-existing path. Whilst the awarded route falls short of the County boundary, the last section forming an old inclosure, it continues on the Inclosure Map. A plan of the proposed Ross and Ledbury Railway 1872 depicts it and the Book of Reference describes it as a footpath. It is marked "FP" on OS maps between 1887 and 1923, though only crossing the County boundary on the latter. It was not originally claimed by the Parish Council for inclusion in the Gloucestershire Definitive Map but was added to the Draft Map by the County Surveyor on the basis of the Inclosure Award and 1923 OS map and understood to continue across the County boundary into Herefordshire. An objection to its inclusion in the Draft Map was made by British Railways and a subsequent Hearing determined it should terminate at the River, although the reasons for this decision are not known. The path was effectively severed by the canal and later railway, with OS map evidence suggesting a through route was established between 1903 and 1923 via the railway bridge across the River.

**Conclusions on the evidence**

33. Considering the evidence on a balance of probability requires a comparative assessment of the evidence as a whole, carefully assessing the relative values of individual pieces of evidence and the evidence taken together. Where there is a synergy between relatively lightweight pieces of evidence, then the collective impact of the documents increases. There is seldom conclusive evidence and often contradictory evidence.

**Appeal A**

34. Late 18<sup>th</sup> Century estate/farm plans show that a track physically existed to/from a named destination, though not its status. It is then shown on the 1816 Ledbury Inclosure Award Map (F-G-H) having the appearance of a public road. Further support is found in the depiction of a track at this location on an 1817 County Map. Railway documents from the early 1860s provide support for the existence of a public footpath at H, but it is not shown continuing to point I.

35. The physical existence of the Appeal route is confirmed in later OS mapping, though not its status. The Finance Act 1910 documentation demonstrates that deductions were calculated for public rights of way at this location, although whether these related to the Appeal route and/or to other paths marked on the OS base map is unclear. The Appellant's analysis suggests the balance of probability tips in favour of it having been regarded as a public right of way. Some support for this view is to be found in the earlier evidence described above. Whilst the Council considers the Finance Act evidence is ambiguous, no detailed analysis of the routes shown on the OS base map against the routes for which a deduction was claimed appears to have been made by them, leaving the potential for the Appeal route to be a candidate, when the other evidence adduced is considered collectively.

36. The Appeal route was claimed when the Parish Survey was drawn up in preparation for the Definitive Map, but subsequently deleted following an objection, and there is nothing to suggest that due process was not followed in

reaching this decision. This weighs against the Appellant's case. Nevertheless, the Parish Claim was based on use by the public, and the available evidence does not suggest that documentary sources (the basis of this Appeal) were considered at that time. Accordingly, there is evidence that seemingly was not considered and/or not available in 1954 when the decision to omit the Appeal route from the Definitive Map was taken. The Appeal route was regarded by Gloucestershire County Council in the 1950s as forming part of a through route crossing the County boundary (now recorded as a cul-de-sac), and there is documentary evidence adduced which supports this.

37. The Council considers it was a private, or by invitation, vehicular access to the Mill from the public road. Some early maps considered above refer to a Mill, though the Council's evidence is this was not on the Appeal route H-I (for example as seen on the Railway plan). The Appeal is for a right of way on foot.
38. Both the Appellant and Council agree there is no conclusive evidence for or against the existence of public rights over the Appeal route and thus it is a judgement as to whether or not test B is met, the Council concluding the evidence is insufficient. I find that Test A is not met. However, I find when considering the evidence as a whole, the balance just tips in favour of Test B and a reasonable allegation a right of way subsists.

### **Appeal B**

39. There is evidence from estate/farm plans dating to the late 18<sup>th</sup> Century that a footpath existed on the alignment of the Appeal route, though not of its status.
40. Its physical existence is confirmed in later OS mapping, though again not its status. The Finance Act 1910 documentation demonstrates that deductions were calculated for public rights of way at this location but, as above, whether these related to the Appeal route and/or to other paths marked on the OS base map is unclear. The Appellant suggests the balance of probability tips strongly in favour of it having been regarded as a public right of way. However, there is very limited support for this in the earlier evidence described above. Again, no detailed analysis of the routes shown on the OS base map against the routes for which a deduction was claimed appears to have been made by the Council, leaving the possibility that the Appeal route was one of the routes evaluated.
41. The Appeal route was not claimed when the Definitive Map was drawn up.
42. Considering the evidence as a whole, there is some in support of the existence of a public right of way but it is limited, notwithstanding what the Finance Act records may show. I find that Test A is not met, and that the evidence does not tip the balance so as to support Test B.

### **Appeal C**

43. Whilst there is evidence for the section I-H in the early documentary record (paragraph 34), there is nothing for the section H-J-K-L.
44. That the Appeal route existed as a physical feature is confirmed in OS mapping, though not its status. Again, deductions were calculated for public rights of way at this location in the Finance Act 1910 documentation, although whether these related to the Appeal route and/or to other paths marked on the OS base map is unclear. The Appellant suggests the balance of probability tips in favour of it having been regarded as a public right of way. Yet, there is little

to support this view in the earlier evidence. As before, no detailed analysis of the routes appears to have been made by the Council leaving the possibility the Appeal route was afforded tax relief.

45. Points I-H were claimed when the Parish Survey was compiled for the Definitive Map, but this was in connection with a route to F (Appeal A) rather than to L.
46. Considering the evidence as a whole, there is some support for the existence of a public right of way but it is very limited. I find that Test A is not met, and that the evidence does not tip the balance so as to support Test B.

### **Other matters**

47. Reference is made to the lack of observed use of the Appeal routes, however, the claims are made on the basis of documentary evidence rather than on use. Issues concerning health and safety, the value of the routes to the network, or the impact of the routes on farming activities, whilst important matters, are not relevant to the tests to be considered under the 1981 Act.

### **Conclusions**

#### ***Appeal A***

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

#### ***Appeal B***

49. Having regard to these and all other matters raised in the written representations I conclude that Appeal B should not be allowed.

#### ***Appeal C***

50. Having regard to these and all other matters raised in the written representations I conclude that Appeal C should not be allowed.

### **Formal Decisions**

#### ***Appeal A***

51. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Herefordshire Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the Herefordshire Council Definitive Map and Statement to add a public footpath as proposed in the application dated 14 January 2007. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

#### ***Appeal B***

52. The appeal is dismissed.

#### ***Appeal C***

53. The appeal is dismissed.

*S Doran*

**Inspector**