



Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 27 February 2020

Appeal Ref: FPS/D0121/14A/10

- 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 North Somerset Council not to make an Order under Section 53(2) of that Act.
 - The Application dated 10 March 2005 was refused by North Somerset Council on 11 April 2019.
 - The Appellant claims that the appeal route, a public Footpath, should be upgraded to a bridleway.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
3. I have not visited the site but I am satisfied I can make my decision without the need to do so.
4. The appeal concerns an application made by Mrs V Craggs on behalf of the Woodspring Bridleways Association ('the Appellant') to upgrade to bridleway the footpaths¹ from Claverham Drove to Kennmoor Road, Parishes of Kenn and Yatton ('the Appeal route'). Submissions have also been made on their behalf by Ms J Roseff. In reaching this decision, I take into account submissions from and on behalf of the Appellant and North Somerset Council.

Main Issues

5. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority 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)(ii) 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 highway shown in the map and statement as a

¹ Footpath LA21/38, Footpath LA21/37 and Footpath LA10/6

highway of a particular description ought to be shown as a highway of a different description.

7. The appeal relies on documentary evidence. Section 32 of the Highways Act 1980 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.
8. The test to be satisfied is on the balance of probability.

Reasons

Yatton with Kenn Inclosure records

9. The Appeal route is described in the 1815 Award under the heading '*Private Carriage Roads, Bridleways and Foot Paths...*' as a Bridleway and Footpath comprising 2 routes – Sluice Stile Bridleway and Footway (between Claverham Drove and the River)² and Great River Bridleway and Footway (running alongside the River). It was set out at 6 feet wide, to be kept in repair by the owners and proprietors of the land.
10. The Appellant maintains it followed a pre-existing public route and, with the Inclosure Commissioners bound by section 8 of the 1801 Inclosure Act not to stop up any ways through the old inclosures (there being no necessary authorisation in the Yatton with Kenn Local Act), it remains a bridleway.
11. The 1810 Local Act empowered the Commissioners to divert or stop up public highways, bridleways and footways within the lands to be enclosed. However, the 1815 Award, the Council maintains, lacks clarity given the Appeal route is listed under a heading pre-fixed by the word 'Private' which arguably refers to all the categories listed thereafter, and that both the routes described were to be kept in repair by the owners and proprietors of the land. In other words, they could be public or private routes. Further, there is no evidence they were established on the ground and used by the public, and whilst Parish Minutes (paragraph 15) refer to an 1807 map showing the Appeal route as a bridleway before the land was enclosed, this does not confirm it was in use by the public as a bridleway.
12. In support of a public status for the Appeal route, one the Inclosure Commissioners were compelled to retain, the Appellant argues that it begins and ends at a public place; accessed a decoy pond; continued to old inclosures; may have been an ancient route to Clevedon; was the shortest most convenient route between destination points; and was portrayed as a bridleway on the 1807 map. Arguments are also made about the meaning of the term 'private' in the context of the Act and at this period in time, in that the Appeal route was not vested in the state (or surveyor).
13. The purpose and status of the 1807 map, which has not been found, are not known. No other maps cited in the submissions pre-dating the Inclosure Award show a route or physical feature at this location other than the River, although not all would necessarily depict a bridleway. There is nothing in the Inclosure Award extracts to indicate it was a pre-existing road or track, although if so,

² This section may or may not coincide with two Private Roads set out in the Award, 'Jones's Road' and 'Bakers Road'

this may explain its retention. Nor is there evidence that the decoy pond was a place of public resort. However, neither does the Inclosure Award restrict those entitled to use the Appeal route to, for example, the allotment holders.

14. Reference is made to the judgement in *Andrews* [2015]³, concerning section 10 of the 1801 Inclosure Act, which held that Inclosure Commissioners were empowered to create public bridleways not just private ones notwithstanding the word 'Private' preceding the list set out in that section (paragraph 12 above). Therefore, it is possible to read the word 'Private' as applying to the first category of way described in the list and the remainder not to be so qualified. Indeed, there would be little benefit in the Commissioners setting out a private way over land being privately enclosed, or a private bridleway and footway over a private road.

Definitive Map 1956

15. The Parish 'walking card' for LA10/6 (a short section at the westernmost end of the Appeal route), in Kenn Parish, described a footpath being a continuation of FP21/37. The walking card for LA21/37 Yatton Parish (the greater part of the Appeal route following the River), claimed a bridleway and this was agreed by the Parish Council in November 1951 and by the Rural District Council in January 1952. Footpath LA21/38 (between Claverham Drove and the River) was claimed as a 'CRF' or carriage/cart road used mainly as a footpath and this was agreed as for path 37. Accordingly, the central section was claimed as a bridleway, but the ends as either a footpath or CRF. The walking cards do not refer to use of the way on horseback, the reference to bridleway status deriving from the 1807 map, as recorded in the Parish Minutes.
16. The Draft Map shows the Appeal route by a purple line denoting a footpath. There were no objections to this and the route appeared in the same manner on the Draft Map Modification Plan, and on the Provisional Map where no objections were recorded, although only part of the mapping survives. The Long Ashton District Council Definitive Map, 1956, depicts the Appeal route as a footpath and it is described as a footpath in the Definitive Statement.
17. There is no explanation why the highway authority changed the status from that claimed, as bridleway and CRF, to footpath. This the Appellant maintains was inexplicable, and possibly unlawful. They point out the status of other routes was inexplicably changed by the highway authority, and that in this case a possible explanation is the depiction of the west end of the Appeal route as a footpath on the 1884 Ordnance Survey ('OS') map.
18. The records show that the basis on which the Appeal route was claimed was historical evidence rather than use by the public. Both parties agree that the 1807 map on which the Parish Council relied may have been an early version of the Inclosure Award map. There is no evidence as to why the Parish Council did not challenge the status recorded. Neither is there any evidence that the highway authority acted unlawfully as asserted.

Widening of the River Kenn

19. The River Kenn was subject to engineering works in the late 1940s/early 1950s (coinciding with the survey of the DMS) and again in the late 1950s. The Council says records indicate the Environment Agency own a large amount of

³ R on application of *Andrews v SSEFRA* [2015] EWCA Civ 669 CA

land on the southern side of the River Kenn, purchased c.1952-55 for the widening and deepening of the River channel and deposit of spoil. Although there are no details in the conveyances about which side of the River was widened, it is assumed it was the southern side.

20. The Council believes the River widening works affected a 10ft width, implying this impacted on the 6ft wide bridleway set out by the Inclosure process (apart from the length between Claverham Drove and the River). If so, then the Appeal route was removed as a result of the scheme. The Council suggests the drainage scheme may provide an explanation for the change in status, and that the route of the bridleway set out under the Inclosure process ceased to exist with the removal of the land, and new routes (the currently recorded footpaths) were laid down.
21. The Appellant maintains the Appeal route was unaffected since the proper procedures would have been followed and the right of way moved: in this case there are no records, and none showing the bridleway was extinguished and footpath diverted.
22. The parties agree the documentary evidence places the Appeal route running alongside the Riverbank. However, the Appellant comments there is no evidence as to where the Riverbank was at the time of the Inclosure Award in 1815, and it cannot be said with confidence the River was wider after dredging works were completed. However, the documentary evidence indicates the River was in fact widened but does not indicate by how much. The works and the preparation of the DMS were contemporary. If the Appeal route was affected by the works, then the physical removal of the land would result in the loss of the path, unless there was some formal diversion, there being no right for the public to deviate under the circumstances. No evidence of this has been adduced.

Other documentary sources

23. A feature on an 1800 Map of Yatton could represent the southern part of the Appeal route (from Claverham Drove and part-way alongside the River) or the River Kenn. Whichever, it does not follow the Appeal route's alignment between the Drove and River in its entirety, though from the River to the edge of the map extract provided does appear consistent with it.
24. Part of the Appeal route is shown on an 1821 Survey Map from Claverham Drove towards the River, as is the River itself, but no route running alongside it. Similarly, this section⁴ is shown on the 1840 Yatton Tithe Map.
25. Only one relevant map is available from the Finance Act 1910 records, showing the Appeal route running parallel with Nailsea Wall where it falls within a number of hereditaments, in part marked on the 1903 OS base map with the letters 'FP' or footpath. Several footbridges are shown along the Appeal route.
26. The 1930 'Handover Map' on which highways maintained by the Council are marked shows the Appeal route from Claverham Drove towards the River but it is uncoloured indicating it was not maintained at public expense.
27. Yatton Parish Council Minutes dated 1951 concerning the survey of public rights of way refer to the "1807 map". They note that two bridle paths had been left

⁴ Which corresponds with 'Jones's Road', awarded as a private road under the 1815 Inclosure Award

out, "...one by the Kenn River, the other off the Claverham Road..." and these the Parish Council agreed should be included.

28. Land Registry documents relating to a parcel which extends to the Riverbank include reference to the land being subject to "...the existing rights and liabilities (if any) under the Local Inclosure Act...".
29. Collectively these records add little to the balance other than confirming the existence of part of the Appeal route. Extracts from three County Maps (Cary 1832, Greenwood 1822 and Day & Masters 1782), have been submitted and form part of the narrative, but do not show the appeal route.

Conclusions on the evidence

30. The Appeal route was set out as a Bridleway under the 1815 Inclosure process and following the judgment in *Andrews*, could represent a public right of way. There is limited evidence of its existence as a physical feature in the documentary record before or after 1815, and it is not until the latter part of the 19th Century that it is depicted in OS mapping, but here annotated as a footpath. The greater part of the Appeal route was claimed as a Bridleway during the Parish Survey on the basis of a now lost map, but subsequently amended to Footpath by the highway authority and came to be so recorded in the DMS. Contemporaneously, improvement works affecting the River appear to have resulted in the destruction of the land and thereby loss of that part of the Appeal route alongside it.
31. I consider the evidence is finely balanced in this case. However, I do not consider the evidence adduced to date sufficient to meet the hurdle set under section 53(3)(c)(ii) of the 1981 Act that an existing right of way ought to be upgraded to a higher status.

Conclusion

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

S Doran

Inspector