



Appeal Decision

by **Martin Elliott BSc FIPROW**

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

Decision date: 28 October 2015

Appeal Ref: FPS/D0840/14A/1

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Cornwall Council (the Council) not to make an Order under section 53(2) of that Act.
- The Application, dated 24 November 2003, was refused by Cornwall Council on 16 April 2015.
- The Appellant, Mr M Powell, claims that the appeal route, part of byway open to all traffic 86 Perranzabuloe should be downgraded to 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 an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so. Numbers in square brackets identify paragraphs in this decision.
3. An interested third party, a Mr R Drake, queries the location of the appeal route which in his view is identified as a path to the east of the byway open to all traffic (BOAT) with the BOAT not appearing on the application map. Whilst I note this query, it is clear that the original application and appeal relates to BOAT 86. The Council have considered the original application and subsequent appeal on this basis.

Main issue

4. Section 53(3)(c)(ii) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a highway shown in the definitive map and statement as a highway of one description ought to be shown as a highway of a different description. The main issue therefore is whether, on the evidence, the appeal route should be recorded as a footpath. In effect the applicant seeks an order to delete vehicular and bridleway rights on the basis that such rights were recorded in error when the route was first recorded on the definitive map and statement as a BOAT in 1986¹.
5. The test to be applied to the evidence is the balance of probabilities.
6. Defra² circular 1/09 (paragraph 4.33) advises that the evidence needed to remove what is shown as a public right from such an authoritative record as

¹ The Council do not provide an exact date as to when the current definitive map and statement was published

² Department for Environment Food and Rural Affairs

- the definitive map and statement, and this applies also to downgradings, will need to fulfil certain stringent requirements. These are that the evidence must be new, an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made. Furthermore the evidence must be sufficient to displace the presumption that the definitive map is correct and the evidence must be cogent.
7. At paragraph 4.34 the circular advises that applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted.
 8. The case of *Trevelyan v SSETR [2000] NPC 6, (CA)[2001] EWCA Civ 266, [2001] 1 WLR 1264* (Trevelyan) is relevant to the downgrading of public rights of way. At paragraph 38 Lord Phillips says: *'Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.'*
 9. It is suggested by the appellant that the mistake has been made by the Ordnance Survey. Whilst the route on the Ordnance Survey maps might show the appeal route as being a BOAT, this information is taken from the definitive map. As noted above [4], the issue to be considered in this appeal is whether the appeal route was recorded in error on the definitive map.

Reasons

Evidence

Limited Special Review

10. In 1970 Cornwall County Council carried out a limited special review in respect of the reclassification of roads used as public paths (RUPPs). Cornwall County Council requested parish councils to complete a limited special review form for routes classified as CRF and CRB³. The survey form in respect of the appeal route was completed on 26 September 1970 and identifies that the survey applied to the full length of path 86. The survey form indicates that the route was heavily used by vehicles of all descriptions and occupiers with the route providing the only link to the 'County Road'. The Parish Council considered that

³ Cart road mainly used as a footpath or cart road mainly used as a bridleway

the way was suitable for vehicular traffic and that the extinguishment of vehicular rights would cause undue hardship. The Parish Council confirms the status of a 'byeway open to all traffic' (*sic*).

11. In a letter to the Parish Council dated 21 June 1973 the clerk of the County Council was prepared to agree with the Parish Council's recommendation that the whole length of path 86 should be classified as a BOAT on the draft review map.
12. The Council subsequently published a draft review map and statement with a relevant date of 23 February 1971. Although no copy of the draft map is available the review statement indicates that path 86 was upgraded from 'F.P.' and 'C.R.F.' to a 'BW'. The draft map was placed on deposit and although some 200 objections were raised to the map as a whole, no objections were made to the depiction of path 86 as a BOAT. The subsequent definitive map and statement (thought to be published in late 1986) showed the whole of path 86 as a BOAT. No legal challenge was brought against the County Council in respect of the Limited Special Review.

Paperwork from Councillors

13. A letter from County Councillor K C Yeo notes the recording of the appeal route as a BOAT on the Ordnance Survey 'Explorer' map series. It is suggested that the fact that the majority of rights of way are BOATs may have caused the confusion/mistake.
14. The appellant also provides a number of items of correspondence and evidence of use forms from chairmen and members of Perranzabuloe Parish Council which attest to the fact that the appeal route is a footpath. The correspondence from an Eileen Carter makes the point that it would be impossible to take a horse across the route. Reference is also made to an old stile where the route joins BOAT 89 and concerns are expressed as to any removal of the stile. Her evidence of use form shows knowledge of the route from 1948.
15. Accompanying the statement of Doreen Lawrence is a map dated 24 May 1937. No information has been provided as to the origins of this map and the appellant makes no comment thereon. In my view the map shows the physical existence of a route crossing the land crossed by the appeal route. However, the map provides no information as to the status of the route shown. The evidence of use form of Doreen Lawrence indicates knowledge of the route from 1981.
16. An evidence of use form of Lily Juleff attests to use of the way for walking since the 1950s and the fact that the route has always been known as a footpath.

Correspondence from Squadron Leader N S J Carter

17. The letter to the Council, 19 April 1994, withdraws a complaint in respect of the obstruction of the appeal route. The correspondence refers to receiving information that the appeal route has not been used in living memory for anything other than a public footpath. It is on this basis the complaint relating to the obstruction is withdrawn.

Photographs

18. The appellant provides photographs of either end of the appeal route. The photographs show the physical attributes of the access and egress points of the appeal route.

Map

19. No information has been provided in relation to the map submitted by the appellant although it appears to be an extract of an Ordnance Survey map. The map shows the physical existence of a route which corresponds with the appeal route but provides no information as to status.

An Illustrated Country Walk – published by Goonhavern Women’s Institute

20. The guide describes a walk which includes the appeal route. The guide describes the appeal route leaving Woodlands Farm up some steps and across a field to another flight of well-worn slate steps with a handrail.

Additional correspondence

21. An exchange of Emails between a Mr Colin Campbell and Mr Steve Dyer of the Council refers to the application to downgrade the appeal route. Mr Campbell states that the appeal route has always been a footpath. He contends that steps, stiles and handrails on the route clearly show hundreds of years of wear which in his view suggests that the way has always been used by miners. It is also contended that the stiles show so much age such as to demonstrate that they have been in situ for a very long time. Further, that vehicles and horses would never have been able to access the route.

Evidence of use forms

22. The appellant has submitted 14 evidence of use forms identifying the use of the route as a footpath and long standing knowledge that the way was a footpath. The earliest evidence of use dates from 1940 although the form of Rhoda Rice indicates that the route was used by her father from 1912 when he was at school. A number of forms refer to stiles and/or gates at each end of the appeal route.

Submissions from Mr Drake

23. Mr Drake refers to the debate by some members of the Trail Riders Fellowship as to difficulties with access from the Woodlands Farm end of the route and the locking of a gate on occasions. Mr Drake has submitted a number of photographs which are said to be of the locked gate on the appeal route. However, when compared with the photographs of the appeal route [18], and as confirmed by the appellant, the photographs do not show the appeal route.

Conclusions on the evidence

24. Bearing in mind all of the above, the initial presumption must be that the route is recorded on the definitive map correctly. Had there been no evidence that the way was a BOAT then it should not have been marked on the map. The route was added to the definitive map in consequence of a Limited Special Review. There is nothing to indicate that the correct procedures were not followed.

25. The issue to be considered is whether the evidence submitted by the appellant is cogent such as to displace the initial presumption that the definitive map published in 1986 is incorrect.
26. Whilst the statements [22] identify use of the route only as a footpath this does not preclude the existence of higher rights which would have also accommodated use by pedestrians. There is also a widespread view, contained in the evidence of use forms and other correspondence [13-16, 17 and 21], that the way is only a footpath. Again whilst this is the view of the various individuals it does not demonstrate that the route was recorded as a BOAT in error.
27. The map provided by the appellant [19] provides evidence as to the physical existence of the appeal route but provides no evidence as to status. Similarly the photographs taken by the appellant [18] show the physical characteristics of the route on the day the photographs were taken. They do not provide evidence that a mistake was made in recording the route on the definitive map.
28. I note that much of the evidence provided by the appellant makes reference to steps and a stepping stile on the route. Other evidence refers to gates albeit these appear to be narrow. The existence of stone steps is recognised in the original survey carried out in accordance with the National Parks and Access to the Countryside Act 1949. Nevertheless the Parish Council at the time considered that rights for vehicles existed along the whole length of the route including that section subject of the appeal. The form completed by the Parish Council in respect of the Limited Special Review confirms that the way was suitable for traffic [10]. Although it appears that there are longstanding structures on the appeal route and that it may be unsuitable for equestrian use this does not preclude the existence of rights for vehicles.
29. As noted in *Trevelyan* it is difficult, particularly after the passage of time, to adduce evidence to demonstrate that a mistake was made when the route was first recorded on the definitive map. Taking all the evidence into account I do not consider that it is sufficiently cogent, on the balance of probabilities, to demonstrate that an error was made in recording the route on the definitive map.

Other Matters

30. The Council refers to procedures under the Highways Act 1980 which would enable them to downgrade the status of the way and to manage its use. The appellant also makes representations as to the use of the appeal route by Mr Drake and the spillage of petrol; refuted by Mr Drake. These are not matters for my consideration.

Conclusion

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

Formal Decision

32. The appeal is dismissed.

Martin Elliott

Inspector