

Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 07 March 2017

Appeal Ref: FPS/P2935/14A/4

- This Appeal is made by Janet Lennard (the Appellant) 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 Northumberland County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The Application is dated 5 October 2015 and was refused by the Council on 15 August 2016.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a Restricted Byway from Byway Open to All Traffic No 124 (the U8022 road) north of The Hope in an easterly direction to join public bridleway no 45 south east of Gaterley Hill summit.

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 of the 1981 Act.
2. This Appeal has been determined on the basis of the papers submitted.

Main Issues

3. Section 53 (3) (c) (i) of the 1981 Act provides that a modification 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.

Reasons

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties; the relevant part of the Wildlife and Countryside Act 1981 and the findings of the High Court in the *Bagshaw and Norton*¹ case.
5. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides 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

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

area to which the map relates. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the 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 right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

6. The Appellant bases her case upon an interpretation of documentary evidence from the nineteenth and twentieth centuries and has not provided any evidence of use of the claimed path by the public. The evidence available to me comprises documents submitted by the Appellant together with other documents consulted by the Council when investigating the application to add the path to the definitive map. Correspondence was received from the agent for the owners of the land over which the claimed Restricted Byway would run; however, the landowner did not submit any documentary evidence in relation to the case.

Documentary evidence

Hexham and Allendale Inclosure award 1800

7. The route at issue is shown in the inclosure award map as being bounded by fences or walls until it reaches the stinted pasture on Gaterley Hill; at the point where the route reaches the stinted pasture the map shows the location of a pinfold; the route is labelled 'Gaterly Road'. At the western end the road forms part of a crossroads with Houstie Carrs Road and Coldcoats Road.
8. The claimed route is described in the inclosure award as "*One other private carriage road, sixty feet in breadth, beginning at Houstie Carrs Road, opposite the end of Coldcoats Road, and leading eastwards to the stinted pasture, for the use of the owners and occupiers, for the time being, of lands and allotments in Catton Grieveship*".
9. I understand that the Act under which the inclosure award was made is dated 1792. Neither party has submitted a copy or extracts from the enabling Act to demonstrate the powers under which the inclosure commissioners acted although the Council submitted that the enabling Act stated that all public roads should be set out at least 30 feet in breadth whereas 'private roads' should not exceed 30 feet.
10. The Appellant draws attention to what she considers to be an inconsistency within the inclosure award in that the commissioners had awarded a private road at a width commensurate with a public road in contravention of the provisions of the enabling Act. The Appellant also submits that it would have been necessary for the public to have access along Gaterley Road to reach the pinfold where stray livestock would be held. Furthermore, Gaterley Road is recorded on the inclosure plan as such without the addition of the word 'private'; this is in contrast to another way, Ardley Road which was awarded as a private road and labelled as such on the inclosure plan but which is now recorded on the List of Streets as a publicly maintainable highway.

11. The Council submits that the inclosure award is binding as to the facts set out in the award and plan and that Gaterley Road was set out as a private carriage road and that there was no evidence that this subsequently evolved into a public right of way.
12. Gaterley Road was awarded as a private road but not solely for the use of named individuals but for a wider class of persons '*the owners and occupiers...of lands and allotments in Catton Grieveship*'. Whilst the inclosure award evidence does not provide conclusive evidence of the existence of public rights over the appeal route, the description of the route as being a private road does not preclude the possibility of the public having subsequently acquiring rights along Gaterley Road.

Small scale commercial nineteenth century maps

13. Gaterley Road is shown by both Fryer (1820) and Greenwood (1828) as a fenced or walled track leading to the stinted pasture and are shown in the same manner as other known public roads with the key to Greenwood's map describing Gaterley Road as a 'cross road'. Cary's map (published between 1820 and 1832), on the other hand, neither shows Gaterley Road nor the northern section of Houstie Carrs Road nor any of the awarded roads which led to the stinted pasture.
14. Of these three maps, Fryer's depiction of the route closely resembles that shown on the inclosure award map with Gaterley Road ending at the stinted pasture whereas Greenwood shows the route to extend over the stinted pasture to connect with what is now public bridleway 502/045 which is shown to run north-south over the stinted pasture.
15. The depiction of Gaterley Road on these small scale commercial maps does not preclude the existence of public rights.

Allendale tithe award 1849

16. The tithe map depicts Gaterley Road as a fenced or walled route leading to the stinted pasture and in the same manner as BOAT 502/124 which leaves Houstie Carrs Road a little to the north of Gaterley Road. None of the tracks shown leading to the stinted pasture have apportionment numbers and would not appear to have been considered capable of producing a titheable crop. The tithe map does not show a track, way or path continuing towards bridleway 502/045 from the eastern end of the walled lane, however, the extract from the tithe map submitted does not show any detail of the stinted pasture and the land may not have been the concern of the tithe commissioners.
17. The Appellant submits that there are a number of walled lanes shown on the tithe map which lead to the stinted pastures of which all except Gaterley Road and Beacon Hill Road² are recorded as public rights of way in the definitive map and statement; the Appeal route is shown in the same manner as other known public routes which lead to the stinted pastures. The Council acknowledges that the enclosed section of the appeal route is shown in the same way as other recognised public highways but does not consider that this demonstrates that the route was a public way at the time of the tithe survey.

² An application to add a restricted byway along Beacon Hill Road is the subject of a further and separate application made by the Appellant on 5 October 2015.

18. Whilst the recording of public rights was not the primary purpose of the tithe commutation process, the depiction of the walled section of the route on the tithe map does not preclude the existence of public rights over it. No conclusions can be drawn from the tithe map regarding the unenclosed section of the Order route as the stinted pasture appears not to have been of interest to the tithe commissioners.

Ordnance Survey maps

19. The first edition 25-inch to 1-mile map of 1865 shows Gaterley Road as running between fences or walls towards the stinted pasture and is coloured brown and is numbered 484. The entry in the Book of Reference for parcel number 484 reads "Public Road". The Appellant draws attention to Gaterley Road being shown and described in the same way as Coldcoats Road (coloured brown, numbered 513 and described as a public road) an inclosure award public road and now a tarmac publicly maintainable road.
20. Successive editions of the 6-inch to 1-mile maps published between 1865 and 1951 are consistent in that they show the Appeal route to be fenced or walled from the junction with Houstie Carrs Road to the stinted pasture. These maps show that the enclosed section terminates at a point labelled "Gaterley" but do not show a path or way running over the stinted pasture to bridleway 502/045; the only feature shown on this section is the northern boundary wall of the adjacent field.
21. Whilst Ordnance Survey maps do not provide direct evidence of the status of any track shown on them, they do provide evidence of the existence of observable features at the time of the survey. In this case, the OS maps demonstrate the continued existence of a track or way capable of carrying vehicular traffic to at least the stinted pasture. The entry in the Book of Reference for Gaterley Road provides evidence in support of the Appellant's claim as to the public status of the walled section of the Appeal route as it was regarded at the time of the survey to be of the same status as the adjacent Coldcoats Road. The Ordnance Survey maps suggest that there was no observable track or way over the stinted pasture.

Finance Act 1910

22. The Appeal route is shown excluded from adjacent hereditaments between Houstie Carrs Road and the stinted pasture and was not subject to incremental value duty. None of the Finance Act documentation submitted sheds any light on how the stinted pasture was treated by the Inland Revenue valuer. The Appellant submits that the exclusion of the enclosed section of the Appeal route from valuation provides evidence that the route was considered to be a public road at the time of the survey. The Council submits that it would be reasonable to assume that the route was excluded from valuation as it was considered to be a public or private road.
23. The Finance Act provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. All land holdings (or hereditaments) in England and Wales were to be valued, although under section 35 (1), land belong to a rating authority was exempt from the provisions of the Finance Act. Land which belonged to a rating authority included public carriageways within the rating authority's area.

24. If a route in dispute is external to any hereditament, it is therefore possible that it was considered by the valuer to be a public highway normally but not necessarily vehicular, since the existence of footpaths and bridleways over land were usually dealt with by way of deductions from site value in the valuer's Field or Valuation Book entries. The representation of part of the Appeal route as being separate from private ownership is evidence which sits in the scale in favour of the Appellant.

Conclusions

25. The documentary evidence adduced in this case shows that the walled section of the Appeal route has been in existence as a feature in the landscape since 1800 when it was set out as a private road to provide access to the stinted pasture for the owners and occupiers of Catton Greiveship. The route was set out a width commensurate with that of a public road and would have been capable of carrying public vehicular traffic.
26. The walled section of the appeal route was recorded as a public road by Ordnance Survey in 1865 and was excluded from valuation under the Finance Act 1910 which is also supportive of the walled section being a public highway.
27. Other than Greenwood's map of 1828, none of the documents considered show the existence of a route between the end of the walled section of the Appeal route and public bridleway 502/405. However, the absence of the route from Ordnance Survey mapping from 1865 onwards does not demonstrate that a right of way had not come, or could not have come into existence at an earlier date.
28. The members of the Council's Rights of Way Committee reached their decision based on an interpretation of the available documentary evidence. The Appellant draws a different conclusion based on a different interpretation of the same documents. In my view, the Appeal fails Test A set out in paragraph 5 above as there is a conflict in the interpretation that can be placed upon the available evidence. However, I have not read or seen any evidence which would inevitably defeat the Appellant's claim; consequently I conclude that the Appeal succeeds against Test B as the evidence adduced is such that it is reasonable for the Appellant to allege that a public right of way subsists over the Appeal route.
29. Having regard to these and all other matters raised in the written representations I conclude that the Appeal should be allowed.

Formal Decision

30. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Northumberland County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a restricted byway as set out in the application of 5 October 2015. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector