



Appeal Decision

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 18 January 2016

Appeal Ref: FPS/J1155/14A/5

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application made on 22 April 2014 was refused by Devon County Council on 16 July 2015.
- The Appellant claims that the appeal route in the Parish of Berrynarbor, North Devon should be added to the definitive map and statement for the area as a restricted byway.

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 Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. The appeal relates to a route which commences on the Sterridge Valley road¹ to the south of Footpath No 16 and re-joins that road near Venture Cottage. It is shown marked A-B-C on the Council's drawing number HCW/PROW/15/21 (the Appeal route). It is agreed between the parties that the part of the Sterridge Valley road which the Appeal route joins was constructed at a later date than the Appeal route and for ease of reference I shall refer to that section of the Sterridge Valley road as the "Bypass" throughout this decision. The Appeal route is dissected by the private access to Woodlands House.
4. The Appeal route was initially considered by the Council as a proposal for the addition of a footpath under Schedule 15 of the 1981 Act as part of the Council's parish-by-parish Definitive Map review process. It was resolved that no modification order be made. Subsequently a Schedule 14 application was made for the same route to be added as a restricted byway and it is that application which is the subject of this appeal.

The Main Issues

5. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered which, when

¹ Also known as Sterries Valley

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 in the area to which the map relates.

6. As set out in the case of *R v SSE ex parte Mrs J Norton and Mr R Bagshaw (1994) 68 P & CR 402 (Bagshaw)* there are 2 tests and an Order should be made where either test is met:

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

7. Section 31 of the Highways Act 1980 (the 1980 Act) provides that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. 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.

Reasons

Documentary Evidence

Maps

8. From the OS 1804 Surveyors drawings for the area around Berrynarbor and the 1st edition 1 inch to the mile 1809 map, it is clear that the road network in the vicinity of the Appeal route has changed considerably over the years. However, there appears to be a route shown in the location of the Appeal route and although there is no obvious continuation south along the Sterridge Valley, the route does connect to the wider network.
9. The 1886-7 1st edition OS map 25" to 1 mile, published in 1891 shows both the Appeal route and the Bypass. The 1904-1906 2nd edition also shows both routes as do all subsequent OS maps.
10. Greenwoods Map 1827 shows the road from Berrynarbor to Berry Down as a through route. The lines of the roads do not appear to be as accurate as the OS mapping but a route is shown which may be in the position of the Appeal route.
11. Ordnance Survey (OS) maps are generally regarded as an accurate guide to what existed on the ground at the time they were surveyed and it appears from them, and supported to a degree by Greenwoods Map, that the Appeal route existed during the early part of the 19th century. However, OS maps specifically did not indicate the status of routes in so far as public rights are concerned.

Inclosure Award Berry Down Berrynarbor 1809

12. The Inclosure Award gave permission to lay out both public and private roads over the area to be inclosed. The Appeal route is not set out as either a public or private road.

Tithe Map 1840

13. Tithe documents were drawn up under statutory procedures laid down in the Tithe Commutation Act 1836. They had the sole purpose of identifying titheable or productive land and were not produced to identify public rights of way. However, they can sometimes be helpful in determining the existence and status of routes.
14. The Tithe map shows the Appeal route as unproductive land, exempt from tithe payments. However, both public and private ways had the capacity to diminish the productiveness of land for the assessment of tithe and this therefore provides little assistance other than showing the physical existence of the route at that time.

Estate Map – map of land in the Parishes of Ilfracombe, East Down and Berrynarbor, Devon – Property of AD Bassett Esq 1854

15. Historically the Watermouth (Bassett) Estate owned substantial amounts of land in Berrynarbor and adjacent parishes. The Appeal route is shown on the Estate map and clearly provides the only access to a number of properties. I accept that most of the properties appear to have been within the ownership of the Estate. However, Lower Cockhill appears to have been in independent ownership and had no other access.

Parish Council minutes

16. The Parish Council minutes of May 1896 refer to the Local Government (Highway) Bill, the object of which was to transfer the maintenance of highways in every rural parish, to the Parish Council. In October 1897 the minutes record discussion of the question of “taking over the road through Sterries Valley and Smithen, and the road commencing from the Church and ending to, and adjoining the High Road at the head of the farm called Chichesters”. It was resolved that “the Parish Council approves of the Parish taking over the roads as shown on this plan and would ask the Rural District Council to carry it into effect, and see that the Roads meet their requirements”. Unfortunately the plan referred to is not available.
17. Minutes of March 26 1898 refer to “the question of the Sterridge Road and also the road leading near the Church to Chichesters Farm and ending on the Highway leading to Berrydown”. The minutes record that the chairman was “pleased to announce that the matter was settled and that in future the above named roads would be parish roads”.
18. In the absence of the plan referred to it is unclear exactly what roads became parish roads in 1898. The Council refers to Parish Council minutes regarding the “dangerous state of the Roads by Sterries Bridge” and the “improvement of corners at Sterries Bridge” which work appears to have taken place as a result of the gathering of both public and private subscriptions prior to the roads being taken over as maintainable at public expense. The minute of March 26 1898 records that “Councillor Besley proposed that the Clerk write a letter the

Rector Revd Reginald Churchill thanking him for granting the land necessary for the improvement of the corner near Sterries Bridge”.

19. It is unclear which land was granted by the Rector which was necessary for the improvement. The Council states that Sterries Bridge is to the south of the Appeal route whereas the appellant states that it is on Glebe land which is situated to the north. Although I accept the submission of the IP that there is no evidence that the land granted by the Rector was part of the Glebe land and note the suggestion that the Rector may not have had the power to grant Glebe land for a road scheme, there is no evidence of any other land being within the ownership or control of the Rector Revd Reginald Churchill. It seems to me more likely than not that the land granted by the Rector was Glebe land and that Sterries Bridge is in the location suggested by the appellant.
20. However, this does not mean that the Bypass was not part of the route shown on the plan. Given that the Bypass had been constructed by that time and that it forms part of the route subsequently shown on the District Handover Map and is now part of the county road it is more likely that the Bypass became a parish road at that time than the Appeal route.
21. The appellant does not disagree with this but contends that it was only the more recently constructed parts of what is now the county road which were taken over by the parish in 1898 as other parts of the through route, including the Appeal route, formed part of an ancient highway. The Council considers that it was the whole of the route through the Sterries Valley which became a parish road at that time and other existing routes, including the Appeal route, remained private. In the absence of the plan referred to in the minutes it is not possible to ascertain which roads, or parts of roads, were taken over by the parish in 1898. It is also not possible to ascertain from the minutes whether the Appeal route was public or private prior to that time.
22. Reference has also been made to a Parish Council minute dated 6 March 1930 which records it being resolved that a letter be written to Mr G D Smith about the “Road by The Woodlands”, “pointing out that same is an occupation road and that the Parish Council have no control over same”.
23. The Council submits that this is a reference to the Appeal route whereas the appellant submits that it could refer to the access to The Woodlands which crosses the Appeal route. In his statutory declaration, Mr Phillip Ivor Thomas states that a new access road was built north of Venture Cottage to serve The Woodlands in the mid-1930s. Mr Thomas also refers to maintenance of the track to the well (which is part of the Appeal route) after property renovations which took place in 1936 and states that the “farther track sections were disused because of the new lower access route”. The inference from this evidence is that the new access to The Woodlands was in place by 1936 but had probably not been constructed by the date of the Council minute.
24. There have been various suggestions that Mr Thomas’ recollections may not be accurate. However, no other evidence has been provided regarding the date of construction of the access to The Woodlands. In any event even if the access was in place by the date of the minute, it is unclear whether “Road by The Woodlands” refers to the Appeal route or the new access.
25. Other Council minutes have been referred to but in my opinion do not provide any particular assistance.

Estate Steward Accounts 1894 to 1906

26. The accounts make specific reference to expenditure on Smithen and Sterridge Roads prior to the Sterridge Road being taken over by the Council in 1898. After that date expenditure is recorded on "Roads and Drives" but no detail is provided. I agree with the Council that the accounts show that the Estate spent large amounts of money each year on making and maintaining roads. However, there is nothing specific to the Appeal route.

Finance Act Documentation

27. Under the Finance (1909-1910) Act 1910 (the Finance Act) all land in England and Wales was valued. The boundaries of taxable parcels of land, called hereditaments, were shown on large scale OS maps. The value of a hereditament could be reduced if the landowner admitted to the presence of a right of way across it, and if so, this was recorded in the appropriate valuation and Field Books. In general, routes known to be public vehicular roads were excluded from the hereditaments and left uncoloured.
28. The Appeal route is uncoloured and in part is bounded by different coloured plots from which it is excluded. The current county road, including the Bypass, is also uncoloured. The Council and the IP state that there are inaccuracies and errors on the Finance Act plan. The Council states that "Smithen Lane (a highway maintainable at public expense since 1989) is shown uncoloured for some distance and then the coloured boundary crosses the road at the corner by the old Smythen Farm". I note that part of what is now a public highway appears to be coloured across in orange ink and enclosed within plot 82. However, in the absence of the plan accompanying the parish council minutes it remains unclear exactly what roads or parts of roads were taken over by the parish council prior to 1910 and I note that the relevant section of road is included within Lot No 4 on the 1920 Watermouth Estate Sale map, which map I shall refer to below.
29. The IP suggests that arguably part of the Appeal route falls within hereditament 15. This is on the basis that there is no open brace to show that the portion of the Appeal route is external to the hereditament. However, similar colouring is shown for the Bypass and it is not suggested that that fell within hereditament 15.
30. The IP also suggests that the Field Book for hereditament 15, when listing the parts of the hereditament that make up Lower Rows and Higher Rows may include the word "road" under H, thereby indicating inclusion of part of the Appeal route within the hereditament. The word referred to is illegible. However, given that the letters A – I clearly relate to a description of buildings shown on a plan on the same page, that H clearly relates to a building and the illegible word follows the word "stone slated", I do not accept that it provides evidence of the inclusion of a road within the hereditament.
31. The IP also refers to the Field Book entry for hereditament 167 "The Woodlands" which records that £560 has been spent on the "house and approaches". It is submitted that this suggests expenditure on the Appeal route and therefore that the Appeal route was not considered to be a public highway. However, there is no detail of what is meant by the "approaches" and I note from the plan that there appear to be various tracks within the hereditament. The Appeal route is quite clearly external to the hereditament

and I do not accept that the expenditure referred to relates to the Appeal route.

32. It seems to me that there are reasonable explanations for many of the supposed discrepancies and inconsistencies in the plan and Field Book referred to by the Council and the IP. I therefore do not accept the IP's assertion that the plan "shows no clear system from which it might be deduced that known public roads were shown "uncoloured and excluded" from the hereditaments subject to valuation.

Watermouth Estate Sales Particulars 1920

33. The entire Appeal route is shown uncoloured and not included within any Lot offered for sale in 1920 by the Watermouth Estate. Lot 17 includes land on either side of the Appeal route, and on either side of the Bypass, but both the Appeal route and the Bypass are clearly excluded from the Lot. Lot 19, described as "Middle Cockhill, a very desirable small holding including a good slated dwelling house" does not appear to have any access other than by use of the Appeal route. The sales particulars do not contain reference to any right of access and no reservation of a right is given through the adjacent Lot 7.
34. The appellant contends that the absence of a right of access to Middle Cockhill is evidence that the Appeal route was a public right of way. The IP suggests that an equally likely explanation is that Lot 19 might have carried with it a right of access from the south over land in the private ownership of a third party. However, no evidence has been provided with regard to any contractual arrangements which may have been made between purchasers of specific Lots and other parties. Mr Harvey, the owner of Middle Cockhill Farm for 42 years, states on his Landowner's Evidence Form dated December 2012, that he does not believe the Appeal route to be public and that he owns the land that is either side of the entrance trackway and has solely maintained and managed the entrance trackway during the period of his ownership. However he makes no mention of any contractual arrangements.

Land Registry Documentation

35. The properties adjacent to the Appeal route which are registered with the Land Registry show their boundaries up to but not including the Appeal route. Although the Appeal route provides the only means of access to Woodlands Cottage and 77 Sterridge Valley (Knocker's Hole) the Land Registry Title documentation does not reveal any rights of access over the Appeal route. The Appeal route itself is unregistered.

Other matters

36. In his statutory declaration Mr Philip Thomas, members of whose family occupied Venture Cottage since 1888, states that his family, including his grandfather and father maintained the Appeal route. He moved to Venture Cottage in 1929, aged 8, and states that as a child and teenager he helped with maintenance. He states that the "County, district or Parish Councils did not maintain the track".
37. The user evidence provided is limited and no-one has suggested that it is sufficient to support a claim based on use, either under Section 31 of the 1980 Act or at common law.

Conclusions on the evidence

38. Early maps show the physical existence of the route since at least the early part of the 19th century. The 1854 Estate Map shows that it provided the only access to a number of properties and that although most were within the ownership of the Estate this was not exclusively the case. The Estate Steward Accounts show significant expenditure by the Estate on roads which is consistent with the Estate maintaining private roads within the Estate.
39. At some time prior to 1886 the Bypass was constructed and Parish Council minutes from 1896 to 1898 record certain roads being taken over by the Council as parish roads. The minutes refer to a plan which is no longer available and use various descriptions of the roads including "the road through Sterries Valley", "the Sterridge Road" and the "Roads by Sterries Bridge". Reference is also made to various improvements being required prior to the roads being taken over, including the "improvement of corners at Sterries Bridge".
40. The descriptions are unclear and in the absence of the plan it is not possible to ascertain exactly which roads, or parts of roads, were taken over at that time. However, on the basis of subsequent events, I agree with the Council that it is likely that the Bypass, but not the Appeal route, was included. Nevertheless, it is possible that, as submitted by the Appellant, parts of what is now the County road were already public highway at the time and in my view the minutes do not show that the Appeal route did not form part of a pre-existing public right of way in 1898.
41. The colouring on the Finance Act plan and the fact that the Appeal route is excluded from adjoining hereditaments is consistent with the Appeal route being considered to be a public vehicular road at that time. I agree with the IP that Finance Act records are not definitive but are "simply one part of the jigsaw puzzle". I also agree that inconsistencies within the documentation would limit the weight to be attributed to it. However, I do not find the inconsistencies which have been referred to as significant as suggested by the Council and the IP.
42. The Watermouth Estate Sales Particulars 1920 also show the Appeal route uncoloured and excluded from any of the Lots for sale, even though the route is required for access to some properties. Although it is possible that private contractual arrangements existed, no evidence of this has been provided. Current Land Registry documentation also fails to reveal any rights of access to the relevant properties.
43. Parish Council minutes of 1930 refer to a "road by The Woodlands" as an occupation road over which the Parish Council had no control. I accept that this may be a reference to the Appeal route. I also note that the Barnstaple Rural District Council Highway Handover Map dating from the 1930s show the Bypass, but not the Appeal route as publicly maintainable highway and that the Appeal route was not claimed as a right of way in the original Definitive Map Rights of Way Survey.
44. It may well be the case that by the 1930s the Appeal route was considered by the Council to be an occupation road with no public rights over it. This would be consistent with the evidence of Mr Thomas with regard to maintenance. However, there is no evidence of any public rights which may have existed

prior to that date having being extinguished. The parish council minutes, whilst showing that certain roads became maintainable at public expense in 1898, and that this probably did not include the Appeal route, do not demonstrate that public rights did not exist over the Appeal route at that time.

45. The Finance Act documentation is consistent with the Appeal route carrying public vehicular rights in 1910 and this is supported by the Watermouth Estate Sales Particulars of 1920. Taking all of these matters into account, I conclude that there is some evidence in favour of the existence of public rights and no incontrovertible evidence before me to demonstrate that a right of way cannot be reasonably alleged to subsist over the Appeal route. Test B is therefore clearly met in this case.

Conclusion

46. Having regard to these and all matters raised in the written representation I conclude that the appeal should be allowed.

Formal Decision

47. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Devon County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify its Definitive Map and Statement by adding the Appeal route as a restricted byway. This decision is made without prejudice to any decisions that may be issued by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alison Lea

Inspector