
Appeal Decisions

by Barney Grimshaw BA DPA MRTPI (Rtd)

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

Decision date: 27 January 2016

Appeal Ref: FPS/G3300/14A/8 referred to as Appeal A

- 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 Somerset County Council not to make an Order under section 53(2) of that Act.
- The Application dated 19 May 2009 was refused by Somerset County Council on 16 April 2015.
- The Appellant claims that the appeal route known as Butts Quarry Lane (footpaths CH33/35 and CH33/36) which runs from Yeovil Road to Higher Easthams Lane, Crewkerne should be shown as Restricted Byway.

Summary of Decision: The appeal is allowed.

Appeal Ref: FPS/G3300/14A/9 referred to as Appeal B

- 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 Somerset County Council not to make an Order under section 53(2) of that Act.
- The Application dated 16 June 2009 was refused by Somerset County Council on 16 April 2015.
- The Appellant claims that the appeal route known as Higher Easthams Lane (footpath CH33/34) which runs from Yeovil Road to Butts Quarry Lane, Crewkerne should be shown as 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 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.
3. In writing this decision I have found it convenient to refer to points on the appeal routes, I therefore attach a map showing both routes and the points referred to.

Main issues

4. Section 53(3)(c)(ii) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered which, when considered with all other relevant evidence available shows that a right of way which is shown in the map and statement as a highway of one description ought to be there shown as a highway of a different description In considering the evidence under this section there are two tests which need to be applied,

as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

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.

5. As the applications were made for the appeal routes to be recorded as restricted byways it is necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which extinguished unrecorded rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

Reasons

6. The two appeal routes are linked and much of the evidence in support of each is similar. Accordingly, whilst I have considered each appeal separately below, I have sought to avoid unnecessary repetition when dealing with the evidence for Appeal B and have instead referred to my consideration of similar evidence in respect of Appeal A.
7. Although I have considered each appeal separately on the basis of the evidence presented for each, I have also been mindful of the fact that, if either one of the appeals was to be allowed and the other refused, this could lead to the recording of a cul de sac byway. Such routes can subsist but would be unlikely in a situation such as this where the termination point of the route would not be at a place of public resort.

Appeal A

Ordnance Survey (OS) Records

8. The earliest available OS map, the 1" to the mile map of 1809-11, shows a route similar to the application route. Later 6" to the mile maps dated 1885-88 show the route on its current alignment as an enclosed, ungated route named as Butts Quarry Lane.
9. In the OS Object Names Book of 1901 the route is recorded as Butts Quarry Lane and described as a road extending from Yeovil Road to Higher Easthams Lane. The authority for this description is given as being the Surveyor of Crewkerne Urban District Council (UDC). The book does not state whether the route was considered to be public or private but the applicant points out that at least one other route is specifically described as being private, albeit on the authority of a different person who was also the landowner.
10. 1:25,000 OS maps 1901-28 show the route un-named and uncoloured whereas publicly maintainable routes are shown in colour. More recent 1:10,000 scale maps show the route marked as "*Butts Quarry Lane (track)*".
11. Later 1" to the mile maps of 1919 and 1946 show the route as a minor road in poor or bad condition.

12. OS maps are regarded as providing good evidence of the physical existence of features marked at the time they were surveyed. However, they did not purport to show the status of routes and many maps contain a specific disclaimer to the effect that the routes shown are not necessarily public rights of way.

Tithe Records

13. Under the Tithe Commutation Act 1836, tithes were converted to a fixed money rent. In most areas this required detailed surveys to be carried out in order to apportion the amount of tithe payable among the landowners of a parish. Tithe documents that were prepared had the sole purpose of identifying titheable or productive land. They are statutory documents which were in the public domain but were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of routes.
14. The Crewkerne Tithe map 1844 shows the whole of the appeal route unnumbered and apparently not liable for tithe in the same manner that public roads were shown.
15. The Crewkerne Easthams Tithe map 1839 also shows the easternmost part of the route.
16. The exclusion of the route from liability for tithe reflects the fact that the land was not productive. This could indicate that it was regarded as a public road but would also be consistent with the way in which a private occupation road might be shown.

1910 Finance Act Records

17. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.
18. In this case the Finance Act base map shows most of the route apparently excluded from adjoining hereditaments in the same manner as public roads would have been shown. However, the easternmost section of the route is shown as being included within hereditament 1582, Eastham's Farm. This hereditament covers a large area in which a deduction from value of £175 is recorded in the relevant field book in respect of 'footpaths'. The records do not specify which routes were regarded as being public footpaths and no deduction is recorded for any other type of public right of way. In the field book, Eastham's Farm is described as being approached by a private road of a rough nature, possibly a reference to this appeal route (or the Appeal B route).
19. The Finance Act records are in my view inconclusive. Much of the appeal route is dealt with in a manner consistent with it having been regarded as a public road, although it is likely that an occupation road with no known owner and a number of users might have been recorded in the same way. However, the Eastham's Farm section is dealt with in a manner which suggests it was regarded as being private. The applicant argues that this is explained by the

fact that land on both sides of this section of the route was in the same ownership but, in my view, if it was regarded as a public road, it could (and should) have been excluded for valuation purposes. However, it is difficult to explain why the status of the route might have been different after it entered Eastham's Farm land.

The Definitive Map and Statement

20. In the survey carried out by the UDC in 1950 as part of the process of preparing the first definitive map, the appeal route was recorded as two public footpaths, Path 36 running from Yeovil Road (Point A) to the junction of paths 35 and 37 (Point B) and the other, Path 35 from Point B to Higher Easthams Lane (Point C). Then, in the 1954 draft definitive map the route was shown coloured purple as a public footpath but also dashed green representing a Road Used as a Public Path (RUPP). No explanation has been found as to why the RUPP classification was recorded despite the UDC having only claimed the route as a footpath. There were no objections to the Draft map but the subsequent Provisional map recorded the route as a footpath.
21. The current definitive map shows the route as a footpath. The accompanying definitive statement described both parts of the route (Footpaths CH33/35 and CH33/36) as CRF but this has been altered by hand to footpath. The term CRF is an abbreviation for a public carriage or cart road used mainly as a footpath. The term has no legal significance and is no longer used. It is not known when or by whom the definitive statement was amended.
22. This evidence shows that the appeal route was considered to be a public footpath in the 1950 survey and was subsequently recorded as such in the definitive map and statement. In between these events there appears to have been some suggestion that the route may have had a higher status although the basis for this is not known.

Other Evidence

23. A map of the estate of a Mr Donne, possibly dating from around 1772 shows the whole of the appeal route. However the map has no key so provides no evidence of the status of the route. A map of the Second Quarter of the Manor of Crewkerne dated 1835 but copied from the Donne survey of 1772 shows the route in a similar manner. Also, another estate map of 1846 shows the appeal route but again does not indicate its status.
24. A commercial map published by Greenwood in 1822 shows the route as a 'Cross Road'. The applicant argues that this suggests that it was regarded as a public road and points out that other routes now accepted as public roads are shown in the same manner. However, other routes not currently regarded as being public are also shown in a similar manner and in my view this map cannot be relied upon as an indication of the status of the route.
25. A Crewkerne Highway Board map of 1862 shows the appeal route coloured green indicating that it was an 'Occupation Road'. It was not listed as being maintainable at public expense.
26. Legal Agreements for the exchange of parcels of land close to the appeal route dated 1871 and 1880 show the route in the same manner as other routes. However, although these agreements were made under the provisions of the Inclosure Acts, the route was not created as a highway under these acts.

27. Crewkerne Highways Board Minute Books are reported to record that in January 1873 a letter complaining of the condition of the public footpath from Eastham's Farm was read and that in November 1883 another letter was read regarding the condition of roads near Higher Eastham's Farm. This latter resulted in the surveyor having works carried out. It is not clear whether either of these letters referred to this appeal route but it would appear that access to Higher Eastham's Farm would have been by way of this route and/or the Appeal B route. The Highway Board would not have had the authority to spend public money repairing private roads.
28. Crewkerne UDC Minutes of February 1895 record the UDC seeking the views of a solicitor regarding the liability of the council to repair occupation roads. The view received was to the effect that the council would not bear such responsibility unless the route had been dedicated for public use before 1835 or had subsequently been formally adopted. No reference was made to the Appeal routes.
29. Bartholomew's 1/2" to the mile map of 1927 shows the route as a metalled road. It is uncoloured which means it was regarded as inferior and not recommended. As in the case of OS maps, this map included a disclaimer to the effect that routes shown were not necessarily public.
30. In 2009, The Land Registry reported that there is no registered owner for any of this Appeal route.

Conclusions regarding Appeal A

31. The appeal route has existed for a long time, since at least the early 19th century. Most of the evidence that is available, whilst not conclusive, is consistent with public vehicular rights having been established over the route.
32. Some of the evidence that might suggest that public vehicular rights have not been established is difficult to interpret. For example, the 1910 Finance Act records show much of the route excluded for valuation purposes but some of it included within a taxable hereditament but it is difficult to see why its status might have changed part way along. Also, the way that the route was described at different stages of the definitive map making process has varied without explanation.
33. Overall it is my view that the evidence in support of the claimed route carrying public vehicular rights is finely balanced but there is no incontrovertible evidence that such a right of way cannot be reasonably alleged to subsist. I therefore find that a public byway has been reasonably alleged to subsist.
34. As the application was made after the 2006 Act came into force and none of the exceptions listed in that Act would appear to apply in this case, any rights for use of the route by MPVs were extinguished by the Act and it would be appropriate for an order to be made for the route to be shown as a Restricted Byway.

Appeal B

35. OS maps from 1809-11 onwards show this route in the same manner as the Appeal A route. The 1901 Object Names Book records it as Higher Eastham's Lane and describes it as a road leading from a junction a short distance north-west of Lower Eastham's Farm (Point D) to a sheep pen where it joins Butts

- Quarry (Point C). The description was also written by the Surveyor of Crewkerne UDC. Bartholomew's map of 1827 also included the route.
36. The Crewkerne Easthams Tithe map 1839 shows the whole of the appeal route unnumbered and apparently not liable for tithe in the same manner that public roads were shown. The Crewkerne Tithe map 1844 also shows the route in a similar manner.
 37. The 1910 Finance Act map shows the whole of the route apparently excluded from adjoining hereditaments in the same manner as public roads.
 38. In the survey carried out by the UDC in 1950 as part of the process of preparing the first definitive map, the appeal route was recorded as a footpath, path 34. Then, as in the case of the Appeal A route, it was shown in the Draft map as a RUPP and then on the Provisional map and Definitive map as a footpath. The definitive statement described the route as CRF but this has been altered by hand to footpath but again it is not known when or by whom the statement was amended.
 39. Estate maps and a manorial map show the route in a similar way to the Appeal A route and Greenwood's map also shows it as a 'Cross Road'.
 40. The Crewkerne Highway Board map of 1862 also shows this route as an 'Occupation Road' not liable to be maintained at public expense. Similar comments regarding entries in the Crewkerne Highways Board Minute Books and the Crewkerne UDC Minutes to those made in respect of the Appeal A route are also relevant to this route.
 41. Legal Agreements for the exchange of parcels of land adjoining the Appeal route dated 1871 and 1880 show the route in the same manner as other routes. Although these agreements were made under the provisions of the Inclosure Acts, the route was not created as a highway under these acts. However, the applicant points out that the agreements did not include easements for access purposes and it is suggested that this indicates a belief that the access route, which was the appeal route, carried public rights.
 42. In 2009, The Land Registry reported that there is no registered owner for any of this appeal route.

Conclusions regarding Appeal B

43. The evidence is generally similar to that in respect of Appeal A. If anything the evidence that public vehicular rights have been established is slightly stronger in this case as the whole route was excluded for valuation purposes under the 1910 Finance Act and the exchange agreements of 1871 and 1881 concerned land adjoining the route and presumably dependent upon it for access purposes.
44. Accordingly, I conclude that it is reasonably alleged that public vehicular rights have been established over this route and that an order should be made for it to be shown as a Restricted Byway.

Conclusion

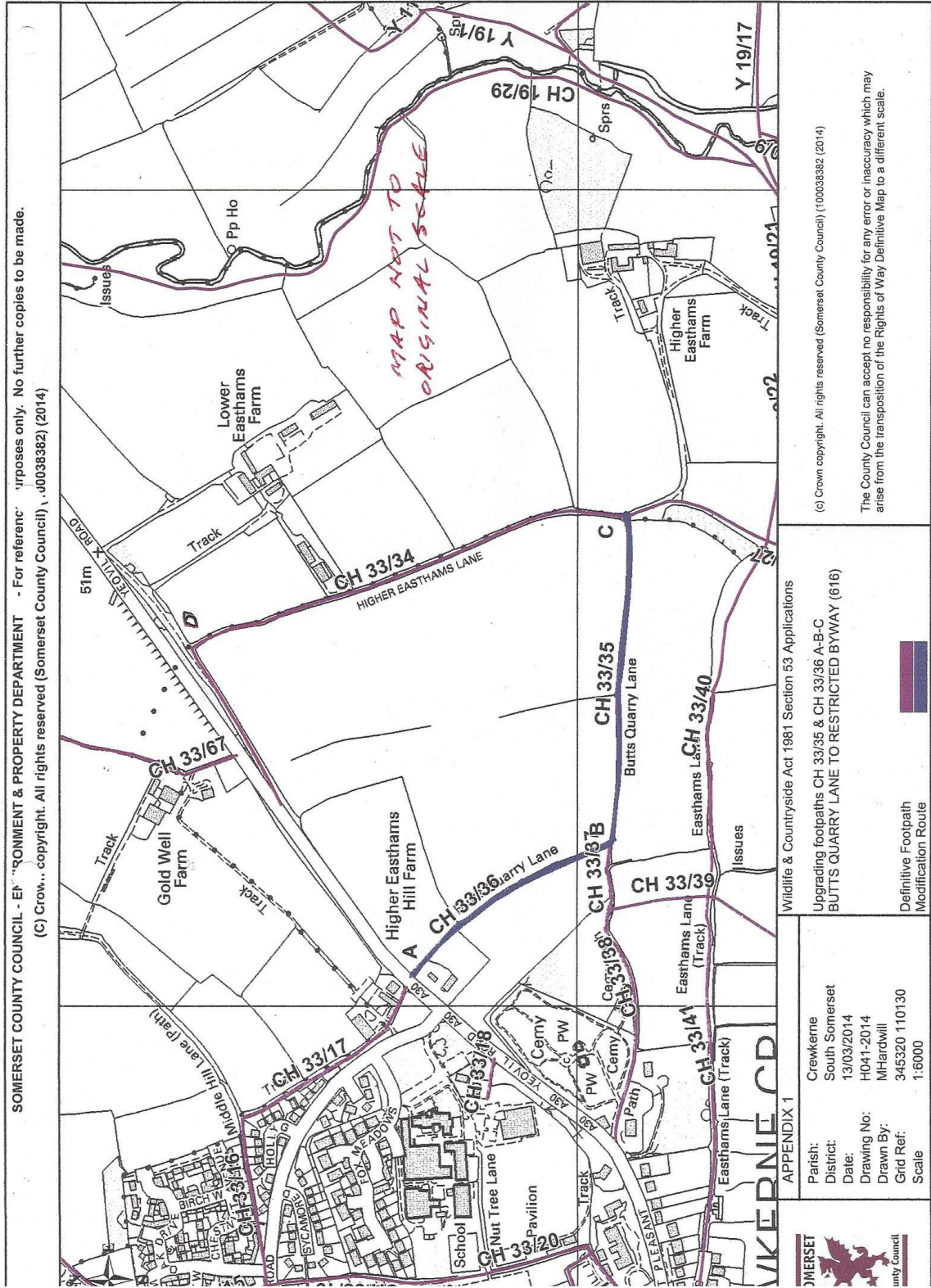
45. Having regard to these and all other matters raised in the written representations I conclude that both the appeals should be allowed.

Formal Decision

46. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Somerset County Council is directed to make an order or orders under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Somerset County Council to add two restricted byways as proposed in the applications dated 19 May and 16 June 2009. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Barney Grimshaw

Inspector



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Wildlife & Countryside Act 1981 Section 53 Applications
 Upgrading footpaths CH 33/35 & CH 33/36 A-B-C
 BUTTS QUARRY LANE TO RESTRICTED BYWAY (616)

Parish: Crewkerne
 District: South Somerset
 Date: 13/03/2014
 Drawing No: H041-2014
 Drawn By: MHardwill
 Grid Ref: 345320 110130
 Scale: 1:6000

APPENDIX 1
 Somerset County Council
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 The County Council can accept no responsibility for any error or inaccuracy which may arise from the transposition of the Rights of Way Definitive Map to a different scale.