



Appeal Decision

by Martin Elliott BSc FIPROW

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

Decision date: 2 March 2016

Appeal Ref: FPS/J1155/14A/7

- 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 Devon County Council not to make an Order under section 53(2) of that Act.
- The Application dated 28 April 2008 was refused by Devon County Council on 24 June 2015.
- The Appellant, Rosemary Kimbell, on behalf of East Devon Group, Ramblers, claims that the appeal route, between the Combe Raleigh to Honiton road and the lane near Summerfield Cottage (grid reference ST 16130138 to ST 15440218), should be added to the definitive map and statement for the area as a public footpath.

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 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.
3. In April 2008 the Ramblers submitted twelve applications under Section 53(5) and Schedule 14 of the 1981 Act for routes in Combe Raleigh parish. Seven of the applications were considered in a report to the Council's Public Rights of Way Committee on 24 June 2015 and were rejected. The routes subject to these applications are identified on the plan produced by the Council HTM/PROW/14/81 dated July 2014 (proposals 1 to 6a). This appeal relates to proposal 2 shown A-C-D-E on that plan.

Main issues

4. Section 53(3)(c)(i) 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 right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. 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 clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there

is a conflict of credible evidence but 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. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced. Section 32 is declaratory of the common law.
6. The main issue is whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the claimed route to the definitive map and statement for the area. The appellant relies on documentary evidence in support of the claim.
7. I note the submissions of the Council as to the tests which should be applied to the evidence. However, the tests are those set out above. In respect of a reasonable allegation this is a lower threshold than on the balance of probabilities.

Reasons

Greenwood's map 1827

8. The copy of the Greenwood's map of 1827 is not particularly clear but appears to show the southern section of the claimed route adjacent to Combe Wood. The map is understood to have mainly been copied from earlier editions of the Ordnance Survey map. The map shows the physical existence of a route which in part corresponds with the claimed route. However, the map provides no evidence as to status.

Ordnance Survey mapping

9. The 1806/7 Ordnance Survey surveyor's drawings are again unclear but appear to show the initial section of the route leading off the Combe Raleigh to Honiton road. The route then enters Combe Wood and is shown as a cul-de-sac. The southern part of the route is also shown on the 1 inch to the mile first edition map dated 1809 as adjacent to Combe Wood.
10. The 1887 25 inch first edition map shows a route between points A and D although the initial section from the Combe Raleigh to Honiton road follows the boundary of Combe Wood rather than taking a route directly across the field. Within field parcel 351 the route is annotated 'F.P.'
11. The 25 inch 2nd edition map of 1903 and the 'A' edition map of 1959/60 shows the claimed route in its entirety and is annotated 'F.P.'
12. The 1 inch to the mile scale maps from 1910, 1919, 1927 and 1937 show the southern part of the route as an unmetalled road or minor road although the route shown continues to Woodhayne Farm. The 1937 map also shows a route corresponding with the claimed route and is identified as a footpath or bridle

path. The 1948 provisional 1:25000 edition shows the claimed route in a similar way to the 1937 map although the route is annotated 'F.P.'

13. The Ordnance Survey mapping provides evidence as to the physical existence of the appeal route between 1887 and 1948. Given that Ordnance Survey maps were produced to record topographical features and not the status of routes shown thereon, the maps provide no evidence as to status. The annotation 'F.P.' shown on some of the Ordnance Survey mapping identifies a route which the public may not mistake as a route traversable by horses or wheeled traffic. However, this provides no indication as to whether or not the route was regarded as public or private. It should be noted that from 1888 Ordnance Survey maps carried a disclaimer to the effect that the representation of any track or way on the map is no evidence of the existence of a public right of way.

Combe Raleigh Tithe Map 1841 and Apportionment 1840

14. The 1841 tithe map shows the southern part of the claimed route. The route, numbered 410a, is identified in the apportionments as a private road and leads to Woodhayne Farm. The tithe map and apportionment do not provide any evidence as to the public status of the route but the recording as a private road does not preclude the existence of public rights.

1910 Finance Act records

15. The appeal route passes through the hereditaments numbered 13 'Woodhayne Farm', pt. 14, 8 'Barton Farm' and hereditament 58 'Rectory Glebe'.
16. The field book for hereditament 13 records under 'Charges, Easements, and Restrictions...' a 'R of Way' through, amongst others, field parcels numbered 378a, 365, 364 and 361; the claimed route passes through these field parcels. An overall deduction of £75 is made in respect of 'public rights of way or user'.
17. No deductions are made for public rights of way or user through hereditament 14. However, this does not preclude the existence of a public right of way.
18. In respect of hereditament 8 the field book identifies under 'Charges, Easements, and Restrictions...' a 'R of Way' through field parcels 311, 353 and 225. Again a deduction of £75 is made for 'public right of way or user'. The appellant observes that field parcel 353 is a very small copse in the middle of field 352 and that no path runs through the copse. It is considered obvious that the intention was to record the right of way through field 352.
19. From my examination of the records the claimed route passes through field parcel 352. Whilst it would be expected that the records were compiled with due diligence, it does appear to be an anomalous situation that a deduction is made in respect of field parcel 353, a very small copse, with no route passing through. In contrast there are three routes shown in field parcel 352. Nevertheless, even if it was the intention to identify field parcel 352 it cannot be concluded that any deduction related to the claimed route. The deduction could have been in respect of the other routes shown as passing through the field.
20. The field book for hereditament 58 identifies under 'Charges, Easements, and Restrictions...' a right of way passing through field parcels 260 and 264. No deduction is identified for public rights of way or user although it is possible that the £50 identified under 'Restrictions' may relate to a right of way passing

through the field parcels identified. It is noted that two routes are shown as passing through field parcel 260 and three through field parcel 264. In view of this it may be the case that the deductions were made in respect of the other routes. However, in the absence of other information it cannot be certain that any deduction relates to the claimed route.

21. It is accepted that in respect of hereditament 58 there is no indication that any route was public and in respect of all the relevant hereditaments there is no indication that the deductions were made for a public footpath. Nevertheless the 1910 Finance Act records in respect of hereditament 13 evidence the existence of a public right of way which is likely to correspond with the claimed route. In respect of the other hereditaments it cannot be concluded from the field book entries alone that the deductions relate to the claimed route. The evidence needs to be considered in the context of all other available evidence.
22. It is accepted that the 1910 Finance Act records do not demonstrate an earlier presumed dedication but the fact that deductions were made in respect of public rights of way would indicate some acknowledgement of such rights. However, in the absence of further records it cannot be concluded that the information contained in the field book was provided by the landowner.

Parish Minutes

23. At the annual parish meeting on 31 March 1913 it was proposed that a small committee be appointed to make a schedule of public footpaths in the parish. The committee was to be empowered to order minor repairs of those paths and fences for which the parish meeting was liable. Although the proposal was seconded by a Mr Bernard it was decided that the proposal should be made again at the next parish meeting. At a meeting on 10 April 1913 the resolution was passed. The schedule of public footpaths was presented to the annual parish meeting on 24 March 1914. The schedule identifies a route '*From the Keepers Cottage skirting Big Cover, across Rectory Lane, over Henley and Rectory field called Centry to lane by Fletchers Cottage*'.
24. The appellant contends that it is reasonable to presume the Mr A F Bernard, present at the parish meetings, is the same A F Bernard who owned Woodhayne at the time of the 1910 Finance Act valuation. The valuation book for Combe Raleigh shows that Woodhayne was owned at that time by A F Bernard Esq with a Mr J Symonds occupying the farm. It is contended that Mr Bernard was, in 1914, fully aware of and accepted the presence of a public footpath along the claimed route. Whilst it is likely that the A F Bernard identified in the minutes was the owner of Woodhayne at the time it does not necessarily follow that there was an open acknowledgement of the existence of the path. Nevertheless there is nothing to demonstrate any dissent by A F Bernard.
25. It is also contended by the appellant that the Reverend James was similarly aware of and acknowledged a public right of way through his two glebe fields. In my view it is of some significance that the Reverend James was involved in the committee which identified the claimed route, which passed through his land, as a public footpath. The minutes indicate that the schedule was presented to the parish meeting by him and Mr Blackmore and that the report was approved unanimously. It would seem unlikely that the Reverend James would have identified a route over his land as being a public footpath if he did not consider it to be public.

26. I note the point that Mr Bernard's and the Reverend James' actions suggest that the 1910 Finance Act field book information emanates from them. However, in the absence of further information from the 1910 Finance Act records I am unable to reach such a conclusion.
27. At a parish meeting on 9 February 1934, following a request from the Honiton Rural District Council for information on public rights of way as affected by the Rights of Way Act 1932 (the 1932 Act), the meeting proposed that some of the paths listed in the 1914 schedule came under the 1932 Act. The minutes describe the claimed route as a public footpath '*From Woodcot skirting Big Cover, across Rectory Lane, over Henley and Rectory Field called Centry to Lane by Fletchers Cottage*'. Those routes which were considered not to be public were removed from the 1914 schedule.
28. It is accepted that although the minutes make reference to the 1932 Act the list was not compiled under any statutory process. Nevertheless the parish meeting, a public body, considered the claimed route to be a public footpath and clearly reviewed the status of the routes previously identified in 1914. I therefore do not regard the evidence from these minutes to be repeating the schedule for 1914.
29. The minutes of the Parish Meeting of 15 May 1946 refers to the repair of the stile on the footpath where it leaves the road to Woodhaynes. However, the minute is lacking in detail and it cannot be concluded that the minute refers to a stile on the claimed route.

Survey of Public Rights of Way

30. The claimed route was included in the survey of public rights of way under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) completed in the 1950s. The survey map identifies the claimed route as part of path 1 and path 2 although it is noted that the first section of the claimed route from the Combe Raleigh to Honiton road is not included.
31. The parish schedule for path 1 describes a route '*From Pheasantry skirting West of Combe Wood across Rectory Lane...*' The grounds identified for believing the path to be public was that it was shown on the Ordnance Survey map under which there is a handwritten note saying '*This is not a public footpath*'. Under '*Remarks*' it is stated that the path is no longer required. It is identified as being steep and no longer used with the road running almost parallel being more commodious. The Rural District Council comments that the path is shown on the Ordnance Survey map and on the map prepared under the Rights of Way Act 1932. It is suggested that the path is not retained as a public right of way.
32. Path 2 is described as '*From Rectory Lane across Henley and Rectory Field to lane North West of Summerland Cottage*.' The grounds for believing the way to be public and the comments from the Rural District Council are the same as with path 1 with an identical handwritten note to say the route is not a public footpath. Under '*Remarks*' is a comment that '*as the path is no longer used it is not required*'.
33. The routes were not subsequently shown on the draft and provisional maps. However, the routes must have been regarded by the Parish Meeting as being public otherwise they would not have been included in the survey. Whilst the paths were regarded as no longer used or required, this would have no effect

on any existing public rights of way. The handwritten note that the routes were not public rights of way conflicts with the fact that they were identified in the parish schedule. I note the point made by the Council that the reason identified for the route being public does not refer to being based on known use by the public. However, the inference to be drawn from the schedules is that the route had been used but that the path was no longer required.

Aerial Photographs

34. Aerial photographs from 1946-9 to 2007 do not show any worn lines along the claimed route. However, this does not assist in determining the existence of the route. The photographs show that on the days they were taken there was no discernible route.

Bartholomew's map

35. The ½ inch to the mile map from 1960 does not show the claimed route although its absence from the map does not preclude the existence of public rights.

Landowner Evidence

36. The Council outlines that evidence from two of the landowners indicates that none of the landowners or tenants believed the route to be public. They had not seen or been aware of the public using the route nor had they required people to ask for permission when using the route. One owner had seen people using the route, particularly for picking apples, who had been turned back or stopped and told that route was not public. Reference is made to notices on the route in the past and more recently. None of the landowners had obstructed the route although one reported that gates were kept wired shut with the top bars wrapped with barbed wire.
37. Whilst I note this evidence it does not preclude the existence of public rights of way along the claimed route.
38. The Council refers to the deposit of a map and statement under Section 31(6) of the Highways Act 1980 in 2003. This would have no retrospective effect on any pre-existing rights.

Representations from interested parties

Mr Sherwood

39. A Mr Sherwood of The Pheasantry refers to his previous objections to the claimed right of way. I have examined the landowner evidence submitted by the Council. The 'landowner evidence form' of Mr Sherwood states that he has lived at The Pheasantry for the last 9 years and for this period has considered that the claimed route is not a public right of way. Mr Sherwood states that on rare occasions he has told people using the way that the road is private. He refers to notices stating that the way was not public in 1954, 1964, 1994 and 2005. He states that there have never been any stiles on the route and that the gate is for agricultural access only. Whilst I note the evidence contained in the form this does not demonstrate that public rights do not exist.
40. Mr Sherwood attaches extracts of the minutes of Combe Raleigh parish meeting. Minutes have been provided referring to the parish survey under the 1949 Act. No specific reference is made to the claimed route but this does not preclude the existence of the claimed route as a public right of way. Minutes

from 2006 refer to the review of the definitive map and an indication that one organisation may attempt to resurrect the previously closed footpaths. There is no reference to the claimed route and the minute does not assist in determining the appeal. The minute from 15 May 2008, responding to the original application, states that after a full discussion the meeting considered that there was no evidence of a need to reopen the footpaths which had been closed for 50 years. Further, that there was nothing to indicate that they were required. This suggests, by the reference to the need for them to be reopened, that the paths were, in the past, public. However, if the routes were public in the past then those rights will remain unless closed by an appropriate Order. A minute from the meeting held on 28 August 2014 states that there was no evidence to support the establishment of the additional footpaths. Although the parish meeting may have been unaware of evidence in support this does not preclude other evidence being discovered which demonstrates the existence of public rights.

41. In a letter dated 31 August 2014 Mr Sherwood outlines that when the property, built in 1954, has changed hands in 1964, 1994 and 2005 no search has indicated that the land is anything other than private with no public footpaths. Whilst searches may have not revealed the existence of a public footpath it should be noted that the information for searches would have been taken from the definitive map. Given that the route is not recorded on that map the response to searches is to be expected. The absence from the definitive map does not preclude the existence of public rights. Although the land is identified as private it should be noted that public rights of way are rights over private land. The fact that the land is private does not mean that public rights cannot exist.
42. The letter from August 2014 also refers to notices at the entrance to the lane since 1954 stating 'Private Road'. Whilst this may be the case, any notices would not have any effect on pre-existing rights. Further, the wording is in my view ambiguous and does not necessarily preclude the existence of a public right of way on foot. Reference is also made to the deposit under section 31(6) of the Highways Act in 2003. I revert to my previous comments at paragraph 38.
43. Whilst the representations of Mr Sherwood do not support the existence of a public right of way on the claimed route they do not provide evidence that public rights cannot exist.

Mr Rosewell

44. Mr D J Rosewell refers to gates on his land being padlocked, wrapped with barbed wire and displaying 'private property keep out signs'. The 'landowner evidence form' completed in 2014 indicates that his family has owned the land for over 56 years and that notices have been in place since 1962. The evidence serves to demonstrate a lack of intention to dedicate a public footpath from 1962. This would have no effect on pre-existing rights which will endure unless stopped up by legal order.
45. Mr Rosewell outlines that he owns the fields from point A to point C with his father owning the land before him. He states that he has never had people walking over his fields or had the need to ask anyone to leave. Whilst Mr Rosewell has not seen use of the way this does not preclude the existence of public rights.

Dr B K and Mrs C Young

46. Dr and Mrs Young became the owners of Woodhayne in May 2015. The correspondence refers to the Ordnance Survey mapping, tithe, parish meeting and 1910 Finance Act records. I revert to my previous comments in relation to this evidence.
47. Dr and Mrs Young agree with the comments previously made by the former owners of the land D and N Bibby. The 'landowner evidence form' of D and N Bibby completed in September 2014 indicates that they had owned Woodhayne Farm for 4 years and 10 months. The content of the form is similar to that in the form of Mr Sherwood which, as I have noted above in paragraph 39, does not demonstrate that public rights do not exist.
48. Correspondence from D and N Bibby, 31 August 2014, refers to Combe Raleigh parish records and the deposit under section 31(6) of the Highways Act 1980; I revert to my comments at paragraphs 40 and 38 above. The correspondence also refers to a notice from at least 1954 saying that the lane is private and the fact that the route has not been used since 2009 and that nobody recalls a footpath along the route. These aspects do not preclude the existence of public rights.

Combe Raleigh Parish Meeting

49. Correspondence from Combe Raleigh parish meeting dated 13 October 2015 makes reference to the fact that the parish meeting in 1956 recommended that the claimed paths should be closed. The point is made that no evidence has come to light over the last 60 years to indicate that the paths are required. Further, that the footpath passes through land owned by residents who were unaware of these original footpaths ever existing.
50. Whilst in 1956 the parish meeting recommended that the path be closed there is no evidence of any order which would have stopped up the way. The implication is that the parish meeting regarded the route as public otherwise it would not have been necessary to consider closure. I note that the parish meeting is unaware of any evidence that the path is required. However, the need for a path is not a matter which can be taken into account under the 1981 Act. The issue is whether rights subsist or are reasonably alleged to subsist such that an order should be made.
51. As regards some residents being unaware of the existence of the route, this does not preclude rights from being shown to exist at a later date.

Conclusions on the evidence

52. Mapping evidence from 1807 shows the claimed route to varying degrees. The Ordnance Survey maps show the physical existence of the route but provide no information as to whether the route is public. The 1910 Finance Act evidence in respect of hereditament 13 is highly suggestive of the route being a public right of way. Although the records provide no evidence as to the status of the route it is of some significance that the parish schedule in 1914 identified a public footpath. Whilst it is not clear whether deductions in respect of other hereditaments relate to the claimed route, given the 1914 and 1934 parish survey, it is quite possible that any deductions did relate to the claimed route.

53. In 1914 the parish meeting prepared a schedule of public footpaths and authorised expenditure to carry out minor repairs. The appeal route is one of the routes identified as being a public footpath; this is consistent with the 1910 Finance Act evidence. In 1934 the parish meeting reviewed the schedule of public footpaths and, whilst some of the routes previously identified as public footpaths were removed from the schedule, the claimed route was identified as public. The schedule, whilst not conclusive, is supportive of the existence of a public footpath. Some weight should be given to the view of a public body that the way was regarded as a public footpath.
54. The parish survey under the 1949 Act is highly indicative that the way was considered to be a public footpath. If the way had not been regarded as public then it would not have been included in the survey. Nevertheless handwritten annotations on the survey forms, that the way was not public, are in conflict with the parish survey and the 1914 and 1934 schedules. The route was not subsequently recorded on any draft, provisional or definitive map but this would not have removed any pre-existing public rights; there is no evidence that the route has been closed by any order.
55. I am aware that the relevant landowners do not consider the way to be public, have not seen public use and refer to notices. The absence of observed use does not preclude the existence of public rights and the existence of notices from the 1950s will not have any retrospective effect on pre-existing rights. The evidence suggests that the way was considered to be a public footpath prior to 1950.
56. Having regard to all of the above, the evidence is insufficient to show that a right of way subsists on the balance of probabilities. However, whilst there is some conflict in the evidence, there is no incontrovertible evidence that a right of way could not be reasonably alleged. As such I should find that a right of way is reasonably alleged to subsist. An order should be made so that the evidence can be tested at a public inquiry if necessary.

Other Matters

57. The appellant claims that the Council did not acknowledge the original application made in 2008. Reference is also made to the administration of the various applications. These are not matters for my consideration.
58. The Council refers to concerns raised by one landowner about the detrimental effects of public access on biosecurity and security in connection with a poultry business. Concerns are also raised by the relevant landowners in respect biosecurity, safety, security, privacy and misuse. It is also questioned why the need for the claimed route is not a consideration. Whilst I note these matters, and can appreciate the concerns, the 1981 Act does not provide for issues of suitability, desirability and need to be taken into account. The issue to be considered in this case is whether a public footpath subsists or is reasonably alleged to subsist such that the Council should make the appropriate definitive map modification order.

Conclusion

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

Formal Decision

60. 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 the definitive map and statement for the area to add a public footpath between the Combe Raleigh to Honiton road and the lane near Summerfield Cottage (grid reference ST 16130138 to ST 15440218). 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.

Martin Elliott

Inspector