



## Appeal Decision

by Mark Yates BA(Hons) MIPROW

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

Decision date: 01 SEP 2015

**Appeal Ref: FPS/W1850/14A/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 the County of Herefordshire District Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 10 April 2006 was refused by the Council on 3 March 2015.
- The appellant claims that the appeal route in the parish of Wacton should be added to the definitive map and statement for the area as a footpath. The claimed footpath ("the claimed route") commences at the northern end of Wacton Footpath No. 9 and proceeds past the site of Butterley Mill through to the U65015 Road.

**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 1981 Act.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The appellant relies upon particular historical documents in support of his appeal. I note his submissions regarding the test applied by the Council in respect of this case. In considering the appeal I shall have regard to the main issues outlined below.

### Main Issues

4. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *"a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist..."*.
5. As was made clear in the case of *R v Secretary of State for the Environment ex parte Bagshaw and Norton 1994* and clarified in *R v Secretary of State for Wales ex parte Emery 1998* this involves two tests at the Schedule 14 stage:

Test A: Does a right of way subsist? This requires clear evidence in favour of the appellant 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 way cannot be reasonably alleged to subsist then I should find that a public right of way has been reasonably alleged to subsist.

## Reasons

### ***Consideration of the evidence***

6. It is apparent that the claimed route is not shown on the Isaac Taylor map of 1754. A track in the locality of this route is shown on the Henry Price map of 1817. The Council says that this map is derived from the Ordnance Survey ("OS") drawing addressed below. In contrast, particular features, such as the claimed route, are not shown on the 1835 Bryant map.
7. The OS working drawing of 1815 appears to show a track in the locality of the claimed route but it is unclear where this track terminated at its southern end. It cannot necessarily be determined that it linked with a highway. The same can be said of the 1831 OS map.
8. A tithe map of 1840 shows most of the claimed route coloured in the same way as the connecting U65015 Road. It is numbered 102 and the Council states that this feature was included in the same plot as the mill site and subject to the payment of tithes. In contrast, the U65015 Road is listed within the roads section of the accompanying apportionment. The claimed route is shown terminating at the mill and no connecting route is shown to the south. The appellant suggests that there was an unknown error which led to the omission of the route from the roads section. Whilst this may have been the case, it would need to be borne out by other evidence. In the circumstances, I do not find that the depiction of the claimed route on the tithe map is indicative of it having public status.
9. The appellant agrees with the Council's assessment that the railway documents supplied do not provide evidence in support of his application.
10. The later large scale First and Second Edition OS maps show the claimed route leading to the mill and the link with Wacton Footpath 9. On the latter map, there is the annotation "FB" to denote a footbridge over the Butterley Brook. In contrast, the 1920 OS popular edition map does not show the route.
11. A map produced in relation to the 1910 Finance Act shows the claimed route within the hereditament numbered 138. The OS base map clearly shows it linking with Footpath No. 9 via a footbridge. A deduction of £6 was recorded in the valuation book in respect of this hereditament for "*Public Rights of Way or User*". The field book records a footpath in connection with the charges, easements and restrictions affecting the value of the land. However, sections of Footpath Nos. 9 and 19 proceed through this hereditament as does an unrecorded footpath shown on the OS base map. I note the possible explanations for the deduction claimed but it cannot be determined to any reasonable extent from the evidence that the tax deduction related to the claimed route.
12. The claimed route is not shown on the handover map produced in relation to the 1929 Local Government Act. However, as the appellant points out, this document was concerned with the depiction of maintenance responsibility for particular highways. The exclusion of a route does not mean that public rights did not exist at the time. This may be particularly applicable to rural footpaths. I place greater reliance on the process documented below in relation to the compilation of the original definitive map for the area.

13. The parties have provided details of the text contained in a 1952 survey form dating from the commencement of the definitive map process but copies of the relevant pages have not been supplied. It is apparent that Wacton Footpath No. 9 was claimed as a right of way by the parish council. This path was described as continuing *"across footbridge to Butterley Mill. Butterley Mill is now disused and in ruins. The footpath at the ruins joins the private road to Butterley Mill, and by courtesy of the landowner of Butterley Mill passage is allowed to the public highway. The use of this private road has been restricted"*.
14. The copy of the survey map provided is not particularly clear and I have had to rely to some extent upon the information supplied by the parties. It is evident that Wacton Footpath No. 9 is shown terminating at or near to the southern edge of Butterley Mill.
15. On another page of the form there is a draft statement produced by the County Council which describes the route as *"From FP8 NW of Great Wacton To Butterley Mill & Private Road"*. It is apparent that there is a reference to permissive use of the claimed route in this documentation. A subsequent statement describes Footpath No. 9 as *"From FP8 NW of Gt Wacton, To S end of unadopted road at Butterley Mill"*. This statement forms the basis for the definitive statement. I note the references quoted by the appellant to particular information being accepted or not accepted. However, the information provided is supportive of Footpath No. 9 only being claimed as far as Butterley Mill and this was the route subsequently recorded in the definitive map and statement.
16. The Council states that a plan attributed to the County Surveyor appears to have been produced in order to identify the footbridges which were the responsibility of the authority. Whilst the appellant says that he believes that this map was produced in 1952 or earlier, there is no evidence to support this view. The plan has a written note which refers to the year of 1960. Nonetheless, I accept that this may not necessarily reflect the year when it was originally produced. This plan shows the footbridge over the River Frome with the route shown continuing via the claimed route through to the U65015 Road. However, it is apparent that this route has not been recorded at any stage of the definitive map process.
17. A statutory declaration signed in 1986 by the former owner of Butterley Mill (Mr Davies) states that he did not acknowledge any public use of the claimed route during his ownership, which had commenced in 1965. This document only relates to the period that Mr Davies occupied the property and has no relevance to the historical existence or otherwise of a footpath prior to 1965. Further, I place little reliance on the use of a particular plan with this statutory declaration in order to identify the route.

### **Conclusions**

18. It is not possible to determine when the claimed route was first established but it is likely that there was some form of access to the mill. The failure of the Isaac Taylor and Bryant maps to depict such a route could suggest that the surveyors did not consider it to be a significant feature. However, a few contemporary maps, notably those produced by the OS, do show the majority of the claimed route. The later large scale OS maps show the claimed route and the connecting route in detail. Whilst the OS maps would generally be taken to

be a reliable indication of the presence of particular physical features, they provide no clarification regarding the status of any tracks or paths shown.

19. The colouring of the majority of the claimed route on the tithe map would be supportive of the existence of a particular physical feature. Whilst this is consistent with the colouring used in respect of the connecting public road, the information provided from the apportionment indicates that the route was not viewed at the time as part of the public road network. It seems to me likely that this feature served as a means of access to the mill. The tithe documentation does not preclude the existence of a public footpath over the road to the mill but nor does it provide any evidence in support of the claimed route being a recognised public right of way at the time. It is accepted that the railway documents provide no relevant information in respect of this case.
20. That a tax deduction was claimed in accordance with the 1910 Finance Act provides some evidence in support of the acknowledgment of a footpath or footpaths through the relevant hereditament. However, it cannot be determined whether this deduction related to the claimed route. In my view, the Finance Act evidence by itself cannot be relied upon to reasonably allege that a public footpath subsists.
21. I consider that little reliance can be placed on the exclusion of the claimed route from the handover map. There may be some inconsistencies within the documents from the initial stage of the definitive map process. I also note that the bridges plan shows the claimed route. However, the overriding conclusion to be drawn is that the claimed route was not viewed as a public right of way at the time irrespective of whether this means that Footpath No. 9 is a cul de sac. Whilst the parish council may have made an error in the extent of the route claimed, the evidence detailed above is not generally supportive of the claimed route historically being viewed as a highway.
22. In light of my conclusions regarding the various pieces of documentary evidence, I do not find that, when taken as a whole, a public right of way can be reasonably alleged to subsist. It follows that I also conclude that a public footpath has not been shown to subsist.

### **Overall Conclusion**

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

### **Formal Decision**

24. The appeal is dismissed.

*Mark Yates*

**Inspector**