



Order Decision

Inquiry held on 14 April 2016

by Peter Millman BA

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

Decision date: 25 April 2016

Order Ref: FPS/J1155/7/111

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Footpath No. 21, Hemyock) Definitive Map Modification Order 2013.
- The Order is dated 24 April 2013 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There was one statutory objection outstanding when Devon County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I have confirmed the Order with modifications.

Procedural matters

1. There are three joint objectors to the Order, Miss R Bickerton and her brother and sister. At the inquiry the Bickerton siblings were assisted by Miss R Bickerton's Land Agent, Mr P Care. Mr Care took the principal part in cross-examining witnesses. After Devon County Council ("DCC") had completed the presentation of its case, I asked Mr Care if he would like to present the case for the objectors. He made an oral submission, summing up and amplifying the contents of their written case. I then asked if he or any of the Bickerton siblings wished to give oral evidence to the inquiry, but they declined.
2. I visited the site of the Order route the day before the inquiry. At the inquiry, DCC requested that I undertake a second, accompanied, site visit, but since the objectors were unwilling to attend, I could not do so. I did, however, revisit the site on my own after I had closed the inquiry.

Main issue

3. The main issue is whether the evidence shows, on the balance of probabilities, that public footpath rights exist over the route shown on the Order plan (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980. It reads as follows: *(1) Where a way over any land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...* The standard of proof is the balance of probabilities.
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Reasons

Background

4. The Order route runs for about 320 metres through an area of woodland between Conigar Lane and Tedburrow Lane in the parish of Hemyock.
5. The eastern two thirds, approximately, of the length of the Order route from where it leaves Conigar Lane, passes unobstructed through land which has belonged to Mr N McLean since 1978. He accepts that this part of the route carries public footpath (and in his view bridleway) rights. The route then enters land bought in 1993 by the late Mr T Bickerton and now owned jointly by his three children, the objectors to this Order, and continues through this land to Tedburrow Lane.
6. Neither Mr Bickerton, nor any of his children, has lived on or close to their land, which is covered by trees. Mr Bickerton senior bought the land with the intention that he should be buried there when he died. The objectors do not accept that the continuation of the Order route across their land carries any public rights.

The statutory test

Whether there is a 'way' (see paragraph 3 above)

7. Starting from the eastern end of the Order route (point A on the plan attached below) there is a clearly defined route on the ground, on the southern side of what appears to be a very old bank. The land slopes steeply up from north to south, across the line of the path, which effectively runs along a slightly concave ridge across the slope. This concavity has the appearance of a route which has been slightly hollowed out by use. The route continues into the objectors' land, the ridge, bank and hollowing becoming gradually less defined. Shortly before point B, the Order route drops downhill from the ridge to a gap in the bank which edges Tedburrow Lane. A slight ridge, however, continues west, leaving the Bickerton's land and joining Tedburrow Lane at the top of the lane leading down to Bubhayne about 100 metres beyond B.
8. There appeared to be the potential for some confusion about whether there was more than one route which members of the public used to get to Tedburrow Lane, principally because there was some variation between the lines shown on different plans produced by DCC when consulting locally about the route, and variations between the lines drawn by users on the maps and plans which they submitted to DCC. I am satisfied, however, by the answers given in oral evidence at the inquiry by users, that before the gap in the bank at B was blocked off in 2010 by a locked gate and barbed wire, the route shown on the Order plan approaching B was the one that was in general use, and that the route continuing westwards along the ridge was only occasionally used. The variations between the lines drawn on plans, it seems to me, were caused by the difficulties of transposing a line of use through woodland onto a line on a plan without the benefit of surveying tools, rather than by the actual use of a multiplicity of routes.
9. I conclude that there is a 'way', as shown on the Order map, for the purposes of the statutory test.

The date when use was brought into question

10. It is not disputed that the current gate and barbed wire blocking access to the Order route at B was erected in the autumn of 2010, and neither is it disputed that this would have brought the right of the public to use the route into question, if it had not already been brought into question by an earlier blocking.
11. The objectors asserted that the route had been blocked at B for many years before 2010. This assertion was based principally on three pieces of evidence, apart from their own knowledge; a sketch map attached to an archaeological survey of the Bickertons' land, made in 1994, which stated 'blocked entrance' with reference to point B, a photograph taken in 1995 of the late Mr Bickerton standing in front of a barrier made of interwoven branches at point B, and a Google Street View photograph of a fence consisting of four posts and two horizontal rails, placed in the gap in the bank at point B. The 1995 photograph does not show the ends of the barrier, and it is impossible to tell from it whether it extended all the way across the gap, although the Bickertons' written evidence was that it completely sealed it and that they had to access the woodland by climbing through it. The Street View photograph, undated but clearly taken between 1995 and 2010, shows the eastern end of the post and rail fence with two tree branches placed to cover the gap between fence and bank. One branch goes from the lower rail to the top of the bank, the other from the upper rail to the top of the bank. Neither appears to be fixed in place. The photograph also clearly shows a narrow gap at the western end of the fence through which a pedestrian could almost certainly pass with ease. A short log is shown placed at an angle against the westernmost post, but does not affect the gap. The objectors argue that the position of the log demonstrated 'interference with this barrier to gain access to the woodland.' In my view such an inference cannot be drawn; it is not at all clear why this log was placed as it was, or by whom or for what purpose.
12. Mr Clare, for the objectors, argued with reference to the 1994 archaeological survey, that 'blocked means blocked'. I accept that it does, and clearly a 'blocked drain', for example, suggests a drain through which nothing will pass, but on the other hand, a road which is described as closed and blocked will often be easily passable by walkers and cyclists. I do not consider it possible to conclude, therefore, that the 1994 survey description demonstrates, on the balance of probabilities, that the Order route was then impassable to pedestrians at point B.
13. The completed user evidence forms sent to DCC, with one exception, stated 'no' in answer to the question whether there were any obstructions (other than the 2010 gate) on the route. At the inquiry, users gave evidence that it was easily possible to get from Tedburrow Lane onto the Order route and vice-versa by going round one end or other of the structures placed in the gap in the bank by the road. There had been no need to climb over or force a way through.
14. The oral evidence given by the nine people who claimed to have used the Order route stood up well to cross-examination, in my view, and I conclude that they did use it as described, and that they did not have to force their way through or past a barrier to get from the lane to the route and vice versa. Some stated that they viewed the barrier as intended to stop vehicular or equestrian use; Mr McLean's (paragraph 5 above) evidence was that he had known Mr Bickerton senior, and that he had erected his barrier (paragraph 11 above) to stop

- motor-cycle scramblers, who had been a problem at one time, from accessing the woodland.
15. I was given no evidence that before 2010 there was any structure across the Order route where it passed from Mr McLean's land to that of the Bickertons. This, together with the fact that there was a gap between the barrier and the bank at B, makes it more likely, in my view, that this barrier was intended, and would have been perceived as intended, to prevent vehicular access to the woodland from Tedburrow Lane, rather than to stop the passage of pedestrians along the Order route.
 16. I conclude from the evidence considered in the preceding 5 paragraphs that the right of the public to use the Order route was not brought into question by any physical barrier placed across it before 2010.
 17. Although today there are numerous signs on the Bickertons' land, before 2010 there were three. The two near the Order route were noticed by some users. They were attached to tree-trunks and stated 'Private Property' or 'Private Land'. The objectors state that the express intention of the signs was to inform members of the public that the land was private and that there was no public right of way. It is, however, how a reasonable user would view the signs that is crucial, and I accept DCC's argument that since almost all public rights of way cross private land, a reasonable view would be, as one user put it in oral evidence, that the notices were telling the public not to stray from the path. I do not consider that the notices would have brought the right of the public to use the Order route into question.

Whether 'the public' used the route

18. DCC decided to make the Order on the basis of the 9 completed user evidence forms it had received. By the end of the inquiry, evidence of the use of the Order route had been given by 20 people, 15 of whom stated that they had used it throughout the period 1990 to 2010. Frequency of use varied from twice a week to as few as ten times a year.
19. Of the 9 people who gave oral evidence to the inquiry of their use of the Order route, 8 were cross-examined. Their evidence stood up well to cross examination. It did not seem to me that there was significant doubt about the veracity of the evidence given.
20. The owner of the woodland to the east of the Bickertons', Mr N Mclean, gave oral evidence, but Mr Clare declined to cross-examine him. Mr McLean stated that he had lived in Hemyock for 57 years, and lives a quarter of a mile away from the Order route. He had bought the land crossed by the eastern part of the Order route in 1978, and had seen use of it, and had used it himself, since 1959. His view was that the Order route was public as 'everybody used it and nobody objected', although he then qualified this by saying that use was mostly by older people with dogs.
21. The Bickerton siblings, however, had not seen anyone using the Order route. They stated in their written submission: *We have had numerous trips and camping excursions to the woods. Two funerals and the preparations these entail have taken place in this small wooded area.* Their land has an area of 5½ acres.
22. Taking the user evidence at face value, on an average day around 3 walkers would have been using the Order route. This suggests that on some days

there might have been none, and on others half a dozen. It would have taken a walker no more than about 10 minutes to get the 320 metres from one end of the Order route to the other. The Order route would have been in use for, on average, no more than half an hour or so each day. I do not consider such a level of use incompatible with a failure, by the non-resident Bickertons and their guests, to have seen members of the public. The 5½ acre block of land they own consists of a very steep lower section, through which the Order route passes, and a much flatter upper section, on which it is likely that the Bickertons and their guests camp, from most of which the Order route would not be visible.

23. I conclude that the Order route was used by the public during the relevant 20 year period.

Whether use was as of right and uninterrupted and for the full period of 20 years

24. Use of a route which is 'as of right' is use which is *nec vi, nec clam, nec precario*; in other words peaceable, open, and not based on any licence from the owner of the land.
25. I have considered above (paragraphs 10-17) the evidence relating to barriers and signs, and it follows from my conclusions that use of the Order route was peaceable and not by force or contentious before 2010. I have seen no evidence to suggest that any public use of the Order route was secretive. Mr Clare argued that it must follow from the fact that neither the Bickertons nor their guests saw anyone using it that use was secretive; they contend that people would have kept out of the way when the land was in use for visits by the family. No evidence was provided to support that argument and I do not accept it.
26. One of the users of the route gave evidence at the inquiry that she had met a man when using the path, who she thought might be the landowner, who identified himself as 'Terry'. The late Mr Bickerton's name was Terence. She asked him if he minded her using the path, and he replied, she said, something like: 'not at all, provided you follow the country code'. She acknowledged that her use was permissive. I have seen no other evidence of permission communicated to users of the path, and I conclude that otherwise public use was not by permission.
27. I have seen no evidence to suggest that public use was interrupted, or that it was not for a full period of 20 years between 1990 and 2010.

The intentions of landowners

28. To be effective, a landowner's intention not to dedicate a right of way to the public must be communicated to those using or likely to use the way. The objectors noted that the late Mr Bickerton wrote to the Forestry Commission about what he intended to do with the wood soon after he bought the land; *A county council road borders the wood separated from the wood by an ancient irregular hedge which has numerous standards some from old coppice. The intention is to lay this hedge, keeping the best standards and filling the gaps with roundwood posts and saplings woven between.* Whether or not that evinced an intention to lay a hedge across the gap at point B, it was not communicated to users of the Order route, and was thus not, as claimed, effective as evidence of a lack of intention to dedicate.

Conclusions on the statutory test

29. I conclude that the statutory test is passed.

Other matters

30. DCC, with its document bundle, included a copy of the opinions of the Lords of Appeal in the case of *R (on the application of Godmanchester Town Council and another) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28. Lord Hope said (paragraph 52): *Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way has been dedicated.* The objectors, citing that comment, argued that since they and their parents had been unaware of public use, there can have been no deemed dedication. I note, however, that Lord Hope was referring to the common law test, not the statutory test, which makes no mention of awareness of use by a landowner. The statutory test and the common law test are alternatives; if one is passed then there is no requirement or necessity to consider the other.

31. Parts I and II of the Schedule to the Order state that the Order route exits to Tedburrow Lane 'via a gate'. It would do so now, if the gate was not locked, but did not at the time it was deemed to have been dedicated as a right of way. The route did, however, exit to the road via a gap, which is unlikely to have been more than a metre wide. In these circumstances I shall delete the words 'via a gate' from the Schedule and insert in their place 'via a 1 metre wide gap'.

Conclusion

32. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed with a modification as described in the previous paragraph.

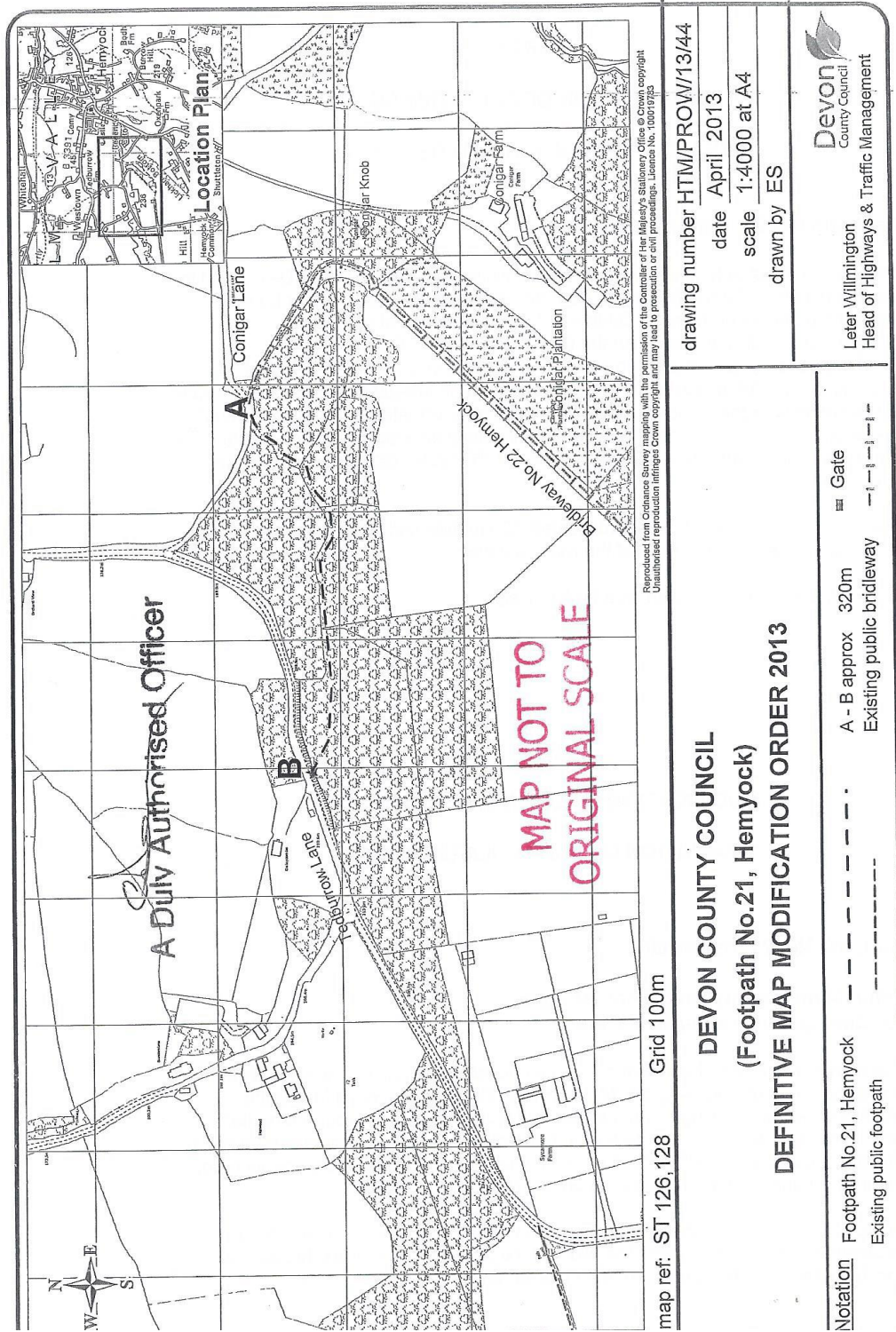
Formal Decision

33. I confirm the Order subject to the following modification.

- In parts I and II of the Schedule, delete the words 'via a gate' and insert in their place 'via a 1 metre wide gap'.

Peter Millman

Inspector



APPEARANCES

For Devon County Council

Mrs H Union	Solicitor, Devon County Council
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She called:

Mrs T Weeks	Definitive Map Review Officer, Devon County Council
Mr L Povah	
Mrs B Povah	Local resident
Mr P Steed	Local resident
Mrs J Steed	Local resident
Mrs A Morgan	Local resident
Mrs R Tartaglia	Local resident
Mr N McLean	Landowner

Other supporters

Mrs J Matthews	Local resident
Mr S Smith	Local resident

Objectors

Mr P Care	Land Agent
Miss C Bickerton	Landowner
Miss R Bickerton	Landowner

Documents handed in at inquiry

1. Letter from Mr P Devine-Wright
2. Signed copy of map – Judy M Barton
3. Devon County Council's opening statement
4. Devon County Council's closing submissions