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# Appeal Decision

by **Peter Millman BA**

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

Decision date: 11 April 2017

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**Appeal Ref: FPS/D0121/14A/2**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (“the 1981 Act”) against the decision of North Somerset Council not to make an Order under Section 53(2) of that Act.
- The Application, dated 25 February 1996, was refused by North Somerset Council on 15 November 2016.
- The appellant, Mrs A Gawthorpe of the Woodspring Bridleways Association, claims that an Order should be made to upgrade footpath AX16/31 to bridleway on Somerset County Council’s Definitive Map and Statement between Wrington Road, Congresbury, and Cleeve Hill Road.

**Summary of Decision: The Appeal is allowed.**

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## 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 1981 Act.
2. I have not visited the site of the claimed bridleway but I am satisfied that I can make a decision without the need to do so.

## Main issue

3. Section 53(2)(b) of the 1981 Act gives surveying authorities (such as North Somerset Council (“the Council”)) the duty of making modification orders following certain events. The event in this case would be as described in Section 53(c)(ii), *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a highway shown in the map and statement as a highway of a particular description [footpath] ought to be there shown as a highway of a different description [bridleway]*.

## Reasons

### Background

4. The first application to upgrade the Appeal Route (shown on the map at the end of this decision) from footpath to bridleway was made in 1989. The application was based principally on evidence of the use of the Appeal Route by the public on horseback for a number of years. The Council, having considered the application and the available evidence in a Committee Report dated 21 November 1990, decided to make an order to upgrade the Appeal Route to bridleway. The order was made in 1993, and objections were received. The
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- order was submitted to the Secretary of State. A public inquiry was held in May 1995, following which an inspector decided not to confirm the order.
5. A second application to upgrade the Appeal Route to bridleway was made in 1996, this time based principally on documentary evidence. It was not, regrettably, considered by the Council until 2016. The Council refused to make an order, and the appellant now appeals against that refusal.
  6. Some documentary evidence had been considered at the 1995 inquiry, and this has been supplemented by additional material since discovered by the appellant. No further evidence of the use of the Appeal Route on horseback has been provided, and although in considering this appeal I must examine all the previous evidence in the light of any new and relevant material, I can see no reason to question the conclusions about the user evidence, and the actions of landowners in response to it, arrived at by the inspector in 1995.
  7. The appeal is based on documentary evidence such as old maps, correspondence, parish council minutes and records of the diversion of highways. In order to determine the value of this evidence in deciding whether bridleway rights have come into existence, it is necessary to bear in mind that public rights of way are, generally speaking, dedicated by the owners of the land across which they run. There is rarely evidence of an express dedication, but an implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. The inference may arise from a consideration of historical documents instead of, or as well as, evidence of use of a route by members of the public. Section 32 of the Highways Act 1980 ("the 1980 Act") provides guidance. It states: *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 a 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.* The standard of proof is the balance of probabilities.
  8. Two parties are concerned that the appeal should not be allowed, the Council, and an owner of land crossed by the Appeal Route, represented by Counsel. This Counsel I refer to below, for convenience, as 'the objector'.
  9. I bear in mind in considering this appeal that the aim of the relevant legislation in the 1981 Act, is the preparation and maintenance of an authoritative record, in the form of a definitive map and statement, showing those highways over which the public have rights of way. In pursuit of this aim, I am constrained by the fact that it is not possible simply to re-examine evidence previously considered; there must be at least some new relevant evidence to be considered in the light of all the previously available evidence. There is no doubt that there is some new and relevant evidence in this case.

### **The evidence**

10. The western end of the Appeal Route, which is shown as footpath AX16/31 on Somerset County Council's Definitive Map, is on the Yatton and Wrington road. It runs for about a mile and a half through an area which is predominantly

woodland, but which has been mined in the past for iron and ochre. It passes three historic properties, The Woodlands at the western end, Woolmers roughly half way along and the site of Corporation Cottage at its eastern end. The Route ends on the road from Cleeve to Wrington. It is shown on a map attached to this decision.

11. It is possible that the Appeal Route existed earlier than the second half of the 19<sup>th</sup> century, but no clear map evidence of its existence as a through route before the start of the 20<sup>th</sup> century has been produced. The earliest documentary evidence relied upon by the appellant relates to a diversion of part of what is claimed to be the Appeal Route in 1877/8. This evidence was not considered at the 1995 inquiry.
12. In 1877 notice was given of an intention to seek a diversion at Quarter Sessions of 180 yards of a highway, called Rocky Lane, which led from the Yatton and Wrington Road (see paragraph 10 above) to Woolmers via Woodlands. Mr Long, who sought the diversion, owned Woodlands. The notice stated that a new road would be laid out and made. Early in 1878 two justices certified that they had seen the new highway and that it had been made and put into good condition and repair. A plan shows the diversion, which took the road to the north of Woodlands. It is clear that the new road left the Yatton and Wrington Road at the point where footpath AX16/31 leaves it.
13. The appellant argues that this evidence shows that Rocky Lane had a higher status than footpath. The objector argues that that it does not. He states: *The crucial point is the purpose of the application [for a diversion]. The application was being made to change the route of the right of way, not to change the status of the right of way. Therefore, descriptions of the way would have been for identification only... This is made out by the fact that the route is usually described as a highway, and only occasionally as a Road or New Road.* This argument is bolstered by reference to the definition of 'highway' in the 1835 Highway Act, which includes bridleways and footways.
14. In the Quarter Sessions records, the details of the diversion are set out under the heading 'Roads'. It is clear that the expression 'foot road', meaning a right of way on foot, was used in the 19<sup>th</sup> century, but in my view the general heading 'Roads' with no reference to 'foot roads' suggests, though with no great force, that vehicular routes are the subject of record unless otherwise indicated. The route which is subject to diversion is named as 'Rocky Lane'. A lane, i.e. a route bounded on either side by a fence or hedge, could be a footpath, but it seems rather unlikely that a route carrying only pedestrian rights would be described as a lane. The purpose of the diversion is described in the Quarter Sessions documents as: *to make the same more commodious to the Public for the following reason namely that the new Highway as marked out and proposed to be made would be a regular line and an easy gradient whereas the old highway is crooked [this word is not clear] and inconveniently steep.* The plan shows not only the lines of the old and new route in plan, but also in section, giving the gradient of the new route. It seems unlikely to me that if the route was merely a footpath there would have been a need to make it less steep, bearing in mind that only a 180 yard section of the lane was to be diverted.
15. The consent of Mr Long to the diversion refers to a 'new road now laid out and proposed to be made by me'. This wording does not suggest a mere footpath;

- a footpath would need to be laid out, but probably not 'made' in the sense of being provided with a metalled surface.
16. The plan of the diversion has a scale of links, so that even if it has not been copied to scale, it is possible to calculate the width of the old and new roads shown on it. A surveyor deposed to the justices in Quarter Sessions that he had taken the measurements of the old and new roads and that they were: *truly set forth and delineated in the plan.*
  17. On the plan, 300 links are represented by 13 cm. The new road is shown on the plan at about 0.7cm wide, which therefore represents just over 16 links. 16 links is equivalent to about 3.2 metres, or about 10 feet. The old road is shown as having a similar width. It seems unlikely that a route carrying only footpath rights would have been anywhere near that wide. The 1835 Act did not specify widths for stand-alone footpaths, but a footway at the side of the road had to be a minimum 3 feet wide.
  18. In my view, looking at the 1877/78 documents as a whole, it is clear on the balance of probabilities, that Rocky Lane was public, was of higher status than footpath, and possibly a vehicular route. I have not seen any evidence of vehicular or bridleway rights having been subsequently stopped up.
  19. I conclude that this is reasonably strong evidence that in 1878 a public bridle or cartway existed between the Wrington to Yatton Road leading as far as Woolmers. It is likely to have followed a route at least similar, if not identical, to the Appeal Route which the inspector in 1995 described as a 'sunken lane'.
  20. Some of the land through which the Appeal Route passes belonged for very many years to the Trustees of the Bristol Municipal Charities ("BMC"). In 1925 there was a dispute between BMC and a neighbouring landowner, Mr Harvey, about what paths over Mr Harvey's land could be used by BMC and its tenants and lessees 'with or without carts, motor vehicles, horses and other animals'. A Memorandum of Understanding was drawn up, accompanied by a map of the land. The agreement stated that BMC had a right to use the routes marked blue on the map (an Ordnance Survey map). The Appeal Route is shown but not coloured blue, and some of the blue routes are shown ending where they meet the Appeal Route.
  21. The appellant concludes from these documents that the Appeal Route was left uncoloured on the map because it already carried public rights higher than a footpath. I accept that this non-colouration is consistent with such a hypothesis, but in my view it does not support it with any significant weight. There may be other explanations, such as those put forward by the objector.
  22. The 1949 National Parks and Access to the Countryside Act set out the process by which definitive maps were to be produced by surveying authorities, in this case Somerset County Council. Parishes carried out surveys of rights of way and routes reasonably alleged to be rights of way. Following a parish meeting to approve the resultant maps and schedules the information was provided to the surveying authority, which produced first a draft map which was publicised and to which objections could be made, then a provisional map, and then, at the end of what was usually a long drawn out process, a definitive map.
  23. Much of the documentation about the process in Somerset has apparently been lost, but in short the Appeal Route was recorded on the Definitive Map as a public footpath, AX16/31, and there were no objections at any stage in the

- process. The relevant date of Somerset's Definitive map was 26 November 1956. The depiction of a route as a footpath on a definitive map is without prejudice to the possibility of the existence of higher rights (or no rights at all).
24. Although full records of the process by which the Definitive Map came into being are not available, the appellant has produced copies of correspondence with landowners, and this correspondence concerns, among other things, the status of the Appeal Route. It is not suggested by any party that this correspondence is anything other than what it purports to be.
  25. On 13 February 1953, Col. Towill, Secretary of the BMC, wrote to Mr F Gosling (a member of Congresbury Parish Council concerned with the survey of rights of way) stating the following: *In summary, for purposes of record, it is agreed that the following footpaths pass through Congresbury Woods, which belong to my Trustees:- 1. Footpath no. 31, from Corporation Cottage [see paragraph 10 above] on the Cleeve-Wrington Road to the road near Woodlands. It is agreed that this is a bridle path as well as a footpath.* On 2 March 1953 the Congresbury Parish Council Minutes record that: *Mr Towill, sec of Bristol Charities, had written Mr F Gosling in the matter of a path running through their property. The matter had now been settled.*
  26. Undated minutes of BMC, probably from 1952 (see below at paragraph 33), record: *The Secretary reported that on 15<sup>th</sup> May he had met Mr F Gosling (representing Congresbury Parish Council) and Mr R D Harvey of Woodlands, Congresbury, regarding the footpaths through the woods which are claimed to be public rights of way and it had been agreed that there are only two rights of way through the Trustees' woods, viz: (i) a bridle path from Corporation Cottage to the Congresbury-Wrington road near Woodlands...*
  27. The inspector's decision of 1995 refers to a letter sent by Mr R D Harvey to the *Weston Mercury and Herald*. In it, Mr Harvey stated: *First, I confirm the following as the only Rights of Way I have recognised over my land at Congresbury Parish since 1924 (28 years)... (4) the right of way (bridlepath) from the Wrington Road (Bench Mark 90) round the back of Woodlands to Woolmers and on through Corporation Woods to the road (Bench Mark 447.6) at Corporation Cottage.* The 1995 decision also refers to a letter sent by BMC to Mr Gosling on 1 May 1952. Noting that BMC owned 'the other half of the woods' to Mr Harvey, the inspector recorded that the letter stated: *(1) Footpath no.31 from Corporation Cottage on the Cleeve-Wrington Road to road near Woodlands It is agreed by my Trustees that this is a bridle path as well as a footpath.*
  28. The inspector noted that further letters from BMC, up to 1958, asserted that the Appeal Route was a bridle path.
  29. In his decision, at paragraph 31, the inspector wrote the following: *The documentary evidence of letters from Mr R D Harvey and Colonel Towill of Bristol Municipal Charities in 1952 in which they stated that they regarded their parts of route AX16/31 [the Appeal Route] as bridlepaths is immaterial unless: 1. It is new evidence not known or taken into account by the committees responsible for formulating the Definitive Map and Statement. 2. The authorities responsible for compiling the Definitive Map and Statement behaved improperly or failed to carry out their statutory responsibilities... I am satisfied, therefore, that all procedures were properly carried out and that Mr Harvey's and Colonel Towill's claims were properly examined.*

30. I do not consider that it was correct to say that Mr Harvey and Col. Towill 'regarded' or 'claimed' their parts of the Appeal Route as bridle paths. On the face of it, Mr Harvey was the freehold owner of his part of the woods with the capacity to dedicate rights of way to the public, and on the face of it Col. Towill was the proper representative of the freehold owner of land crossed by the Appeal Route, which had the capacity to dedicate rights of way to the public. Their respective assertions clearly identified the land they were concerned with, and clearly and unambiguously identified the position and intended status of the route in question. What each one wrote was, in my view, effectively an express dedication (see paragraph 7 above) of bridleway rights over the Appeal Route, if they did not already exist. There is no direct evidence that either drew back from from the position taken.
31. For a right of way to come into existence, there must not only be dedication, but also acceptance by the public. The inspector recorded in 1995 that he had before him evidence of equestrian use of the Appeal Route dating back to the 1940s. He stated that there was no evidence of a physical barrier or notices on the route before the 1970s. I conclude that this is powerful evidence of express dedication of public bridleway rights over the Appeal Route.
32. The objector dismisses the statements of Mr Harvey and Col. Towill as ambiguous and argues that they should be given no weight. He states of the February 1953 letter (paragraph 25 above) for example: *The reference to 'bridle path as well as a footpath' does not make clear the author's view as to whether the Route has public rights of way on horseback, or merely public rights of way by foot with possible additional private rights.* In my view this is an unsustainable view. Even if the individual statements could possibly be considered ambiguous, their combined effect is quite clear. The apparent freehold owners or their representatives are declaring that the Appeal Route as it crosses their land carries public bridleway rights.
33. At the same time as this correspondence, and connected to it, the process of compiling the Definitive Map was going on. The minutes of Congresbury Parish Council note that the Parish survey (paragraph 22 above) was completed by March 1952 and that the Parish meeting to consider it was held on 7 April that year. Over the next year, until March 1953, there was correspondence between the Parish Council (in the person of Mr Gosling) and Mr Harvey and Col. Towill, but the minutes are less informative than the correspondence noted above (paragraphs 25 to 27), noting uninformatively for example on 8 September 1952: *Mr F Gosling and Mr R D Harvey agreed in regard to certain footpaths Charity Trustees property & were meeting Mr Towill in the matter of a final decision.*
34. The minutes do not clarify whether only footpaths were recorded in the Schedule sent to the County Council, although evidence given by Avon County Council to the 1995 inquiry was that the record cards (presumably the form the Schedule took), written in pencil and unsigned, showed the Appeal Route as a footpath. Nor do the minutes clarify why that was the case when Mr Harvey and Col. Towill had been adamant about the existence of public bridleway rights on the Appeal Route. It is clear that when the Draft map was produced in 1956 it recorded the Appeal Route as a footpath only.
35. The inspector, after commenting on the 'claims' of Mr Harvey and Col. Towill (paragraph 29 above), continued: *The question is whether bridleway rights have been established under the terms of HA80 s31.* After discussing the user

evidence and challenges to use, he concluded: *In summary, this order seems to fail on all counts. I do not find that the criteria set out in HA80 s31(1) have been met...* It is understandable, given that the case for confirmation was based on evidence of use, that he should have taken that view, but it was not correct to do so, in my view. It would have been open to him to draw conclusions about the weight to be given to the declarations of Mr Harvey and Col. Towill, to discuss how they could be reconciled with the outcome of the Definitive Map process, and, if there could be no reconciliation, whether more weight should be given to the process or to the declarations. Their evidence was not, in my view, 'immaterial' (paragraph 29 above).

36. In my view, the discrepancy between what was recorded by the Parish Council and the declarations made by the landowners seems very odd; the inspector in 1995 regarded it as a mystery which could only be the subject of speculation. I agree, but the important point is whether the fact that the Appeal Route was recorded as a footpath apparently with no opposition can nullify or negate the effect of what amounts to an express dedication of public bridleway rights and their acceptance by the public. In my view it cannot. I do not consider the fact that the Parish Council only put forward footpaths for inclusion on the Draft Map, or that there were no objections to the depiction of the Appeal Route as a footpath on that map, amounts to sufficient evidence that the dedications were withdrawn before they could become effective. Later actions by subsequent owners cannot undo the effect of dedication.

### **Conclusion**

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

### **Other matters**

38. I note that Council officers, in advising the Committee which considered the 1996 application in 2016, clearly misunderstood the legal test which applied. Despite the application being based on documentary evidence the Council officer who wrote the Report stated that the test in s31(1) of the 1980 Highways Act had to be satisfied if an order was to be made. That test reads as follows: *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 officer wrote: *However having regard for the test laid down by Section 31(1) having evaluated this matter it is my opinion that the new evidence is not sufficient to alter the conclusions drawn by the inspector at the inquiry held in 1995.*
39. The test in s31(1) is applicable to an application based on evidence of use, but is not apposite to an application, such as that of the appellant, based on documentary evidence. The test to be applied to such evidence, known as the common law test, is as noted above at paragraph 7. The statutory test is separate and distinct from the common law test and not, as appears in Appendix 1 to the Committee Report, part of a single test.

**Formal Decision**

40. The appeal is allowed.

41. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act North Somerset Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify its Definitive Map and Statement by upgrading to bridleway on it footpath AX16/31 between Wrington Road Congresbury and Cleeve Hill Road. 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.

*Peter Millman*

**Inspector**



