
Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 22 November 2017

Appeal Ref: FPS/G3300/14A/13

- This Appeal, dated 21 July 2017, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Somerset County Council not to make an Order under 53(2) of that Act.
- The Application dated 16 October 2009 was refused by the Council on 28 June 2017 and the applicant was notified by letter dated 27 June 2017.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal route, which extends south from Copse Lane, Ashill, to the vehicular road south west of Rapps and is known as Footpath CH1/23, as a Restricted Byway rather than a Public Footpath.

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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. Submissions have been made by the Appellant (Mrs Sarah Bucks on behalf of the applicants - South Somerset Bridleways Association), Somerset County Council ('the County Council'), Ashill Parish Council ('the Parish Council'), and by one of the landowners concerned, Mr P Speke.

The Main Issues

4. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the County Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events, cited in Section 53(3).
 5. Section 53(3)(c)(ii) of the 1981 Act provides that an order should be made to modify the DMS if evidence is discovered which, when considered with all other relevant evidence available, shows that a highway shown on the map and statement as a highway of one description ought to be there shown as a highway of a different description.
 6. Section 32 of the Highways Act 1980 ('the 1980 Act') provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, 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.

7. The applicant relied on documentary evidence to support their claim. South Somerset Bridleways Association did not submit any user evidence in respect of the application, although some user evidence was submitted in connection with an application on an adjoining route (Copse Lane).

Reasons

Background

8. The appeal route commences opposite the southern end of Copse Lane, Ashill (Grid Reference ST 333172) and runs in a generally southerly direction along a hedged lane currently recorded on the DMS as Public Footpath CH1/23. It terminates at Grid Reference ST 333167 where it meets an unclassified road near the A358 road. I include, as Appendix 1, a map of the route submitted by the appellant but annotated with the additional lettering used by the County Council in their reports. I have used their lettering in this decision, and the appeal route runs between Points (small)C-D-E-F.

What is the evidence which has been 'discovered'?

9. The Definitive Map Modification Order ('DMMO') application was made because of the impending 'cut-off date' imposed by Section 53 of the Countryside and Rights of Way Act 2000 ('the 2000 Act') after which historic rights which are not recorded on the DMS will be extinguished. Neither the Council nor the appellant clearly identifies the evidence which was 'discovered', as required by Section 53 of the 1981 Act, but the applicants submitted a variety of documentary evidence in the form of maps, property documents and information from the Finance Act 1910 ('the 1910 Act'). Some of this information was not available at the time that the DMS were first prepared in the early 1950s¹. I have therefore approached this decision on the basis that I am now entitled to take that information into account, together with all other evidence available, whether it has been previously considered or not.
10. There is no dispute between the parties that the appeal route is a highway (it is recorded on the DMS as a public footpath). The issue is one of status, and the interpretation of the documentary evidence. The appellant considers that the evidence submitted has been undervalued by the County Council, and not given the evidential weight it is due.
11. It is necessary when examining documentary evidence to distinguish between the 'cumulative' approach, where the similarity of several pieces of evidence might be regarded as repetition since they may emanate from the same source; and the 'synergistic' approach where such similarity might be accorded more weight because the source material is different in each case.

Historical Evidence

Enclosure Award

12. Although the County Council refers to a map of Enclosures (Neroche Forest and West Sedgemoor Enclosures circa 1830) it is not clear to me whether or not

¹ Notably the documentation in relation to the Finance Act 1910

there is an associated Act or written Award. The map shows the southern half of the appeal route, albeit indistinctly and across the edge of what seems to be open heath or common. It does not assist in identifying the status of the route.

Ordnance Survey Mapping

13. There appears to be no dispute between the parties that the claimed route appears on a variety of maps, to a greater or lesser extent, dating back to 1809, when it appears on the first edition of the Ordnance Survey ('OS') Old Series one inch to one mile map. It has continued to be shown on OS maps, even those at quite a small scale, on the route described in the application.
14. The OS mapping evidence is unlikely to be considered to be new evidence, as it was available at the time when the DMS was being produced in the early 1950s. However, I am able to take it into consideration in the context of all the available evidence, and I am satisfied that the mapping evidence shows the physical existence of the route on the ground for over 200 years. Nevertheless, the continued appearance of the route on OS mapping cannot provide strong evidence as to its public status, as the source of the information essentially remained the same (i.e. it must be assessed in a cumulative fashion).
15. It is true to say that, on the edition of the County Series mapping published in 1888, part of the appeal route is shown with one of the boundary lines thickened or 'shaded' and is faintly coloured in burnt sienna. This could permit the inference to be drawn that it was a '*a metalled public road for wheeled traffic kept in good repair by the highway authority*' in line with the Circular issued by the OS in April 1884. However that advice was rescinded and amended a number of times, and the final Circular on this topic was issued in November 1885. The final Circular makes clear that Carriage Drives would also be shown in a similar fashion to 2nd Class Roads resulting in an ambiguity for present day researchers. The County Council refers to an article written in 1999 by Yolande Hodson in the Rights of Way Law Review from which it can be seen that later OS guidance from 1896 confirmed that Carriage Drives were a classification of private vehicular routes.
16. The section of the appeal route which is coloured and shaded on the 1888 OS map is the part which runs from its southern terminus north to the property identified as White House. I consider that this raises the possibility that it may have been considered by the OS as a private vehicular access to the property and not necessarily a public vehicular route. It is nevertheless possible to conclude that it was being kept in good repair at that time.

Other commercial mapping

17. The appeal route is not shown on the earliest commercial mapping examined by the Council (Day and Masters 1782) but it is shown on all the other commercial maps referred to by the appellant and researched by the Council. The Bartholomew maps, although engraved by that company, relied on the OS for their source material and this limits their evidential value in a synergistic sense.
18. Whilst the Bartholomew maps were popular with cyclist, for example, it does not follow that every route shown on these maps was open to them to use.

Without clear evidence of local knowledge at that time being used to inform the engravers, the value of these maps is the same as that of the OS maps discussed above.

19. The Greenwood Map of 1822 shows the northern part of the appeal route in a manner defined as a 'cross road' in the key. However it seems to turn to the west rather than continue towards the south. This map would suggest that, at the time of the survey, the southern part of the appeal route was still rather undefined across the open area of heath land.
20. The term 'cross road' has been interpreted by some as meaning that the route carries public vehicular rights, but the judicial view² is that the depiction of such a route on a map merely indicated that the map-maker, rightly or wrongly, considered the way to be either a bridleway or a highway for vehicles. Greenwood was a map-maker of some renown, but no information has been provided on the survey history for this map. It does not provide good evidence of public status of the route as a whole, but it is slightly more suggestive of rights higher than that of a footpath for the northern part of the route.

Tithe Map and Apportionment

21. The Tithe information which is relevant to the appeal route is the Broadway (Old Enclosures) Tithe Map and Apportionment circa 1840.³ The appeal route has no apportionment number and was therefore presumably considered unproductive. The County Council takes the view that private roads are treated on this document in exactly the same manner as routes which are now public roads, and also, in some cases, public footpaths.
22. I agree with the appellant that the comparison with other routes now thought of as private (or as public footpaths) is not necessarily helpful, since there is always the possibility that the existence of public rights may simply be under-recorded. Whilst it is true that the Tithe Commissioners were not concerned with the status or existence of highways, these maps do feature the appeal route quite prominently so it must have been of some value locally. Certainly by this time the southern half of the appeal route was evolving to become clearly separated from the adjoining area referred to in the Tithe Apportionment as part of Rapps Green. It is necessary to take this information into account when considering its treatment in the property documents.
23. The separation of the route from the arable area of Rapps Green suggests that it was desirable for land management purposes. It is likely that the route was, by then at any rate, being used by someone in addition to the party who was farming Rapps Green, otherwise there would have been no need to clearly define the two areas. In the absence of detailed information about the surrounding owners at that time, and subsequently, I am unable to draw any further conclusions on who might have been likely to use the route.

Property documents

24. The documents referred to by the appellant as 1808 sales documents are described by the County Council as being part of the Will of Mrs M Woodland. The map would suggest that the appeal route did not form part of the lands to

² Hollins v Oldham [1995] C94/0206 unreported

³ The appellants refer to this as being 1845 probably due to the different versions of the map examined.

be bequeathed as part of the settlement, and I note that ownership of the land on either side of the appeal route at that time was in different hands. Mrs Woodward appears to have owned some of the land on the east side between Points E and F, but not the land to the west, or Rapps Heathfield to the south (marked as Rapps Green on other documents mentioned above). Rapps Heathfield is depicted as open land with no distinction made where the appeal route would run.

25. No easements are mentioned but as other landowners also had land abutting the route it is likely that some right of access pertained. However, the information cannot tell us whether the appeal route was carried public or private rights. It is pure conjecture to assume that the absence of any mention of easements meant that the access was public.
26. A map dating from 1852 and relating to land owned by the trustees of the late Earl of Egremont shows how Rapps Green is gradually becoming more defined, and bounded by unfenced tracks to three sides. It does nothing to address the question of what rights exist over the appeal route though.
27. Sales particulars from 1858 contain a plan based on the Tithe Commutation Map of Broadway referred to above. The land being sold was that belonging to Mr William Woodland and the plan shows that the land on either side of the appeal route between Points C and D was, at that time, split between two landowners: W Speke Esq to the west and Mr Woodland to the east. The southern part of the appeal route is only indicated by a short spur as the land for sale did not include any land south of Point E.
28. The land was sold subject to all existing rights of way, and other easements, but did not specifically refer to the appeal route. This could imply that access was obtained over it by easement or by a right of way, but it is not helpful in deciding which applied, nor whether public rights were involved.

Finance Act 1910 Documentation

29. This information was not available in the early 1950s and in this particular case it sheds some new light on the potential status of the claimed route. There is no dispute between the parties that the appeal route is shown, in its entirety, as falling outside the chargeable hereditaments, meaning that no rateable value was attached to it. In this type of location and for parcels of land of this linear type, I consider that the most likely reason for it to be excluded would be that it was a highway of some sort.
30. I note that there was a deduction made for a footpath in relation to the field adjacent to the northern part of the appeal route, but that since two footpaths are marked in the field it is not clear whether this relates to one or both paths.
31. I also note that 'Landowner A', as identified in the County Council's investigation report, is quoted as having allowed the footpath (CH1/23) "between Points C and F *to be changed from running in the field, as it was originally, to go up the lane, at Whitehouse Farm, which was sensible.*". This is also referred to by 'Landowner B'. No indication of when, or how, this happened is given, and the County Council can shed no light on this. If the landowners concerned have personal knowledge of this happening, it is unlikely to relate to something that happened in 1910 or thereabouts. (I will return to this issue when dealing with the DMS process below.)

32. I therefore consider that it is more likely that, at the time of the 1910 Act, both footpaths in the field were the subject of the deduction, and the exclusion of the appeal route from the hereditaments therefore weighs slightly towards a highway of a higher status than that of footpath. It would be unusual to exclude land from valuation duty because it was merely a public footpath. As the appellant comments, it was not uncommon for a footpath to run in the field beside a track to provide a dryer route for those on foot, if the track became muddy.
33. I acknowledge, nevertheless, that this assessment only applies to the northern half of the appeal route. There is no indication on the OS base maps of a footpath through the hereditaments adjoining the southern half of the appeal route. Given the earlier depiction of this route as a vehicular route in good repair (1888 OS map discussed above) the 1910 Act information adds a modicum of weight to the existence of higher rights than those associated with a public footpath.
34. I note, however, that the County Council can point to other examples of where double fenced footpaths have been excluded from hereditaments, only to be included within them where the fencing ceased. So I must accept that, in this area at least, it was not unknown for footpaths to be excluded from valuation.

The Definitive Map Process

35. The information supplied by the County Council demonstrates quite clearly that the recording of the right of way (and its extension to the north along Copse Lane) was the subject of considerable debate and correspondence at the time when the DMS was first being prepared. After objections and representations, and a recommendation that it should be shown as a CRF⁴, the appeal route (but not Copse Lane) was finally included on the map as a public footpath. These discussions may have included the question of the alleged change of route for part of the footpath referred to by Landowners A and B as reported by the County Council.
36. It is not clear from the material made available to me why the recommendation with regard to the CRF designation was not acted upon, and it does not seem to be clear to the County Council either. But that recommendation clearly indicates that the appeal route was considered by someone at that time to have vehicular rights. The status of CRF was not an official status in terms of the DMS, and had it been acted upon the correct designation would have been RUPP (Road used as a Public Path) as pointed out by the County Council. As a RUPP, it would have been eligible to be considered for re-classification under the 1981 Act, and failing that it would have automatically have become a Restricted Byway under the 2000 Act.
37. I think it is fair to say that the interpretation of rights existing on CRFs or on RUPPs was inconsistent between different Surveying Authorities; a situation which was not resolved until the reclassification under the 2000 Act. In the eventuality, the appeal route was only recorded as a public footpath. I acknowledge that the evidence in support of this conclusion is a little ambiguous, but I must nevertheless give significant weight to the DMS because of its intrinsic evidential value, and because there was quite clearly some

⁴ Cart or Carriage Road used mainly as a footpath

considerable attention paid to the matter in the 1950s by the Surveying Authority.

38. However I note that the County Council in its own evaluation acknowledges that the DMS is only conclusive in what it shows, and does not preclude higher rights.

Overall Conclusions on the Evidence

39. Section 53(3)(c)(ii) requires that there be some 'discovered' evidence; and the implication is that the new evidence might alter the way in which all the other available evidence is interpreted.
40. In this case, the discovered evidence (principally in relation to the Finance Act 1910) offers new insight into the situation that was investigated in the 1950s and early 1960s. I have some sympathy for the appellant's view that this demonstrates that the appeal route is a public vehicular route, since it would be unusual for a public footpath to be excluded from hereditaments in this way. Nevertheless it is conceivable that the route continued to be the dividing line between different owners, and thus not claimed by either of them. In the absence of detailed information about landownership at that time⁵ it is not possible to reach a firm conclusion on this. Earlier documentation would support that the appeal route was a landownership boundary, which might account for its exclusion.
41. Taken with all the other evidence available (for example the 1888 OS map) I think that the status of the route is more likely to have been principally an agricultural access for the surrounding land, used by farm carts etc., but not necessarily use by the general public in vehicles of any sort but only on foot. This could be a plausible reason for its exclusion from the surrounding hereditaments for the purposes of the 1910 Act; a process which was not implemented by surveyors in a consistent fashion across the country or, indeed, within individual valuation areas.
42. None of the documentary evidence is convincing in itself to demonstrate public vehicular (or even bridleway) rights. Taking the body of evidence together, there is a suggestion from some documents that some people may have considered there to be a general right of public access, but other documentation which is either silent or neutral on the subject. Furthermore, there was clearly a considerable investigation carried out in order to compile the DMS which was itself rather ambiguous, but came down in the end in favour of public footpath rights. I consider that the question is very finely balanced.
43. For this type of application it is not open to me to consider the test of whether or not it is reasonably alleged that a right of way subsists. I must apply the balance of probabilities. In the absence of any documented evidence of use it is difficult to reach any conclusion on its public status other than that reached by the County Council in its assessment. The anecdotal evidence of use as a bridleway from the Parish Council is not supported by any signed statements of use. Overall the evidence is insufficient to cause me to conclude that the balance of evidence overall is tipped in favour of the existence of higher public rights than those already recorded on the DMS.

⁵ Nothing of significance has been submitted in relation to the Field Books or the Valuation Books associated with the Finance Act 1910 procedures.

Conclusions

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

Formal Decision

45. The appeal is dismissed.

Helen Slade

Inspector

APPENDIX 1

