



Order Decision

Inquiry Held on 13 December 2017

Site visit made on 14 December 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 15 February 2018

Order Ref: ROW/3170540

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Devon County Council (Bridleway No.15, Thelbridge and Bridleway No. 14, Washford Pyne) Definitive Map Modification Order 2012.
- The Order is dated 10 August 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public bridleway as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Devon County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry into the Order on 13 December 2017 having made an unaccompanied inspection of the Order route from public vantage points on the afternoon of 12 December. At the inquiry the Council adopted a neutral stance having been directed to make the Order by the Secretary of State.
2. No party was prepared to take the lead in putting forward a case for the confirmation of the Order, although I heard from a number of individuals as to their view of aspects of the documentary evidence adduced and regarding their personal use of the claimed bridleway. The case against the confirmation of the Order was put on behalf of the objectors by Mr Kingsland. I am grateful to all parties for their assistance during the course of the inquiry. I undertook a final site inspection in the company of the parties and their representatives on the morning of 14 December 2017.
3. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the DM&S subsists over the land in question.

The Main Issues

4. As noted above, the Council was directed to make the order following a successful schedule 14 appeal. That direction was made on the basis that it was reasonable for the applicant to allege that the claimed bridleway subsisted. However, for the Order to be confirmed, I must be satisfied that the evidence

discovered demonstrates, on a balance of probabilities, that the claimed right of way subsists (*Todd & Bradley v the Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin).

5. In this case there is both documentary evidence and evidence of claimed use of the route on horseback. Section 32 of the Highways Act 1980 ('the 1980 Act') requires that I should take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
6. Where there is evidence of claimed use of a way by the public over a prolonged period of time, the provisions of section 31 of the 1980 Act are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right¹ and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
7. If section 31 of the 1980 Act is inapplicable, then the question of dedication must also be examined in the context of the common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Reasons

Documentary evidence

8. The full extent of the Order route is first shown in the Ordnance Survey ('OS') 25 inch to 1 mile map published between 1880 and 1890; it is shown in part as an enclosed feature and partly as an unenclosed track passing through fields. On the map, part of the enclosed track (that part between points A and B on the Order plan) is annotated 'Westcott Lane'. At the point where the Order route crosses the Dalch, the OS map records the existence of a foot bridge ('F.B.') and a ford. The Order route is similarly shown on the 25 inch OS map of 1904-1905.
9. Earlier mapping such as the 1809 OS old Series map, Greenwood's map of 1827, the Thelbridge tithe map and apportionment of 1837 and the Washford Pyne tithe map and apportionment of 1839 show enclosed features heading south to Westcott Farm from the Thelbridge road or show an enclosed route leading to Wonham Farm, but none of these documents show any connection between Westcott Farm and Wonham Farm via a crossing of the Dalch.
10. The OS popular edition of 1919 depicts the order route on the north side of the Dalch as a minor road which ends before the river; on the Wonham side of the river, the road leading to the farm is depicted (according to the key) as a road under 14 feet in width. The 1919 map does not indicate the existence of a route crossing the river. Bartholomew's half inch map of 1921 depicts the whole of the Order route as uncoloured; the key showing such routes to be '*inferior and not to be recommended to cyclists*'. The OS one inch fifth edition Tiverton sheet shows a through route crossing the Dalch as an unmetalled road

¹ Without force, without secrecy, without permission

whereas other one inch OS maps published in 1946 and 1960 do not depict a track between the river and Wonham.

11. Whilst OS mapping provides good evidence of the existence of physical features which were present at the time of the survey, they do not provide evidence of the status of any route shown. At the time of the publication of the 25 inch to 1 mile OS maps there was a through route between Westcott and Wonham Farms via a ford or footbridge; however, these maps are of no assistance in determining the status of the route shown.
12. The OS Object Name Book of 1903 was produced to record the correct spellings of place names which would appear on OS maps. Authority for the correct spelling was sought from owners or occupiers of property or from someone acting in an official capacity, such as the District Surveyor. In the Object Name Book, Westcott Lane was described as '*an occupation road extending from a point about ¼ mile NE Somer Moor Cross to Westcott*'. Authority for the spelling of Westcott Lane and Westcott was signed for by Mr W Blackford as the occupier. That authority for the spelling was sought from Mr Blackford as the occupier of the lane suggests that at the time, the route was considered to be nothing more than a road which served as access to Westcott Farm.
13. The Finance Act 1910 plans show that Westcott was included as part of hereditament 99 which included land between the Thelbridge road and the Dalch. Under the heading '*Fixed charges, easements, common rights and restrictions*' in the Field Book is written '*Halter path through roadway to Wonham*'. Under the heading '*particulars, description and notes made on inspection*' is included '*Public Rights of Way through Ord Nos 356 – 382 – 449*'. On the base map used for the survey, these OS parcel numbers relate to the enclosed track running to and past Westcott Farm and the partly enclosed, partly unenclosed track between the farm buildings and the Dalch. A reduction in taxable value of £90 was granted for a public right of way or user within hereditament 99.
14. Wonham Farm comprised part of hereditament 1 with the Field Book recording a reduction in taxable value of £25 for '*public rights of way or user*' although there is no indication as to the location of the way or ways for which a reduction in taxable value was granted.
15. Mrs Parsons submitted that the term 'halter path' was synonymous with the term 'bridle path' and cited a number of inclosure awards in Devon and Somerset in support of her contention. In addition, Mrs Parsons relied upon the descriptions given in a number of parish or rural district council minute books and other definitions of the term. The term 'public bridleway or halter path' had been used in awards in Isle Moor, Stourpaine and Kingsbury Episcopi. The term was also recorded in the minute books from Crediton RDC of 29 April 1899 as having the same meaning as bridleway; that is, a route for the riding or leading of horses.
16. Mr Kingsland was of the view that the term 'halter path' was to be distinguished from 'bridle path' as a halter was used for leading horses or livestock, whereas a bridle was used by those wishing to ride a horse. Mr Kingsland referred to some of the evidence given by residents that the route had been used for the '*moving of cattle and sheep between Witheridge and*

*Black Dog*² or had 'been used by farmers for droving cattle'³ as supporting his view of what a halter path was.

17. I have no reason to doubt that the Order route (or at least part of it) had been used in association with the leading or driving of animals, and there is evidence of use of part of the route having been used to drive sheep to the dip which had operated near the Dalch on land which was part of Stourton Barton. The Crediton RDC minute of 29 April 1899 refers to 'a halter path through Pascoe and Appledore' having been acknowledged and noted that the 'Public had always ridden that way and would in justification of the right continue to do so'. This minute supports Mrs Parson's contention regarding a halter path being used for the riding of horses. However, a minute of South Tawton Parish Council of an unspecified date in 1896 that the route at issue was "understood to be a public halter path for pack horses and donkeys" appears to give support to Mr Kingsland's interpretation of a halter path being used for the leading or driving of animals.
18. I acknowledge that there are two schools of thought as to what may be understood by the term halter path. In coming to a decision on the conflicting positions of the parties, I place some weight upon the definitions of halter path provided in the *Dialect of West Somerset* [1886] by F W Elworthy and in *The English Dialect Dictionary* of 1902. Both these publications are nearly contemporaneous with the Finance Act survey and provide an insight into what may have been understood by the term 'halter path' in the west of England in the late nineteenth and early twentieth centuries. In the *Dialect of West Somerset*, a halter path is described as "A horse-road, but not suitable for any carriage. There are still many of these left in the hill district, where, since my recollection, pack-horses were the chief mode of transit...Bridle path is also used, but not so commonly"; in the *English Dialect Dictionary*, under 'halter' is found "halter-path, a bridle path, horse road". Given these near contemporaneous definitions, I consider that the term halter path found in the Field Book is synonymous with the term bridle path and what was being described was a route over which it was possible to ride or lead a horse or to lead livestock.
19. Although a halter path may have been synonymous with a bridle path at the time of the Finance Act survey and although the Field Book entries for hereditament 99 suggest that at the time a public right of way was considered to run over the OS parcels that made up the Order route to the north of the Dalch, there is no evidence in the Field Book entries for hereditament 1 on the south side of the river that such a route continued through and over the Dalch to Wonham. Although there was a reduction in site value granted on hereditament 1 for public rights of way or user, such a reduction may have been for what is now known as bridleway 10 or footpath 3 or for some other route. Given the inconsistency of how the Order route was assessed in the Finance Act documents I am not persuaded that great weight can be attached to those documents as evidence that the Order route had the reputation of a public right of way in the early part of the twentieth century.
20. This lack of reputation is reflected in the minutes of the Thelbridge Parish Council minutes of 13 October 1913 when the Parish Council considered the question of repair to the footbridge between Westcott and Wonham. The

² Mr G Cox user evidence form

³ Mrs C Hannaford

- minutes note that after considerable discussion it was resolved that no action should be taken by the Parish Council as it did not consider itself responsible for the repair of the bridge. Given that until 1897 the four fields to the north of the Dalch had been the property of the owner of Wonham, the bridge may have been required as a private means of access to Mr Bragg's land either side of the river. Once the land to the north of the Dalch had been sold in 1897, any private maintenance of the bridge over the river is likely to have ceased.
21. The Order route was not claimed as a public right of way by either Thelbridge or Washford Pyne Parish Councils as part of the surveys of public rights of way carried out under the National Parks and Access to the Countryside Act 1949. Thelbridge Parish Council depicted those routes which it considered to be public with a blue line and numbered them accordingly. Pencil marks on the survey map (believed to have been made by the Council's surveyor's office) show an arrow next to Westcott Lane and the words "*? OMISSION per Mr Cole this is not deemed to be a public right of way*". Mr Cole had been one of the parish councillors who had conducted the survey and had been a member of the parish council since 1913.
 22. No objections were made to the omission of the Order route from the draft or provisional maps. I consider this to be significant evidence that at the time of the surveys, the Order route did not have the reputation of a public right of way of any description. The parish survey in Thelbridge had been conducted by a person who had served the Parish Council for almost 40 years and is likely to have had first-hand knowledge of those routes which were considered to be public rights of way and those which were not.
 23. This lack of reputation as a public right of way appears to have remained during the latter part of the twentieth century. When the parish clerk for Washford Pyne was contacted regarding a review of the DM&S in December 1968, he replied "*In answer to your inquiry Survey of Public Rights of Way the enclosed Ordnance Survey map appears to be correct as I know of no other footpaths or bridleways in use*". In 1977 the Council commenced a further review of the DM&S and sent copies of the map to parish councils. The Thelbridge parish minutes of 9 December 1977 show that the maps had been considered noting that the Council had asked "*to be notified of any errors, omissions or other changes*". That no comments were made by Thelbridge Parish Council is indicative of the Order route not having the reputation as a public right of way.
 24. In summary, with the exception of the reference in the Field Book for hereditament 99 of a public right of way over those OS parcels that made up the Order route north of the Dalch, there is no evidence to support the suggestion that the Order route is an historic public right of way which had been dedicated at some indeterminate point in the past. Although large scale OS maps from 1889 onwards demonstrate that a route existed which provided access between Westcott and Wonham Farms, it is likely that the origins of that access were private in nature to allow Mr Bragg access to his property on the north side of the Dalch prior to its sale to Westcott in 1897. I place considerable weight upon the absence of any claim that the Order route was a public bridleway at any stage of the definitive map process, be that during the original survey in the 1950s or during subsequent reviews in 1968 and 1977.

25. I conclude that the documentary evidence does not demonstrate, on a balance of probabilities, that the Order route is an historic public right of way. If a public right of way does subsist over the Order route, it will have come into being in the recent past through use by the public. It is to the evidence of use adduced in this case that I now turn.

User evidence

The date on which the right of the public to use the claimed footpath was brought into question

26. Westcott Farm was purchased from Mr Blackford's estate in 2006. Mr Kingsland obtained planning permission for the conversion of the barns to a dwelling and the grant of planning permission required Mr Kingsland to erect gates across the lane to mark his property boundaries; these gates were fitted with locks. The erection and locking of the gates did not lead to an application being made to the Council for the route to be recorded as a public right of way. Irrespective of the lack of a response from the public to this challenge, as the actions taken by Mr Kingsland would have prevented any use of the way by the public, this event can serve as the point in time when public use of the claimed route was brought into question.

27. Accordingly, I conclude that the relevant 20-year period of use for the purposes of section 31 (2) of the 1980 Act is 1986 – 2006.

Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public right was brought into question

28. I heard from seven individuals at the inquiry regarding their use of Westcott Lane. Of these seven witnesses one had not ridden the route since 1976 and had only occasionally walked it thereafter. Another had ridden the route once or twice between 2003 and 2006 and had not crossed the Dalch on either occasion. A third had run a livery yard locally from 1975 to around 1986 and had ridden along Westcott Lane 2 or 3 times per year during that period.

29. The remaining four witnesses were members of the same family. Mr Hutchings owns Stourton Barton to the east of Westcott and had been the tenant of some of Westcott's land for a short period between Mr Blackford's death and the sale of his property by his executors. Mr Hutchings had also instigated proceedings against Mr Kingsland and others claiming that he had the benefit of a private right of way over Westcott from Stourton Barton; I understand that that claim has been discontinued.

30. It was Mr Hutchings' case that Westcott Lane had been in use by the public for many years and that Mr Blackford had understood that the lane was a public right of way. Mr Hutchings said that he had ridden along Westcott Lane "*all his riding life*" and that he had never had permission from Mr Blackford to do so. Miss Hutchings had last ridden the Order route in the late 1990s and had no recollection of not being able to ride through the section D – E. Mrs Gutteridge had grown up at Stourton Barton and had ridden the Order route between the mid-1960s and 1976 although she had latterly walked the route regularly. Mrs Gutteridge acknowledged that she had had permission from Mr Blackford to cross his fields from Doctors' Corner; Mr Gutteridge had also been given permission by Mr Blackford to be on his land.

31. Although Mr Gutteridge said that Mr Blackford's permission did not include permission to use Westcott Lane, it is not possible to corroborate or check that statement as Mr Blackford died in 2000. As Westcott Lane north of the Dalch formed part of Mr Blackford's property, I am of the view that it would be highly unlikely that Mr Blackford would challenge use of the lane by those he had given permission to be on other parts of his property. Consequently, I cannot put significant weight upon the Gutteridge's claims to have used Westcott Lane as of right; use with permission is not use 'as of right'.
32. It is known that Mr Blackford granted permission for the local hunt to cross his land and gave permission in or around 1994 for the erection of a hunting gate on his side of the Dalch to allow the hunt access to the southern end of Westcott Lane. Wonham has been owned by Mr Rottenbury since 1993 and he had also granted permission to the hunt to access Westcott Lane. If Westcott Lane had the reputation as being a public right of way, it is unlikely that permission to install a gate or to use the way would have been sought by the hunt. Other than the hunt Mr Rottenbury had only encountered two people using or attempting to use the lane since he purchased his property; when challenged those people had turned round and gone back the way they had come.
33. The section of the Order route shown D – E is a sunken route enclosed between hedges. At the time of my site visit it was possible to pass along this section on foot although there were a number of trees growing within the lane in various places. A copy of a report prepared in 2009 on the condition of this section of the Order route describes it as having a stand of birch in the middle which prevented use other than on foot and which were estimated to be around 30 years old; these trees were still present at the time of my site visit. The report also notes that there were other small trees within the enclosed section which varied between 10 to 30 years of age with a 30 year old beech at point E. The consultant's conclusion was that whilst access on foot may have been possible prior to 2006, it was unlikely that anyone could have made their way along this section on horseback.
34. Whilst I appreciate that 12 years have passed since Mr Kingsland physically prevented use of the claimed route, the trees which were present within the enclosed section at the time of my site visit have not taken root and grown in only that short space of time. The consultant's report suggests that the trees had been growing for up to 30 years in 2009 and having viewed the site, I have no reason to doubt those findings. However, none of the witnesses had any recollection of being unable to make their way along the route between Westcott and the Dalch.
35. There is clearly a conflict between the recollections of those who claim to have used the Order route during the relevant period and the evidence found in the consultant's report that it would not have been possible for equestrian use of D – E to have taken place due to the extent of tree growth present within the lane. Taking the evidence on both sides at face value, this conflict can only be resolved if those who claim to have used the route had not ridden along the section D – E but had ridden along the field edge to the west; this would explain Miss Hutching's lack of recollection of being obstructed and the consultant's view that D – E could not have been used on horseback.

36. If that is the case, and there is no other satisfactory way of resolving this evidential conflict, then those who claim to have used the Order route during the relevant 20-year period had not done so; the use of an alternative route cannot give rise to prescriptive rights over D – E which was not used. Had D – E already been recorded in the DM&S as a public right of way, then a minor deviation away from the definitive line would have been legally permissible to overcome the obstruction of the route by undergrowth and overgrowth. However, D – E was not, and is not recorded in the DM&S as a public right of way of any description; there is therefore no lawful right of deviation around the obstructions present on D - E.
37. Of the oral evidence given at the inquiry, it is highly likely that those 3 witnesses who claimed to have ridden the whole of the Order route during the relevant 20-year period had not in fact done so, as part of the claimed route was impassable on horseback. Of the remaining oral evidence given, two witnesses had permission from Mr Blackford to be on his property, and the remaining two did not provide evidence of use on horseback during the 20-year period under consideration. The oral evidence given at the inquiry does not demonstrate use of the Order route as of right throughout the 20-year period in question.
38. There were 22 user evidence forms submitted from other individuals who did not appear at the inquiry. These suggested that use had been made of the Order route since the 1930s, although the bulk of the claimed use was from the 1960s onwards. In response to the question regarding frequency of use in a year, the responses were couched in vague terms 'occasional', 'a few times' 'often', 'once or twice' and so forth. Only two respondents claimed to have used the route weekly or with greater frequency. Two of the respondents claimed that it was 'common knowledge' or 'general knowledge' that Westcott Lane was a public route. Two members of Mr Hutchings' family claim to have used part of the Order route in association with their claimed private access between Westcott and Stourton Barton.
39. Eight of the respondents claim that Mr Blackford had told them that the route was a public way, and five claim that Mr Blackford had seen them use the path and had not challenged them. One respondent acknowledged that he had been given permission by Mr Blackford to use the route.
40. In contrast, the written evidence of the daughter of Mr Blackford's tenant from 1980 was to the effect that during the 20 years or so of the tenancy, there was no observed use of Westcott Lane on horseback or on foot and that the Gutteridge's had only been seen using the route since 2006. The oral evidence from Mr Rottenbury was of similar effect, in that there had been no observed use of the Order since 1993 route except on one occasion.
41. Given that the frequency of the claimed use of the Order route as set out in the user evidence forms was at low levels, it may well have been possible for Mr Blackford's tenant and Mr Rottenbury to not see use which may have been 'once or twice' a year or 'a few times' or 'infrequent'. Although use may not have been observed, that does not mean that it did not take place. However, to raise a presumption of dedication, use has to be at a level which will bring home to the landowner that a public right to do so is being asserted. The written evidence of use suggests that actual use was limited and infrequent and the oral evidence of use that I heard was of use outside the relevant 20-

year period, use which did not include the whole of the claimed route or use which was with permission.

42. Furthermore, neither Mrs Gutteridge nor Mr Gutteridge mentioned in their user evidence forms that Mr Blackford had given them permission to access his property, but at the inquiry conceded that had been the case. It is known that one other respondent used the claimed route with permission and it is not improbable that other respondents whose evidence has not been tested may also have used Westcott Lane with Mr Blackford's permission. In the light of the oral evidence given at the inquiry, I do not place significant weight upon the remaining untested evidence of use found in the user evidence forms.
43. Although a number of the user evidence forms contended that it was '*common knowledge*' that the Order route was a public way, that claim is contradicted by the absence of any suggestion as to the existence of public rights over Westcott Lane during any of the periodic reviews of the definitive map and statement.
44. Having given consideration to both the oral evidence given at the inquiry and the written evidence submitted, I consider that the user evidence adduced in this case is insufficient to raise a presumption that Westcott Lane has been dedicated as a public right of way under the statutory scheme.

Whether there is sufficient evidence that there was during this twenty-year period no intention to dedicate the claimed footpath

45. As I have concluded that the evidence of use is insufficient to raise a presumption of dedication the burden of proof on the supporters of the Order has not been discharged. Consequently, it is not necessary for to give consideration to the proviso to section 31 (1) of the 1980 Act.

Conclusions

46. The documentary evidence does not demonstrate that the Order route has been dedicated as a public right of way at some indeterminate point in the past. The user evidence submitted in support of the claimed bridleway is also insufficient to raise a presumption that the Order route has been dedicated as a public bridleway. As the user evidence submitted is insufficient to raise a presumption of dedication under the statutory provisions it follows that such user evidence is also insufficient to raise an inference of dedication at common law.
47. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

48. I do not confirm the Order.

Alan Beckett

Inspector

APPEARANCES

In support of the Order:

Mrs J Parsons

Mrs C Lowes

Mr G Manning

Mrs K Gutteridge

Mr O Gutteridge

Mr C Hutchings

Miss C Hutchings

Mr J Cheffins

Mrs R Kimbell

In objection to the Order:

Mr P Kingsland

Mr J Ayre

Mr M Welch

Mr S Preece

Mr R Rottenbury

Inquiry documents

1. Witness statement of Michael John Perkins (dated 10 December 2017).
2. Witness statement of Jayne Lorna Elston (dated 12 December 2017).
3. Letter from Kenneth Philips (undated).
4. Letter from Richard Gutteridge (dated 9 December 2017).
5. Email from Kerri Schwartz (dated 6 December 2017).
6. Email from Monica Bond (dated 6 December 2017).
7. Letter from Zelda Hutchings (dated 9 December 2017).
8. Email from Heather Greenslade (dated 12 December 2017).
9. Letter from Leonard Chappell (dated 12 December 2017).
10. Letter from J A Prout (dated 10 December 2017).
11. Email from Janet Russell (dated 12 December 2017).
12. Email from Chloe Deakin (dated 12 December 2017).
13. Mr Manning's user evidence form.
14. Three statements made in connection with Mr Hutching's claim for a private right of way.
15. Extracts from Ordnance Survey 1 inch maps; 2.5 inch maps and Bartholomew's half inch map of 1921.