



# Appeal Decision

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 02 August 2018**

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## **Appeal Ref: FPS/D0121/14A/5**

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of North Somerset Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 21 July 2004 was refused by the Council on 15 November 2017.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a Byway Open to All Traffic (shown by A – B – C – D on the plan attached to this decision).

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

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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 of the 1981 Act.
2. This appeal has been determined on the basis of the papers submitted.

## **Procedural Matters**

3. The application made to the Council in July 2004 was for the addition of a Byway Open to All Traffic between the southern end of the maintainable highway known as Duck Lane (point A on the plan appended to this decision) and the northern end of the maintainable highway known as Ladymead Lane (point F on the appended plan).
4. The Appellant claims that the application was made to add a Byway Open to All Traffic on a route where there were no previously recorded public rights of way. However, A – B on the appended plan, B – C – D and E – F are currently recorded on the definitive map of public rights of way; A – B is part of public footpath AX14/44 with B – C – D and E – F both being part of public footpath AX 14/46. The only section of the claimed route which is not currently recorded on the definitive map is D – E.
5. The Appellant contends that footpaths AX14/44 and AX14/46 do not run over the claimed route and refers to the description of the position of the footpaths found in the 'walking cards' prepared by the parish council as part of the survey of public rights of way conducted under the provisions of the National Parks and Access to the Countryside Act 1949. Whilst I acknowledge that the description of the route in the walking cards does not accord with the claimed route, the fact remains that the claimed route runs over land which is shown in

- the definitive map to be crossed by public footpaths.
6. Although the Appellant claims that the application was made to add a Byway Open to All Traffic, given that the claimed route is already partly recorded as a public footpath, the application and appeal should proceed on the basis of the Appellant seeking to upgrade parts of AX14/44 and AX14/46 and to add a Byway Open to All Traffic over that section of the claimed route between point D and point E.
  7. The application made on 21 July 2004 was made to record a Byway Open to All Traffic. On 2 May 2006 the Natural Environment and Rural Communities Act 2006 came into force. Section 67 (1) of the 2006 Act provides for the extinguishment of any right the public had to use mechanically propelled vehicles over a route not shown in the definitive map or any route which was shown in the definitive map as a footpath, bridleway or restricted byway.
  8. The extinguishment of the public's right to use mechanically propelled vehicles is however subject to the exceptions set out in sections 67 (2) to 67 (8); if any of these exceptions apply, MPV rights will not have been extinguished. None of the exceptions found in sections 67 (2) or (4, 5, 7 and 8) are applicable in this case. The provisions of section 67 (3) (a) are applicable subject to the provisions of section 67 (6).
  9. Section 67 (3) (a) provides that "*Subsection (1) does not apply to an existing public right of way over a way if—(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic*". The 'relevant date' for the purposes of section 67 (3) (a) is 20 January 2005.
  10. Section 67 (6) provides that "*For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.*" An application under paragraph 1 of schedule 14 has to be made in the prescribed form and be accompanied by copies of any documentary evidence which the applicant wished to adduce in evidence in support of the application. In the *Winchester*<sup>1</sup> case, the Court of Appeal held that an application made to record a BOAT has to strictly comply with the requirements of paragraph 1 of schedule 14 to engage the exception found in section 67 (3) (a).
  11. In this case, although the applicant provided a list of the documentary sources on which reliance was placed, copies of all of those documents were not submitted with the application. As the application did not strictly comply with the requirements of paragraph 1 of schedule 14, any right the public had to use MPVs over the claimed route has not been preserved. Consequently, the claimed route could not be recorded as a BOAT although it could be recorded as a Restricted Byway if the available evidence demonstrates that public vehicular rights subsist.

## **Main Issues**

12. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is already shown in the definitive map is subject to additional public rights is dealt with under section 53 of the

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<sup>1</sup> R (Warden and Fellows of Winchester College) v Hampshire County Council and SSEFRA [2008 EWCA Civ 431]

- 1981 Act. Section 53 (3) (c) (ii) of the 1981 Act provides that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
13. In this case there is a section of the claimed route which is not currently recorded in the definitive map and statement; such situations are provided for by section 53 (3) (c) (i) of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
  14. No evidence of use of the claimed route by the public has been submitted by the Appellant who relies upon the documentary evidence adduced. When considering whether documentary sources as evidence of the existence of a public highway, the provisions of section 32 of the Highways Act 1980 ('the 1980 Act') are relevant.
  15. Section 32 of the 1980 Act provides that: "*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 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 documents, 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 was produced.*"
  16. The main issue in this case is whether the available evidence demonstrates that a public right of way for vehicles subsists over footpaths AX14/44 and AX14/46 and that such a right could be reasonably alleged to subsist over that section of the appeal route between points D and E.

## **Reasons**

### ***Documentary evidence***

17. The Day and Masters Map of Somerset (1782) shows a route on the same general alignment as the claimed route and in the same manner as other roads in the locality. The depiction of the route suggests that a through route between Duck Lane and Ladymead Lane was in existence at the time the map was produced. The map also shows hedged or fenced routes which lead to fields or to other property. No key to the map was submitted and it is not known what the cartographer intended to convey by the depiction of the route. The map does not provide evidence of the status of the route shown.
18. An Ordnance Survey (OS) map of 1811 shows the claimed route as part of a hedged or fenced through route; the claimed route is shown in the same manner as other routes which are currently public carriageways. In addition to through routes, the map also shows a number of routes which lead to fields or residences; these are shown in the same way as the claimed route. Although the map shows that a route was available which corresponds with the appeal route, Ordnance Survey maps do not provide evidence of the status of any

track or way shown.

19. A David and Charles map of 1817 shows the appeal route in the same way as Day and Masters and the earlier OS map; the map also shows other hedged or fenced routes which lead to fields or other property. There is no key to the map and the map is of no assistance as to the status of the appeal route.
20. Greenwood's map of Somerset (1822) also shows the claimed route as part of a through route from Stock Lane to Jubilee Lane although Greenwood shows the route further to the west than earlier or later maps. No key to the map was submitted and it is not known what the cartographer intended to convey by the depiction of the route. Greenwood's map does not provide evidence of the status of the appeal route.
21. The Churchill tithe map (1840) shows the appeal route as part of an enclosed route running between Stock Lane and Jubilee Lane. The appeal route is shown in the same way as known public roads are shown. The appeal route is not numbered and there is no reference to the route in the tithe apportionment. A study of the apportionment detail shows that the appeal route would have provided a means of access to three landholdings. Although the Appellant submits that the absence of an apportionment number could mean that the route was a public highway, equally, the appeal route may have served as a private means of access to adjacent fields. Tithe maps were not produced for the identification of public ways.
22. The appeal route is shown on the 1884 OS map as enclosed by fences of hedges with a peck line route annotated 'F.P.' running parallel to it. The Appellant contends that the adjacent footpath demonstrates that the enclosed route would have been used by horses and vehicles with pedestrian traffic travelling over adjacent drier and firmer ground. Whilst this may well be the case, no evidence has been submitted of equestrian or vehicular use by the public and any use of the enclosed track by horses and vehicles may have been connected with agricultural activities being carried out on adjacent land. The depiction of the appeal route on this and other OS maps does not provide evidence of the status of the route.
23. The 1904 OS six-inch to 1-mile map (sheet X ISW) does not show the appeal route as a through route. The route is shown as a means of access to fields at points D and E with the remainder of the route being incorporated into the adjacent field. The route is annotated 'Ladymead Lane' with the annotation appearing between points A and D.
24. Two extracts from the OS Name Books which relate to the 1904 six-inch to 1-mile map sheets have been provided. One extract relates to sheet XI SW discussed above and describes Ladymead Lane as "*A lane, now fallen into disuse overgrown extending from Stock Farm to Plood Lane*". The second extract relates to sheet XVIII NW (although Ladymead Lane is not named on that sheet) and describes the name as applying "*to an old lane extending N from its junction with Plood Lane a few chains SE of Ladymead Lane Cottage*".
25. The entry for sheet XI SW together with the map suggests that Ladymead Lane was no longer in use whatever its status may have been. The Appellant drew support from the case of *A-G v Council of the Metropolitan Borough of Woolwich* (1929) claiming that in that case the judge had considered the term 'lane' to mean a minor road leading from one main road to another. In the

- Appellant's view, the description of Ladymead Lane in the OS Name Book entry accorded with the view expressed in *A-G v Woolwich*.
26. The Appellant did not submit a copy of *A-G v Woolwich* and it has not been possible to view the Appellant's claim in the context of the case. I attach little weight to the Appellant's submission on this point as the OS Name Book entry describes Plood Lane as a 'Parish Road' and thereby draws a distinction between the two routes being named on the sheet. What was meant by the terms 'lane' and 'parish road' is not explained by the Name Book; there is however a distinction in the terminology used and it is more probable than not that the description given in the Name Book entries reflected the understanding as to the status of the routes being described.
  27. A similar distinction is drawn between Ladymead Lane and other adjacent routes in the Name Book entries for sheet XVIII NW. On the same page of the OS name book which describes Ladymead Lane are entries for Pudding Pie Lane, Plood Lane, Stock Lane, Redshard Lane and Says Lane. With the exception of Says Lane which is described as a '*Public Road*', the remaining routes are described as '*Parish Roads*'. In neither Name Book sheet case is Ladymead Lane referred to as a public or parish road which is indicative that it did not have the reputation as a public route for vehicles.
  28. The sections of the appeal route between points A – D and E – F are shown as excluded from claimed ownership on the 1910 Finance Act map with the remainder of the appeal route being included in hereditament 173. The hereditament is described as "*Small holding situate at the end of Ladymeade Lane. Buildings none too good. Orcharding good and well kept up. Fair quality of land for district*". The description of Ladymead Cottage (hereditament 112) is described as "*adjoins Ladymead Lane a hard road leading to Owner's Farm*". No details as to whether the hereditaments were granted a reduction in duty for public rights of way or user has been submitted.
  29. On the Finance Act map the section E – F appears to be gated at both ends as depicted by a line across the enclosed section of the route. The existence of a gate at point F is shown in a photograph submitted by the current owner of Ladymead Farm which is dated as having been taken in 1900. In this photograph a family is shown as sitting and standing at or around point F with field and pedestrian gates immediately behind them. There is no indication in this photograph of a continuation of a route northwards from point F. Photographs of the site taken by the Council in January 2018 show these gates to remain in situ.
  30. The exclusion of the enclosed sections of the appeal route from private ownership may be indicative that the route was considered to be the responsibility of the rating authority (in contrast to what might be indicated by the OS Name Book entries). The Finance Act records are however ambiguous; although parts of the appeal route are excluded from valuation, one section excluded is gated at both ends and although Ladymead Lane is clearly marked on the base map, the valuer describes it as being nothing more than a hard road leading to Ladymead Farm.
  31. The 1930 handover map of roads maintained by the rural district council was drawn on an 1888 base map which shows the appeal route as an enclosed track. The handover map shows that Ladymead Lane as far as point F was maintainable (coloured yellow numbered 85). To the north Duck Lane was

- maintainable to point A (coloured yellow number 42). The Appellant draws support from *Eyre v New Forest Highways Board* [1892] as authority for the proposition that the status of a route between two culs-de-sac can be presumed to be the same as those culs-de-sac.
32. In *Eyre* the court gave consideration to evidence of use of the route which covered the 70 years prior to the case and evidence of the highway authority of maintenance of the route. In contrast with *Eyre*, there is no evidence of use of the appeal route by the public with vehicles, nor any evidence that the appeal route has been maintained as a public carriageway; the circumstances of this case are therefore quite different and no direct analogy with *Eyre* can be drawn.
33. It can be seen from the extracts of the handover map provided that a number of routes regarded as being publicly maintainable ended as culs-de-sac at farm premises or other private property (Redshard Lane and Kitland Lane for example). Although Duck Lane and Ladymead Lane were publicly maintainable in the late 1920s it does not necessarily follow that the section of land between the two terminal points was also subject to public vehicular rights. The 1930 handover map demonstrates that the appeal route was not considered to be a publicly maintainable carriageway. The public carriageway of Duck Lane and Ladymead Lane extends to serve the last property on those routes with the two terminal points being connected by public footpaths.
34. Bartholomew's maps of 1937, 1947 and 1965 show the appeal route by means of a single peck line running between the enclosed sections of Ladymead and Duck Lanes. The keys to these maps show that routes depicted in this way were among 'other roads and tracks'. These maps do not provide evidence of the status of the appeal route.
35. A survey of Churchill Park, Langford produced by Avon County Council as part of a Smallholdings Survey refers to a route known as Duck Street which was said to have crossed Park Farm to the site of Ladymead Cottage where it "branched southward along Ladymead Lane and northward to Stock along Duck Lane (now disused). Although most of it was already stopped up by the early 19<sup>th</sup> century, it is noticeable that the remaining public footpaths between Ladymead Lane and Lower Court Farm follow the alignment of the old highway". The documents considered above show that an enclosed route was evident on the ground in the eighteenth century but by the late nineteenth century some parts had ceased to be a visible feature in the landscape whereas others were overgrown. The smallholdings survey does not assist in determining the status of the appeal route.
36. As noted above, the survey of public rights of way conducted under the National Parks and Access to the Countryside Act 1949 resulted in public footpaths being recorded over parts of the appeal route. No evidence has been submitted to suggest that objections were made to the recording of public footpaths on the grounds that other public rights subsisted over them.

## Conclusions

37. The evidence adduced in the case does not demonstrate that the appeal route is a public vehicular way. Whilst the Finance Map shows that parts of the appeal route were excluded from claimed ownership, this is the only document which provides some support for the Appellant's case.

38. The test to be satisfied under section 53 (3) (c) (ii) is that the route shown as a highway of one description ought to be shown as a highway of another description. This requires evidence to have been discovered which demonstrates on a balance of probabilities that the claimed vehicular right of way subsists over the appeal route. The evidence adduced does not demonstrate that the claimed right of way subsists.
39. With regard to that section of the appeal route which is not currently recorded in the definitive map, there is no evidence which suggests that the appeal route is subject to public vehicular rights. As the evidence does not demonstrate that public vehicular rights subsist over A – D and E – F, the remainder of the route could not subsist as a section of public vehicular was as a cul-de-sac at either end. Consequently it would not be possible for the Appellant to reasonably allege that a public vehicular way subsisted over D – E.
40. Accordingly, it follows that the appeal should be dismissed.

**Formal Decision**

41. I dismiss the appeal.

*Alan Beckett*

Inspector

APPENDIX

