
Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 4 October 2018

Appeal Ref: FPS/W1850/14A/2

- This Appeal, dated 25 August 2017, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Herefordshire County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 17 March 2014 was refused by the Council and the applicant was notified by letter dated 10 August 2017.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the Appeal route as a Public Footpath.

Summary of Decision: The Appeal is allowed.

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 Charles Richardson, who researched and prepared the original application to Herefordshire County Council ('the County Council') although it was originally submitted by Peter Newman on behalf of the Open Spaces Society ('OSS'). Both Mr Richardson and Mr Newman are members of the OSS. It has been agreed by The Planning Inspectorate the appeal can be conducted by Mr Richardson.
 4. The County Council has made submissions in response to the Appeal which include its detailed Research Report to the Director for Economy, Communities and Corporate. The appellant has not submitted any documentation and makes reference to this same report in his submissions. I have relied on the copies of documents referred to, and appearing, in that report.
 5. Mr Richardson accepts the County Council's decision in relation to the majority of the route for which he originally applied, and which he states was only included on the advice of an officer at the County Council. He was principally concerned with only the section shown as B-D on the plan
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showing the claimed routes (attached to this Appeal as Appendix 1). His appeal relates only to that section.

6. This Appeal decision relates only to that section of the original application route which is being appealed.

The Main Issues

7. 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).
8. There is no user evidence in relation to the appeal and therefore the relevant provisions are those set out in Section 53(3)(c)(i) of the 1981 Act, which provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] 68 P & CR 402, and upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064:
 - Test A: Does a right of way subsist on the balance of probabilities?
 - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

9. 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, 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.

Reasons

Background

10. Mr Richardson contends that the County Council has rejected his evidence due to poor analysis and weighing of the facts, and that consequently it has failed in its responsibilities and erred in law.
11. He disagrees with the interpretation placed by the County Council on the evidence of historical mapping, and with the inferences drawn from the information contained in the Parliamentary Railway Plans, the Finance Act 1910 documentation, and the submissions made by Eardisley Parish Council in connection with the preparation of the first Definitive Map and Statement ('DMS').

12. The County Council has stated that its conclusions would have been the same if it had considered the evidence in relation only to the route B-D rather than the entire claimed route shown on Appendix 1 to this decision.

Historical Evidence

Commercial and Ordnance Survey Mapping

13. The first map which appears to show the Appeal route (B-C-D) is the Ordnance Survey ('OS') Two-Inch scale Working Drawings, made in 1815. These maps are very detailed and give the impression of being very accurate. I note that the map shows the Appeal route as a clear track, in the same way as it shows the start of the public right of way that is now known as EE6. The northern end of the Appeal route joins to a route now recorded as Bridleway EE45. The drawings also show the access track to Lady Arbour from the road that is now known as the A4111, but which is not a recorded public right of way.
14. Whatever the purpose of these maps may have been in military terms, and I accept that they cannot be taken as evidence of the existence of public rights, the Appeal route was clearly an obvious feature on the ground at that time. The County Council has been cautious in concluding that the line of the route shown is B-C-D, saying that the scale precludes certainty. However I do not consider that such cautiousness is warranted, particularly when taken in conjunction with other maps of a later date.
15. The route is shown similarly on an 1817 map by Henry Price and on the 1831 first edition OS map at the 1" scale, both derived, according to the County Council, from the earlier OS drawings; but it does not appear on the 1835 Bryant's map.
16. The reproductions in the County Council's submissions of the large scale first and second editions of the 1:2500 County Series OS maps are small and appear to have been reproduced from a digitised source. This can affect their interpretation as it is more difficult to see any difference in the depiction of the line features. However, the Appeal route is clearly shown as a feature which is represented throughout its length as having a double boundary, similar to its earlier depiction in the OS drawings. I also note that by the time of the second edition of the 1:2500 map, the footpath which is shown branching out of the Appeal route north of the railway line in the earlier edition is not shown. I refer to this route again when looking at the Railway Plans below.
17. I note that the 1952 Definitive Map is based on the 6" OS map, but no date for the underlying map has been provided. Nevertheless it must presumably pre-date 1952 and was also the map used for the surveying process. The Appeal route is clearly marked and its continuation to the north and south is annotated with the letters 'FP'.
18. I accept that this information cannot be taken to imply a public footpath, but it was clearly still a feature on the ground. This is good evidence of a continuing physical feature for at least 150 years or thereabouts, and of its appearance to a surveyor as being that of a path used on foot.

19. As depicted on the OS maps, the Appeal route is part of a feature which links other routes, some of which are acknowledged highways today, and which itself joins two other routes now recorded public rights of way (EE6 and EE45). There is thus good reason to attach weight to the fact that the public would have had access to the Appeal route at either end.

Tithe Map and Apportionment

20. Due to the fact that the Appeal route is only a part of the original application, I only need to concern myself with the 1840 Tithe Plan and Apportionment for Eardisley.
21. The County Council again takes a very cautious approach by claiming that the Tithe Plan shows a section of the Appeal route 'corresponding approximately' to section C-D (and on to E). Given that the route is shown on OS maps as running between two defined boundaries for the length equating to C-D, and in a similar fashion on the Tithe Plan, I consider that such caution is mis-placed.
22. No extracts from the associated Apportionment have been submitted so it is not possible to know whether or not the line of the Appeal route between points B and C is referenced in the description of the relevant field, nor whether or not the section which is depicted (C-D) is referenced at all in the Apportionment. I note also that the access track to Lady Arbour Farm from the south east is not shown either, suggesting to me that where a track passed across a productive field it was not indicated on the map. It might have been of assistance to have examined the Apportionment itself to help in interpreting the evidence of the Tithe Plan.
23. Whilst I accept that the Tithe Plan and Apportionment are unlikely to assist in determining whether the Appeal route was a public right of way, it is part of the picture demonstrating a long-standing route which had connections to other highways (in this case, what is now EE6).

Railway Plans

24. Mr Richardson considers that the plans relating to the construction of the Hereford and Brecon Railway, which were lodged in 1858/9, are important to his claim, as he believes that they show the Appeal route as being in the ownership or occupation of the public.
25. The Plans show the 'corridor' of the proposed railway line, and the extract provided is annotated with numbers relating to various shown features. The associated Book of Reference provides the key to the numbers and shows that the Appeal route between Points C and D was described as an 'Occupation Road' owned by William Percy Herrick, and occupied by William Bufton and Clement Downes. Between Points B and C the route is shown only as a pecked line on the plan and is not numbered separately from the field (no. 28).
26. Mr Richardson claims that the path numbered 26, described in the Book of Reference as a 'Footpath' in the ownership of William Herrick and in the occupation of the public, is effectively the Appeal route and that the public rights over it were later transferred to the route shown on the later OS

maps. (The line of Path 26 is that to which I have previously referred in Paragraph 16 above.)

27. Whilst this is an attractive supposition there is, unfortunately for Mr Richardson, no obvious evidence to support his speculation despite the assistance of archival research undertaken on his behalf by the Senior Archivist at the Herefordshire Archive and Records Centre. The Archivist himself speculates that a decision to divert the footpath may have been taken at an operational level and that no records have consequently survived. Whatever the legalities of this possible action, the fact remains that there is no evidence to show that this was done and an inference must be drawn from the circumstantial evidence.
28. The Book of Reference shows that Field 28 was described as 'Pasture Field and Cartway' owned by the same William Herrick and in the occupation of the same William Bufton. Clearly the cartway was more substantial than a footpath crossing the adjoining field and was important enough to warrant the Railway Company building a bridge which is still in existence today (despite the demise of the railway).
29. I do not consider that it is unreasonable to speculate that the public on foot, who apparently had the right to use the footpath in the adjoining field, would have taken to using the cartway, particularly as there may have been a need to alter the levels at the point where the bridge was constructed (which is the point at which the footpath joined, or diverged from, the cartway). The lack of any legal documents formally diverting the highway would not have prevented the public choosing themselves to discontinue the use of the footpath in favour of the cartway.
30. Whilst I accept the County Council's view that this is speculation, it needs to be considered in the light of other evidence available.

Finance Act 1910 Documentation

31. Mr Richardson places great reliance on the information contained in the Finance Act 1910 documents relating to the area crossed by the Appeal Route. The County Council has reproduced in its Committee Report a number of illustrations of the documents, including extracts from the map (much reduced) and entries in the Field Books. The County Council states that the Appeal route (B-C-D) crossed hereditament 74, although from the reproduction I have available to me it is difficult to identify that. I have had to assume that the portion of land to the north of the railway also forms part of hereditament 74 although the colouring of the extract makes that far from clear to me.
32. There appears to be no dispute that a deduction was made for the relevant holding in relation to public rights of way or user, and that the deduction is represented by the calculation '£4x25'. Mr Richardson considers that the County Council's conclusions on this issue suggest that they think there might be 25 footpaths at a deduction of £4 each, but I find no support for that belief. The County Council has merely stated that the hereditament was 265 acres in size and that the deductions could relate to a number of different paths, not necessarily B-C-D. They claim that no evidence has been found of instructions or simple formulae having been issued to local

valuers at the time as to how they were to calculate such deductions and that it was left to their discretion.

33. I believe that a number of instructions were, in fact, issued to valuers but the valuing of agricultural land is not a subject which was isolated to the need to raise taxes in 1910. Although it may to some extent be an 'art' it is one in which surveyors would be well-versed, and in my experience of looking at similar documents elsewhere, a deduction of £25 for a footpath is not an uncommon figure. I think that Mr Richardson's supposition that it related to four paths is not unreasonable. However, I accept that the identity of the paths is not clear, and cannot be related to the numbering of the paths given forty years later during the definitive map process. It is more likely to have related to a deduction relating to four separate fields, each having a footpath or part of a footpath in it.
34. Consequently, although it may be an attractive theory for Mr Richardson to suppose that the deduction covered the Appeal route, it can only be unsubstantiated speculation. In this respect I agree with the County Council's cautious assessment. More research would need to be done to be able to place any great weight on this evidence.
35. Notwithstanding my comments above, the information contained in the 1910 Finance Act documents does not constitute evidence that B-C-D was not a public right of way.

Property documents

36. Lady Arbour Farm was put up for sale in 1918 but the sales particulars make no mention of any public rights of way. This does not mean that none existed, but it does not serve to shed any light on alleged status of the Appeal route.

The Definitive Map Process

37. During the process of preparing the first DMS, Eardisley Parish Council submitted maps of the parish showing which paths within their area they considered to be public. The Appeal route formed part of a longer route (EE5) running a considerable distance to both the north and the south of the stretch which is the subject of this Appeal.
38. The County Council has provided details of notations marked on the Parish Council submission forms, of which there appear to be two for Path EE5. However, as far as the Appeal route is concerned, it appears to have been decided to delete it from the maps used as working copies for the production of the Draft Definitive Map, principally because the continuation into the adjoining parish of Willersley was not claimed by that parish. The owner of the property through which it would have run is said to have denied seeing anyone using it during the previous 40 years.
39. The County Council observes that the deletion of the path, and its omission from the resulting Draft and Provisional maps did not provoke any reaction and thus its status as a public right of way must have been in some doubt even then. Its continued absence from the DMS has not been challenged until now, despite an intervening review in 1972.

40. In the 1950s many paths were omitted from DMS all over the country for reasons which might now appear legally doubtful or spurious. One of the purposes of the 1981 Act was to permit corrections to be made. Consequently, dismissing a claim on the basis that the omission of the path was not challenged at the time is not evidence that it did not, or does not exist. The DMS is conclusive evidence only of what it shows, and not what it does not show.
41. The County Council has correctly identified that their duty is to consider whether, on the balance of probabilities there is sufficient evidence overall to demonstrate that a public right of way subsists or is reasonably alleged to subsist. However, the County Council's report goes on to say (at paragraph 7.10) that in order to demonstrate that a public right exists, or even reasonably allege that one exists, there needs to be sufficient positive evidence of a public right of way over the route claimed, and not just a lack of negative evidence. As far as Test B is concerned, I think that rather overstates the matter.
42. The County Council considers that there is insufficient coherent evidence to make a case that a public right of way subsists or is reasonably alleged to subsist over the Appeal route. However, all that is required at this stage is that, having considered all the relevant evidence available, the evidence is sufficient that a reasonable person could reasonably allege a right of way. There may be conflicting evidence, but if it would be reasonable to disregard that evidence for some reason, and reasonably accept the positive evidence, then a case in support of a right of way would have been made as far as Test B is concerned.
43. In this case, although the evidence is all documentary, there is nothing which could be described as evidence that B-C-D could not be a public right of way. Conversely, there is evidence that it is of long-standing existence on the ground; that it links two other public rights of way; that a railway bridge was built which is likely to have compromised access along an adjoining route acknowledged to have been a public footpath and which linked to it; that the Appeal route was an obvious alternative; and that in the 1950s, despite possible years of disuse, the local parish council (with the advantage of local knowledge) still considered it to be part of a much longer public right of way in 1951. The fact that they did not challenge the decision made by a County Council officer to delete the route does not amount to evidence that the route cannot be a public right of way.
44. I consider that Test B is adequately met and that it is reasonable to allege that a public right of way subsists over the Appeal route B-C-D on the plan attached to this decision.

Other Matters

45. I agree with the County Council that the Appellant has raised in his application and his appeal matters which are not relevant to the tests which must be considered as part of this process. However, I assume that these matters were included by Mr Richardson and Mr Newman as they were relevant to the County Council's scoring system for determining the order of priority in which such applications were made. I have had no regard to them in reaching this Appeal decision.

Conclusions

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

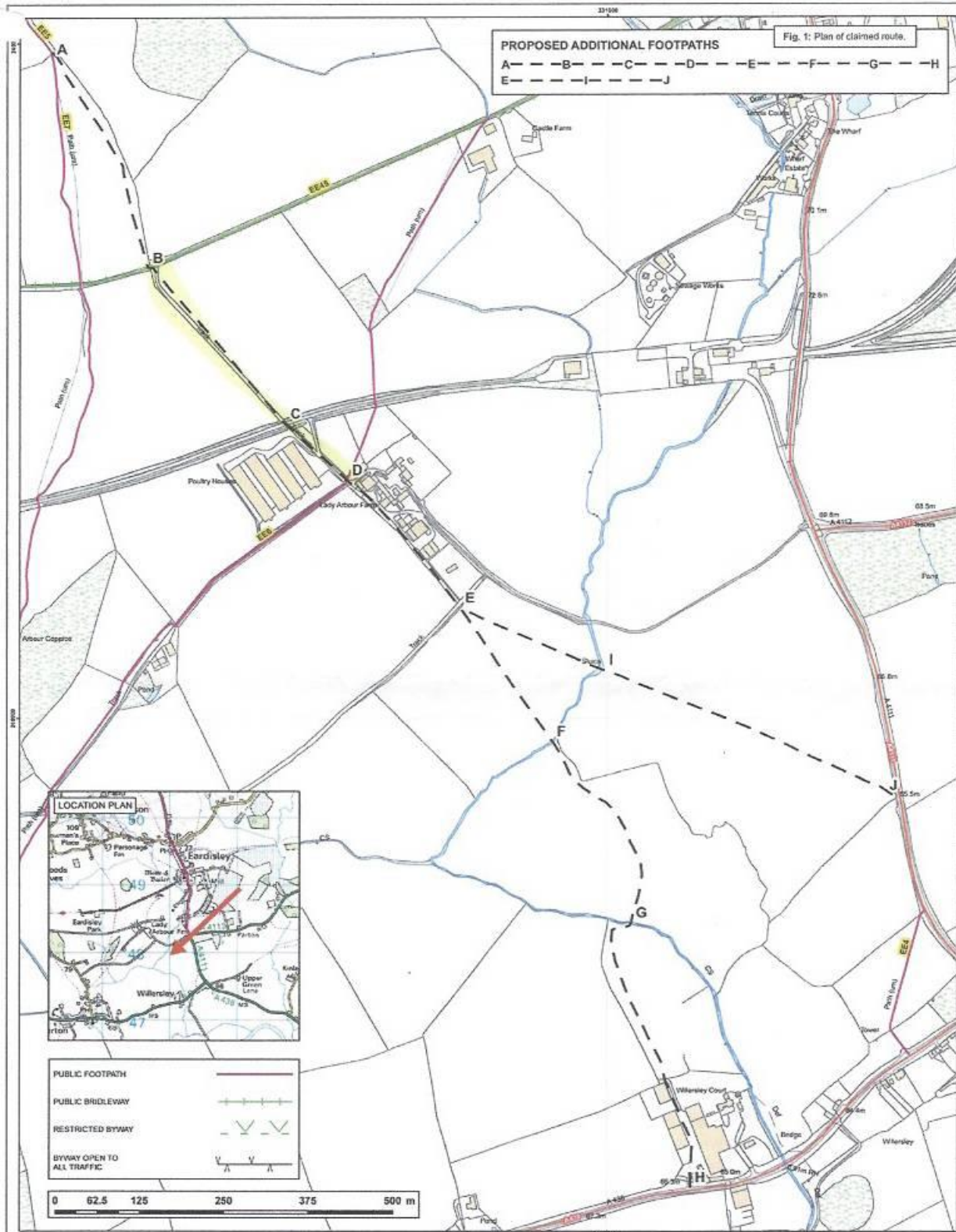
Formal Decision

47. The appeal is allowed in respect of the Appeal route B-C-D.

48. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Herefordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the Definitive Map and Statement for the area to show the Appeal route as a Public Footpath.

Helen Slade

Inspector



LOCATION PLAN- Wildlife and Countryside Act, 1981 - Application for Definitive Map Modification Order
 Addition of Public Footpaths, Parishes of Eardisley and Willersley & Winforton

SCALE 1:5,000 @ A3

Balfour Beatty Living Place
 Unit 3, Thorn Business Park
 Rotherwas Industrial Estate
 Hereford HR2 6J

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01/08/2017