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# Appeal Decision

by **D. M. Young BSc (Hons) MA MRTPI MIHE**

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

**Decision date: 13 February 2019**

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## Appeal Ref: **FPS/P2935/14A/6**

- The appeal is made under Section 53(5) and paragraph 4(1) to the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Northumberland County Council not to make an Order under Section 53(2) of that Act.
- The application was made on 13 October 2016 and was refused by Northumberland County Council on 4 September 2018.
- The Appellant (Mr T Liddle) claims that the appeal route from Chillingham Barns to Amerside Law (Parishes of Chatton and Chillingham) should be added to the Definitive Map and Statement as a Restricted Byway.

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

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## Procedural 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. The appellant, requests that the Secretary of State directs Northumberland County Council (NCC) to make a Definitive Map Modification Order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a Restricted Byway. The application was considered in a report to the Council's Planning and Licensing Committee on 23 August 2018. This appeal relates to the Council's decision not to make an Order.
3. I have not visited the site but I am satisfied that I can make my decision without the need to do so. For ease of reference, I shall refer to points G, A, B and H labelled on the plan submitted with the application.
4. In arriving at my conclusions I have taken account of the evidence submitted by the parties; the relevant part of the Wildlife and Countryside Act 1981 and the findings of the High Court in the *Bagshaw and Norton*<sup>1</sup> case.

## The Main Issues

5. Section 53 (3) (c) (i) 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 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. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

**Test A** - Does a right of way subsist on the balance of probabilities?

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<sup>1</sup> *R v Secretary of State for the Environment ex parte Bagshaw and Norton (QBD)[1994] 68 P & CR 402, [1995] JPL 1019*

**Test B** - Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

6. For the purposes of this Appeal, I need only be satisfied that the evidence meets Test B, the lesser test.
7. The appellant has not provided any evidence of use of the claimed route by the public. Instead the application relies upon historical documentary evidence comprising maps of the area. The main issue is therefore whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the claimed route to the Definitive Map and Statement (DMS) for the area.

## Reasons

### *The Route*

8. The claimed route commences at the junction of classified county road U1095 and C43 to the north of Chillingham. Section G-A proceeds in an easterly direction following the line of U1095 until it reaches Hollow Burn. Hereafter I shall refer to this part of the route as the 'western section'. On the eastern side of the burn the route traverses an arable field on an undefined line and then turns northwards towards Amerside Law following the field edge until reaching point B whereupon the route joins unclassified county road U1103 at point H. Hereafter I shall refer to this as the 'eastern section'.

### *Documentary Evidence*

9. The route first appears on the county maps of Fryer and Cary dated 1820 and 1820-32 respectively. These show the western section as a track but with no through route to Amerside Law. Greenwood's 1828 County Map depicts a track along the same general alignment as the claimed route. Given the relatively high cost of these maps at the time, it is not unreasonable to assume that their primary purpose was to show vehicular routes.
10. The 1824 Alnwick & Eglington Turnpike Plan shows a route leading from Chillingham Road to Hollow Burn. From there it is annotated "*from Belford*" and passes close to Amerside Law. On the 1828 Greenwood's Map the route is depicted as a "*cross road*" between two turnpike roads. The western section is shown on the 1838 Tithe Award for Chillingham. Although a route is shown on the eastern side of the burn and annotated "*From Amerside Law*", it is not possible to identify its exact alignment. The 1844 Tithe Award for Chatton clearly shows the eastern section of the claimed route.
11. The 1860 1<sup>st</sup> Edition 1:2,500 and 1866 1<sup>st</sup> Edition 25 Inch Ordnance Survey (OS) maps identify the western section as a "*public road*". The latter also clearly shows the eastern section passing through plots 544 and 541 which the Book of Reference records as "*arable & road*". The whole route is also shown on the 1894, 1897 and 1899 OS maps.
12. There is no deduction for a "*right of way or user*" in relation to the western section in the 1910 Finance Act Book of Records. However, this is far from conclusive as the existence and recording of highways was incidental to the purposes of the Finance Act and there was no obligation to the landowner to

claim a deduction. According to the Valuation Book entry the eastern section of the route was in the ownership of the Earl of Tankerville and occupied by William Grieve. A deduction of £13 for a "right of way or user" was made in respect of this hereditament. By studying the accompanying map, it seems more likely than not that this deduction was claimed in respect of the eastern section of the appeal route.

13. The 1925/6 3<sup>rd</sup> Edition 1:10,560 OS map annotates the eastern section as 'FP'. The western section is shown as a road on the survey map completed by the parish as part of the survey of public rights of way completed in the early 1950s under the National Parks and Access to the Countryside Act 1949. The 1957 Provisional Edition 1:10,000 OS map shows the western section enclosed by two solid lines. The eastern section is shown between two dashed lines and following the same general alignment towards Amerside Law. Whilst some of the eastern section is not shown on more recent OS mapping this does not demonstrate that a right of way had not come, or could not have come, into existence at an earlier date.
14. The western section is shown as a publicly maintainable highway on the 1951 Highway Map as is the section B-H. It was subsequently included in the 1958, 1964 and 1974 County Road Schedules where it is identified as being 0.28 miles in length. According to the Council, section B-H is currently recorded as a Byway Open to all Traffic (BOAT) on the DMS and along with section G-A is also shown on the List of Streets kept by the local authority pursuant to section 36(6) of the Highways Act 1980. I am thus satisfied that the evidence in this case is sufficient to lead to the reasonable allegation that vehicular rights have been established over these sections of the route at some point in the past. However, the evidence is insufficient to demonstrate that vehicular rights are reasonably alleged to have subsisted over section A-B.
15. I am satisfied that saving provision (b) under section 67 of the Natural Environment and Rural Communities Act 2006, applies to section G-A and accordingly this should be included in any future Order as a BOAT. Section B-H is already shown as a BOAT on the DMS and therefore does not require modification other than to record its width. In terms of section A-B, I concur with the Council's assessment that there is no relevant saving provision under section 67 and therefore this should be recorded in any future Order as a Restricted Byway.

### **Conclusions on Evidence**

16. The whole of the Order route is shown on a range of maps where it clearly formed part of a historical route connecting Amerside Law to Chillingham. I am therefore satisfied that the route subsisted as a physical feature from the early part of the 19<sup>th</sup> Century up until the early/mid part of the 20<sup>th</sup> Century.
17. I accept that many of the maps do not assist in identifying the status of the route. However, both the eastern and western sections of the route are annotated/recorded at one time or another as being public roads or footpaths. The western section of the route has been recorded as a publicly maintained road since 1951 and is still on the Council's List of Streets. Therefore, and notwithstanding that it is possible to identify some discrepancies between the various maps, I consider the totality of the evidence before me is clearly sufficient to meet the lesser test (test B).

18. Taking all of these matters into account, it is reasonable to allege that on the balance of probabilities a BOAT/Restricted Byway subsist over the western and eastern sections of the appeal route respectively.

### **Other Matters**

19. Those objecting to the appeal have raised various concerns including; the appellant's motives, the suitability of the route, the cost of providing a bridge over the burn, the effect on farming operations and public safety. However, these are not matters which can be taken into consideration under section 53 of the 1981 Act.
20. The fact that there has been no public use of the route in recent times does not preclude the possibility of a right of way being added to the Definitive Map bearing in mind the long established legal principle "*once a highway, always a highway*"<sup>2</sup>.
21. I have noted the comments of Mr & Mrs Brown who support the Council's decision not to make an Order on the basis that the Committee correctly assessed and appropriately weighed the available evidence. However, as no substantive minutes of the relevant Committee meeting have been supplied, I have no way of knowing how Members came to reject the advice of its professional Officers in relation to the mapping evidence which in my view provides strong support in favour of the appeal.

### **Conclusion**

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

### **Formal Decision**

23. The appeal is allowed and in accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Northumberland County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the Definitive Map and Statement in the terms set out above. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*D. M. Young*

**Inspector**

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<sup>2</sup> Harvey v Truro Rural District Council (1903)