



Appeal Decision

by Helen Slade MA FIPROW

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

Decision date: 9 September 2019

Appeal Ref: FPS/V3500/14A/5

- This Appeal, dated 11 May 2019, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Suffolk County Council ('the Council') not to make an Order under 53(2) of that Act.
- The Application dated 21 March 2016 was refused by the Council and the applicant was notified by letter dated 1 May 2019.
- 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 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. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
2. Submissions have been made by the appellant (Mr John Andrews), and Suffolk County Council. The Council has relied upon its report to the Development and Regulation Committee which recommended refusal of the application. Mr Andrews has relied upon his appeal submission.

The Legal Framework

3. The original application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify it upon the occurrence of specific events, cited in Section 53(3). This application is based solely on the interpretation of historical Ordnance Survey mapping. No user evidence of any sort has been submitted.
 4. The appropriate event is therefore that as 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:
 - Test A: Does a right of way subsist on the balance of probabilities?
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- 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.

5. Section 32 of the Highways Act 1980 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

6. The route claimed by Mr Andrews commences at the northern end of Clare Footpath 14 and runs in a generally easterly direction to meet the B1063 road at Grid Reference TL 756 481. Footpath 14 is currently a cul-de-sac which was described in the original parish statement (after surveys carried out in the 1950s) as terminating at Trundle's Farm. The farm is no longer extant.

Common Law dedication

7. Dedication at common law requires either that there be evidence of an express intention to dedicate a way as a highway, together with the acceptance of that dedication by the public; or alternatively, a sufficiency of evidence from which it is possible to infer that a dedication must have taken place.
8. Given the absence of any user evidence, it is necessary to examine the mapping evidence to see whether there is any basis for inferring that it was the intention of the landowner or landowners at any time to dedicate the appeal route as a public footpath. The onus is on the person asserting that the right exists to show that the facts overall support an inference that a highway has been dedicated, allowing for the fact that at this stage of the process it is only necessary to meet the requirements of Test B outlined above.

Commercial and Ordnance Survey Mapping

9. The appellant submitted copies of three Ordnance Survey ('OS') maps with his original application and relies on his interpretation of those maps and what he describes as the logical analysis of the situation. The Council examined several additional documents, as listed and appended to the report to the Development and Regulation Committee meeting which took place on 30 April 2019.
10. The earliest map to which reference is made, and which shows the appeal route, is a map produced by Bryant in 1824/5. The Council points out that the manner in which the route is shown does not conform to any of the routes identified in the key, but that its inclusion suggests that, physically, it had the appearance of more than a public footpath. The current definitive footpath route is not indicated at all, and I agree with the Council that it is likely to be the consequence of the small scale of the map.
11. A Tithe Plan dating from 1848 shows the line of the appeal route, but the accompanying written Apportionment does not identify the route separately

- from the fields and land parcels it crosses. I agree with the Council's assessment that this must be interpreted as meaning that the path or track was part of the arable field and was subject to the payment of a tithe. It does not provide any evidence in relation to its status in terms of a potential highway.
12. A series of OS maps have been examined, by both the Council and the appellant, beginning with the 1885 edition of the 6" scale OS map. A route representing the appeal route is shown on all the OS base maps, the most recent of them identified as the 1957 2½" OS map. The date or scale of the base map for the current definitive map is not identified but is likely to post-date the 1957 map. I note that these latter two maps are the only ones which appear to indicate any sort of linking path between the northern end of the definitive line of Footpath 14 and the appeal route.
 13. However, the 1885 6" OS map suggests a link between the appeal route and a route running south from the vicinity of Trundle's Farm but slightly to the east of the line currently recorded for Footpath 14 at its northern end. This is shown more clearly on the 1886 25" OS map, and is also shown on the 1891 6" OS map. Subsequent editions of the OS mapping omit this link, and the line of the present Footpath 14 is the only north-south route retained. Neither the appellant nor the Council make reference to the existence of this earlier link.
 14. I also note that there is a water feature (pond or watering place) depicted on all the mapping (apart from Bryants map) slightly to the south of the farm buildings at Trundle's Farm and it remains on the maps even after the farm itself has disappeared. This feature is not referred to by either the appellant or the Council. The water feature lies within the parcel of land through which the appeal route passes in order to link the northern end of Footpath 14. Any suggestion of a linking path across this area is only shown on the two maps I have referred to in paragraph 12 above, and both of these maps are rather more schematic in appearance.
 15. As a further matter of interest in this case, I note that the line of Footpath 14, as shown on the current Definitive Map, does not follow the line of the footpath marked on the OS base map, and does not accord with its historic line as shown on the earlier OS maps dating from 1902 onwards or thereabouts. The middle section of Footpath 14 as shown on the Definitive Map is recorded on the opposite side of the field boundary from the OS base map, crossing it in the opposite direction part way along. This does not affect its northern terminus, but despite the Parish Survey recording that it ended at Trundle's Farm, both the survey map and the subsequent definitive maps and statements show and describe the route terminating some yards to the south of the farm buildings at a boundary of some sort.
 16. So the question is, simplistically put, is it reasonable to allege that the appeal route linked to the line of the north-south path currently reflected in the definitive line of Footpath 14, and that it is therefore a highway? The appellant relies on the principle that a highway should normally have a terminus on another highway and that the logical deduction is that these two paths met to form a continuous route; Trundle's Farm not being a legitimate destination for the public and there being no other continuing route from Footpath 14 which meets a highway.

17. In the absence of any evidence of use by the public, it is a matter for the appellant to demonstrate with sufficient cogency to meet the required test. I am not persuaded that either of the legal judgements referred to¹ are of particular assistance in this case, except that I am prepared to accept that common sense must play a part. However, to accept the conclusion that the appellant has reached, based on the evidence submitted, together with that examined by the Council, requires that there is no other conclusion that could reasonably have been reached.
18. The first problem is that the line of the north-south linking route (now represented by Footpath 14) has clearly moved. It would seem that there may have been a link with the line of the appeal route up to around 1891, but that link did not match entirely with the line of the route claimed by the appellant. Nevertheless, there appears to have been a continuous route in existence at that time although that link was lost at some point after 1891, and thus there is a break in the consistency of the mapping evidence which does not assist the appellant's case.
19. The second complication is the presence of the water feature. It would not be unreasonable to ascribe the existence of the appeal route to the need to access water for stock etc. The same could apply to Footpath 14, although I accept that there is no reference to that being the reason for the existence of the path. Nevertheless, if the word 'awarded' on the parish survey is to be taken with any degree of authority, it might be the case that the water feature marked on the maps was a public watering hole. I do not consider that it would be unreasonable to reach that conclusion. It would certainly be no less reasonable than the assumptions made by the appellant.

Conclusion on the documentary evidence

20. The Council considers that the evidence submitted does not meet the required tests for making an Order.
21. In the absence of any evidence of use it is very difficult to show, to the required level of proof, whether highway rights subsist over an unrecorded route. It is only necessary at this stage to show that it can be reasonably alleged that they subsist. However, the evidence required to meet even the lesser test needs to be consistent and positive.
22. In this case, I therefore agree with the Council's assessment that Mr Andrews logical approach cannot be faulted but I consider that, in the absence of evidence of public use, there are other equally logical conclusions that could reasonably be reached. I also consider that the alteration in the route in the vicinity of Trundle's Farm at the end of the 19th century (not referred to by either of the parties) introduces a complicating element which has not been addressed either by the appellant or the Council.
23. Thus although I agree that the evidence suggests the existence of a long-standing route on most of the alignment of the appeal route, and that it formed, at one time, a continuous through route, I do not consider that the evidence provides a sufficiently cogent basis to support a reasonable allegation of public rights over the alignment claimed by the appellant.

¹ *Eyre v New Forest Highway Board 1892 and Roberts v Webster 1967*

Conclusions

24. Having regard to these, and to all other relevant matters raised in the written submissions, I conclude that the Appeal should not be allowed.

Formal Decision

25. The Appeal is dismissed.

Helen Slade

Inspector