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| **Appeal Decision** |
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| **by Gareth W Thomas BSc(Hons) MSc(Dist) DMS MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 April 2022** |

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| **Appeal Ref: FPS/X2600/14A/7** |
| * The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of East Sussex County Council not to make an Order under section 53(2) of that Act. |
| * The application dated 22 January 2017 was refused by Norfolk County Council on 20 September 2021. |
| * The appellant claims that the Definitive Map and Statement of Public Rights of Way should be modified so that Cley-Next-the-Sea Footpath No.20 would be upgraded to a restricted byway.   **Summary of Decision: The appeal is allowed.** |
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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 Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site as I am satisfied that I can make my decision without the need to do so.
3. I attach a copy of the map showing the claimed route.

Main Issue

1. Section 53(3)(c)(ii) of the 1981 Act states that an order should be made on the discovery by the authority 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.
2. There are two tests that aid this consideration:
3. Firstly, does a right of way subsist on a balance of probabilities, in this case, sufficient to warrant modifying the DMS to include the appeal route as a Restricted Byway?
4. Secondly, is it reasonable to allege on the balance of probabilities that such 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 such a right of way subsists.
5. The evidence adduced is primarily documentary. Section 32 of the 1980 Act requires a court or tribunal to 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. Therefore, the main issue before me is whether the documentary evidence discovered demonstrates that the appeal route is a public vehicular carriageway which should be recorded in the definitive map and statement as a Restricted Byway.
7. Common law also requires me to consider whether the route and the actions of landowners have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.
8. The application is supported by documentary evidence (with no evidence of use) which might give rise to a presumption of statutory dedication under the provisions of the 1980 Act or an inference of dedication at common law. I deal with the main elements of the evidence separately below.
9. The quality of some of the photocopies provided is poor, in particular some of the written texts. However, neither party has challenged this and I have therefore based my analysis on the descriptions provided by the parties.

Reasons

1. The appeal route known locally as Whymerhill Lane commences on Bridgefoot Lane and runs in a southerly direction for some 300m before it connects with Holt Road.
2. The application the subject of this appeal was supported by a range of sources, including Enclosure Awards, Tithe, Finance Act, Bryant’s and Faden’s Map records. The Council investigated a further range of documentary sources including Ordnance Survey maps, Bartholomew Maps and INSPIRE HM Land Registry map images. Following consideration and rejection by the Council of the application, the appellant takes issue with a number of the findings made in the Council’s report, and which I refer to below.
3. The appellant explains that the evidence should be taken as a whole and separate pieces of evidence should not be taken in isolation or discounted where such evidence is not conclusive. It is though an accepted position of the parties that the alignment appears unchanged over time.

***Documentary evidence***

1. Early maps submitted in support of the existence of the appeal route and its status as a road include Faden’s Map of Norfolk (1797), the first large scale map of the County. The Council accepts that this map shows the route is of ancient origin and is supportive of the appellant’s view that it carried public carriageway rights at the time. Research of two enclosure awards that include the parish of Cley-Next-the-Sea in 1812, which includes Field Dalling and the award of 1824 involving the parish of Wiveton would in the Council’s view indicate that public rights that may have previously existed had been removed.
2. No key to the map or those used in the Enclosure Awards have been provided although the appellant points out that there is little or no difference between the way those roads that exist today were depicted on these maps and the present public footpath on Whymerhill Lane.
3. The appeal route is depicted on Bryant’s map of Norfolk (1826) as a ‘Good cross or driving road’, which suggests that the surveyor preparing this map believed that the route was suitable for carriages. The Council relies on the fact that by that time, the public use had already been removed in the two enclosure awards and the surveyor would not have necessarily established this possibility. However, arguably, the Bryant map was prepared for use by the public and it would therefore have sought to indicate routes that could be accessed by carriages. The reference to ‘good cross’ would also suggest that it linked the two other roads to the north and south. As such, I believe it can be given greater credence than that suggested by the Council.
4. The 1841 Tithe map and apportionment for Cley-Next-the-Sea shows the route not subject to any apportionment and depicted in the same way as the other roads used by the public. However, the Council point out that the Tithe map could equally have been used to show an occupation road upon which no tithe was payable and which is supported by the Council’s view that the 1812 enclosure award set out that the road was private. The appellant’s explanation of maps being drawn to indicate titheable land and that landowners would have been keen to ensure that titheable land was shown correctly to avoid payments and that the depiction of the claimed route being a public vehicular highway at the time of the assessment is probably likely.
5. The Council accepts that the Ordnance Survey County Series 1st edition of 1886 and the 2nd edition of 1905 clearly show the named route of Wymerhill Lane as a bounded lane between the two highways of today. The value of the historical OS maps is that they generally provide a reliable indication of the presence of particular physical features when the land was surveyed. They do not purport to identify the status of the tracks or roads shown and their evidential weight will accordingly be limited. However, there are no markings to depict that the Lane was gated at either end and it does have the appearance of affording connection between Bridgefoot Lane and Holt Road. On balance, it is quite conceivable that the depiction of the claimed route in this manner could be reflective of it having public status.
6. The Bartholomew’s Map of 1903 like the Bryant’s Map above, was produced for use by the public and shows the claimed route as an uncoloured road, which according to the appellant, is described in the key as “inferior and not recommended to cyclists”. Taking the key to the map into consideration, it shows the route in the manner of a road rather than a footpath or bridlepath. Overall, I do not find that this map provides much greater assistance than the OS mapping and it is on the basis of probabilities that they lend some support to the appellant’s case.
7. The exclusion of the claimed route from the surrounding hereditaments on the Finance Act map 1910 provides a good indication of highway status and is more likely to be representative of a vehicular highway. However, I note that the Finance Act’s primary purpose was not the identification of highways and there may be other reasons for the exclusion of the route. Whilst nothing has been provided to indicate another reason for the exclusion of the route from the surrounding hereditaments, I accept that this matter adds value to the document.
8. There is no recorded or known owner of the land crossed by the claimed route in the Land Registry INSPIRE Index Polygons Service. It appears as a distinct lane separate from the adjoining land parcels and this could potentially be supportive of it being an ancient highway.
9. The Council’s view as to the lack of utility of the claimed route by the public is conjecture given the various mapping that depicts the lane connecting two highways thus enabling a through route. Whilst it provides no support for vehicular status, it could be reflective of the current use of a historical road that has fallen into disuse for the purpose of public vehicular traffic.

*Conclusions regarding the Documentary Evidence*

1. Overall, it is my view that on the balance of probability the documentary evidence is sufficient to show that the claimed route should be recorded as a Restricted Byway.

***Common Law***

1. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
2. In this case, no landowner claims to have taken action to prevent use of any kind by the public or claims ownership of the route.

**Other matters**

1. There are physical boundaries in the form of hedgerows that have been in a consistent position for an extensive period of time, probably in line with the documentary evidence. These hedges form the extent of the public footpath and the higher rights that are now proposed would also exist over the full width of the present route up to these boundary features. I am satisfied that the width can be so defined by the present hedgerow boundaries.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities it is reasonable to allege that the claimed route is a Restricted Byway. I also note that the Council has reconsidered its position with regard to this application and is now taking a neutral stance in respect of the claimed route. The appeal should therefore be allowed.

**Formal Decision**

1. The appeal is allowed and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Norfolk 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 to upgrade Cley-Next-the-Sea Footpath No.20 to a Restricted Byway. 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.
2. Under normal circumstances the authority would be directed to make the necessary order within 3 months of this direction. However, as a result of the present situation of restrictions following the Covid-19 outbreak, exceptional circumstances have arisen and I therefore direct that the order should be made within 6 months of the date of this direction.

Gareth W Thomas

INSPECTOR