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| **Appeal Decision** |
| **by G D Jones BSc(Hons) DipTP DMS MRTPI** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 July 2022** |

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| **Appeal Ref: FPS/X2600/14A/8** |
| * 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 Norfolk County Council (‘the Council’) not to make an Order under section 53 (2) of that Act. |
| * The application dated 17 May 2017 was refused by the Council on 25 November 2021. |
| * The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a restrictive byway from Brakefield Lane (U35020) to Mattishall Road (U35014) in the parish of Garvestone.   **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 papers submitted.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties and the relevant part of the Act 1981. I have also taken into consideration the findings of the Courts, including in respect to the following cases:

* R v Secretary of State for the Environment ex parte Simms and Burrows [1990] 60 P & CR 105 (Simms and Burrows);
* Mayhew v Secretary of State for the Environment [1992] 65 P & CR 344 (Mayhew);
* Kotarski V Secretary of State for Environment, Food and Rural Affairs [2010] EWHC 1036 (Kotarski);
* R (oao Roxlena Ltd) v Cumbria County Council [2019] EWCA Civ 1639 (Roxlena);
* R v Secretary of State for the Environment ex parte Bagshaw and Norton (QBD) [1994] 68 P & CR 402, [1995] JPL 1019 (Bagshaw and Norton): and
* R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 367 (Emery).

Main Issues

1. The principal issue is whether there had been a discovery of evidence so that the terms of Section 53 (3) of the 1981 Act were engaged.
2. If section 53 (3) was engaged, the issue would be whether the documentary evidence demonstrated that the appeal route should be recorded in the definitive map and statement.

**Legislative Framework**

1. 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 not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery by the surveying authority 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.
2. It is the discovery of evidence by the surveying authority which engages the provisions of section 53 (3) of the 1981 Act and the ‘events’ specified in section 53 (3) (c) of the Act. Evidence can be discovered by the surveying authority or that evidence can be discovered by a third party, such as the Appellant, and provided to the surveying authority for its consideration. In Simms and Burrows, Mayhew, Kotarski and Roxlena, the Courts have examined what the ‘discovery of evidence’ entails.
3. If the surveying authority has ‘discovered’ evidence, then the question arises as to whether it can be concluded that a public right of way subsists or can be reasonably alleged to subsist.
4. 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?

**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.

1. In relation to Test B, the Court of Appeal recognised in the Emery case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In Emery, Roche LJ held that "… The problem arises where there is conflicting evidence … In approaching such cases, the authority and the Secretary of State must bear in mind that an order … made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."
2. No evidence of use has been submitted in support of the Appellant’s contention of the existence of the claimed public right of way that is the subject of the appeal. Their evidence is derived from documentary sources.

**Background**

1. The appeal concerns a route which crosses land to the south of Brakefield Green and to the northeast of Tanners Green. It links Brakefield Lane to the west with Mattishall Road to the east. It is described on various Ordnance Survey maps as ‘Back Lane’.
2. The Appellant states that while no one single piece of evidence is conclusive, when taken as a whole the evidence demonstrates highway reputation over many years indicating that the route has highway status and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. The evidence has been provided primarily by the Appellant with additional material and comment from the Council and from the Ramblers’ Association Norfolk Area. The latter supports the application.
3. The evidence includes various historic maps, the 1812 Inclosure Award for Yaxham, Westfield, Whinburgh and Garvestone, the 1839 Garvestone Tithe Map and Apportionment 1839, Ordnance Survey object name book records, Inland Revenue valuation records, Ministry of Food records, definitive map and statement records, documents associated with the handover of highway authority responsibilities to the Council, aerial photographs and land registry information.
4. The dispute between the Appellant and the Council relates to whether the historic documentary evidence together is sufficient to conclude that a public right of way subsists or can be reasonably alleged to subsist along the route. I consider the various evidence types in turn and then draw an overall conclusion on the evidence in its entirety.

**Documentary Evidence**

*Faden’s 1797 Map of Norfolk*

1. It is common ground between the main parties that this map does not show the route. I have found no reason to disagree.

*Inclosure Map & Award of 1812 for Yaxham, Westfield, Whinburgh & Garvestone*

1. The Award refers to the eighth private road in Garvestone. It is clear that a limited number of people were entitled to make use of this road and that they were responsible for its upkeep. The messuages Cottages and land referred to in the Award as belonging to these named people, although not entirely clear, appear to be located to the north of the route such that the route would have provided access to that land.
2. It has been suggested that this eighth road might relate to only a section at the eastern end of the application route rather than its full extent. However, I see no good reason to draw such a conclusion as it appears to extend at least as far west as the route. In making this assessment I have taken into account that the route overall follows a broadly east-west alignment whereas the Award refers to the eighth private road proceeding in a north west direction. Nonetheless, the reference to a ‘north west direction’ is made in the context of the road ‘branching out of the fourth described public road’, the Mattishall Road, which is correct, as at that point it does follow a broadly north western alignment turning more westward as it progresses.
3. Moreover, there is no indication that any part of the route was awarded as a public road. It also seems unlikely that a public road would have been created leading to a private road thereby forming an impasse of this type. While the route does not appear to be shown as gated, a private road does not necessarily need to be gated, particularly where it serves enclosed fields.
4. There is also an extract map within the evidence that is said to have been prepared as part of the claim on behalf of the Rectory of Carleton Forehoe and the Rectory of Kimberley in the enclosure of Garvestone. One of the fields is said to be bound to the south by ‘a common lane’. Nonetheless, this term has no specific meaning in rights of way law or practice. As outlined above, the route appears to have been for the common benefit of a few named people as a private road. Had it been a public road or lane at that time, it seems more likely that it would have been referred to as such.
5. For the reasons outlined above, therefore, this evidence indicates that the route was a private road established by the Award. Although not necessarily preventing the subsequent establishment of public rights over it or necessarily precluding use of the route by others at that time, the route was private at the time of the Award.

*Bryant’s 1826 Map of Norfolk*

1. The route is shown on this map, the cover of which says it is produced from an ‘actual survey’. The route is depicted in the same manner as ‘Lanes and Bridleways’ as shown in the map’s key. The Appellant maintains that as the map was made for sale to the public it is unlikely to show routes that the public could not use and that reference to ‘bridleway’ in the key might imply public use. However, this does not necessarily follow.
2. Indeed, it seems most likely that the route was included as a record of what could be found on the ground at that time, following the ‘actual survey’. It does not denote that the route was a public highway considered to have equestrian and / or vehicular rights, only that it was a lane and / or bridleway in the terms of the map’s key, either or both of which could have been for private use only. In the context of the Inclosure Award, only some 14 years earlier, it seems most likely that it was a private route, included on the map as one of many features in the landscape to help map users orientate themselves. Thus, rather than be a source of confusion, this would be an aid to navigation.

*Ordnance Survey Map c1838*

1. The route is shown on the ‘One Inch series’ map from around 1838. While it is shown in a similar manner to the roads that are acknowledged as public today, like the Bryant’s map, there is no record here of it being a public road. Again, in the context of the Inclosure Award and the foregoing evidence, it seems most likely to be a private road.

*Garvestone Tithe Map and Apportionment of 1839*

1. The route is shown on the map and no tithe apportionment is attributed to it. It was in the landowner’s interests for untithed roads to be shown correctly in order to minimise payments. The route is also depicted and coloured in the same manner as other routes now known to be public roads. While these matters might be viewed as indicating that the route was considered as public at that time, the Council has pointed out they could also indicate this was an occupation road, where more than one owner held private rights of access. upon which no tithe was payable and there are other routes in the parish that are depicted in the same way but which are not recorded as public roads today. Again, in the context of the Inclosure Award and the foregoing evidence, it seems most likely that the route was a private road at that time.

*Ordnance Survey County Series Map dated 1885*

1. While it is not coloured, the route is recorded on the map. Although another uncoloured route shown is now recorded on the definitive map as a restricted byway, there is no clear evidence here that the route in question was a private or a public road at that time.

*Ordnance Survey Object Name Book 1904/1905 and Revised 1926*

1. This source refers to the route as a public lane and to others elsewhere as occupation roads. Consequently, it lends some weight to the case that the route was a public road at that time. Nonetheless, that weight is tempered considerably given that it was not the purpose of the Ordnance Survey to establish the legal status of routes, while the purpose of the object name book was to assign an appropriate name to a route. Unsurprisingly, therefore, there is nothing to indicate that any investigation of the legal status of the route took place at that time. Notwithstanding their level of knowledge on the matter, which seems likely to have been very good, there is also no way of knowing whether or on what basis the people who provided information to assist with naming were asked about the route’s status.

*Bartholomew’s Maps*

1. The Council, rather than the applicant, refers to Bartholomew’s maps of 1903 and 1921. The maps state that *representation of a road or footpath is no evidence of the existence of a right of way*. In any case, the route is not shown on either map.

*Inland Revenue Valuation*

1. The 1910 Finance Act map shows the route uncoloured / white and so exempt from charge. Public roads would have been exempt from charge and hence would be shown uncoloured. Nonetheless, it seems at least as likely that the route is uncoloured on the basis it was an occupation road.

*The Ministry of Food National Farm Survey 1941-42*

1. These maps indicate the extent of agricultural landholdings. The route is not included in the mapped survey, such that it appears in the same manner as public highways on the map. However, it does not follow that it was a public road and again it seems at least as likely that the route is uncoloured on the basis it was an occupation road.

*Definitive Map and Statement*

1. The route is not marked on the definitive map. The definitive map does though include two footpaths numbered 2 and 3 which terminate at Back Lane. Footpath No 2 is described as entering Back Lane almost opposite the northern end of Footpath No 3, while footpath No 3 is described as starting from Back Lane almost opposite the southern end of Footpath No 2. It is notable, therefore, that these footpaths terminate at Back Lane and are ‘almost’ opposite each other, rather than directly opposite. This arrangement, as set out on the definitive map and statement, is supportive of the case that the route, Back Lane, carries public rights, at least over the section joining the two footpaths.

*Highway Authority Handover Maps*

1. Until 1929 Mitford and Launditch Rural District Council (MLRDC) was the local highway authority, at which time the Council took over this role. The maps associated with the handover of responsibilities are rather inconsistent in respect to the route’s status. The 1929 map produced by MLRDC does not mark the route as publicly maintainable, whereas surrounding routes are shown as maintainable.
2. In contrast the ‘Quadrant Handover’ map, also produced in 1929, shows the route in a similar manner to public vehicle routes and has a reference number, 278. The Council advise though that this map was a copy made by the Council at the time it took over responsibility for maintaining highways from MLRDC. Surprisingly, this map shows Mattishall Road, immediately to the east of the route, as not being highway even though the wider evidence indicates that this is a public highway of longstanding.
3. Given that this map appears to be a copy produced by the receiving authority and that it seems to contain a significant error in respect to Mattishall Road, its reliability is limited. In contrast the map produced by MLRDC appears far more reliable bearing in mind that it was produced by a highway authority of longstanding, which it is reasonable to assume would have been very familiar with its area and responsibilities, and given that its record of surrounding vehicular routes is consistent with the highway network as it is recorded today.
4. The ‘1940s/50s' copy of the Handover Map shows the route as maintainable. The Council does not have a record of why this set of maps was created, but suggests that it may have been to consolidate information from various sources. It seems likely that the information recorded on this map is carried over from the 1929 ‘Quadrant Handover’ map as discussed above.
5. Moreover, the Council has advised that its records also show that the ‘1940s/50s’ map was the subject of an auditing process to check whether details on the map were correctly recorded, albeit that the exact auditing process is unclear. One outcome of the audit was the finding that a route described as *road from SL177 to SL155 is not a County Road*. This description is consistent with the route and as such suggests that the latter copied handover map was incorrect.
6. In this regard, I note the Appellant’s submissions concerning how the nearby ‘CRF No 1’, a county road used mainly as a footpath, was treated relative to the route. However, in practice this does little to assist the understanding of how the route’s status was considered at that time. On balance, bearing in mind the foregoing points on these aspects of the evidence, it seems most likely that at that time the Council did not believe the route to be maintainable.

*Aerial Photographs*

1. These include RAF aerial photographs from 1946, as well as others from 1988 and 2021, all of which were provided by the Council. The 1946 images show the route present on an alignment comparable to earlier Ordnance Survey maps. The 1988 image is similar, albeit that the western end of the route was at that time part of the farmyard of Brick Kiln Farm, while the 2021 image shows the farmyard extending further eastward along the route.

*Land Registry*

1. The western end of the route is registered as being owned, yet the remaining, majority of the route is not registered. Similar to the Inland Revenue Valuation evidence, this could be because the route is considered as highway or because multiple owners have an interest in the land with no one owner having claimed sole possession of most of the route. Nonetheless, land ownership is distinct from highway rights so one does not necessarily inform the other. Accordingly, the evidence seems at least as likely to indicate that the unregistered section of the route is not registered on the basis that multiple owners have an interest in the land compared to the likelihood that this is due to reasons associated with it potentially having public access rights.

**Conclusion**

1. As the appellant acknowledges, there is no single piece of evidence that proves the route carried a public right of way. Taken together, although there is some evidence in support of the appeal, on the balance of probabilities a right of way does not subsist along the route and nor would a reasonable person, having considered all the relevant evidence available, reasonably allege that a right of way subsists here. I summarise the reasons for this conclusion below.
2. As outlined above, the Ordnance Survey Object Name Book evidence provides support for the case that the route was a public road at that time. However, the weight it carries is limited bearing in mind that the purpose of the object name book was to assign an appropriate name to a route and that the Ordnance Survey’s role was not to establish the legal status of routes. The small misalignment of Footpath No 2 and No 3 where they meet the route also provides limited support for the case that it carries public vehicle rights.
3. The Inclosure Map and Award evidence, overall, indicates that the entire route was awarded as a private road for use by a small number of named people. In the context of the Inclosure Award, the bulk of the remaining evidence (including the Bryant, Ordnance Survey and Bartholomew maps; the Tithe, Inland Revenue, Ministry of Food and Land Registry evidence; and aerial photographs) is most likely to indicate that the route was a private occupation road. The Highway Authority evidence, including the handover maps, is rather inconsistent. Nonetheless, for the reasons outlined above, when considered together it indicates that the greatest likelihood is that the route was not publicly maintainable.
4. While there is some evidence that supports the Appellant’s case, it is limited and outweighed by the wider evidence which indicates that the route is a private road. The documentary evidence, therefore, does not demonstrate that public rights over the appeal route are reasonably alleged to subsist.

**Formal Decision**

1. I dismiss the Appeal.

G D Jones

INSPECTOR