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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: 25 April 2023** |

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| **Appeal Ref:** **FPS/D0840/14A/2** |
| * 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 Cornwall Council’ (‘the Council’) not to make an Order under section 53 (2) of that Act. |
| * The application dated 30 August 2010 was refused by the Council on 23 March 2022. |
| * The Appellant claims that the definitive map and statement of public rights of way should be modified by downgrading a section of Byway Open to All Traffic 554/47 Tintagel to a footpath from Ordnance Survey Grid Reference SX 0808/8863 (adjacent to the boundary between the properties of St Yse and St Cleder) to where it joins Footpath 554/46 Tintagel.   **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. I have not visited the site but I am satisfied I can make my decision without the need to do so.

Main Issues

1. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (the DMS) under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made on the discovery 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 shown as a highway of a different description.
3. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by such an order.
4. Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, October 2009, provides that the evidence needed to downgrade a way recorded in the DMS with “higher” rights to one with “lower” rights will need to fulfil certain stringent requirements. These are that:

* the evidence must be new – an order to downgrade a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
* the evidence must be of sufficient substance to displace the presumption that the definitive map is correct.
* the evidence must be cogent.

1. In considering the evidence, I have also had regard to the judgement in Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] (Trevelyan) and in particular to the following statement by Lord Phillips M.R., “Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists”.
2. In view of the above, my starting point is that the appeal route is presumed to exist, as a Byway Open to All Traffic (BOAT). It is for those contending that a mistake has been made to provide evidence which demonstrates that, on a balance of probability, the appeal route is of a lower status than that shown in the DMS. In reaching my decision I take into account the caselaw referred to in the evidence.

**Reasons**

1. The right of way in question had been a footpath, No 47, in the DMS prior to being reclassified as a BOAT. The appeal relates to a comparatively short section of that right of way as a proportion of its full length. From the information before me it appears that the change in status from footpath to BOAT stems from a Limited Special Review by the Council made pursuant to the Countryside Act 1968. Tintagel Parish Council (the Parish Council) provided information to and corresponded with the Council as part of this process.
2. A form relating to footpath No 47 was completed by the Parish Council in April 1970. Amongst other things, it states that the Parish Council considered that footpath No 47 should be reclassified in the draft revision as ‘a byeway open to all traffic’ (sic). A letter from the Council to the Parish dated 10 August 1973, which seems to mark the end of correspondence between the two parties on this matter, indicates that the County Surveyor *is prepared to recommend the County Council to reclassify as byways* certain footpaths including No 47. Nonetheless, the route only appeared in the DMS for the first time as a BOAT, rather than as a footpath, in 1986.
3. What happened between 1973 and 1986 is unclear, albeit that intended changes to rights of way which had objections to them were the subject of Inquiries that took place in June 1981. Although there do not appear to have been any objections to the proposed upgrading of footpath No 47 to a BOAT, it seems likely that the time lag between 1973 and 1986 was at least in part due to the timing of those Inquiries. Of course, the Wildlife and Countryside Act 1981 predates the 1986 version of the DMS on which the route first appeared as a BOAT, but from the information before me it appears that the decision to upgrade the right of way to a BOAT was taken in the early 1970s, most likely in 1973, rather than in the 1980s.

***Discovery of Evidence***

1. In reaching its decision not to make an order, the Council concluded there had been no discovery of evidence sufficient to overturn the initial decision that vehicular rights subsist over the appeal route. Nonetheless, the Council now acknowledges, the Finance Act Maps were not released to the public until later in the 1970s. Consequently, it seems very unlikely that they would have been taken into account in the decision to reclassify the route to a BOAT even though the pursuant change to the DMS did not occur until the 1980s. On that basis alone, therefore, there has been a discovery of at least some evidence, which is ‘new’.

***Consideration of the Evidence***

1. In making my decision as to whether the evidence is sufficient to displace the presumption that the definitive map is correct and whether that evidence is cogent, I have considered all of the information before me, not only the ‘new’ evidence. I focus, nonetheless, primarily on the aspects of the evidence where there is disagreement between the appellant and the Council.
2. Regarding the Tithe Apportionment of 1842, the appeal route is not shown as a feature on the associated Map. Accordingly, it seems most likely that this section of what is now BOAT No 47 did not exist at that time.
3. The numerous Ordnance Survey maps before me collectively evidence that a track existed along the appeal route from the 19th century through to at least 1950. Nonetheless, they provide no evidence regarding whether use of the track was public or private, nor indeed what modes of transport used the route. Consequently, they are of little assistance.
4. In respect to the Finance Act 1909/10 evidence, there is a distinction as to how BOAT No 47 is depicted to the west, where it follows an enclosed road, compared to the section that is the subject of the appeal, which is largely included within Hereditament 243. The only deduction for a right of way in that Hereditament is for a footpath, which in any event has a different alignment to the appeal route. This evidence, therefore, suggests that the appeal route was not considered to be a right of way at that time.
5. Pursuant to the National Parks & Access to the Countryside Act 1949 the Parish Council was asked to carry out a survey of all the public rights of way within its area. In respect to what was later to become BOAT No 47, the Parish informed the Council in 1951 that, amongst other things, *this footpath goes on an Accommodation Road for 3 parts of its distance* and *there is only one gate and one stile*. Additionally the Parish Council stated that it *has not been repaired at public expense*, that *the farmer usually does the pruning* and also refers to *uninterrupted user by public for over 20 years*. The Council prepared Draft and Provisional Maps showing route No 47 as a footpath rather than as a BOAT.
6. As touched on above, pursuant to the Countryside Act 1968, the Council carried out a Limited Special Review whereby all Roads Used as Public Path (RUPPs) were reclassified either as a BOAT, over which there were vehicular rights, as a Bridleway or as a Footpath. Parish Councils could also put forward any footpaths or bridleways which they considered should have been classified as RUPPs. As outlined above, this led to the Parish Council identifying that footpath No 47 should be reclassified as a BOAT.
7. Later that year, 1970, the Council wrote to the Parish Council explaining, amongst other things, that for a footpath to be reclassified as a BOAT it had either to already be a RUPP, which does not appear to have been the case in respect to footpath No 47, or the way was shown as a footpath in the DMS and which in the opinion of the Council ought to have been there shown as a RUPP. In the latter option, the letter adds that the Parish Council must be in a position to say that there were probably public vehicular rights over the way at the relevant date of 1 October 1957.
8. While much later in the letter there is reference to objections in the context of the Council looking to the Parish Council for evidence of public vehicular use over the ways identified, including footpath No 47, this does not equate to such evidence only being required in the event of an objection as has been suggested by the appellant. While there is nothing within the material before me to indicate that the Parish Council did produce evidence that there were extant vehicular rights over route No 47, it seems likely that the documentation is incomplete.
9. Certainly there are no records of Committee reports and minutes, as might be reasonably expected, following the Council’s 10 August 1973 letter, or other evidence of the process taken by the Council after that letter was produced to the point where it made its decision. It is also reasonable to assume that due process was followed and, notwithstanding the appellant’s assertions, there is no evidence that it was not followed in any significant way.
10. I also note that as part of the material produced pursuant to the Limited Special Review, the Parish Council indicated that part of route No 47 was not suitable for cars and that, regarding the route at large, there was limited room to turn and no parking spaces. However, the section identified as being unsuitable for cars lies well beyond the section under consideration in this appeal and, in any event, car use is only one aspect of use to be taken into account.
11. None of the documentary information before me, including the Finance Act 1909/10 documents, is evidence that a right of way, including a BOAT, does not exist over the appeal route. There is also user evidence. However, most of this post-dates the time when it was concluded that the appeal route should be reclassified as a BOAT, while those which concern its use during the time of the Limited Special Review can only represent those moments in time when the user recalls using the route rather than a more comprehensive and contemporary perspective that would have been available at the time that decision was likely to have been made.

**Conclusion**

1. For the foregoing reasons, although there is new evidence, the evidence in its totality is insufficient to displace the presumption that the definitive map is correct and insufficiently cogent. Accordingly, having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

**Formal Decision**

1. I dismiss the appeal.

G D Jones

INSPECTOR