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| **Appeal Decision** |
| On Papers on file. |
| **by John Dowsett MA DipURP DipUD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food, and Rural Affairs** |
| **Decision date: 29 April 2024** |

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| **Appeal Ref: ROW/3305346**  **Footpath 16 Aveton Gifford to road running from Chilleton Cross to Fernhill Cross, Devon** |
| * The appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Devon County Council not to make an Order under Section 53(2) of that Act. * The application was made on 30 January 2021 and was refused by Devon County Council on 15 July 2022. * The Appellant claims that the appeal route running between Footpath 16 Aveton Gifford to road running from Chilleton Cross to Fernhill Cross should be added to the Definitive Map and Statement as a public footpath.   **Summary of decision: The appeal is dismissed.** |

Preliminary Matters

1. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
2. The appellant, Ms Lucy Wilson, requests that the Secretary of State directs Devon County Council (the Council) 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 public footpath. The application was considered by the Council’s Public Rights of Way Committee on 30 June 2022 and a formal decision was issued on 15 July 2022. This appeal relates to the Council’s decision not to make an Order.
3. The plan submitted with the application indicated the claimed route starting from Point A on the map, located at the junction of Stanton Lane with the minor road that connects Chilleton Cross to the B3196. From here it follows the route of Stanton Lane northwards before turning west to run across a small field and thence through an area of woodland. On exiting the area of woodland, the claimed route then runs west across an agricultural field to meet public Footpath 16 at Point B. The Council included a plan in the report considered by its Public Rights of Way Committee which added additional intermediate reference points (Drawing No: HIW/PROW/22/28 and hereinafter referred to as the Council’s plan). For clarity, as the Council’s evidence refers to points on this plan, and the appellant’s evidence refers to a number of sections of the route, I have referred to the points on the Council’s plan throughout this decision unless otherwise stated. A copy of the Council’s plan is attached as an Appendix to this decision.
4. The report to the Council’s Public Rights of Way Committee sets out that between Points A and C on the Council’s plan, which corresponds to the metalled portion of Stanton Lane, is presently a highway maintainable at public expense over which public rights currently exist. The report also sets out that there is a pending stopping up order under Section 116 of the Highways Act 1980 relating to the section of Stanton Lane between Points B and C on the Council’s plan.

Main Issues

1. Section 53(2) of the 1981 Act requires a surveying authority to make orders to modify its definitive map and statement in consequence of certain events specified in Section 53(3). One type of event is set out in sub-section 53(3)(c)(i): “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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic".
2. The evidence in this case is primarily documentary evidence. The application was not accompanied by any evidence purporting to be claimed use of the route by local people or others. In these circumstances, it is necessary to consider whether it can be inferred from the documentary evidence that there has been a dedication of a right of way at common law.
3. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability? (Test A) or has a right of way been reasonably alleged to subsist? (Test B).

Reasons

1. Notwithstanding that there is a pending stopping up order, public rights indisputably currently exist over part of the claimed route. The principal matter for consideration in this appeal is whether those public rights on foot exist over the section of the claimed route between Points C and F as shown on the Council’s plan.
2. The appeal submissions include a number of historic Ordnance Survey (OS) map extracts and extracts from the 1839 Tithe Maps for the area. The OS maps show a road or track running from Point C on the Council’s plan to the edge of Stanton Higher Coppice. From here a track is shown as a double pecked line running through the coppice and then across a field to join another similarly marked track (which is now recorded as Footpath 16). The section of track from Point C to the edge of the coppice is also indicated on the Tithe Map but the continuation through the coppice and beyond to what is now Footpath 16 is not shown. Although part of the route is shown on the Tithe Map and identified in the Apportionment as a road not charged with Tithes, it was not the purpose of the Tithe Map and Apportionment to distinguish between public and private highways.
3. There is documentary evidence that the settlement at Stanton was historically more extensive than exists today. However, it gradually declined throughout the nineteenth century until only one house remained by 1906.
4. The First Edition OS map and the Tithe Map show the track serving a group of buildings that are largely gone by the time of the Second Edition, with only one small building, visible as a ruin today, remaining. These maps also show the whole of the track as one land parcel (land parcel 796 on the OS) separate from the adjoining land parcels. On the OS Second Edition 25 inch to the mile map, within land parcel 790, the track to the edge of the coppice is marked with braces that indicate that the land over which is runs is part of parcel 790. This is different from the section of track or road forming Stanton Lane from Point A to Point C on the Council’s plan which is indicated as being a discrete land parcel in its own right (land parcel 796). Although not conclusive, it is, nonetheless, indicative that by the time of the OS Second Edition, this section of the track served a different purpose from the section now forming Stanton Lane.
5. This would also tie in with the Council’s point in respect of the solid line across the track at Point C adjacent to land parcels 789 and 798 which the Council suggest indicates the presence of a gate or a barrier. Whilst a solid line is indicative of a boundary feature, or a gate, a track or road may continue beyond this feature. I am also mindful of the disclaimer on the OS maps that the representation of a road, track or footpath is no evidence of the existence of a right of way.
6. The most recent OS map in the evidence which shows some of the claimed route dates from 1959. It is clear that, historically, a combination of roads, tracks and paths has existed over the claimed route, and this is not disputed by the Council. The status of these routes and their usage is, however, a matter of disagreement.
7. The appellant’s evidence also includes photographs of parts of the claimed route. Although these are not titled, and there is no plan indicating the location or direction that the photographs were taken from, it is broadly possible to determine what they show. None of the photographs show the section of the claimed route from Point C on the Council’s plan to Point D. The two photographs showing Point F and part way between Point E and Point F do not show any indication of a path or desire line. The evidence indicates that this section of path fell out of use in the 1960’s and there is no map evidence later than 1959 that has been put to me which would gainsay this. The appellant’s photographs also purport to show the claimed route through the coppice, however, vegetation and leaf litter obscure anything on the ground in these photographs and there is nothing on these which would indicate a route which was used for any length of time.
8. Tithe Apportionment 1529, indicated as a road on the Tithe Map, covers the section from Point A to the eastern edge of the coppice. This would correspond with the road or track shown on the First Edition OS map. However, by 1904 and the publication of the Second Edition there has clearly been a change as the Second Edition OS shows the last section of this road apparently separated from the remainder of the road at approximately Point C on the Council’s plan. There is some dispute between the parties as to the significance of this. However, on the Second Edition map, beyond this point the land under the lane shown as part of the adjoining land parcel and has effectively been severed from the land parcel constituting Stanton Lane. To my mind, this is suggestive that something more than the simple erection of a gate had occurred in the period between the First and Second Edition OS maps. This period is also the period that from other documentary evidence marks the terminal decline of the settlement.
9. The appellant points out that the instructions to OS Field Examiners sets out that paths to wells should be shown. Whilst the first edition OS map shows a well on the east side of the coppice near to the claimed route, this is not shown on the Second Edition. Although the position of this well is such that it would be readily accessible to the residents of Stanton there is nothing in the evidence that would indicate that this also served the farms at Wizaller. In addition, there are other wells marked on the OS maps on the southern part of Stanton Lane and so this well was not the sole source of water for the settlement and may have served only a small number of properties.
10. Extensive entries from the Loddiswell Highway Surveyors accounts have been provided that include many references to road repairs in and around Stanton between 1774 and 1852. Whilst there are many references, only one is relatively specific, in the period 1774-75, for “repairing 34 yards of road leading from Staunton Copse to Staunton Brook”. It is common ground that “Staunton” and “Stanton” are references to the same place.
11. The appellant asserts that this relates to the continuation of the claimed route through the coppice. The Council point out that this reference is unclear as to what it refers to and that there are a number of copses and watercourses in the area. None of the map or documentary evidence identifies either Staunton (or Stanton) Brook or Staunton Copse. Within the context of eighteenth century English, “copse” and “coppice” are broadly synonymous, with the former being a diminution, or contraction, of the latter. The map evidence identifies three coppices, Stanton Higher, Middle, and Lower Coppice but does not show the names of any of the watercourses in the area. The map evidence also shows a watercourse on both the east and west sides of the coppice. To my mind it does not seem logical to refer to a section of path through the coppice and between these two watercourses as leading “from Stanton Copse to Stanton Brook”. Consequently, I would concur with the Council’s position that this reference to a road cannot with any degree of certainty be ascribed to the claimed route.
12. The other entries are less specific and whilst there are some references to Stanton Lane itself, it is unclear whether the references to Stanton Road and Stanton Hill relate to the claimed route. Nor is it possible to discern whether the references to Stanton Lane relate to parts of the lane outside the extent that is recognised by the Council as being highway maintainable at the public expense.
13. Reference has also been made to the 1910 Finance Act Map and Valuer’s Field Books. Under the terms of this act, landowners were able to apply for a reduction in the duty payable in respect of their land where that land was crossed by public rights of way. Although these records can be evidence of a right of way over land and use an OS base map, they do not identify the route of the right of way. The appellant asserts that the lack of any easements recorded for Heridaments 10, 12 and 13 indicates that the route where it passes through these must be public. The claimed route follows Stanton Lane where it passes through Hereditament 10, and Hereditaments 12 and 13 adjoin the route.
14. An easement gives a landowner the right to make use of another nearby piece of land for the benefit of his own land. For an easement to exist there must, amongst other things be a dominant and servient piece of land (the dominant land is that owned by the owner of the right; the servient land bears the burden of the easement) and the dominant and servient owners must be different people. Hereditament 12 lies adjacent to the stretch of Stanton Lane, which the Council accept is highway, and before the gate or fence shown on the Ordnance Survey map which corresponds with Point C on the Council’s plan. An easement would therefore not be required. In addition, the provided extracts from the Valuer’s Field Book show that the Heridaments 10, 12, and 13 are all within the same freehold ownership. An easement cannot exist where the dominant and servient land owners are the same. Consequently, the lack of recorded easements in the Valuer’s Field Book is due to all the land being within the same ownership and Heridaments 10 and 12 having access to the section of Stanton Lane which is currently a highway.
15. The Valuer’s Field Book does show an addition of £12 recorded in Hereditament 9 (the land to the west of the coppice) for a footpath in the calculation of the gross value, which correlates with a later £12 deduction recorded under Public Rights of Way. The Council suggest that this reference is to what is now recorded as Footpath 16. The appellant suggests that it is the claimed route as Footpath 16 was a cart road. I do not find the appellant’s argument compelling as the route of what is now Footpath 16 is clearly marked as a footpath on both the First and Second Edition OS maps as well as on the Finance Act Map, which is on an OS base map. The FP (footpath) annotation on the OS map is used to prevent footpaths being mistaken for routes which could be used by horses or wheeled vehicles, which contradicts the appellant’s contention that what is now Footpath 16 was a cart road. The claimed route has no footpath annotation. It is therefore more likely that the reference in the Valuer’s Field Book to a footpath is to the one explicitly marked as such on the map. The use of OS base maps also explains the footbridge annotation on the Finance Act Map, which the appellant considers significant, as this annotation is present on the OS map and not an addition to the Finance Act Map.
16. No evidence from the Valuer’s Field Book has been provided in respect of Hereditament 262 which includes the coppice and so what, if anything, is recorded in respect of that section of the claimed route through Hereditament 262 is unknown.
17. The documentary evidence shows that there was historically a much larger settlement at Stanton, and it could be argued that the inhabitants would have used the now lost section of Stanton Lane between Point C on the Council’s plan and the edge of the coppice, to access their properties. However, there is no substantive evidence to determine how many properties were historically present beyond point C on the Council’s plan. The map evidence also shows that by the time of the Second Edition OS map, this section of Stanton Lane had been blocked at Point C and the land over which the lane ran had been incorporated into the adjoining land parcel. There is nothing in the evidence that would show that there has been any regular use of this section of the route, as of right, by the public at large for approximately one hundred and twenty years.
18. There is very little evidence which would support the contention of wider public use of the footpath through the coppice and across the field to meet Footpath 16. Whilst the 2003 English Heritage (now Historic England) survey report in respect of Stanton shrunken settlement refers to the hollow lane running through the centre of the settlement as part of a through route, it also makes it clear through both the text and annotations on the included plan that the continuation of the lane runs north east as it leaves the field and enters the woodland. This corresponds with the Ordnance Survey maps which show a track running along the eastern boundary of the coppice and into the moor to the north. The claimed route also enters the woodland but runs to the west. The report also notes that the section between the present track and the edge of the woodland is visible as an earthwork which suggests that the former track had been assimilated back into the landform by that time.
19. The survey report does refer to the claimed route in so far as it notes that there is a bridge crossing the stream on the western edge of the village marking the start of a footpath which branches off the main hollow lane and leads to the nearby settlement of Wizaller to the west. The Historic England report is unspecific as to the route through the coppice and beyond. Whilst it is not in doubt that a path existed until around the 1960’s, there is not any compelling evidence to suggest that this was used by the wider public as of right.
20. There is some documentary evidence that Loddiswell Parish Council contributed to repairs to a footbridge in 1895 and 1896. However, the Council do not accept that this is evidence of the Parish Council recognising that the bridge is public, suggesting that the person carrying out the work requested a contribution and the fact that the full amount requested was not paid, only a smaller sum as a gratuity, indicates that the Parish Council did not consider the route or bridge to be public. From the language used in the Parish Council minutes, I would agree with the Council’s interpretation.
21. There is no user evidence supporting the claim, and representations made by the landowners of the section of the claimed route between Point C and Point F on the Council’s plan are to the effect that no one has walked the route or asked for permission to walk the route during time that they have owned the land, approximately 17 years and 20 years respectively, and there is less substantive evidence, recounted by interested parties from discussions with former owners, that there has not been any use in approximately 60 years. It is also pointed out that the field crossed by the claimed route between Points E and F has at various times had electric fences in place for livestock control purposes which had the route been in regular use would likely have generated complaints of which there is no record.
22. The question that has to be asked is would a reasonable person on considering the available evidence conclude that a right of way can reasonably be alleged to subsist? There is no doubt that a track and footpath are shown on the OS maps from the First Edition until 1959, however, this of itself is not indicative of a right of way. There are currently public rights over the section of Stanton Lane from Point A to Point C. At the time the Tithe Map and Apportionments were produced the section of track between Point C and the edge of the coppice also appears to have been recognised as a road, although the Tithe Apportionments do not distinguish between public and private roads, and it is shown as such on the First Edition Ordnance Survey Map. At this time Stanton was still a functional settlement. By the time of the Second Edition Ordnance Survey, circumstances had changed, the settlement is largely abandoned, the lane is potentially gated at Point C, and the land over which the track runs has been incorporated into the adjoining land parcel which speaks against this section being a public road. There is nothing in the evidence that would suggest that there has been any public use of this section of the claimed route for over one hundred years.
23. There is no current or historic user evidence which would indicate that the section of the claimed route between Point D and Point F has been used by the wider public at any time. The sole reference in the historical highways accounts is not sufficiently specific to conclude that it refers to the section of the claimed route through the coppice.
24. There is no recent evidence which would suggest that public rights exist and the appellant’s whole case leans heavily on historic map evidence and numerous, non-specific references in highways accounts. The appellant argues that the route is alleged to subsist by reputation. The Oxford English Dictionary defines reputation as “the beliefs or opinions that are generally held about someone or something”, and “a widespread belief that someone or something has a particular characteristic”.
25. The Council have referred to Parish Council minutes from 1896, through to 1950 which cover the time period when the Rights of Way Act 1932 and the National Parks and Access to the Countryside Act 1949 brought in new aspects of law and required surveys of rights of way. These minutes are silent in respect of the claimed route, although other potential rights of way are identified. To my mind, had there been a generally held or widespread belief that a public right of way existed over the claimed route, it would have been noted during this period given the local knowledge of the Parish Council. The Parish Council minutes from 1950 indicate that the Parish Council was both well aware of and diligent in its survey work.
26. Whilst the footpath is shown on the first and second edition OS maps, examiners were instructed to record paths on the ground that appeared to be used but the instructions are also clear that the OS was not concerned with identifying rights of way.
27. The section of the claimed route between Points C and D on the Council’s plan is that for which there is potentially the strongest argument that public rights may exist. This served the settlement of Stanton until around the end of the nineteenth century. Given the documented time that the settlement existed and the historical size of the settlement it could be argued that the inhabitants would be considered as the wider public, although it is not clear how many properties were served by this section of the route.
28. This notwithstanding, it is clear from the OS maps that between the publication of the First Edition and the Second Edition maps an event or events occurred which appears to have led to this section of the claimed route being severed from the land parcel it previously formed part of and being incorporated into a different one with the route being interrupted by a gate or other barrier across the track. As this corresponds to the time period during which the village was more or less completely abandoned, it is likely that there is some connection between the abandonment of the village and the section of road being taken out of general use. There is no evidence before me that would suggest that there has been any use by the wider public of this section of the claimed route in the last one hundred and twenty years. The 1959 1:25000 OS map shows an “other road” with a poor, or unmetalled, surface which terminates at Point C on the Council’s plan. Beyond this, there is no marking on the map that would indicate a route between this point and the edge of the coppice. At the east edge of the coppice a single pecked line indicating an unfenced footpath is shown running through the coppice to meet Footpath 16. Although the extract in the evidence has been annotated in red by the appellant to show the claimed route, the base map beneath this does not show a continuous route from Point C to Point F.
29. Although there is evidence of works being carried out to roads around Stanton in the eighteenth and nineteenth century, this is not sufficiently specific to relate directly to the claimed route either between Points C and D on the Council’s plan or beyond the edge of the woodland.
30. The single reference to repairs to a road between Staunton Copse and Staunton Brook cannot be attributed with any certainty to the section of the claimed route through the coppice as there is no evidence that has been put to me which identifies either of these features. Nor does the claim gain any support from the Finance Act Map and Valuer’s Field Books.
31. There is no user evidence to support the claimed route and although the appellant suggests that the reputational evidence is sufficient there is nothing before me which would suggest that there was a widespread belief that the route is or has been a public right of way. On the face of the evidence, it would be reasonable to allege that a combination of road and path had previously physically existed over the claimed route. However, even taking the various pieces of evidence together it is doubtful that from this it could be inferred that the whole of that route was a public right of way. There is almost no evidence in respect of use of the route between Points D and F on the Council’s plan and, from this, any suggestion that there are public rights over this part of the route can only really be speculation.
32. The comments from interested parties, two of whom are the owners of land over which the claimed route passes between Points C and F, set out that no-one has used the claimed route or sought permission to use the claimed route for a period of at least 20 years and possibly longer. No user evidence has been put forward by the appellant that would contradict these statements and given that the photographic evidence is far from clear in respect of whether there is in fact an obvious walking route on the ground, I have no reason to doubt the veracity of these statements. In addition to this there is no compelling evidence of regular public use of the route between points D and F.
33. Whilst there is one representation supporting the appeal and setting out that the claimed route would be a welcome recreational route, this is not evidence of use *per se*, rather an aspiration to use the route. There is some anecdotal evidence in this representation that a small number of walkers were potentially deterred from proceeding down Stanton Lane towards or beyond Point C. The evidence does indicate that the claimed route was blocked in recent times by a gate at approximately Point B on the Council’s plan, this was subsequently required to be removed by the Highway Authority as it would have been erected on land which was within the adopted highway.
34. However, the photographic evidence shows that there is a further fence and field gate just beyond Point C and users on the present highway of Staunton Lane, the surface material of which also changes in nature at this point, would reasonably assume that there was no further access. Whilst the representation refers to illegal obstruction of a “path, bridleway and road” it is unclear whether this refers to the whole of the claimed route or just the section between Points B and C.
35. There is nothing in the evidence put to me which would suggest that the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way can be shown to have occurred expressly. On the contrary the evidence in the form of historic Ordnance Survey maps shows that over a century ago, the claimed route was gated and the land over which the section between points C and D was severed from the land parcel containing the remainder of Stanton Lane and incorporated into a field. There is no compelling evidence of public use over the whole of the route, nor does the evidence adduced by the appellant give any support to an inference of dedication of the whole of the route as a right of way. Although the appellant states that the Council have not shown that a right of way does not exist, this is not the test, and an inability to disprove does not prove.

**Conclusion**

1. It is not in doubt that, historically, there has been a physical path or track over the whole of the claimed route, and it is beyond doubt that public rights exist over Stanton Lane between Points A and C shown on the Council’s plan. However, beyond this point it is less clear.
2. The appellant’s case relies on documentary and map evidence. Whilst the OS maps show the existence of a physical feature, they carry a disclaimer in respect of rights of way. The Tithe Map and Apportionments only indicate the presence of a road between Point A and approximately Point D on the Council’s plan and do not indicate anything beyond Point D. The Finance Act Map and Valuer’s Books do not record the location of rights of way and, as set out above, the submitted evidence is incomplete and does not cover all of the land over which the claimed route passes. Whilst there is a reference to a right of way within one Hereditament, this reference is more likely to be to a different route than to the claimed route. Although extensive highway maintenance records were submitted, these are insufficiently precise to attribute them to sections of the claimed route and there is no evidence of this type with regard to the section of the claimed route between Points E and F on the Council’s plan.
3. There is no substantiated evidence of any historic use, or recent attempted use, of those parts of the claimed route which are not currently an adopted highway by members of the public as of right, i.e. without force, secrecy, or permission.
4. For the reasons set out above, I find that having regard to the evidence before me, it cannot be reasonably alleged that a public right of way subsists over the whole of the claimed route and, consequently, the appeal must fail.
5. I therefore conclude that the appeal should be dismissed.

John Dowsett

INSPECTOR

**Appendix**