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| **Appeal Decision** |
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| **by Paul Freer BA (Hons) LLM PhD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 June 2024** |

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| **Ref: ROW/3319177** |
| * 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 not to make an order under Section 53(2) of that Act. |
| * By application dated 19 November 2004, Mr and Mrs Dyckhoff claimed that a route between Point A and Point D on Byway 34 Mullion should be deleted from the definitive map and statement for the area and that a Byway between Point A on Byway 34 Mullion and a new Point B should be added to the definitive map and statement for the area. |
| * The application was refused by Cornwall Council and the appellant was formally notified of the decision by letter dated 27 February 2023. |
| **Summary of Decision: The appeal is allowed in part** |
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Preliminary matters

1. The application was initially made by Mr and Mrs Dyckhoff as the then owners/occupiers of the property known as Polbream. This appeal against the refusal of that application has been made by Ms Suzy Black, the current owner/occupier of Polbream, with the agreement of Mr and Mrs Dyckhoff. I am satisfied that it is appropriate for me to deal with the appeal in this case.
2. The application form clearly seeks to add a byway (the form doesn’t specify which type) to the Definitive Map and Statement (DMS) for the area from Polbream Gateway down Laflouder Lane to Meres Lane. The Council has identified this a route A-B. The application form also seeks to vary the particulars of the DMS for the area from Polbream Gateway through Polbream land to Meres Cliff. The Council has interpreted that to mean deleting that byway open to all traffic. The Council has identified this route as A-C-D.

**Main Issues**

1. The key issue to be determined is whether it can be shown that an error occurred at the relevant date of the original definitive map. It is settled case law that the relevant tests in sections 53(3)(c)(i) and 53(3)(c)(iii) of the 1981 Act are linked. The appellants do not submit that an additional footpath has been dedicated. Rather they argue that route A - B (Laflouder Lane) should have been recorded on the DMS, with route A - C - D (Polbream Drive) being recorded in error.
2. It is also settled case law that whether a right of way that is marked on a definitive map in fact exists, there is 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 that such evidence existed. But there must be evidence of some substance if, on the balance of probabilities, it is to outweigh the initial presumption that the right of way exists.
3. I must therefore determine whether there is cogent evidence to suggest that route A - C - D as recorded on DMS should not be recorded. It is convenient to consider this first before then considering route A-B.

**Reasons**

***Route A-C-D***

1. The essence of the appellant’s argument is that this is a case of mistaken identity. It is necessary therefore to consider why the route was included on the DMS for the area in the first instance. This in turn requires assessing the documentary evidence.
2. The route A to D appears on various maps and documents. It is shown on the Greenwood map of 1826-27, on which the alignment broadly corresponds with existing recorded rights of way at this location. The Greenwood map showed both public and private ways, and is therefore is not in itself an indication of public of a public right of way.
3. The route is clearly identifiable on the 1840 Tithe Map as being depicted in a colour, using a sienna wash, which makes it distinct from the surrounding apportionment. This is typically good evidence that the route was being used by the public, insofar as it was in the interest of landowners to exclude unproductive land so as not to be subject to tax. The route is depicted on the Tithe Map as following the current line of Byway 34.
4. Records produced in relation to the Finance Act 1910 show a not-insignificant deduction for rights of way for the hereditament crossed by route A-C. This is indicative of the route being a public right of way at that time. This is more likely than not to coincide with existing tracks recorded on the underlying Ordnance Survey (OS) map on which the various hereditaments are plotted, one of which coincides for a large part of its length between A-C.
5. Neither the 1879 OS map nor that produced in 1888 include the full extent of the track that coincides with Byway 34. As the Council points out, this might suggest that with two immediately adjacent paths heading towards the same destination, one had been allowed to fall into disrepair. Nevertheless, by 1895, the route had been reinstated on OS maps and thereafter a well-defined track on that line is shown on the OS maps until at least 1950. Whilst the inclusion of a way on an OS map provides no evidence as to the status of that route, it is a good indication of the physical presence of that route at those times.
6. Pursuant to the provisions of the National Parks & Access to the Countryside Act 1949 (the 1949 Act), Parish Councils were required to carry out a survey of all the public rights of way in the parish as part of the Definitive Map (DM) process. An extract from the original Mullion Parish Survey from 1951 shows path 34 running to the north of Polbream, largely coinciding with the position of the track that was shown on large-scale OS maps from around 1908. The description in the Schedule to accompany the Parish Map in 1951 identifies the route as Cart Road used as Footpath (CRF). On my reading of that map, a copy of which is provided as part of the Council’s evidence, path 34 is clearly now route A-D, as may be judged by its position in relation to the property known as Polbream.
7. The First Edition of the DM was published in 1968, on which the route (now A-D) was recorded as Byway 34. On my reading of the evidence before me, there is nothing in the DM records to indicate that this route was recorded in error. On the contrary, the inclusion of the route on the DM appears to have logically followed from the original Mullion Parish Survey in 1951.
8. In 1972, the DM was subject to a Limited Special Review (LSW). Following a survey undertaken in March 1970, the Parish Council addressed the requirements for reclassification of the CRF and confirmed that CRF 34 as shown on the DM was a road used as a public path suitable for vehicular traffic. The alignment of the route that was considered during the LSW but was not changed. Neither did the then owner of Polbream take the opportunity to dispute the alignment of the way, albeit I recognise that there may have been reasons why that that was not done.
9. The photographic evidence is inconclusive. The aerial photographs taken in 1946, 1988 and 1996 appear to show the continuation of Byway 34 across the front of Polbream, albeit there is then no evidence of the path then continuing westwards to join Footpath 57 Mullion. The later aerial photographs are less clear in that respect. The existing side entrance first appears in the photograph taken in 2000, and is omnipresent thereafter. The aerial photographs do, however, confirm the physical presence of the majority of route A-D from 1946 onwards, although this provides no evidence as to the status of the route.
10. In summary, when looked at in the round, the documentary evidence points towards a long-standing public use of the route A-D. In particular, the inclusion of route A-D on the Definitive Map (and the fact that the alignment was not altered following the LSW in 1972) carries significant weight.
11. Having seen the photographs provided by the appellant, the steepness of the terrain is readily apparent. I can fully understand why the appellant considers that Route A-C-D was included on the DMS in error. But that is simply not the case. The evidence clearly shows that Route A-C-D is the route identified in the Mullion Parish Survey in 1951 was the intended route. That route itself follows the alignment shown on previous maps from as early as 1826. The alignment was re-surveyed in 1970 as part of the LSW. It is reasonable to conclude that, if an error had been made, then it would have been discovered in that survey. In the event, the continued inclusion of Route A-C-D in the DMS following the LSW was not challenged by the then landowner.
12. Several of the User Evidence Forms (UEFs) that have been submitted indicate that the respondent was not aware that there was a footpath along route A-C-D. I accept without hesitation that the views expressed are genuinely held. However, for the reasons set out above, there is clear evidence that route A-C-D was recorded on the DMS, albeit the respondents were clearly not aware of that.
13. There must be presumption that the way is as shown on the DMS, unless there is evidence to establish that the way should be shown as being of a different status or not shown at all. In relation to the route A-C-D, there is no cogent evidence to displace the evidence recording the route on the DMS in 1968.

**Route A-B**

1. The application was submitted on 2 December 2004. In the absence of any other acts by the landowner, the submission of that application may be taken as bringing the use of way into question. It is therefore necessary for the applicant to show that the use of the way (Route A-B) has taken place as of right for a period of 20 years ending with the date on which the application was submitted. The relevant dates are therefore 2 December 1984 to 2 December 2004.
2. The documentary evidence shows route A - C - D but route A – B does not appear in any form until the OS map of 1961. Even then, the route is far from being district. The documentary evidence is therefore of little assistance in relation to this route.
3. The application was supported by 11 User Evidence Forms (UEFs) completed in 2004 and 2005. Use of the way on foot was reported by only one witness for a period between 1974 and 2005, and therefore for the whole of the relevant period. Ten of the eleven witnesses did not provide any evidence of actual use of route A-B. Those respondents simply stated on their UEFs that to their knowledge there had never been a right of way over Polbream Drive, indicating that it has always been across Laflouder Lane.
4. The response by those 10 respondents may be an accurate description of their understanding of the situation, but it entirely misses the point of a UEF. The purpose of a UEF is to establish the frequency of the actual use and experience of the route by those individuals, this in order to establish whether the route had been used as of right for the requisite 20-year period. The response by those 10 respondents adds nothing to the body of evidence in that respect. The evidence of the single individual is not, in itself, sufficient for that purpose.
5. The same applies to the two letters from local residents submitted with the application, neither of which records any use of Route A-B.
6. The evidence of the landowners of Laflouder Lane is somewhat contradictory. The former owner occupier of ‘Meres Cliff’, a property adjoining Laflouder Lane, had witnessed use on foot in addition to the lane providing vehicular access to the property known ‘Tresidder’. One co-owner of Laflouder Lane, including land over which Route AB runs was aware of the public using the way on foot, by horse and with a vehicle. However, she assumed the latter was in a private capacity and did not consider the way to be public. Another co-owner of Laflouder Lane explained that to his knowledge the public had been using the way on foot, by horse or with a vehicle, but did not consider this way to be public.
7. The National Trust stated that there was no evidence for the proposed addition over Laflouder Lane because, other than the owner of ‘Tresidder’ who enjoys a private right of access over it, the route had not been used by anyone other than pedestrians. The National Trust stated that they have impliedly granted permission to the public to access their land at this location on foot only.
8. On the balance of probability, the evidence falls a long way short of showing that a right of way (of any description) subsists on Route A-B. The evidence therefore does not meet with Test A.
9. However, there is no incontrovertible evidence that a right of way could not subsist on Route A-B. As landowners, the National Trust are aware of use of the route on foot and have acquiesced to that. I am also mindful that there is belief amongst some landowners and those who have completed UEFs and/or submitted letters that Laflouder Lane is a public right of way. That belief does not constitute evidence that a right of way subsists but it is reasonable to conclude from the evidence that this belief is predicated on witnessing use of route (even if only on foot).
10. The application form does not specify which type of route is applied for. This could include the lower right as a footpath. Consequently, having considered all the relevant evidence available, I am satisfied that a reasonable person could reasonably allege that a right of way as a footpath subsists along Route A-B. Test B is therefore met.

**Conclusion**

1. The level of proof required to disturb the DMS is high. In my assessment of the available evidence and within the limits of the information provided, I do not find the case made in respect of appeal route A-C-D to be compelling, although I recognise that there may be more evidence to be found.
2. I have concluded that an Order should be made in respect of appeal route A-B. The determination of such an Order made as a result of this appeal will, more likely than not, raise arguments and evidence that concern both appeal routes.

**Formal Decision**

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Cornwall Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Cornwall Council to add a footpath as proposed in the application dated 19 November 2004. The Order should be made within 3 months of the date of this direction. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

Paul Freer

INSPECTOR