



Appeal Decision

by **Martin Elliott BSc FIPROW**

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 18 January 2016

Appeal Ref: FPS/J1155/14A/6

- 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 Devon County Council not to make an Order under section 53(2) of that Act.
- The Application dated 28 April 2008 was refused by Devon County Council on 24 June 2015.
- The Appellant, Rosemary Kimbell, on behalf of East Devon Group, Ramblers, claims that the appeal route, between the Combe Raleigh to Honiton road and the junction with footpath 5 at Woodhayne Farm, should be added to the definitive map and statement for the area as a public footpath.

Summary of Decision: The appeal is allowed.

Preliminary matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so. In reaching my decision I have had regard to all the submissions including those made by interested parties.
3. In April 2008 the Ramblers submitted twelve applications under Section 53(5) and Schedule 14 of the 1981 Act for routes in Combe Raleigh parish. Seven of the applications were considered in a report to the Council's Public Rights of Way Committee on 24 June 2015 and were rejected. The routes subject to these applications are identified on the plan produced by the Council HTM/PROW/14/81 dated July 2014 (proposals 1 to 6a). This appeal relates to proposal 1 shown A to B on that plan.

Main issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

Test A: Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there

is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

5. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced. Section 32 is declaratory of the common law.
6. The main issue is whether the evidence indicates that a right of way subsists, or is reasonably alleged to subsist, such that an order should be made to add the claimed route to the definitive map and statement for the area. The appellant relies on documentary evidence in support of the claim.
7. I note the submissions of the Council as to the tests which should be applied to the evidence. However, the tests are those set out above. In respect of a reasonable allegation this is a lower threshold than on the balance of probabilities.

Reasons

Greenwood's map 1827

8. Greenwood's map of 1827 shows the initial section of the appeal route leading from the Combe Raleigh to Honiton road. The map is understood to have mainly been copied from earlier editions of the Ordnance Survey map. The map shows the physical existence of a route which in part corresponds with the claimed route. However, the map provides no evidence as to status.

Ordnance Survey mapping

9. The 1806/7 Ordnance Survey surveyors drawings show the initial section of the claimed route leading off the Combe Raleigh to Honiton road. However, the route does not continue to Woodhayne and takes a different alignment to the claimed route. The route is shown in a similar way on the 1 inch to the mile first edition dated 1809.
10. The 1887 25 inch first edition map shows the claimed route in its entirety. The Council refers to the presence of lines across the route suggesting a barrier such as a gate. Although the marking does suggest the presence of some form of barrier on the route this does not preclude the existence of public rights.
11. The 1898-1900 1 inch to the mile map shows a route leading to Woodhayne. However, the claimed route is obscured by the annotations on the map for Woodhayne Farm and it is not clear whether the claimed route in this area is shown.
12. The 1903 second edition 2 inch map shows the route in a similar fashion to the 1887 map. The appellant makes the point that the route is not annotated '*f.p.*' therefore indicating that the route was traversable by horses and wheeled traffic. Whilst this might be the case, the map provides no evidence as to the

status of the way. The map records the physical existence of a route. The appellant also refers to the depiction of what is now recorded as public footpath number 5. However, I do not think it can be inferred from the map that this route was used less as a direct route from the south but more as a continuation of the appeal route through Woodhayne Farm. The map only shows the physical existence of a route leading to Woodhayne Farm.

13. The 1 inch to the mile scale maps from 1910, 1919 and 1927 show the southern part of the route as an unmetalled road. It is not possible to make any observations in respect of the route at Woodhayne Farm as the route is obscured by annotations on the map. The 1937 and 1946 1 inch maps show part of the claimed route as a track up to the point where the track leads more directly to Woodhayne Farm (this is referred to by the appellant as the lower branch).
14. The 1948 provisional 1:25000 edition shows the appeal route as a road or a track. However, I do not agree with the assertion of the appellant that the map provides evidence that the way is used by the public. The map only shows the physical existence of a route. It is perhaps surprising that the northern end of the appeal route is shown on the Ordnance Survey map when aerial photographs from the 1940s give no indication as to the existence of such a route. I do not accept that this means that the Ordnance Survey considered the track leading more directly to Woodhayne Farm as private whereas the appeal route was used by the public, to join what is now public footpath 5, and was therefore mapped. Ordnance Survey maps were not produced with a purpose of identifying public rights or identifying whether routes were used by the public.
15. The 1959/60 'A' edition map shows the claimed route except at its northern end where the map shows the lower branch leading directly to Woodhayne Farm. The route is similarly shown on the 1 inch to the mile map of 1960.
16. The 1:50000 scale map of 1974 and the 1:25000 scale maps of 1976 and 2006 show the southern part of the claimed route and the lower branch leading to Woodhayne Farm as a track.
17. The appellant refers to Ordnance Survey policy which was not to mark paths on large scale maps where they passed through yards. It is suggested that it is reasonable to presume that the claimed path did pass through the yard of Woodhayne Farm linking with what is now footpath 5. As noted above, Ordnance Survey maps were not compiled to record public rights. It cannot be presumed from the Ordnance Survey mapping that public rights extended through the yard. Nevertheless there is nothing from the maps which precludes public rights. I note the additional submissions of the appellant in this respect which provides examples of a number of rights of way passing through farmyards. However, each case needs to be considered on its individual evidence.
18. The current owner of Woodhayne Farm contends that any former farmer would not have welcomed members of the public passing through the farmyard. This may be the case but this does not mean that a right of way would not have passed through the farmyard. The schedule of public footpaths from 1914 and 1934, considered below, identifies a public footpath passing through Woodhayne.

19. Having regard to the above, the Ordnance Survey mapping provides evidence as to the physical existence of the appeal route between 1887 and 1948. However, other Ordnance Survey maps do not depict the entire claimed route and show the lower branch to Woodhayne Farm. Given that Ordnance Survey maps were produced to record topographical features and not the status of routes shown thereon, the maps provide no evidence as to status. It should be noted that from 1888 Ordnance Survey maps carried a disclaimer to the effect that the representation of any track or way on the map is no evidence of the existence of a public right of way. The Ordnance Survey evidence needs to be considered with all other evidence.

Combe Raleigh Tithe Map 1841 and Apportionment 1840

20. The 1841 tithe map shows a route which in part corresponds with the appeal route. The route, numbered 410a, is identified in the apportionments as a private road and leads to Woodhayne Farm. The route passes through a field numbered 405 which is identified in the apportionment as 'Path Field'. Whilst this might suggest that a path runs through the field it provides no evidence as to the existence of a public footpath. The tithe map shows no route leading through field parcel 408 and provides no evidence as to public rights. However, this, and the recording of the route 410a as a private road does not preclude the existence of public rights.
21. I note the depiction of a route corresponding with footpath 5 (shown on the 1809 Ordnance Survey map as a track) and it may well be the case that its subsequent depiction on the 1887 Ordnance Survey map with the annotation 'f.p.' might suggest that the route became impassable to wheeled traffic. However, it does not follow that there could have been footpath links to and through Woodhayne Farm in 1841 connecting with the appeal route. Although tithe records were not compiled with a view to recording public rights, in the absence of any evidence from the 1841 tithe records no such conclusion can be reached.

1910 Finance Act records

22. The appeal route falls within the hereditament numbered 13 'Woodhayne Farm'. The appellant states that the field book for hereditament 13 records a 'R of Way' through, amongst others, field parcels numbered 378a, 378, 380, 360 and 358. It is suggested by the appellant that the value of £75 indicates more than a single right of way within the hereditament and in my view the identification of other field parcels would suggest the existence of other rights of way. A deduction of £75 is entered in respect of public rights of way or user.
23. The field book evidences the existence of a right of way through the parcels identified which correspond with the claimed route. However, it is unclear as to why the deduction is for a route through field number 358 when the route passes through the adjacent field parcel 360. It also cannot be concluded, in the absence of further records that the information contained in the field book was provided by the landowner. The evidence needs to be considered in the context of all other available evidence.

Parish Minutes

24. At the annual parish meeting on 31 March 1913 it was proposed that a small committee be appointed to make a schedule of public footpaths in the parish.

The committee was to be empowered to order minor repairs of those paths and fences for which the parish meeting was liable. Although the proposal was seconded by a Mr Bernard it was decided that the proposal should be made again at the next parish meeting. At a meeting on 10 April 1913 the resolution was passed. The schedule of public footpaths was presented to the annual parish meeting on 24 March 1914. The first footpath identified is '*From Woodcot (the Keepers Cottage) through Woodhayne and over Rectory Field to Rectory Lane...*' This describes the route continuing through Woodhayne Farm.

25. The appellant suggests it is reasonable to presume the Mr A F Bernard present at the parish meetings is the same A F Bernard who owned Woodhayne at the time of the 1910 Finance Act valuation. The valuation book for Combe Raleigh shows that Woodhayne was owned at that time by A F Bernard Esq with a Mr J Symonds occupying the farm. It is contended that Mr Bernard was, in 1914, fully aware of and accepted the presence of a public footpath along the claimed route. Whilst it is likely that the A F Bernard identified in the minutes was the owner of Woodhayne at the time it does not necessarily follow that there was an open acknowledgement of the existence of the path. However, there is nothing to demonstrate any dissent by A F Bernard and the schedule is consistent with the 1910 finance Act records.
26. At a parish meeting on 9 February 1934, following a request from the Honiton Rural District Council for information on public rights of way as affected by the Rights of Way Act 1932, the meeting proposed that some of the paths listed in the 1914 schedule came under the 1932 Act. The minutes describe a public footpath '*From Woodcot (the Keepers Cottage) through Woodhayne and over Rectory Field to Rectory Lane...*', this describes the claimed route. Those routes which were considered not to be public were removed from the 1914 schedule. It is accepted that although the minutes make reference to the 1932 Act the list was not compiled under any statutory process. Nevertheless the parish meeting, a public body, considered the claimed route to be a public footpath and clearly reviewed the status of the routes previously identified in 1914. I therefore do not regard the evidence from these minutes to be repeating the schedule for 1914.
27. The minutes of the parish meeting held on 15 May 1946 refer to the repair of the stile on the footpath where it leaves the road to Woodhayne. Whilst this may have been before the statutory procedures for recording rights of way under the 1949 National Parks and Access to the Countryside Act (the 1949 Act) the parish meeting clearly considered the route to be public otherwise they would not have authorised any expenditure on the route.
28. Correspondence from the parish meeting, 19 May 2008, to a Mr Rugg, the then Footpath Secretary for the Ramblers, is in response to applications to the Council to add a number of routes, including the appeal route, to the definitive map. The letter states that the matter was last considered in 1956 when there was a decision to close the claimed paths and that no evidence has come to light in the last fifty years to indicate that the routes were required. It is the view of the parish meeting that the routes claimed should remain closed.
29. The correspondence does not dispute the existence of the claimed routes but refers to a decision to close the claimed routes in 1956. This suggests that the routes were in existence in 1956 and although the routes were said to have been closed at that time there is no evidence that the routes have been closed by legal order. The fact that the routes were not recorded following the survey

under the 1949 National Parks and Access to the Countryside Act (the 1949 Act) would not have stopped up any existing rights.

30. Correspondence from Combe Raleigh parish meeting dated 13 October 2015 makes reference to the fact that the parish meeting in 1956 recommended that the claimed paths should be closed. The point is made that no evidence has come to light over the last 60 years to indicate that the paths are required. Further, that the footpath passes through land owned by residents who were unaware of these original footpaths ever existing.
31. Whilst in 1956 the parish meeting recommended that the path be closed there is no evidence of any order which would have stopped up the way. I note that the parish meeting is unaware of any evidence that the path is required. However, this is not a factor which can be taken into account in determining the appeal. The need for a path is not a matter which can be taken into account under the 1981 Act. The issue is whether rights subsist or are reasonably alleged to subsist such that an order should be made.
32. As regards some residents being unaware of the existence of the route, this does not preclude rights from being shown to exist at a later date.

Survey of Public Rights of Way

33. The appeal route was not claimed in the survey of public rights of way under the 1949 Act completed in the 1950s. No information has been provided as to the survey but whilst the appeal route was not claimed at that time this does not preclude the existence of public rights.

Aerial Photographs

34. Aerial photographs from 1946 to 2006-7 show the road leading to Woodhayne Farm (taking the lower branch) but do not show the northern part of the appeal route. Although the northern part of the route is not shown that does not mean that there are no public rights on the route. The aerial photographs show the physical characteristics of the land on the day the photographs were taken; the photographs show no discernible route along the northern section of the claimed route.

Bartholomew's map

35. The ½ inch to the mile map from 1960 does not show the claimed route and does not assist in determining the appeal.

Landowner Evidence

36. Evidence from the owners of land crossed or adjoining the claimed route indicates that the route is not considered to be public. None have seen, or been aware of, the public using the route. Reference is made to a notice in place since the 1950s to the present, stating 'Private Road' at the entrance from the Combe Raleigh to Honiton road. Whilst these landowners do not consider the way to be public, and have not seen use of the way, this does not preclude public rights being shown to exist at a later date. As regards any notice, it may be the case that one has been in place since the 1950s but such a notice would have no effect on pre-existing rights.
37. The landowners provide extracts of Combe Raleigh parish meeting minutes. Minutes have been provided referring to the parish survey under the 1949 Act. No specific reference is made to the claimed route. The fact that the claimed

route was not included in the survey might suggest that the parish meeting at the time did not consider the way to be public. However, any rights on the route would not have been extinguished in consequence of the route not being claimed at the time. Minutes from 2006 refer to the review of the definitive map and an indication that one organisation may attempt to resurrect the previously closed footpaths. There is no reference to the claimed route and the minute does not assist in determining the appeal. The minute from 15 May 2008, responding to the original application, states that after a full discussion the meeting considered that there was no evidence of a need to reopen the footpaths which had been closed for 50 years and that there was nothing to indicate that they were required. This suggests, by the reference to the need for them to be reopened, that the paths were, in the past, public. However, if the routes were public in the past then those rights will remain unless closed by an appropriate Order. A minute from the meeting held on 28 August 2014 states that there was no evidence to support the establishment of the additional footpaths. Although the parish meeting may have been unaware of evidence in support this does not preclude other evidence being discovered which demonstrates the existence of public rights.

38. Correspondence from the landowners outlines that no property searches have indicated the existence of a footpath. However, it should be noted that the claimed route was not recorded on the definitive map which would have been the source of any information. The absence from the definitive map and the fact that searches have not revealed the existence of a public footpath does not preclude the existence of public rights.
39. In August 2014 the owner of Woodhayne Farm deposited a map and statement under Section 31(6) of the Highways Act 1980 and in 2003 a map and statement was deposited for Barton Farm. These deposits have no retrospective effect on any pre-existing rights.
40. Correspondence from a Mr D J Rosewell makes representations in respect of the claimed route although identified A to C (proposal 2). Reference is made to gates on his land being padlocked, wrapped with barbed wire and displaying 'private property keep out signs' from 1962 onwards. Although there is reference to notices on the claimed route there is no indication that gates on the route (A to B) were wired up; the route provides access to Woodhayne Farm. It is likely that the gates are on the route A to C from where this route leaves the route subject of this appeal. However, in the absence of further details it is difficult to reach any conclusions. In any event the evidence does not preclude the existence of a public footpath.
41. Mr Rosewell outlines that he owns the fields from point A to point C with his father owning the land before him. He states that he has never had people walking over his fields or had the need to ask anyone to leave. Again it would appear that in terms of access to fields Mr Rosewell is referring to the land crossed by proposal 2 where it leaves the appeal route. However, he does refer to the route A to C which in part corresponds with the claimed route. Whilst Mr Rosewell has not seen use of the way this does not preclude the existence of public rights.

Conclusions on the evidence

42. The appeal route is first shown on the 1887 Ordnance Survey map and is shown on some later editions up to 1948. The Ordnance Survey maps show the physical existence of the route but provide no information as to status.

The 1910 Finance Act evidence is highly suggestive of the route being a public right of way but in the absence of other information it cannot necessarily be concluded that the information in the field book was provided by the landowner.

43. In 1914 the parish meeting prepared a schedule of public footpaths and authorised expenditure to carry out minor repairs. The appeal route is one of the routes identified as being a public footpath; this is consistent with the 1910 Finance Act evidence. In 1934 the parish meeting reviewed the schedule of public footpaths and, whilst some of the routes previously identified as public footpaths were removed from the schedule, the claimed route was identified as public. In 1946 a stile on the route was repaired. Some weight should be given to the view of a local public body that the route was considered to be a public footpath for which public funds were used for its repair. The schedule, whilst not conclusive, is supportive of the existence of a public footpath.
44. Although the route was not recorded in the survey carried out under the 1949 Act this would not have removed any pre-existing public rights; there is no evidence that the route has been closed by any order. Nevertheless the fact that the way was not recorded conflicts with the evidence that in 1914 and 1934 the route was regarded by the parish meeting to be a public footpath. I do not accept that the absence of the route from the 1949 Act survey reduces the significance of the parish minutes. The parish meeting clearly considered that the route was a public footpath and recorded the route in the two schedules. Some weight should be given to the view of a public body but as noted above there is a conflict of evidence.
45. Subsequent minutes of the parish meeting indicate that the parish meeting did not support the addition of the way to the definitive map. However, the minutes do lend some support to the fact that the way, in the past, was considered to be a public right of way.
46. I am aware that the relevant landowners do not consider the way to be public, have not seen public use and refer to notices. The absence of observed use does not preclude the existence of public rights and the existence of notices from the 1950s will not have any retrospective effect on pre-existing rights. The evidence suggests that the way was considered to be a public footpath prior to 1950.
47. I note the point made by the Council, that there is no indication as to public use of the way, but the inference to be drawn from the evidence is that the way was considered to be public.
48. Having regard to all of the above, the evidence is insufficient to show that a right of way subsist on the balance of probabilities. However, whilst there is some conflict in the evidence, there is no incontrovertible evidence that a right of way could not be reasonably alleged. As such I should find that a right of way is reasonably alleged to subsist. An order should be made so that the evidence can be tested at a public inquiry if necessary.

Other Matters

49. The appellant claims that the Council did not acknowledge the original application made in 2008. Reference is also made to the administration of the various applications. These are not matters for my consideration.

50. Concerns are raised by the relevant landowners in respect biosecurity and safety issues. The appellant also raises safety issues. It is also questioned why the need for the claimed route is not a consideration and concerns are raised as to obstruction of private access by vehicles. Whilst I note these matters, and can appreciate the concerns, the 1981 Act does not provide for issues of suitability, desirability and need to be taken into account. The issue to be considered in this case is whether a public footpath subsists or is reasonably alleged to subsist such that the Council should make the appropriate definitive map modification order.

Conclusion

51. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

52. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Devon 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 for the area to add a public footpath between the Combe Raleigh to Honiton road and the junction with footpath 5 at Woodhayne Farm. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Martin Elliott

Inspector