



# 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

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## Appeal Ref: FPS/J1155/14A/9

- 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 lane southwest of Combe Raleigh village and the lane leading to Worfield House, should be added to the definitive map and statement for the area as a public footpath.

**Summary of Decision: The appeal is allowed.**

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## 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.
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 4 shown C-I 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

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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. The route is not shown on the 1827 Greenwood's map. The map does not assist in determining the appeal.

### ***Combe Raleigh tithe map 1841***

9. The claimed route is shown on the tithe map as a dashed line crossing field parcels 385, 382 and 383; field parcel 382 being called Great Henley. The Council state that the field book entries for the fields crossed by the route are identified as pasture and meadow, the applicant indicates that field parcel 385 is listed as coppice. The tithe map shows the existence of a route but the tithe records provide no evidence as to status.

### ***1910 Finance Act records***

10. The claimed route passes through the hereditaments numbered 8, Barton Farm and Pt14, Rectory Wood.
11. In respect of hereditament 8 the field book entry under 'Charges, Easements and Restrictions...' identifies a deduction for 'R of Way' in respect of Ordnance Survey field parcels 311, 353 and 225. A deduction of £75 is made for 'Public Rights of Way or User'. The appellant observes that field parcel 353 is a very small copse in the middle of field 352 and that no path runs through the copse. It is considered obvious that the intention was to record the right of way through field 352.
12. From my examination of the records a deduction of £75 is made for public rights of way or user in respect of routes passing through the field parcels identified. The claimed route only passes through the field parcel 311 and not through field parcels 353 or 225. However, whilst it would be expected that

the records were compiled with due diligence there does appear to be an anomaly in respect of field parcel 353. A deduction for a right of way is recorded as passing through field parcel 353, a very small copse, where no route is shown. In contrast no deductions are made in respect of field parcel 352 which shows three routes. Nevertheless, even if it was the intention to identify field parcel 352 it cannot be concluded, in the absence of other information, that any deduction related to the claimed route. The deduction could have been in respect of the other routes. However, given that there is a deduction in respect of field parcel 311 and the claimed route continues from field parcel 311 into the adjacent field parcel 352 it is quite possible that the deduction, or part of that deduction, is made in respect of the claimed route.

13. In respect of hereditament 14 no deduction is made in respect of any public right of way. Whilst no deduction is made this does not preclude the existence of public rights.
14. Overall, the 1910 Finance Act records suggest the existence of a public right of way over the land crossed by claimed route. It is accepted that the records do not provide any information as to status. It is also accepted there is nothing to indicate that the details contained in the field books was based on information provided by the landowner such that it shows their acceptance of the route as a public right of way. In light of this the evidence needs to be considered with all other available evidence.

### ***Ordnance Survey mapping***

15. The route is not shown on the 1806/7 Ordnance Survey surveyors drawings or on the 1809 1 inch to the mile first edition map.
16. The 1887 25 inch to the mile first edition map shows the majority of the claimed route as a double pecked line annotated '*f.p.*' A footbridge is marked on the map between the field parcels 352 and 311. The southern section of the claimed route where it passes through Rectory Wood is shown as a single dashed line. The revised New Series 1 inch to the mile 1898-1900 does not show the claimed route.
17. The second edition 25 inch to the mile map of 1903 shows the route in the same way as the 1887 map with the exception of the section through Rectory Wood which is depicted as a track. The 1910, 1919 and 1927 1 inch to the mile maps do not show the claimed route. However, the route is shown on the 1937 and 1946 1 inch to the mile maps as a dashed line identified in the key as 'Footpaths and Bridle Paths', the 1960 edition showing the route as a footpath or track. The 1:25000 scale map of 1948 shows the route as a footpath. The Ordnance Survey 'A' edition map 1959/60 shows the route in a similar fashion although the footbridge is not marked. 1:50000 and 1:25000 scale Ordnance Survey maps from 1974 and 1976 show the route as a path but the route is not shown on the 1:25000 Explorer 2006.
18. Ordnance Survey maps were produced to record topographical features and not the status of any routes shown thereon. It should be noted that from 1888 Ordnance Survey maps have carried a disclaimer to the effect that the representation of a track or way on the map was no evidence of the existence of a public right of way. The maps show, at certain times, the physical existence of a route from 1887 which corresponds with the claimed route; the maps do not evidence the existence of a public footpath. Nevertheless, the

annotation of 'f.p.' indicates a route which the public might not mistake the route for a route traversable by horses or wheeled traffic.

### **Bartholomew's Map**

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

### **Parish records**

#### *Combe Raleigh Parish Meeting*

20. At the first parish meeting held in December 1894 it was resolved to make an archway on the stile in Henley. The appellant contends that the stile in Henley was either on the claimed route at the entry to Rectory Wood or on another claimed route (proposal 3). However, in the absence of further details as to its location I am unable to reach any conclusions.
21. A minute from 30 September 1895 reports that the parish meeting had power conferred on them by the County Council under the 1894 Local Government Act for the repair of footpaths. In August 1897 the parish resolved that the stile at the lower end of Henley should be repaired. The appellant contends that this probably relates to the stile at the entry to Rectory Wood and likely to be the same stile referred to in the minutes of 1894. The 1897 minutes detail that the archway in Henley should be replaced by a single plank bridge with rails. Given that the bridge was to replace the archway in Henley and the bridge shown on the 1887 and 1903 map is shown between Ordnance Survey field parcels 311 and 352 I do not think that the stile referred to in 1894 is likely to be at the entry of the route into Rectory Wood. In my view it is more likely that the stile was on the boundary between field parcels 311 and 352 at the location of the footbridge. However, in the absence of details as to the location of the stile it is difficult to put a great deal of weight on this evidence.
22. On 31 March 1913 the annual parish meeting proposed to appoint a small committee to make a schedule of public footpaths in the parish. The committee would be empowered to order the minor and absolutely necessary repairs to the paths and fences for which the parish meeting were clearly liable. Although the proposal was seconded (by a Mr A F Bernard) it was decided to put the proposal to the next parish meeting when it was hoped that more ratepayers would be present.
23. At the meeting on 10 April 1913 the parish meeting passed a resolution that a small committee be appointed to make a schedule of public footpaths in the parish. Repairs were to be funded by a general subscription. At the annual parish meeting in March 1914 the Reverend James and Mr Blackmore, who had been appointed to the committee, presented the schedule. The claimed route is identified as path 4 '*From Rectory Lane across Henley & Barton house field to village*'.
24. Present at the meeting was the Reverend James and a Mr Bernard who respectively proposed and seconded the motion to appoint the committee. The appellant suggests it is reasonable to presume that Mr Bernard was Arthur Frances Bernard of Barton Farm as identified in the 1910 Finance Act valuation book. The appellant makes the point that, given Mr Bernard owned Barton Farm at the time of the 1910 Finance Act valuation, Mr Bernard was, in 1914, fully aware and accepted the presence of a public footpath along the line of the claimed route. It is suggested that there is no evidence from the minutes that

- Mr Bernard gave anything less than their full support to their proper recording of public rights of way and to the existing public footpaths across Barton Farm and the Glebe.
25. Whilst it is likely that the A F Bernard identified in the minutes was the owner of Barton Farm, it does not necessarily follow that there was an open acknowledgement of the existence of the path. Nevertheless, there is nothing from the minutes provided to demonstrate any dissent by A F Bernard.
26. On 9 February 1934 the parish meeting had before it '*the survey map 1904 second edition (large scale)*' and the schedule of public footpaths presented to the parish meeting in 1914. The meeting proposed that a number of paths came under the Rights of Way Act 1932 (the 1932 Act) including the claimed route again described as '*From Rectory Lane across Hanley & Barton home field to village*'. Those routes not considered to be public were removed from the list with others added. The list was lodged with Honiton Rural District Council. I do not regard the evidence from these minutes to be repeating the schedule for 1914; it is clear that the parish meeting reviewed the status of the routes previously listed and maintained the view that the route was a public footpath. Further, whilst the list was not produced in connection with any statutory process some weight should be given to the recording of a public footpath in a schedule prepared by a public body. It is apparent from the minutes of the parish meeting that the responsibilities in respect of public rights of way were understood.
27. Correspondence from the parish meeting, 19 May 2008, to a Mr Rugg, the Ramblers' Footpath Secretary at the time, is a response to a number of 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.
28. 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.
29. In August 2014 proposed changes to the definitive map, including the claim for the appeal route, were available for inspection. It was reported that the matter had been considered on a number of occasions. It was agreed that the decision of previous parish meetings, that there was no evidence to support the establishment of the routes, should be supported and that the proposed changes should be rejected. Whilst the minute demonstrates the view of the parish meeting at the time, it provides no evidence as to the status of the claimed route and does not assist. It should be noted, contrary to the view of the parish meeting in 2014, that in 1914 and in 1934 the parish meeting regarded the claimed route as a public footpath.

### ***Survey of Public Rights of Way***

30. Under the survey carried out in accordance with 1949 National Parks and Access to the Countryside Act the claimed route is shown on the map as part of path No. 1 described in the survey form as '*From Pheasantry skirting west of*

*Combe Wood across Rectory Lane over Henley and Barton Fields to Combe Raleigh Village and on North over two fields to Ford*'. The reason for believing the path to be public is that it is shown on the Ordnance Survey map although in handwriting are the words '*This is not a public footpath*'. It is identified that no one has maintained the path and it is also said that the path is steep, no longer required and no longer used as the road is more commodious. The Rural District Council notes that the route is shown on the Ordnance Survey map, and also the map prepared under the 1932 Act, but suggests that the footpath is not retained as a public right of way.

31. The evidence from the survey indicates that the claimed route was considered to be a public right of way although the survey form contains conflicting information which suggests that the way was not regarded as public. The fact that it was no longer required suggests that at some point the route was considered to be a public footpath.
32. I note the observations made by the Council that the reason for Combe Raleigh parish considering the way to be public was not on the basis of public use but on the basis of it being shown on the Ordnance Survey map. However, whilst the maps were the basis of considering the way to be public, the survey form makes reference to previous use of the way. Although this provides no evidence as to the levels of use this was clearly recognised as taking place. Notwithstanding the hand written addition '*This is not a public footpath*' some weight should be given to the view of a public body that the way was used in the past. Clearly the levels of use were sufficient for the parish meeting to be aware of it.

### ***Aerial Photography***

33. Aerial photographs from 1946-9 to 2007 do not show any wear lines along the claimed route. The absence of any route does not disprove the existence of the claimed route but show that on the day the photographs were taken there was no visible worn line. The absence of a worn line is not unexpected given that the evidence suggests that the route fell out of use certainly by 1950. The photographs do show the later construction of a track and agricultural structures from before 1999-2000 but this has no bearing on the existence or otherwise of public rights.

### ***Landowner Evidence***

34. The current owner of Barton Farm purchased the land in 2008. This owner outlines that he bought the land because it had no public access. The landowner refers to the son of the previous owner confirming that he had not known of any public access or witnessed any members of the public attempting to obtain access over the claimed route. It is stated that there is no indication of any access onto the land on the claimed route which passes through the centre of the farm slurry store. Although there may have been no indication of public access this does not preclude rights from existing. As noted above it would appear that the use of the way had ceased by 1950. Lack of use, or the obstruction of the route, does not remove any pre-existing rights. This landowner raises concerns as to security and biosecurity but the Council have not given any weight to the desirability of the claimed route and such matters cannot be taken into consideration under the 1981 Act.
35. A landowner evidence form from the owner of the land where the claimed path passes through Rectory Wood indicates ownership of the land for 8 years in

2014, believing for the same period that the route is not public. The owner identifies that notices were erected on the claimed route in 2008 stating that the way was not public; they have not seen any use of the claimed route. Although the owner does not consider the way to be public their knowledge appears to be limited and has no bearing on any historic evidence as to public rights. Notices erected in 2008 would have no retrospective effect on existing rights. The landowner also states that the Land Registry and the Deeds to the property show no footpath since the house was built in 1923. It may be the case that the Land Registry records and title deeds appear to be silent in respect of any public rights of way. However, it should be noted that such records were produced to show evidence of title and private rights of property. The absence of any record of public rights in the title does not preclude the existence of public rights.

36. The owner of The Barton since May 2008 indicates in the landowner evidence form that he does not consider the route to be public and has not seen use. There is nothing to indicate the owner's knowledge is any earlier than 2008 and in my view does not assist in determining the appeal.
37. In 2003 the then owner of Barton Farm made a deposit under section 31(6) of the Highways Act 1980. The deposit includes land crossed by the claimed route and states that there were no known paths on the land. The deposit has no retrospective effect on existing rights of way.
38. Overall the evidence from the landowners, whilst not supportive of public rights, does not preclude the existence of public rights. I note that the Council refer to people being turned back or advising people that the way was public. Reference is also made to notices and gates being wired shut. However, from my examination of the evidence this does not extend to the claimed route. Whilst some of this evidence may relate to an extension of the claimed route (proposal 2) there is nothing to indicate that it relates to the claimed route. In any event the Council do not give the evidence any significant weight as evidence against the claim except for elements indicating a recent lack of intention to dedicate. As noted above this would have no effect on any pre-existing rights.

### ***Representations from Interested Parties***

39. 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, which includes the appeal route, 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.
40. 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.
41. 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.

### **Conclusions on the evidence**

42. The claimed route was first shown on the tithe map of 1841. However, the tithe records do not provide any evidence as to status. The route is also shown on the 1887 Ordnance Survey map. The route is annotated 'f.p.' and the map records a footbridge on the route. This suggests a route suitable for pedestrians but as noted, Ordnance Survey maps were not produced to record public rights of way. Subsequent Ordnance Survey maps show the physical existence of a route identified in some instances as a footpath. In this respect I revert to my previous comments.
43. In 1914 Combe Raleigh parish meeting prepared a schedule of public footpaths and authorised expenditure thereon to carry out minor repairs. The appeal route is one of the routes identified as being a public footpath. Some weight should be given to the view of a public body which considered the way to be a public footpath. Although there is some ambiguity in respect of the deductions made for public rights of way or user identified in the 1910 Finance Act records, the recording in the schedule is consistent with those records. It should be noted that in any event the deduction in respect of field parcel 311 is likely to relate to the claimed route.
44. 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. Again, 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 authorised for its repair.
45. It is accepted that the schedule was not compiled under any statutory process but it was prepared by the parish meeting through an agreed process. It appears from other minutes that the parish meeting were clearly aware of their duties and it is unlikely that the route would have been included in the absence of evidence that the way was public. The schedule of public footpaths, whilst not conclusive, is supportive of the existence of a public footpath.
46. The parish survey under the 1949 Act indicates that the route was considered to be public. However, there is a conflict of evidence in that the schedule also states that the way is not a public footpath; this also conflicts with the evidence from the 1914 and 1934 schedules. The route was subsequently not recorded on the definitive map which again conflicts with the evidence that the route was considered to be a public footpath.
47. Although the current landowners do not consider the way to be public this does not demonstrate that the way is not public. Any pre-existing rights will continue unless legally stopped up. I have no evidence that any order has been made to stop up the route.
48. The Council point out that there is no indication as to public use of the way. However, the inference to be drawn from the evidence is that the way was considered to be public and used as such. The implication from the survey under the National Parks and Access to the Countryside Act 1949 Act is that the way has been used in the past. As noted above that use must have been sufficient to have been recognised by the parish meeting.
49. Having regard to all of the above, the evidence is insufficient to show that a right of way subsists 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**

50. The appellant claims that the Council did not acknowledge the original application made in 2008 although the Council confirm and provide copies of correspondence which indicates that the application was acknowledged. Reference is also made to the administration of the various applications. These are not matters for my consideration.

### **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 lane southwest of Combe Raleigh Village and the lane leading to Worfield House. 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