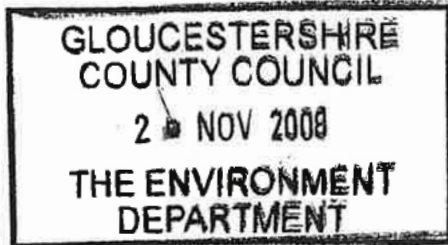


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Ms S Burge
Public Rights of Way
Gloucestershire County Council
Shire Hall
GLOUCESTER
GL12 2TH

National Rights of Way Casework Team

Citygate
Gallowgate
Newcastle upon Tyne
NE1 4WH

Switchboard: 0191 201 3300
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Email: Julie.HUME@gone.gsi.gov.uk

Your ref: 573/11/101(1)
Our ref: NATROW/T16000/529A/07/32
Date: 25 November 2008

Dear Madam

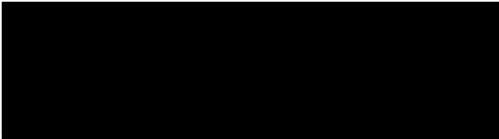
**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY DR N J GILBERT AGAINST THE DECISION OF GLOUCESTERSHIRE COUNTY
COUNCIL NOT TO MAKE AN ORDER IN RESPECT OF A CLAIMED PUBLIC
FOOTPATH AT WITCOMBE FARM, GREAT WITCOMBE, NEAR GLOUCESTER**

1. The Secretary of State for the Environment, Food and Rural Affairs has considered the appeal under paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 made by Dr N J Gilbert on 30 April 2007 against your authority's decision not to make an Order modifying the Definitive Map and Statement of public rights of way for the area by the addition of a public footpath running from Witcombe Farm Lane generally southwards for about 210 metres to its junction Footpath AWG/4, adjacent to Witcombe Reservoirs and passing through Witcombe Farm.
2. The Secretary of State, having considered the appeal, considers that an Order should be made. A copy of the letter to Dr N J Gilbert is attached.
3. Accordingly the Secretary of State, under the powers contained in paragraph 4(2) of Schedule 14 to the Wildlife and Countryside Act 1981 and of all other powers enabling him in that behalf, hereby directs Gloucestershire County Council to make an Order under Section 53(2) of, and Schedule 15 to, the 1981 Act to modify the Definitive Map and Statement for the area, as proposed in the application of Dr N J Gilbert dated 6 September 2005.



4. I would be grateful if the Council would notify this office when the Order has, in compliance with the direction, been made.

Yours faithfully



JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:

Dr N J Gilbert
Wychbury
GREAT WITCOMBE
Gloucestershire
GL3 4TS

National Rights of Way Casework Team
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4WH

Switchboard: 0191 201 3300
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Your ref:
Our ref: NATROW/T1600/529A/07/32
Date: 25 November 2008

Email: Julie.HUME@gone.gsi.gov.uk

Dear Sir

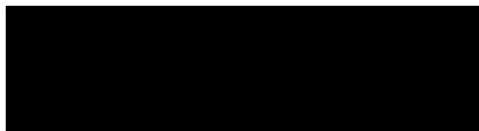
**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY DR N J GILBERT AGAINST THE DECISION OF GLOUCESTERSHIRE COUNTY
COUNCIL NOT TO MAKE AN ORDER IN RESPECT OF A CLAIMED PUBLIC
FOOTPATH AT WITCOMBE FARM, GREAT WITCOMBE, NEAR GLOUCESTER**

1. I am directed by the Secretary of State for the Environment, Food and Rural Affairs to refer to your appeal made under Section 53(5) of, and Paragraph 4(1) of Schedule 14 to, the Wildlife and Countryside Act 1981 against the decision of Gloucestershire County Council not to make an Order modifying their Definitive Map and Statement for the area by the addition of a public footpath running from Witcombe Farm Lane generally southwards for about 210 metres to its junction Footpath AWG/4, adjacent to Witcombe Reservoirs and passing through Witcombe Farm (shown as A – B on the attached Annex B map being the map dated 27/02/07 produced by Gloucestershire County Council showing the application route).
2. An Inspector, Helen Slade MA FIPROW, has carefully considered all the submissions made with regard to this appeal and has submitted her report to the Secretary of State. A copy of the Inspector's report is attached as Annex A to this letter. Your case as the appellant and the case for Gloucestershire County Council are set out in paragraphs 6 to 30 and 31 to 43, respectively, of the Inspector's report. Comments on behalf of the landowner, opposing the application, are set out in paragraphs 44 to 60 of the report. The Inspector, whose conclusions are set out in paragraphs 61 to 103 of her report, has recommended, at paragraph 104, that the appeal be allowed.
3. The Secretary of State agrees with the Inspector's conclusions and accepts her recommendation. Having taken all the arguments and representations presently before him into account, the Secretary of State has reached the view that an Order should be made. Therefore in accordance with the provisions of paragraph 4(2) of Schedule 14 of

the Wildlife and Countryside Act 1981 he has directed Gloucestershire County Council to make an Order, under Section 53(2) of, and Schedule 15 to, the Act modifying the Definitive Map and Statement for the area by the addition of a public footpath, as described in paragraph 1 above, as proposed in your application dated 6 September 2005. This decision is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under the said Schedule 15.

4. A copy of this letter has been sent to Gloucestershire County Council.

Yours faithfully



JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:



Report to the Secretary of State for Environment, Food and Rural Affairs

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by Helen Slade MA FIPROW

an Inspector appointed by the Secretary of State
for Environment, Food and Rural Affairs

Date: 21 January 2008

WILDLIFE AND COUNTRYSIDE ACT 1981
REPORT INTO AN APPEAL BY
DR N J GILBERT
AGAINST THE DECISION OF
GLOUCESTERSHIRE COUNTY COUNCIL
NOT TO MAKE AN ORDER UNDER SECTION 53(2)
IN RESPECT OF A CLAIMED PUBLIC FOOTPATH
AT
WITCOMBE FARM, GREAT WITCOMBE, NEAR GLOUCESTER

Case Details

- This appeal is made by Dr N J Gilbert under Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Gloucestershire County Council not to make a modification order under Section 53(2) of that Act.
- The application dated 6 September 2005 was refused by notice dated 20 March 2007.
- The appeal is dated 9 April 2007
- The appellant claims that the Definitive Map and Statement should be modified to show a public footpath running from Witcombe Farm Lane to Footpath AWG/4 adjacent to Witcombe Reservoirs and passing through Witcombe Farm.

Recommendation: I recommend that the appeal is allowed.

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on the above mentioned appeal made in accordance with Paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. The appellant's evidence consists of 49 user evidence forms on behalf of 50 people and comments on the evidence provided by, or on behalf of, the landowner. He has also commented on the consideration of the application by the relevant committee. I am satisfied that I can make a recommendation without the need to visit the site.
3. The report consists of the relevant points made in the submissions of the parties, an assessment of the evidence against the relevant criteria and my conclusions and recommendation.

Description of the Route¹

4. The claimed route commences at the southern end of unclassified road number 41143 (Witcombe Farm Lane) at a point referred to in the submissions as Point A and runs in a generally southerly direction for about 210 metres to its junction with public footpath AWG/4 (referred to as Point B). At Point A, another route branches off to the west towards an installation belonging to Severn Trent Water.
5. The path runs through Witcombe Farm, between the barns and farm buildings and past the Farm House and the Office. Its width varies between 3-3.5 metres at Point A, where the surface of the claimed route is made up of unevenly distributed areas of tarmac and gravel, and about 4.5 metres at Point B where there is more tarmac coverage.

¹ Taken from the County Council's submission

The Case for the Appellant

The material points are:

6. The application was made on the grounds of use and was carefully considered and weighty. The user evidence was of high quality from 50 people of good standing. One of them was a retired vicar. In addition, 24 supplementary statements have been submitted. This weight of evidence demonstrates a significant depth of feeling by a cross section of society.
7. Of the user witnesses, 40 have used the route for over 20 years – 10 of them for over 50 years and 2 for over 70 years. Use was mainly on foot either singly or in groups; some with dogs and some with children in pushchairs. A few used it on horseback. The landowners' claims that 29 of the users have never used the path are not logical or likely. The evidence of use is irrefutable.
8. It is acknowledged that some of the user witnesses are members of the applicant's family, or his friends, but their evidence is entirely independently and freely given. They are not constrained by being in his employ and have not been unduly influenced by him. Of the remaining 42 witnesses, 24 were not previously known to him, and a further 10 were barely known to him.
9. Contrary to the assertions by the landowner, only 12 of the user witnesses have addresses outside the local area, and of those people, 10 used to live in the area and but have since moved away. Some of the witnesses who live in Brockworth and Little Witcombe actually live nearer to the claimed route than people who live in the parish of Great Witcombe and whose opinion was canvassed in a poll organised by the clerk to the Parish Meeting.
10. The suggestion by the landowner that people from outside the village may have been confused and that their evidence ought to have been treated with caution is audacious, since only 18 of the people concerned are known to her. The landowner displays an inability to grasp the notion that people may walk several miles for pleasure, and that the reservoirs are a destination in themselves as a beauty spot. The claimed route also provides a means of access to the Cotswold escarpment.
11. The comments made by the landowner with regard to the abilities of elderly people to walk are patronizing and also fail to appreciate that people were younger during earlier years of usage.
12. The landowner claims that those witnesses whom she acknowledges to have used the route did so by permission or invitation. The user witnesses deny this. Mr Comrie had used the claimed route for many years before he helped to set up the nature reserve. Mr Organ died in 1969 and his widow has had no connection with the estate since that time. Her use of the route continued occasionally until 1995. Mrs Straley tutored the landowner's son for four months only in 1980, and at her own home. She was self-employed and not an employee of the landowner. She has walked the claimed route for many years before and since that time. Susan Willis received permission from Mr Paget, the tenant farmer, but he left the farm 23 years ago and she has

continued to use the route. Mrs Hostler states that the permission she was given in 1997 related to that one day alone. Other use has been without formal permission. Reverend Thornton has used the path for his own pleasure in addition and quite separately from the use made of the route for the annual Rogation Service. The current warden for the Gloucestershire Wildlife Trust ('GWT') reserve states that he and his staff have had no difficulty using the route despite the claims by the landowner that use is by permission only.

13. There appears to have been a sea-change in the attitude of the landowners in about 2002 when new signs were erected at both ends of the claimed route (Points A and B), since when many people have been accosted. The landowner seeks to pretend that this has always been the case, but since they have only lived at the farm since 1981 they cannot know what happened before that time. The new signs state:

'Witcombe Estate. Private Land. No public right of way.'

The older sign, which is still present, says:

'Private Road. No unauthorized access'

The old sign was placed near to the junction with the road which branches off to the pumping station and has often been obscured by the overgrown hedge. However, many public rights of way follow private roads and almost all cross private land. The wording of the old sign does not preclude the existence of public rights on foot, and may have referred to the other track.

14. Many comments by, or on behalf of, the landowner are pure conjecture and cannot constitute evidence. In many cases they are not credible. Several of the landowner's witnesses have not lived in the village very long and cannot comment on use prior to their arrival. Most of them do not know the user witnesses' names so it is meaningless to state that they have never seen named individuals. Some of the estate employees have not been present on the premises during the period of claimed user, or were only there for a short time. Of the 19 witnesses for the landowner, three of them are her children; six of them are employees (including one tenant); one of them is a lessee; one is a self-declared close friend and three acknowledge that they have been given permission to use the route. Two others appear to disapprove of public rights of way through farms and their evidence may therefore be prejudiced. Five of the witnesses have been present in the area for less than ten years; some as few as five years.
15. The landowner's sons cannot comment on usage with any authority since they were too young for much of the relevant period, or were away at school. Their statements conflict with their mother's, particularly in respect of usage by the applicant himself. The landowner has misinterpreted the applicant's user evidence. The applicant has made clear on his user evidence form the periods when he was away at university. He did not use the path to *visit* his parents but *during* visits to his parents.
16. The evidence of the residents of properties along Witcombe Farm Lane, on the approach to the claimed route, is conflicting. Testimony varies between neighbours and is in direct conflict with evidence from user witnesses. Some

- user witnesses report having talked to the residents, and even to having walked with some of them, directly contradicting evidence of the residents concerned, some of whom deny seeing any of the user witnesses.
17. Mr Teesdale, as a member of GWT, states that the route is not a public right of way. However the GWT brochure for the site, produced for public information, indicates that access to the reserve along the claimed route, referring to it as a 'footpath' and stating that it is always open, but not for cars. Permits are only required to access the reservoir banks.
 18. The supplementary statements submitted recently by the landowner's legal representative are all made by tenants of the Hicks Beach estate. They all live on the far side of the village, and would rarely be present to witness usage of the claimed route. Their evidence is of little value.
 19. Many user witnesses report seeing the landowners during their walks and even speaking to them at times. This is in direct contrast to the claims by the landowner that these same people had never used the route. Photographs submitted by some witnesses clearly indicate that use of the route has taken place.
 20. The similarity of the user evidence is not surprising since they witnesses were responding on a *pro-forma*. No-one can be in any doubt, reading the supplementary statements, as to the authenticity of the user forms, nor that they are a genuine reflection the feelings of the witnesses concerned. Furthermore, the user witnesses are not influenced by way of employment, tenancies or leases, or other rights granted to them by the landowner, in the way that the opposing witnesses may be. Any familial relationships amongst the user witnesses do not affect the factual evidence of their individual usage.
 21. By suggesting that users had walked alternative routes the landowner is acknowledging that the presence of those routes is a relevant factor, despite claiming otherwise. If the alternative routes are not physically passable, or are hazardous in some way, it makes it more likely that usage of the claimed route has taken place.
 22. The report by the Council Officer ('the Officer') to the Commons and Rights of Way Committee ('the Committee') was 70 pages long and concluded that credible evidence of use had been produced. The Officer considered that it was reasonably alleged that a public footpath subsisted, in accordance with Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981Act') and recommended that an order be made.
 23. Only four of the eight Members of the Committee were present, and one of them declined to take part as she was a member of the GWT. Thus only three Councillors made the decision, and appeared to do so reluctantly. The application was turned down for irrelevant reasons.
 24. Members placed too much weight on the poll conducted by Great Witcombe Parish Meeting ('GWPM'). The poll did not canvass opinion from all the people affected by the decision but only those within the parish. In addition, far from being anonymous as claimed, the names of those who responded are minuted, and a high proportion of them were employees or lessees of the

- landowner. More importantly it was only concerned with opinion and not evidence. Members ignored Officer advice that the desirability or otherwise of a footpath existing was not a relevant issue.
25. Members were told that there was no documentary evidence in support of the claimed route, although the report did state that Bryant's map of Gloucestershire appears to show a similar route slightly further to the west than the claimed route. However, the Bryant map pre-dates the construction of the reservoirs, and the route may therefore have moved. Furthermore, the Archivist report states that the 1884 Ordnance Survey Map (1:25 inch scale) shows the route, although the adjoining east-west definitive footpath is not indicated. This demonstrates the vagaries of historical documents. The claimed route is shown on the map in the 1929 sales particulars for the estate. However, the application was made on the grounds of user and not documentary evidence. This should have been the prime factor and the report to Members made this clear. The Members placed too much weight on the absence of documentary evidence. Nevertheless, the documentary evidence does show that the route has existed for a very long time. It has been used extensively for at least several decades with the knowledge of the owner, tenant, employees and users of the stables.
 26. Members were concerned about the conflicting evidence from users of the route about the presence or otherwise of a gate at Point A. The explanation is simple and confirmed by one of the landowner's own witnesses: Mr Arnold Price (now unfortunately deceased). He states that the gate was removed in the early 1970s when farm machinery became too big to get through the gateway. Thus many of the witnesses will have used the route when there was no gate there. Furthermore, the gate was frequently open and thus unlikely to be noticed by anyone using the route on foot. In any case, the existence of a gate does not preclude the existence of a public right of way.
 27. Councillors were also concerned about the lack of a response from the Ramblers' Association ('RA') and took this to mean that they were unable to provide any evidence of user and that this was somehow evidence against the other use of the path. It is not clear how the lack of evidence from the RA has any bearing on the evidence of use by 50 other people. Nevertheless, the RA secretary has subsequently provided five letters and emails in support of the appeal, all confirming long-standing use of the way by the individuals concerned; some of them since the 1960s. A change of secretary had resulted in the lack of an earlier response.
 28. Councillors attached great importance to the fact that no application had been made to register the footpath when the definitive map and statement was first produced in the 1950s. This is of no relevance. It was only when the public was prevented from using the route following the challenge to its status in about 2001 that it became an issue, and the application was made. Nevertheless the minutes of the relevant Parish Meeting show that the decision on what paths to register at that time was taken by three people; two of whom were members of the Hicks Beach family, one of whom was Chairman. Some modifications were apparently suggested but there is no evidence as to their nature. There is thus little evidence of wider public consultation.

29. Members appeared to be most concerned about the conflict between the evidence from users and that from those in opposition. The Councillors were clearly directed by their Officer's advice that the applicant had produced credible evidence and that therefore a public right of way was reasonably alleged to subsist. The applicant considers that something improper occurred at the Council Meeting and that the application was not properly or competently heard. There appears to be a bias in favour of the landowner.
30. The significance of the application is that the two other paths to the reservoirs both run over difficult terrain which is sometimes flooded. Stiles, gates and bridges along them (until the time of the application at any rate) have been overgrown and neglected. The appeal route is a good track which gives which gives easy access to the reservoirs. The failure of this application would deny access for many elderly and infirm people.

The Case for Gloucestershire County Council

The material points are:

31. The application first came to attention in 2005 when the applicant requested user evidence forms and guidance. He had been requested by the landowner not to use the claimed path in a telephone call. The application was made in September 2005.
32. User witnesses were not consistent about the date on which notices had been erected at two points along the claimed route (Points A and B) but the general consensus was that it was in about 2001/2002. Clarification was sought by Officers from the landowner's legal representative who stated that it was about 8 years ago. A cautious approach was therefore taken and the year 2001 was used as the date on which the right of the public to use the way was called into question.
33. The report was presented to the Committee on 20 March 2007. Officers concluded that there was a conflict of evidence between that of the users and that of the landowner, but that the appellant had produced credible evidence of public enjoyment of the route for over 20 years. Under Section 53(3)(c)(i) of the 1981 Act a right of way was reasonably alleged to subsist and Officers recommended that an order should be made.
34. Members discussed all the evidence and queried a number of issues. Officers advised that usage by any person or body having permission could not be taken into account when determining whether public rights had come into being. GWT members had permission, but arrangements regarding Severn Trent Water, and the fishing club were unknown.
35. Members commented with surprise on the lack of a response from the RA. Officers explained that they had made efforts to contact the local secretary prior to the Committee meeting, in addition to formal consultations, but no comments had been received.
36. Members noted that the survey conducted by GWPM indicated that the majority of residents thought the path was private, and opposed it being a public right of way. Officers pointed out the limited extent of the survey, and

- that many user witnesses lived outside the parish concerned. Furthermore the decision had to be based on evidence, rather than whether it was a good or bad idea.
37. Members noted that there was no documentary evidence in support of the claim but Officers advised that it was not necessary. The application had been made on the basis of use.
 38. Members raised the issue that the path had not been claimed in the 1950s but Officers advised that the 1981 Act introduced procedures to permit the alteration of definitive maps and statements on the discovery of evidence. Paths may have come into being since the 1950s.
 39. Members acknowledged that the evidence showed a lot of use of the claimed path, but landowners and employees denied seeing the majority of the users. Although accepting the case law cited by Officers (*R v Secretary of State for the Environment ex parte Bagshaw and Norton [1994]* and *R v Secretary of State for Wales ex parte Emery [1996]*) with regard to the conflicting evidence, Members felt that the evidence was inconsistent with regard to the existence of a gate at Point A, and that there was confusion amongst the user witnesses. Members have delegated powers and decided to refuse the application.
 40. The appellant raised six main points in his appeal. With regard to the parish survey carried out by Mr Buxton (as Chairman) it is correct that people outside the parish were not canvassed, and that includes most of those people who completed user evidence forms, many of whom live in Brockworth. It is also correct that definitive map modification orders must be determined on the basis of evidence and not on desirability or otherwise.
 41. With regard to the lack of supporting documentary evidence, the Council is obliged to look at all available evidence regardless of the basis on which the application is made. It is accepted that a path is shown on Bryant's map but although it provides supporting evidence of the physical existence of a route, as an individual piece of evidence it carries little weight. Members were made aware that documentary evidence is not essential and that the decision must be made on the balance of all the evidence.
 42. With regard to the conflicting evidence, Members were given the appropriate guidance in accordance with case law. In the Officers' view, the appellant had produced credible evidence to show that a public right of way was reasonably alleged to subsist.
 43. With regard to the existence of a gate at Point A, it was noted in the Committee report that six witnesses whose use had begun prior to 1971 referred to a gate, whilst a further 16, whose also used the path prior to 1971, did not mention it. The report supports the appellants' view that the gate may not have been noticed if it was open. The Officers' report concurs with the appellant's view that the presence of a gate does not preclude the existence of a public right of way.

Comments on behalf of the Landowner opposing the application and appeal

The material points are:

44. It is accepted that the claim made by the applicant was procedurally correct and that a considerable number of evidence forms were submitted. Almost none of the user witnesses mention the existence of a gate across the access which was present during the 1970s. The user evidence is contradictory and confused in relation to signs at Point A over the years.
45. The circular walk referred to by a number of the witnesses does not involve the use of the application route. Evidence from residents of Brockworth must be viewed with caution as the village is some miles from the path in question.
46. Several of the user witnesses are members of the applicant's family and therefore not entirely independent. Only a very few of the user witnesses come from the nearest settlements of Witcombe, Little Witcombe, Bentham, Birdlip or Brockworth. The poll of residents of Great Witcombe alerted the parishioners to the issue and the possibility of adding evidence from either perspective. It was thus valuable evidence to the Committee in reaching their decision.
47. Some of the user evidence extends back into the 1950s. Nevertheless, the path was not claimed at that time under the provisions of the National Parks and Access to the Countryside Act 1949. The minutes of the Parish Meeting of 31 March 1951 records that the maps were approved with modifications and returned to the Cheltenham Rural District Council.
48. The suitability or condition of other public rights of way nearby is not relevant to the application. Access to these paths has never been denied by the landowner, and the horses kept in them pose no threat to users of the paths unless attacked by dogs. Where maintenance issues have arisen these have been resolved. There is no duty upon either the landowner or the Highway Authority to provide a metalled route to the reservoir.
49. The documentary evidence supports the private nature of the access route. The Corporation of Gloucester made a payment for exercising the right of access, and the owner of Witcombe Wood had a right of access for timber extraction. The route is not a public right of way.
50. Although not having been resident at the farmhouse until 1981, the farm was run by the landowner's late husband from 1958 until his death in 1998. This required daily involvement with the affairs of the estate, including the activity in and around the farm. The family were well aware that the farm manager, Mr Paget, did not allow public access through the farm yard without express permission, and on the authority of the estate owner. Between 1975 and 1981 the landowner and her family lived in a property on the estate overlooking the reservoirs.
51. The landowner has never seen most of the user witnesses on the path. One or two have been given specific permission for various reasons. Others have been seen and turned back. Mr Organ was the Farm Manager and any use by

him or his wife would therefore have been in that connection, or as a tenant. Mr Pither farms neighbouring land and uses the access by agreement. Permission was granted by the present landowner's in-laws and predecessors to GWT members to use on foot and in cars, and is still extant. Permission was granted for access during the Annual Rogation Service. Mrs Straley was employed as a tutor to the landowner's son, and visited during her employment and afterwards. No unknown horse-riders have ever been given permission to use the track.

52. Statements from a total of 19 people have been submitted by, or on behalf of, the landowner; 14 of them following the application and a further four in response to the appeal. Most of them claim very few people have attempted to walk the route and report either seeing people turned back, or turning back people themselves. Almost all state that they have never seen any of the user witnesses using the route.
53. Several of the witnesses are aware of permissions having been given to use the track, either to themselves or to other people.
54. Some live along the approach road to the claimed route and say they have a clear view of part of the route from their property, thereby being in a good position to say whether or not use by the public has occurred. Mr and Mrs Diett have a large dog and live immediately adjacent to Witcombe Farm Lane. The dog always alerts them to anyone going past the house, and Mrs Diett spends a lot of time in the garden. They have lived there for 27 years and the usage of the route is not as high as is being claimed.
55. Mr Arnold Price worked for Witcombe Farm from 1956 onwards, and lived in Witcombe Farm cottage from 1962. He was regularly in the yard and states that only people with permission used the route. He was aware of many people being turned back by the Hicks Beaches, their bailiffs or the yard managers. There had been a 'Private Road' sign in existence for the last 25 to 30 years, and about 4-5 years ago² a new sign was erected ('No public right of way'). There was a gate at Point A until the early 1970s which was removed when the machinery got too large. He had never seen witnesses using the path.
56. Riding stables operated from the farm, and were frequented by girls from Cheltenham Ladies College. They were always accompanied by a housemistress from the school. Neither the yard manager nor the housemistress had seen any of the user witnesses on the claimed path.
57. Other employees, both paid and voluntary, state that they have been present on the premises or at the farm and have never seen any of the user witnesses.
58. Mr Buxton, who was Chairman of the GWPM at the time, states that in 1999 he checked to see if the route was a public right of way, in response to a query. He was informed by the County Council that it was not.

² at the time he made his statement

59. Three of the landowner's children have provided statements. Fred Hicks Beach states that he has turned people away during the 25 years he has known the path, and has only seen the applicant using the path, or the Rogation Service procession. His brother Andrew states that he has stopped people occasionally over the years, but not seen any of the people who have completed user evidence forms. Their sister, Lucy, lived at the property between 1975 and 1995 and again between 1999 and 2002. She states that anyone who was seen using the route has been turned back by the owners or their representatives.
60. The Committee considered the detailed Officers' report and undertook a thorough debate of the issues. The landowner considers that the Officers' report did not accord appropriate weight to the evidence submitted on her behalf. This evidence was provided by many people who have actually lived or worked in close proximity to the claimed path and have first hand knowledge of the route. The Committee is entitled to come to a different view from its Officers, provided it has sound reasons for doing so. Their decision was correct. The landowner has no connection with any of the Committee and refutes any suggestion of influence.

Conclusions

Introduction

61. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act, the Highways Act 1980 ('the 1980 Act'), of Department of Environment Circular 2/93 and relevant court judgments, the gist of which I set out below. References in square brackets refer to paragraph numbers in the cases of the parties set out above.
62. Section 53(3)(b) of the 1981 Act states that an order should be made to modify the definitive map and statement where it can be shown that a period of time has expired such that the enjoyment by the public of a path during that time raises the presumption that the way has been dedicated as a public path.
63. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue, there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]*, and clarified in the case of *R v Secretary of State for Wales ex parte Emery [1997]* ('Emery').
64. **Test A:** Does a right of way subsist? This requires that there is clear evidence in favour of public rights and no credible evidence to the contrary.
65. **Test B:** Is it reasonable to allege that a public right of way subsists? If there is a conflict of credible evidence but no incontrovertible documentary 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.

66. Section 31 of the 1980 Act states that where a way over any land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question.
67. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
68. It is also possible for public rights to be established at common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be inferred or alternatively that express dedication can be shown to have occurred.

Documentary evidence

69. The mapping evidence which has been referred to does indicate that a route has existed in the vicinity of the claimed route for over 100 years [25][41]. However, these maps are generally speaking unable, on their own, to indicate the status³ or classification⁴ of a track depicted. The sales documents do indicate that at least some private rights exist, but these appear to be mainly to do with vehicular access [49][51].
70. The application was made on the basis of user, and whilst it is right that the County Council should examine all available evidence [41], I agree with the Officer's view that the lack of the documentary evidence supporting evidence of a public footpath is not crucial to the determination [41]. If there were documentary evidence which specifically militated against there being public rights, that would need to be given substantial weight. However, that does not appear to be the case, on the basis of the evidence submitted. It is the user evidence, and not the documentary evidence, which is of more value in determining this particular application and appeal.

Date on which the right of the public was brought into question

71. Although the application was made in 2005, there does seem to be a significant body of opinion that a sign was erected in about 2001/2 which directly denied the existence of a public right of way along the claimed route [13][32]. There is some uncertainty about the date, but I do not consider that to be unusual. People will not necessarily have been taking particular note of the time at which they noticed the sign. I place more weight on the evidence of the landowner's own witness, Mr Arnold Price, who placed the event at about that time [55]. As he was working at the farm, and clearly had been for a very long time, I consider that he may have a better memory of the date.

³ i.e. public or private

⁴ i.e. footpath, bridleway or carriageway

72. Mr Buxton recalls being asked to check on the status of the claimed route in about 1999 [58], but there is no evidence to show that, at that time, any action was taken by any party to bring the doubt about it to the attention of the public using the way. Following the recent judgement in the House of Lords⁵ this event would be unlikely qualify as one capable of bringing the rights of the public into question.
73. However, a number of the witnesses do state that their use of the way diminished significantly following the erection of the new sign, whichever date it was erected [13]. The County Council has erred on the side of caution and used the date of 2001 as the appropriate date on which the right of the public was called into question by the erection of the new sign [32] and I consider that is a reasonable judgement to make. The relevant period of usage for the purposes of Section 31 of the 1980 Act is therefore 1981 to 2001.
74. Should the sign in fact have been erected in 2002, I do not think that the discrepancy would have a significant impact on the consideration of the evidence. There is no obvious difference between the quality of the user evidence for either the period 1981-2001 or 1982 to 2002.

Whether there has been uninterrupted use by the public as of right for 20 years

75. The County Council's report acknowledges that the user evidence is credible [33]. The Members acknowledged that the evidence submitted showed a lot of use of the route [39].
76. The landowner's legal representative acknowledges that a considerable number of evidence forms were submitted [44], but considers the landowner's evidence denying such use had taken place to be of more value [60].
77. The mere fact that the landowner's witnesses had not seen many of the user witnesses using the claimed route [52] does not constitute evidence that the claimed use did not take place. It simply means that it was not necessarily always observed. Nevertheless, there is some merit in the argument put forward by the appellant that if the landowner's witnesses do not know all the user witnesses by name, it is meaningless to claim that none of them was seen [14].
78. The assertion on behalf of the landowner that anyone seen using the route was turned back [51][59] may be true, but those witnesses who have provided a substantial body of user evidence do not admit to being turned back except in recent times (i.e. since the erection of the new signs) [13]. These actions would fall outside and after the qualifying period of use which is under consideration.
79. The landowner has provided no good evidence to support the contention that those people living in Brockworth lived too far away for their evidence of use to be accepted at face value [45]. The appellant states that many of those people actually live nearer to the path than people living in the parish of Great Witcombe itself [9] and the landowner herself refers to Brockworth as being

⁵ *R (on the application of Drain and Godmanchester) v Secretary of State for Environment Food and Rural Affairs* [2007]

- one of the nearest settlements [46]. The distances people walk and the reasons for doing so are not matters on which the landowner can reasonably comment, without more detailed knowledge of their circumstances [45]. There is no reason to disbelieve the evidence of use, honestly given.
80. Given the location of the path, the access it provides to the reservoirs, and its condition underfoot compared to other paths leading to the same place I consider that it would be more likely than not that at least some use of the claimed route has been made by the public in accordance with the user evidence submitted [21].
 81. For that use to demonstrate that a public footpath has been dedicated, it is necessary for it to have been exercised 'as of right'. The use must have been open (i.e. not secretive), without force, and without permission.
 82. Although the landowner and many of her witnesses assert that the claimed use did not take place in either the volume or frequency alleged [52][54], the appellant points out that people often walked with dogs or children, and sometimes in groups [7]. Photographs have been submitted, some of which are alleged to have been taken along the claimed route itself [19]; claims which have not been refuted.
 83. It is not credible to believe that all the people who have submitted user evidence chose to use the path at times when they were unlikely to be seen. Indeed many of them refer to occasions when they saw or spoke to the landowner [19]. There is no credible evidence to suggest that all the use of the way that took place was in secret.
 84. No evidence of use by force has been submitted or alleged.
 85. The landowner and others of her witnesses claim that the only people who used the path were those to whom permission had been given. The members of the GWT allegedly had permission [51] and this has been acknowledged by the appellant [12]. Severn Trent Water may enjoy private access rights, possibly inherited from Corporation of Gloucester [34][49], as may the fishing club. The owner of Witcombe Woods clearly had rights at one time [49]. However, there is no indication of how the members of GWT were identifiable to the landowner or her family or employees, and other members of GWT indicate that they never had any difficulty using the way [12]. They do not say whether or not they were asked to identify themselves at any time, but the brochure produced by the GWT [17] would suggest that the reserve was visited by people other than members.
 86. Even reasonably disregarding the evidence of those people for whom it might be possible to show that permission to use the way existed or exists, there is still a large body of evidence from users who claim not to have received permission, and for which there is no evidence that permission was granted.
 87. Thus, whilst it is possible that some of the usage which has been made of the claimed route has been by permission, however vaguely implied, there is significant evidence of claimed use that has been made as of right.
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88. No evidence of any interruption to use has been submitted, except that caused by the outbreak of Foot and Mouth Disease (FMD) in 2001. This would post-date a period of qualifying user measured between 1981 and 2001 and is thus irrelevant. Nevertheless, it is the view of the Department for Environment Food and Rural Affairs that any break of use caused by FMD is not considered to constitute an interruption for the purposes of Section 31 of the 1980 Act, because the closure was not initiated by the landowner; nor was it instigated primarily to prevent the use of the way by the public but to prevent the spread of disease.
89. Consequently whether the qualifying period of user is taken as 1981-2001 or 1982-2002, the evidence of user submitted would suggest that user by the public has been enjoyed for an uninterrupted period of 20 years as of right.
90. The evidence of the landowner that such use has not taken place has some merit, but it is not so overwhelming as to eradicate the value of the user evidence.

Whether there is sufficient evidence of a lack of intention to dedicate during the relevant period

91. Members considered that the absence of any claim to the public right of way in the 1950s militated against dedication of a public footpath [38]. I consider that the Officer's advice that a right of way may have been dedicated subsequent to that time is sound [38], and that the absence of a claim in the 1950s has no effect on the qualifying period of user post 1980 in any case.
92. Considerable weight appears to have been given by Members as to whether or not the user evidence was consistent and accurate in respect of a gate at Point A [39]. This appears to have led them to consider that the user evidence was unreliable, and should be accorded significantly less weight than the evidence of in opposition to the claim. They consequently refused to make the Order [39].
93. It was acknowledged by one of the landowner's witnesses that the gate was removed in the early 1970s [55] and thus it cannot have been present during any part of the qualifying period of user (1981 to 2001). Furthermore, I consider that the explanation provided by the appellant [26], and with which the Officer concurred, to be reasonable [43]: that the gate was often open and therefore unnoticed by users of the route and that its presence did not preclude the dedication of a public right of way. This does not constitute evidence of the landowner's lack of intention to dedicate a public footpath during the period in question.
94. The poll conducted by GWPM [24][36] appears to have been conducted after the application was submitted to the County Council. Whilst it may have been conducted in a genuine attempt to gauge local opinion, it cannot provide evidence of the status of the claimed route. It is true that it provided an opportunity for local people to be made aware of the application and perhaps for them to provide evidence in support or in opposition [46], but in itself it cannot perform that function, as explained in the Officer's report [36]. It is not evidence of the landowner's lack of intention to dedicate a public right of

way and can only express the feeling of the members of the parish some considerable time after the qualifying period of user.

95. Mr Buxton's query to the County Council with regard to the status of the route, made in 1999, does fall within the period of qualifying period of user [58]. However, the fact that the route was not recorded on the definitive map and statement as a public footpath does not preclude the existence of such rights. Furthermore it does not in itself provide any evidence of the landowner's intentions in the matter, even if it may have pre-empted the action eventually taken a couple of years later (i.e. the erection of the new signs).
96. The landowner claims that it has been her family's habitual practice to turn back anyone using the claimed route throughout all the time that both she and her predecessors have owned the land [50]. Were that to be the case, it would be good evidence of a lack of intention on the part of the landowner to dedicate a public footpath over the claimed route. However, this claim is not borne out by the user evidence, and thus there is a conflict of evidence which needs to be resolved.

Whether it is reasonably alleged that a public right of way subsists

97. Both the appellant and the landowner allege that witnesses of both parties have been influenced due to familial or other relationships between individuals concerned. [18][20][46]. The appellant considers that the influence of the landowner over witnesses is likely to be greater than his own influence over user witnesses [20]. There is perhaps some merit in that argument, due to the contractual relationships between certain parties, but in the absence of any proof of such influence either way, I consider that the whole issue is neutral in determining whether or not a right of way is reasonably alleged.
98. There is a conflict of evidence, but the evidence of both those who have used the way and those who deny the dedication of public rights has credibility. Nevertheless, there is no documentary evidence which would unequivocally demonstrate that public rights cannot subsist. The case law affecting decisions taken under Schedule 14 of the 1981 Act is clearly set out in the two cited cases (see paragraph 63 above). It was also set out clearly in the Officer's report [39]. The recommendation of the Officer relies on a reasonable interpretation of those judgements [42].
99. Consequently, whilst the Members are entitled to take a different view to their Officers, if it can be justified [39][60], I agree with the Officer's recommendation that the test set out in **Test B** is met and thus a reasonable allegation has been made that a public footpath subsists along the route in question.
100. The evidence of equestrian use by the public is insignificant, and would not, in my view, meet even the lesser requirements of **Test B**.

Other Matters

101. I have disregarded any comments made in respect of impropriety on the part of any party as such accusations are not relevant to my consideration of the appeal.
102. In view of my conclusion it is not necessary to consider the question of dedication at common law.

Overall Conclusion

103. In accordance with Section 53(3)(c)(i), evidence has been discovered which, when considered with all other relevant evidence available shows that a public footpath has been reasonably alleged to subsist along the claimed route and that an order should therefore be made.

Recommendation

104. I recommend that the appeal should be allowed and Gloucestershire County Council should be directed to make an Order..

Helen Slade

Inspector