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# Appeal Decision

**by Alison Lea MA (Cantab) Solicitor**

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

**Decision date: 10 February 2016**

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## **Appeal Ref: FPS/Q2371/14A/14**

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Lancashire County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 18 February 2014 was refused by Lancashire County Council on 13 May 2015.
- The Appellant claims that a footpath should be added and part of Footpath 22 Pilling at Field House should be deleted from the definitive map and statement for the area.

## **Summary of Decision: The appeal is dismissed**

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### **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 (the 1981 Act). I have not visited the site but I am satisfied that I can make my decision without the need to do so.
2. Pilling Footpath 22 is depicted with a thick line on both the First Definitive Map and the Definitive Map First Review. There have been no subsequent reviews and I am informed that there have been no legal orders made to stop or divert any part of the route since it was originally recorded. The relevant date of the First Definitive Map and Statement is 1953. The Definitive Statement provides no detail of the location of Footpath 22 other than it runs from Path 21 to opposite Bodkin Hall.
3. The Council has prepared a plan showing what it believes to be the line of Footpath 22, marked as Points A, B, C, D and F (Route 1). It runs along the access track to Field House<sup>1</sup> and through the garden of that property. The route which the appellant claims should be added runs parallel to that route and is shown on the plan between Points A, E and F (Route 2). It is located in the field to the south side of the access track and along the field edge to the south of the boundary of the garden of Field House.
4. The appellant claims that a mistake was made in the recording of the position of Footpath 22 or alternatively that the Council has made a mistake in interpreting the Definitive Map. The Council accepts that the line on the Definitive Map is imprecise. Accordingly the Regulatory Committee decided to make an order to amend the particulars in the Definitive Statement so as to

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<sup>1</sup> Also referred to as Fieldhouse

define the position and width of the footpath more precisely. No order has been made as yet.

### **The Main Issues**

5. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made to modify the Definitive Map and Statement if evidence is discovered 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 in the area to which the map relates.
6. Section 53(3)(c)(iii) of the 1981 Act provides that an order to modify the Definitive Map and Statement should be made where evidence is discovered which, when considered with all other relevant evidence available, shows there is no public right of way over land in the map and statement as a highway of any description. Section 32 of the Highways Act 1980 (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.
7. In *R on the application of Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs EWHC 171 (Admin) (Leicestershire)* Collins J considered how the tests under 53(3)(c)(i) and (iii) should be considered in a case where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. He held that in such circumstances *"it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing on the map of, in effect, a new right of way."*
8. He went on to say  
*"what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it should stay in place....."*  
*As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality section 53(3)(c) (iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around."*
9. Section 53(3)(c) requires there to have been a "discovery" of evidence and this is not disputed in this case. The main issue to be determined is therefore the correct route of the footpath. This involves consideration of whether there is sufficient evidence to show that the route shown on the Definitive Map is wrong and that on the balance of probabilities an alternative route exists.
10. The appellant also claims that Route 2 exists by virtue of use by the public. Accordingly if I conclude that there is insufficient evidence to show that the

Definitive Map is wrong I shall then consider whether an order should be made under Section 53(3)(c)(i) of the 1981 Act.

11. As set out in the case of *R v SSE ex parte Mrs J Norton and Mr R Bagshaw (1994) 68 P & CR 402 (Bagshaw)* there are 2 tests and an Order should be made where either test is met:

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

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is 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.

12. Section 31 of the Highways Act 1980 (the 1980 Act) provides that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

## **Reasons**

### **Documentary evidence**

#### *OS and other maps*

13. No route around Field House is shown on early commercial maps. The earliest Ordnance Survey 6 inch map for the area, surveyed in 1844-45 and published in 1848 shows an enclosed track leading from Lancaster Road to Point A. From Point A an unenclosed track leads to the front of an unnamed building which is in the same position as the building later known as Field House. Neither Route 1 nor Route 2 is shown.
14. The earliest OS map at a scale of 25 inch to the mile was surveyed in 1890 and published in 1893. It shows the access from Lancaster Road to Point A and a track marked FP leading to the intersection of other tracks marked FP. The track does not correspond to either Route 1 or Route 2 but is located some distance from the boundary of the unnamed building. A further track, which is not marked FP, leads directly to the building.
15. The 1910 Finance Act plan shows a track leading to the property. Where it curves away from the house it is shown by a double row of dotted lines and labelled F.P. in the same manner as the various tracks to which it connects. It passes close to outbuildings and around the south of the boundary of the property. The valuation Field Books have not been provided but I am informed that no deductions were made for public rights of way or user.
16. A further edition of the 25 inch map was published in 1912. This shows a track marked FP leading towards the unnamed property and then following close to

but outside the boundary of that property. 2 outbuildings are shown close to and abutting the boundary. The Council states that it is not possible to determine the extent to which this footpath corresponds to either Route 1 or 2 or whether it was a public footpath at that time. It notes however that it links to other routes also shown as FP and which are now recorded as public footpaths.

17. A further edition of the 25 inch map was published in 1932. It shows an area which appears to be enclosed by fences or hedges leading from Point A towards the unnamed property. It is shown as gated, both close to Point A and close to the house. The enclosed area appears to continue beyond the gate close to the house and around the boundary of the property, passing close to 2 outbuildings which are shown in a similar position to those on the 1912 map. As it leaves the boundary at Point F, one of the solid lines becomes dotted. None of the route is marked FP but it connects with other routes labelled FP. I note that the enclosed area is considerably wider than the dotted track marked F.P. on the Finance Act plan.
18. The Council states that key to interpretation of the Definitive Map is whether the current boundary fence/hedge of Field House is consistent with either boundary of the enclosed track on the 1932 map. The Council states that it has overlaid the 1932 map with the modern OS MasterMap and has taken measurements on site with a laser distance meter to check that the modern OS map accurately reflects what is on the ground. From this it concludes that the modern OS MasterMap reflects the reality on site with a tolerance of 0.5m in respect of most measurements and that "the modern boundary hedge and fence does not coincide exactly with either of the boundaries of the enclosed track although it has greater coincidence with the southern boundary". Accordingly, in the Council's opinion, at least part of the track that existed in the 1930s has become absorbed into the garden of Field House.
19. The appellant states that the Council's survey and measurements are meaningless as the size and position of Field House changed during the recent rebuilding of the property. He also points out that various boundaries, including those of properties to the east of Field House do not appear to be accurate. In any event, the appellant submits that the 1932 map does not show a public footpath at all as at that time no public rights were in existence.
20. The 1955 6 inch OS map shows similar details to the 1932 map. However, the enclosed area around the boundary of the garden is now marked FP. I note that unlike the tracks to which it connects, it is marked FP rather than F.P. and that the appellant suggests that this may be because the annotation was added later. He also suggests that as the annotation has been made on the field side of the track it is likely that the footpath was to the south of the boundary of the property.
21. The 1968 25 inch map shows a route leading away from the boundary of Field House similar to that shown on the 1890 map. It shows an enclosed track from A leading towards Field House, leaving the boundary of Field House at about Point D, passing close to outbuildings and then crossing to meet other tracks. The Council states that although the enclosed track is no longer evident the boundary of Field House as shown is consistent with the southerly boundary of the enclosed area which now appears to have been absorbed into the garden. However, the map shows a number of outbuildings, 2 of which are

close to or abutting the boundary. Their shape suggests that they may not be exactly the same buildings as shown on earlier mapping, but the location of the buildings does not appear to have changed.

#### *The First Definitive Map*

22. The parish survey was prepared for Pilling in 1950. The map is hand drawn on a 6 inch to one mile OS map and shows a line which appears to run along the access track to Field House right up to the building and then around what appears to be the boundary of the property, passing close to an outbuilding. The parish survey card records a starting point and destination but does not provide any useful information with regard to the exact location of the route.
23. The draft map appears to show the route of Footpath 22 running along the access track towards Field House then, contrary to the parish survey map, curving away before reaching the house. It then follows the boundary of the property passing close to an outbuilding. The route shown on the Provisional Map is consistent with this as is the First Definitive Map. However, I agree with the appellant that the width of the pen line makes the route imprecise and the Council accepts that the hand drawn lines of the various maps used in the Definitive Map process lack precision.
24. The Council's interpretation of the Definitive Map appears to have varied over the years. When, in 1995, a member of the public complained that the route was blocked by a locked gate at Point A, a Council officer found that the width of the path encompassed both the locked gate and the adjacent stile situated to the south of the gate and leading into a field.
25. In a letter dated 21 October 2011 the Council stated that it was clear that the public footpath "passes into the field very close to and just south of the property". In a letter dated 3 October 2012 the Council states "the correct line of the footpath is along the drive to near the front of the house and not into the field at an earlier point".
26. In a letter dated 14 February 2013 the Council states that "in part the current boundary of Field House coincides with the southern boundary of the formerly enclosed footpath and hence the public footpath is within the garden for much of the southern edge of the garden. However, at the eastern end of the garden the changes in the boundary position are not so clear, in part because of the position of various outbuildings, and the footpath now runs along the boundary, partially inside and partially outside the Field House boundary. It is clear that it runs along the access drive to the eastern end of the building before straddling the fence for a short distance".
27. None of these descriptions reflect what is shown as Route 1 on the plan provided by the Council.

#### *Photographic evidence*

28. The earliest aerial photograph from which any detail can be ascertained is stated by the Council to have been taken in the 1960s. This appears to be the same photograph dated by the appellant as 1963. It shows a track leading towards Field House which then curves away from the house, passing close to an outbuilding, which appears to be in the same location as shown on the 1968 map. The worn track then continues to follow close to the southern boundary of the property. Immediately to the north of the worn track, or perhaps within

- the worn track, there is a thin black line which may be a fence or a hedge. There appears to be a small gap between the black line and the hedge around the boundary of the property and the area between the black line and the hedge appears to be open at both ends. Even if the black line does represent a fence or hedge, the photograph does not appear to show the enclosed area as represented on the 1932 OS map.
29. Aerial photographs stated to have been taken on 13 June 1967 also show a track leading towards Field House, which then passes close to an outbuilding before following a hedge along the southern boundary of the property. The thin black line visible on the earlier photograph is not apparent and the hedge around the boundary to the property appears to be the same as that on the earlier photograph.
  30. An aerial photograph taken in 1988 shows a grass track from Point A leading towards Field House. There also appears to be darker shading around the boundary of the property which could also be a track. The outbuildings appear to have disappeared by this time. An aerial photograph dated 2000 does not show a track leading to Field House. There is a mown area around the perimeter of the property.
  31. An aerial photograph taken after the property had been redeveloped shows that an access track had been reinstated and fencing erected around the boundary of the property. The appellant states that he believes the photograph to have been taken in the winter of 2009/2010.
  32. A number of photographs have been produced showing a gate across the access road at Point A, together with an adjacent stile. A photograph taken in 1993 shows that the gate is padlocked and that there is a sign attached which states "Keep out of this Field". The stile is waymarked with a yellow arrow. The appellant states that the stile was placed in position in 1971 and that the situation existed for almost 40 years.
  33. Photographs have also been provided of a locked gate at Point B on the plan. Mr Walter Lawrenson states that he fixed the gate and gate posts on 12 April 1971 and that there was no public access beyond the gate from that date. He also states that he painted waymark arrows on the gate post in the mid 1970s. The waymark arrow points to the adjacent field. A new "private" sign and footpath waymarks were fixed on 7 August 1999.

### **Other evidence**

34. Mrs Freda Gornall who lived at Field House from 1956 to 1973 recalls that there was a gate across the track to Field House and that the public footpath was outside the boundary of Field House and in the field to the south of the house. Other local residents appear to have been shown a photograph of the stile at Point A and recall it from the 1950s, 1957, 1960, 1969 and more recently. Those who record recent use of the path state that they generally use "the track to Field House and over the stile". Some state that, if open, they use "the gate at the start of the track to Field House".
35. Pilling Parish Council state that "according to local knowledge and experience" the route "ran over a stile that was situated to the south of the entrance track to Field House at point A....and ran from point A to E to F.....for well over 30 years before it was moved to the position it is now in 2006". The Council

accepts that Route 1 has probably not been capable of being walked in its entirety since some point in the 1960s.

36. The appellant has expressed concern that the existence of a public footpath close to the house and through the garden would devalue his property. However, this is not a matter to be taken into account in determining whether the route of the footpath has been correctly recorded.

### **Conclusions on the evidence**

37. The route of Footpath 22 as shown on the First Definitive Map is unclear. The hand drawn pen line is thick and lacks precision and this is evidenced by the difficulties which the Council appears to have encountered in advising on the exact line of the footpath.
38. The route shown appears to follow the access track towards the property and then curve away along the boundary of the property. With regard to the section of the route leading from Point A towards the house, there is no evidence that the stile was in place in 1953 and there is little evidence from the various maps and the later aerial photographs which would lead me to conclude that the route at the date of the First Definitive Map was other than along the access track. Although this route may have been obstructed at times and an alternative route may have been used, I conclude that the Definitive Map is correct in showing the route along the access to Field House.
39. In relation to the part of the route which curves away from the house, all the evidence before me suggests that it passes close to an outbuilding and along the boundary of the property. I accept that the boundary may have changed over time. However, all of the maps and photographs show the route passing close to an outbuilding which appears to have been in a similar location throughout the years, both prior to and after the date of the First Definitive Map. It is unfortunate that there are no aerial photographs which show any detail prior to that date. However, all the photographs from the 1960s onwards appear to show the boundary hedge in the same place. Although the 1960s photograph may show a second hedge or fence, it does not appear to reflect the boundaries shown on the 1932 OS map, and does show the route on the ground to the south of the black line. There is no evidence of any personal recollections of a boundary change.
40. The suggestion that the boundary may have changed is mainly due to the work carried out by the Council in overlaying maps and taking measurements on site. However, the enclosed area shown on the 1932 OS map does not necessarily represent a public footpath. OS maps specifically did not indicate the status of routes in so far as public rights are concerned, but it is interesting that the area is not marked FP whereas other routes in the vicinity do carry that notation. Even if public rights had been acquired by that time, there is no indication that they had been acquired over the whole area. I note that the track shown by a double dotted line and marked F.P. on the Finance Act plan does not coincide with the full extent of the enclosed area on the 1932 plan.
41. Taking all of these matters into account I conclude that on the balance of probabilities the boundary to Field House has not changed to any material extent. Accordingly, at the time that it was recorded on the Definitive Map, Footpath 22 passed through, or close to, Point E as shown on the Council's map. In my opinion this accords with what is shown on the First Definitive

Map, albeit that I accept that the line is imprecise. I therefore conclude that the footpath should not be deleted from the Definitive Map.

42. I note that the Council intends to make an order to modify the Definitive Statement and I agree that, given the confusion that has arisen in this matter, clarifying the location and width of the footpath would be helpful. Once any such order is made there will be an opportunity to object to it and for the matter to be considered by the Secretary of State if necessary.
43. With regard to the section of Route 2 which runs parallel to the access track from Point A towards the house I shall now consider whether the evidence before me is sufficient to show that a right of way subsists or is reasonably alleged to subsist. Such a route would be in addition to the route along the access track which is shown on the Definitive Map.
44. The right of the public to use this route appears to have been brought into question in 2006 when a stile at Point A was moved to Point C and the appellant was subsequently informed by the Council that the legal route of the footpath was along Route 1 rather than Route 2. The appellant claims that there has been a footpath along this part of Route 2 since at least 1966 until it was moved in 2006.
45. Although the user evidence is limited, that provided, including by the Parish Council and a former resident of Field House, is consistent with use of a route over a stile to the south of the entrance track to Field House at Point A. The user evidence is supported by photographs of the stile at Point A and the evidence of Mr Lawrenson.
46. However, the evidence provided gives little indication of the route taken after crossing the stile. There is no evidence of the extent or frequency of use of Route 2 or whether that use has been interrupted. Given the limited detail available to me I conclude that the evidence is insufficient to make a reasonable allegation that on the balance of probabilities a right of way exists. Accordingly neither Test A nor Test B is met.

### **Conclusions**

47. Having regard to these and all matters raised in the written representations I conclude that the appeal should be dismissed.

### **Formal Decision**

48. I dismiss the appeal.

*Alison Lea*

**Inspector**