

# Appeal Decision

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 19 December 2016**

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## **Appeal Ref: FPS/M1900/14A/6**

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Hertfordshire County Council not to make an Order under section 53 (2) of that Act.
- The Application dated 10 November 2014 was refused by Hertfordshire County Council (the Council) on 26 July 2016.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by deleting footpath 43 Tring (shown A – B – C – D and C – E on the plan appended to this decision).

## **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 an appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This appeal has been determined on the basis of the papers submitted.

### **The Main Issues**

3. Section 53(3)(c)(iii) of the 1981 Act states that a modification order should be made by the surveying authority following the discovery of evidence which (when considered with all other relevant evidence available to them) shows that there is no public right of way over land shown in the map and statement as a highway of any description.

### **Reasons**

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties; the relevant part of the Wildlife and Countryside Act 1981; the findings of the Court of Appeal in the *Trevelyan*<sup>1</sup> case; the guidance given in Defra Rights of Way Circular 01/09 (version 2, October 2009) and the findings of Recorder Hancock QC sitting in the Watford County Court in the case of Dacorum Borough Council and Mavis Ann Foy and Toneye Foy [10 February 2015] (2WD00867) ('*Dacorum*').
5. In the *Trevelyan* case, Lord Phillips MR held that "*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably*

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<sup>1</sup> *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266

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*arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

6. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the surveying authority to demonstrate that the map was correct.
7. Circular 18/90 has been superseded by Defra Circular 01/09. Circular 01/09 says at paragraph 4.33 *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
  - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made;*
  - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;*
  - *the evidence must be cogent."*
8. In the *Dacorum* case, Recorder Hancock held that footpath 43 was a public footpath with a width of 6 metres between points B – C – D<sup>2</sup>, that conveyances from the 1880s and 1890s referred to properties which were bounded on one side by a way known as Wells Lane where none of the adjacent properties were recorded as having a private right of access over the lane; that the 1910 Finance Act documents showed Wells Lane not to be in private ownership and that the most likely explanation for that was that it was a public right of way; and that Ordnance Survey mapping through the twentieth century had consistently shown the width of Wells Lane as being between 6 – 7 metres.
9. The burden of proof lies with the Appellant and the standard of proof in relation to the proposed deletion of footpath 43 is the civil standard of proof; that is the balance of probabilities.

## **Background**

10. The Appellant does not dispute that a public highway once existed between

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<sup>2</sup> As shown on the plan annexed to this decision.

Icknield Way in Tring and the Lower Icknield Way (known as Wells Lane) in the village of Wilstone; however, the Appellant contends that this road had been closed with the building of the Wilstone Reservoir to provide water to the Grand Union Canal and that there was no evidence that the road had been re-opened until a footpath was recorded in the definitive map and statement.

11. It is the Appellant's case that the inclusion of footpath 43 in the definitive map and statement was erroneous as there was no evidence that public rights had been in existence over the way when the definitive map and statement had been prepared.

## **Reasons**

### ***Whether any evidence has been discovered which was not considered when footpath 43 was first recorded in the definitive map.***

12. The Appellant submitted an extract from a "*History of Wilstone*" by A R Gomm (undated) and two undated conveyance plans but not the conveyances the plans related to. It is not known what, if any, documentary evidence was taken into account prior to footpath 43 being recorded in the definitive map and statement in 1953 and the evidence adduced by the Appellant may therefore be new evidence which has not previously been considered.
13. As part of its investigation of the application made to delete footpath 43 from the definitive map, the Council undertook a comprehensive review of the documentary evidence it had discovered, some of which had been considered by Recorder Hancock in the *Dacorum* case. I am of the view that new evidence has been discovered which was not considered when footpath 43 was first recorded in the definitive map.

### ***Documentary evidence***

#### *Drury and Andrews Map of 1766*

14. The map pre-dates the construction of Wilstone Reservoir and shows the road network to have been broadly similar to the current day; Lower Icknield Way runs east-west and Tring Road is shown to run north to Wilstone. A route is also shown running south on a similar alignment to footpath 43 to a junction with Icknield Way. This route runs over land which is now occupied in part by Wilstone Reservoir. These roads are all depicted as "*road enclosed by hedges*" according to the key to the map.
15. Drury and Andrews' map shows a route on the alignment of footpath 43 in the same manner as other known public roads in the area. Although not conclusive, the depiction of the footpath in this way provides some evidence that the route was considered to be one which was open for the public to use.

#### *Tring Inclosure Award 1799 and map 1804*

16. The Inclosure award was made prior to the construction of Wilstone Reservoir and consequently the reservoir is not shown on the award map. Lower Icknield Way and Tring Road are shown on the map coloured sepia; on the south side of Lower Icknield Way opposite Tring Road is shown a wide bounded route which provides access to a large field (numbered 269) which was awarded to one Drummond Smith in exchange for land allotted to the "Dean and Chapter". There is no reference to the existence of public rights over the entrance to field

269 or over field 269 itself. The inclosure award does not assist in determining whether footpath 43 was incorrectly recorded in 1953.

#### *Highway Extinguishment Records*

17. The Appellant submitted an extract from Gomm's "*History of Wilstone*" in which is it asserted that the road south from Lower Icknield Way to Icknield Way was closed by Tring Court Rolls in 1800. Having studied the records in its care, the Council has found no reference to any stopping up or extinguishment order having been made for a route on the alignment of footpath 43. As the Appellant has not provided a copy of the relevant Court Roll, the reference in Mr Gomm's history cannot carry significant evidential weight and does not demonstrate that any public rights over Wells Lane had been extinguished in 1800.

#### *Bryant's Map 1822*

18. This map shows a route on the same alignment of footpath 43 which commences on Lower Icknield Way and runs in a generally southerly direction to a point which approximates to the current edge of Wilstone Reservoir. The route is depicted as a "good cross or driving road" according to the key to the map. Bryant also shows a route extending northwards from Icknield Way which ends just south of the Wendover Cut, an arm of the Grand Central Canal. The two ends of the route shown by Bryant are on approximately the same alignment as the road shown by Andrews and Drury.

19. Bryant also shows the first phase of development of Wilstone Reservoir which was originally constructed in 1802 to provide water for the Wendover Cut. The reservoir was extended in 1835 and then again in 1839 when it reached its current size.

20. Bryant's map shows that the route of footpath 43 continued as an observable feature in the landscape beyond the initial construction of the reservoir. Although the map does not demonstrate that the route carried public rights, equally it does not demonstrate that footpath 43 was incorrectly recorded in 1953.

#### *Property Deeds*

21. The Council says that the two conveyance plans adduced by the Appellant are the plans to two incomplete conveyances submitted by the Appellant in the *Dacorum* case. These conveyance plans and the conveyances to which they relate were considered by Recorder Hancock and his findings as to their relevance and the relevance of other conveyance material is set out in his judgement in paragraphs 21 (2) and 21 (3). I do not reproduce these finding here but I have read them and I find no reason to depart from them.

22. In short, the conveyances from 1886 and 1887 describe the position of the land being conveyed by reference to adjacent features. A conveyance of 1886 referred to the land being bounded by "*a road or lane known as Wells Lane*" whereas the conveyance of 1887 described Wells Lane as "*a private road leading to the swing bridge belonging to the Grand Central Canal Company*". The conveyances of 1895 and 1896 described the land as being bounded by "*a private road*", "*by the road or way known as Wells Lane*" and "*by a road or way known as Wells Lane*".

23. In his judgement at paragraph 7.3 Recorder Hancock held "*The picture painted by these conveyances is consistent. There were a series of properties, between which ran a road now known as Wells Lane. That road had originally been a private road belonging to the canal company; but there is no reason to suppose that it remained so on the basis of the material in these conveyances*". Recorder Hancock found that those conveyances which described Wells Lane as being a private road had not granted private rights of access over it, nor had those conveyances which made no mention of Wells Lane being private.
24. For those cottages and other properties which took their access from Wells Lane, the implication is that at the date of these conveyances, Wells Lane must have provided a public means of access to the properties.
25. One conveyance submitted by the Council but which was not before Recorder Hancock is dated 27 January 1896 by which land opposite Tring Road was sold to Lord Rothschild by Mr Hare. That land corresponds to the land south of Lower Icknield Way and north of C – D. The route of footpath 43 between C – D and part of B – C is shown in the conveyance plan in the same way as the public road to which it connected and was described in the conveyance as "*a road or way there called Wells Lane*". The conveyance plan also annotates as "*Public Foot Path*" that part of footpath 43 shown as C – E.
26. The Hare conveyance provides supporting evidence for the C – E spur of footpath 43 as having been regarded as a public right of way in 1896 by the parties to the conveyance. As C – E was regarded as a public right of way at that time it is more likely than not that this path would have had an outlet onto another public highway at its southern end. The Hare conveyance therefore also provides supporting evidence that Wells Lane would have been at least a public footpath in 1896 and is supportive of the correct recording of a public footpath in 1953.

*Ordnance Survey mapping 1882-1892, 1899 and 1924*

27. The first edition of the 25-inch to 1-mile map published between 1882 and 1892 shows footpath 43 between points B – C – D as a wide route commencing on Lower Icknield Way and running in a generally southerly direction between hedges, fences or walls. At point B is a gate or a similar barrier where the route of footpath 43 is divided into two plots. The plot numbered 364 is described in the book of reference as a "road". That part of footpath 43 between C – E is shown by a single peck line adjacent to a hedge, fence or wall.
28. The second edition of the map published in 1899 shows the route B – C – D as a well-defined track between boundaries although the boundaries south of B have disappeared and the route from B now merges into the field. There is no change to the depiction of section C – E. The 1924 edition of the map shows the section A – B – C – D in the same way as the previous editions had done whereas C – E is shown as running between solid boundaries.
29. Ordnance Survey maps provide evidence of what existed on the ground at the time of the survey although they do not provide evidence of the existence or otherwise of public rights over any route shown in the map. The maps demonstrate the continued existence of a route which corresponds with footpath 43. In my view the Ordnance Survey maps do not provide evidence that the recording of the path in 1953 was incorrect.

### *Photographs 1874 -1912*

30. A number of photographs from "*The Story of Wilstone – a history of our village*" were submitted. These photographs were taken at various points in time during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Although the photographs post-date the construction of the reservoir they show that Wells Lane remained a broad stoned track from which a number of now-demolished residences took access. Although these photographs do not assist with the determination of the status of the route, they show the existence of a route which would have been capable of supporting at least public pedestrian traffic.

### *Finances Act 1910 records*

31. Wells Lane between B – C – D is shown on the Finance Act plan bounded by fences or hedges and excluded from neighbouring hereditaments. The section A – B is shown as part of hereditament 1474, a plot of land extending to 209 acres for which a reduction in taxable value of £200 was allowed. That part of footpath 43 between C – E is shown to be part of hereditament 1393 for which no reduction in taxable value was recorded.

32. I accept that the evidence provided by the Finance Act documents is conflicting. On the one hand the exclusion of B – C – D from adjacent hereditaments is suggestive of that part of footpath 43 being a public highway (as Recorded Hancock found) whereas the hereditament crossed by section C – E was not considered to be subject to a public right of way. Although it was an offence to falsely claim tax relief as part of the process, there was no compulsion on an owner to admit to the existence of public rights over his or her land; it may have been that the owner of hereditament 1393 either did not recognise the existence of a public footpath over the land (despite the evidence of the 1896 Hare conveyance) or had opted to ignore its existence and pay the tax instead. Bearing in mind the conclusions of Recorder Hancock I consider that the Finance Act documents are supportive of the existence of public rights over footpath 43 in the early part of the twentieth century.

### *Definitive Map records*

33. Under the provisions of the National Parks and Access to the Countryside Act 1949, the County Council of the day was required to produce a map showing all the public rights of way within its area. Surveys of public rights of way were conducted by Parish Councils with the results being passed to the County Council who would compile the maps. The publication of the maps was a three stage process, with draft, provisional and definitive maps being produced. Following the publication of the draft map, objections to the inclusion or omission of routes regarded as public rights of way could be made by any interested party. However following the resolution of all issues raised at the draft map stage and the publication of the provisional map, only landowners were permitted to make further objections or representations.

34. Footpath 43<sup>3</sup> and the footpath to which it connects were surveyed on 30 July 1951 by a Mr P C Birtchnell who described the path as "*from Wilstone Reservoir to Wilstone Green. Commencing from junction of paths 71 and 73<sup>4</sup> this path*

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<sup>3</sup> The footpath was originally numbered 70 in the parish survey but this was changed between the survey being made and it being approved by the parish council on 9 October 1951.

<sup>4</sup> Now footpath 45.

*descends the embankment of the reservoir very steeply, to a railing and continues along "arm" of a large field to a step stile then along a short green lane. There are two exits onto road; one veers right to a gap beside a short railing and other runs ahead between a short fence and hedge to the road at Wilstone Green".* The description of footpath 43 approved by the Parish Council was that the path commenced *"from FP 45 on NE side of Wilstone Reservoir thence NW to Wilstone Green, having two exits on the county road"*.

35. No objections were received from landowners or the public to the inclusion of footpath 43 in the draft or provisional definitive maps. The parish survey provides evidence of the local reputation of the path as a public right of way in the early 1950s and the lack of objection to the inclusion of the path in the draft and provisional maps is supportive of the recording of the footpath in 1953 as being correct.

#### *Other relevant evidence*

36. In a letter dated 25 October 2016 a Mr Johnson provided evidence of his personal use of footpath 43 since 1994. In addition, Mr Johnson enclosed a letter from his neighbour Mr Rodwell who stated that he had been born in Wilstone in 1930 and *"throughout the time since (particularly in younger days) often used the footpath in question to gain access to the local reservoir and for walks and picnic, even for bathing"*.
37. Whilst Mr Johnson's use of the path does not assist with the question of whether the footpath was incorrectly recorded in 1953, Mr Rodwell's evidence demonstrates that footpath 43 was in use by members of the public from at least the mid-1930s and adds weight to the reputation of the route as a public footpath demonstrated by the parish council survey of July 1951.

#### **Conclusions**

38. The burden of proof in this case lies with the Appellant to demonstrate on a balance of probabilities that a mistake was made when footpath 43 was first recorded in the definitive map and statement. The only pieces of evidence which the Appellant submitted were two conveyance plans (without the relevant conveyances) and extracts from a local history of the village.
39. Although the Appellant contends that the reference in the local history to Wells Lane having been stopped up in 1800 to allow for the building of Wilstone Reservoir, the appellant has not submitted a copy of a formal order under which the road (and any rights over it) would have been stopped up. The conveyance plans by themselves are of little assistance and provide no support to the appellant's case.
40. The remaining documentary evidence adduced by the Council and provided by Wilstone residents is of a vehicular through route which was in existence in 1776 and which was severed by the extension of Wilstone Reservoir in the 1830s. That part of Wells Lane which remained between Lower Icknield Way and the reservoir continued to exist as a broad track or road from which a number of cottages took their access. Subsequent to the building of the reservoir, Wells Lane was described in maps and conveyances variously as a public road, a private road and as a public footpath. The evidence from the mid-twentieth century is that Wells Lane had the reputation of being a public right of way on foot and a means by which the public could access the banks of

the reservoir for informal recreation.

41. The survey of public rights of way conducted by Mr Birtchnell is indicative of the local reputation of Wells Lane as being a public right of way, and that evidence of repute is bolstered by the recollections of the personal use of the path by Mr Rodwell.
42. I conclude that the Appellant has failed to adduce evidence of sufficient substance and cogency to displace the presumption that the definitive map is correct. I also conclude that the evidence which has been adduced by the Council and others points to the inclusion of footpath 43 in the definitive map and statement in 1953 as being correct.
43. The evidence submitted with this appeal appears to be the same evidence considered by Mr Recorder Hancock in the *Dacorum* case. The conclusions I have reached are as one with the findings of the Court; that is that footpath 43 Tring is a public footpath which was correctly recorded in the definitive map and statement in 1953.
44. Accordingly, it follows that I conclude that the Appeal should be dismissed.

**Formal Decision**

45. I dismiss the appeal.

*Alan Beckett*

Inspector



APPENDIX

