



# Appeal Decision

by **K R Seward Solicitor**

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

Decision date: 17 January 2019

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## Appeal Ref: **FPS/Z1585/14A/15**

- The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Essex County Council not to make an Order under Section 53 of that Act.
- The application dated 3 July 2017 was refused by Essex County Council on 1 August 2018.
- The appellant claims that the definitive map and statement for the area should be modified by adding a limitation affecting the public footpath known as Footpath 21 Great Wakering.

## 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 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site, but I am satisfied that I can make my decision without doing so.
3. A copy of a map accompanying the application showing the approximate location of the stile which is the subject of the application is attached for reference purposes.
4. The application is made by Mr Neil Threadgold of Oxenham Farm. It follows notice given by letter dated 9 May 2017 from the County Council requiring removal of two stiles across Footpath 21 Great Wakering ('FP21'). Only one of these stiles is the subject of the current application. I gather that the stile is not currently in situ due to vandalism and its reinstatement depends upon the outcome of this appeal.
5. It transpires that the land on which the stile was sited belongs to a neighbouring farmer. The applicant says that his neighbour is content for him to carry on managing the stile. The Council is concerned that if a structure has been maintained in this position by the applicant's family over decades, as claimed, then it amounted to a trespass. As such, it questions whether a lawful limitation can be added to the Definitive Map and Statement ('DMS').
6. The point in issue is whether there was a limitation on the public use of the footpath at the time of dedication. According to the Council, that date must have preceded 1916. If that is so, it was before the applicant's family lived at Oxenham Farm and the issue of lawfulness does not arise. The current

landowner has been notified of the application with opportunity to object. No objection has been raised.

### **Background**

7. The application claims that when FP21 was recorded in the DMS in the 1950's it should have been made subject to the right to maintain a stile in the south-east corner of Mill Head. Schedule 14 of the 1981 Act allows an application to be made for alterations to the DMS.
8. Pursuant to section 53(2) the Council is under a duty to keep the DMS under continuous review. That duty extends to making such modifications to the DMS as appear to them to be requisite in consequence of the occurrence of an event as identified in section 53(3). An event includes the discovery by the Council of evidence which (when considered with all other relevant evidence available to them) shows that particulars contained in the DMS require modification (section 53(3)(iii)).
9. By virtue of section 53(4), the modifications which may be made by an order under section 53(2) include the addition to the statement of particulars as to any limitations or conditions affecting the public right of way.

### **Main Issue**

10. The main issue is whether the evidence is sufficient to show, on the balance of probabilities, that particulars of the stile should be added to the DMS as a limitation for FP21.

### **Reasons**

11. FP21 is described in the Definitive Statement for Great Wakering as:  
*"Continuation of footpath 30 in Barling parish. Commences at the parish boundary at Mill Wharf easterly and following the sea wall via Oxenham. Continues easterly to a point north-west of Havengore Bridge where it proceeds in a south-westerly, south-easterly then in a north-easterly direction to Havengore Bridge, then south-easterly to the site of the former bridge."*
12. There are no entries alongside FP21 in the 'Remarks' column. The footnote indicates that this column includes limitations or conditions (if any) affecting the right of way in addition to such stiles, footbridges, field gates, etc, as are indicated on the Map.
13. The DMS is conclusive evidence of the existence of a footpath over which the public has a right of way on foot (section 56(1)(a) of the 1981 Act). The definitive statement may include particulars of any limitations or conditions affecting the public right of way. For these purposes 'limitations' includes the presence of a stile across the route. Where a limitation is recorded in the definitive statement it too is conclusive evidence that a right of way is subject to that limitation. However, section 56(1)(e) makes plain that it is without prejudice to any other limitations or conditions that may exist.
14. The fact that no limitation is currently recorded does not mean a stile did not exist. The key point is whether there was a stile at the time of dedication of FP21 as a public right of way.

### **Date of Dedication**

15. When the County Council undertook a review of the DMS in 1963 under the National Parks and Countryside Act 1949 an objection was made on behalf of the Ministry of Defence to the inclusion in the Draft Map and Review Statement of Footpath 28 which runs along an adjoining section of sea wall from Wakering Stairs to Havengore Bridge. The Council decided on 5 January 1965 not to delete FP28, but it appears that an application was made to the Justices at Quarter Sessions for a declaration that no public right of way subsisted along this part of the route.
16. The County Council has been unable to trace the application and decision, but an internal memorandum of 4 March 1969 from the County Surveyor to the Clerk of the County Council confirms that the Court dismissed the application. This is reinforced in the minutes of the Landscape and Conservation Sub-Committee meeting of 19 March 1969 where the outcome was reported.
17. Some years later on 7 January 1983 a letter was sent on behalf of the Chief Executive and Clerk of the Council to the Secretary of State seeking assurances that the public would not be hindered from walking along the footpath on the river wall at Havengore Bridge. The final paragraph of that letter reads:  
  
*"Incidentally, the length of footpath 28 from Wakering Stairs to the bridge was included in a revision of the rights of way map and the subsequent objection by the Ministry of Defence was dismissed by Quarter Sessions in 1968 when the Court accepted that the path was substantiated on the evidence of witnesses of use prior to 1916 when the bridge was built. Until that time of course the footpath now having two numbers (21 and 28) was one path on a continuous river wall."*
18. The letter points firmly to FP21 historically having formed part of a single path along the sea wall. The Council says that this indicates the Court found public rights over FP21 to have been dedicated some point prior to 1916. The conclusion could be drawn that the date of dedication was 1916 if not before, but the letter was written many years after the Court findings to which it refers without any indication of the source for the statement. It provides some evidence of the date of dedication, but consideration is required as to the other evidence available to assess whether there is anything to reinforce that view of if any other date may be identified.

### **Documentary Evidence**

19. According to the County Council the Chapman and Andre Atlas 1777 was compiled between 1772 and 1774 and was the first atlas to be drawn of the whole County of Essex. The extract depicts a line broadly following what is now the sea wall. There are no obstacles marked to denote a stile.
20. The estate map attached to the 1814 Survey of Great Wakering by Robert Baker Junior is relatively detailed. There are differences in the coastline from how it appears on the Definitive Map, but the area in question known as 'Mill Head' is identifiable. There is a solid line following the coastline which is annotated as the "sea wall". A symbol is shown partway along what is now FP21. It is not known what it represents. The Council surmises it may be a wind pump or tide mill. Whatever it may be, it is not in the position of the stile.

21. There is no indication of a path or stile on the Tithe Map for the Parish of Great Wakering, 1841.
22. The Council reports that the base map for the Finance Act Map 1910 was the 2<sup>nd</sup> edition 25" Ordnance Survey ('OS'). No extract of the map itself is supplied.

*Ordnance Survey maps*

23. A Surveyor's Drawing from 1799 compiled in preparation for the first OS map for Essex shows the sea wall and some kind of feature in the approximate position as the symbol on the 1814 estate map. Nothing is marked across the route of what is now FP21.
24. The 1877 1<sup>st</sup> edition OS map (scale 6" to 1 mile) shows a mark which could indicate a barrier further to the north of the stile applied for. There does not appear to be anything in the location claimed, but the scale is small which also makes it difficult see if there is a path. The larger scale version of this map is unavailable although an extract of the digitised copy (scale 25" to 1 mile) is supplied from which it is clear that no feature is shown to denote a stile.
25. Both the applicant and County Council have produced copies of the 1897 2<sup>nd</sup> edition OS map (scale 25" to 1 mile). The applicant claims that the stile is shown where he has marked an 'X'. The County Council disagrees that a structure is shown on the smaller scale map that he has submitted or the extract obtained from the Record Office. Having carefully examined these copies, I see there is a line indicating a barrier of some form across the alignment of the path and which joins a channel to the east. This feature is further north than the location of the stile shown on the application map.
26. On the 1923 new series edition OS map (scale 25" to 1 mile) the junction of FP21 with FP23 is annotated and an elongated 'S' denoting an area brace is marked across the sea wall in the approximate position of the stile. These symbols were used to join areas of land together. In this case it suggests that part of the sea wall was intended to fall to the owner of the former brickworks. I tend to agree with the Council that the symbol was unlikely to be placed in that spot if it coincided with a physical feature on the ground, such as a stile.

*County Surveyor's maps*

27. The County Surveyor's 1932 Book of Maps was produced for the purpose of creating a permanent record of public rights of way within the surveying authority's area. The 1920's new series edition map was used for this purpose with footpaths and bridleways marked thereon. FP21 is not marked on the extract provided although other routes to Oxenham Farm are coloured to identify public paths.

*Parish Survey map*

28. In pursuance of section 28 of the National Parks and Access to the Countryside Act 1949 the County Council engaged with the parishes in its area before conducting a survey of public rights of way.
29. In Essex the Parish Councils were supplied with plans showing paths which the County Surveyor believed to be public paths and they were tasked with walking and checking the routes. Each route was described in a Parish Card which accompanied the Parish Map. A Parish Meeting was required to be called at the

- conclusion and the corrected Parish Cards and Map were returned to the County Council who used them to draw up the 1953 Draft Map.
30. FP21 is coloured and annotated '21' on the Parish Survey Map for the Parish of Great Wakering of 1951. The letter "O" is handwritten on the map with arrows pointing to three spots along Footpath 14, but there are no marks along FP21.
  31. The Memorandum issued to parish councils instructed that obstructions, being both those which are (i) unlawful or (ii) due to neglect, should be marked with "O" except for barbed wire which merits a separate symbol. Stiles are to be marked with the letter "S". It says to use arrows, where necessary, on the map to indicate the exact site of stiles, obstructions, etc.
  32. The Parish Card for FP21 records "One or two rails across path at various points. Fairly well used" The location of the rails is not marked on the map.
  33. The applicant believes that the lack of the symbol "O" coupled with the note appended to the map suggests that there were no impassable obstructions present on FP21 due to the existence of stiles across the fences. That is possible particularly as there do not appear to be any stiles marked with an "S" along the coloured routes perhaps indicating that instructions for stiles were not followed. Alternatively, it could mean there were lawful and passable rails without a stile. Whatever the explanation, there is no mark on the Parish Map to indicate the presence of a stile in the location identified by the applicant.

#### *Definitive mapping*

34. Information from the Parish Survey Map was used in the compilation of the 1<sup>st</sup> Definitive Map given the relevant date of 1 January 1953. FP21 is shown following the sea wall. The accompanying Statement describes the route as "Continuation of footpath 30 in Barling Parish. Commences at the Parish boundary at Mill Wharf following the sea wall via Oxenham Farm to Havengore Bridge." No limitations are identified in the 'Remarks' column.
35. Objection was raised by the War Department to the inclusion of FP21. The County Council subsequently determined on 28 April 1955 to delete from the Map a portion of the path adjacent to and on Havengore Bridge. This was reflected in the 1955 Proposed Amendment Map but there were no changes to the accompanying Statement.
36. The First Review of the DMS has been discussed already with regard to the dedication date.
37. When the County Council published a Draft Map for its Special Review in 1971 FP21 continued to be recorded in the same manner as before with no reference to a stile. The present DMS was published with a relevant date of 1 July 2002. The County Council points out that there is no record of any issue previously being raised of the relevant details being missing or incorrect.

#### *Aerial photographs*

38. Whilst the applicant says that the stile is shown on a black and white aerial photograph from 1930 the scale and quality of the image is too poor to make out any feature in the relevant location.
39. Aerial photographs are produced by the County Council. An enlarged extract from the black and white 1970 image shows a barrier of some description

across the sea wall in the vicinity of the claimed stile. It cannot be seen on the 1981 aerial photograph or that from 1990. The Council says that the colour aerial photograph from 2000 shows a structure across the route slightly to the north of that in the 1970 image, but from my copy it is not very clear. From another colour aerial photograph from 2010 it is possible to see a structure of some sort across the route. It seems to me to be in the same spot as the feature on the 1970 photograph, or thereabouts.

### **User Evidence**

40. The applicant explains that Oxenham Farm has been owned and run by his family since 1936 which included the husbandry of a dairy herd until 2001. Throughout those 65 years, cattle were grazed along the length of the sea wall and fenced in to stop them escaping.
41. The application is supported by two evidence forms. Mr John Threadgold states that the sea walls have been grazed since his family started the dairy herd in the late 1930's and so "there must have been a barrier at the boundaries". He does not elaborate further or make any specific mention of the stile.
42. A copy black and white photograph said to be taken in 1949 shows a herd of cows on the sea wall at Oxenham Farm. Whilst it corroborates that grazing took place along the sea wall, there is no fencing or stile visible. Logic may indicate that the herd would be enclosed, especially as there was a nearby industrial brickfield site, and the public would need a means of crossing any barrier to follow the path. However, it cannot be assumed that the stile which prompted the application was in the same place as in the past.
43. A more detailed statement is provided by a Mr Butler. He recalls playing on the stile and fence at Mill Head as a boy after the Second World War in about 1946. As a teenager in the late 1940's he remembers wild rabbits which had been caught being hung on the fence. Since then, Mr Butler says that the sea wall has been built up twice and each time the stile and fence were replaced.

### **Other Evidence**

44. The County Council reports that the Environment Agency responded to its enquiries by telephone and having checked their asset register their only record was of an old sluice gate, some steps and a ramp. No inferences can be drawn from this.
45. Copy photographs from the complainant show only the condition of the stile and how ineffective the fencing would be now for stock control given the gaps and its condition. It does not provide evidence of the position at the time of dedication.
46. The applicant has produced a copy of the Conveyance on sale of land at Oxenham on 26 July 1920. The land conveyed excludes the section of sea wall where the stile was located, but Mill Head is shown on the map drawn on the Conveyance. There is no indication of a stile.

### **Analysis**

47. The historical documentation from at least the 1800's indicates the physical presence of the sea wall along an alignment which broadly corresponds with the footpath route that became FP21. The evidence points clearly to the

Quarter Sessions in 1968 declining to delete FP28 from the DMS. There is anecdotal evidence in the letter from the County Surveyor in 1983 that there was single continuous path along the sea wall of which FP21 and FP28 formed part. The letter indicates that the Court of Quarter Sessions was persuaded in 1968 that a path existed based on user evidence prior to 1916. Key records from the Quarter Sessions cannot be found to substantiate the content of the letter. In isolation the letter is not compelling evidence, but there is no other or better evidence before me of any other date of dedication. It is the best evidence available. The aerial photograph of 1930 is inconclusive. In any event, if dedication had occurred already then any evidence to support the presence of a stile after that time does not assist the applicant.

48. If dedication occurred in or before 1916 then there is no evidence of a stile at that time. The applicant's submissions that a stile is shown on the 1897 OS Map is unpersuasive for the reasons given.
49. As FP21 appeared in the First DMS of 1 January 1953 that is the very latest dedication could have occurred. Even then, only Mr Butler provides first hand evidence of a stile in the claimed location since about 1946. Whilst there is no reason to question Mr Butler's recollections of fencing and a stile across the path, this solitary account does not provide sufficient evidence of a stile in the same position as that applied for in the absence of supporting evidence. Mr John Threadgold is not explicit in his evidence. The Parish Card from 1951 confirms the presence of rails of some sort across FP21 at various points but it does not say whereabouts or identify the nature of these rails.
50. Therefore, even if dedication of FP21 as a public path took place as late as the early 1950's there is insufficient evidence that a stile was in situ in the claimed location at that time for the dedication to be subject to a limitation. As it is, the clearest evidence is that dedication took place much earlier in 1916 and the evidence does not support existence of a stile in this location prior to that time.

### **Other Matters**

51. The applicant considers that if the Parish Survey of the 1950's had been undertaken correctly, the stile would have been recorded on the DMS already. He considers it unfair that due to this error he must research back over an extra 40 years. Whilst I can sympathise with that position, the application cannot succeed unless there is sufficient supporting evidence. There is simply not enough evidence to support the applicant's case.

### **Conclusion**

52. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does not show that on the balance of probabilities, the particulars of the stile should be added to the DMS as a limitation for FP21.

### **Formal Decision**

53. I dismiss the appeal.

*KR Seward*

INSPECTOR

CURRENT MAP

SHOWING POSITION OF STILE - APPENDIX A

