



Appeal Decision

by **Mark Yates** BA(Hons) MIPROW

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

Decision date: 11 June 2019

Appeal Ref: FPS/P2114/14A/3

- 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 the Isle of Wight Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 29 October 2013 was refused by the Council on 7 March 2018.
- The appellants (Mr and Mrs Thorne) claim that the definitive statement should be modified in respect of a section of Footpath NT 46 ("NT46") in the parish of Niton and Whitwell.

Summary of Decision: The appeal is dismissed.

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. I note the appellants request that a site visit is undertaken. However, after reviewing the evidence, I am satisfied I can make my decision without the need to visit the site.

Main Issues

3. The two requested modifications included within the application form involve:
 - *"Deleting the footpath NT46 from the eastern end of the top of the sea wall to the western end of the top of the sea wall from the definitive statement"*.
 - *"Varying the particulars relating to the footpath from the foreshore south of Castle Haven Lane to the foreshore approximately 35 metres westwards by providing that the definitive statement describes the route of NT46 as continuing along the foreshore linking the above locations (thereby complying with the alignment shown on the definitive map)"*.
 4. Section 53(2) of the 1981 Act requires a surveying authority to make an order to modify its definitive map and statement in consequence of certain specified events set out in Section 53(3) of the Act. Reference is made in this case to the provisions of Section 53(3)(c)(iii), which specifies that an order should be made where *"there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification"*.
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5. The appellants believe that a section of NT46 does not proceed along the sea wall in front of their property (Beach Cottage) and should be recorded over the foreshore. It seems to me that this would involve firstly the deletion of a section of footpath in line with the first limb of Section 53(3)(c)(iii). Secondly, it is apparent that the requested modifications would lead to NT46 running along another route. In this respect, it would ordinarily be necessary to have regard to whether "*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist*" in accordance with Section 53(3)(c)(i) of the 1981 Act.
6. As outlined in paragraph 27 of the *Leicestershire*¹ case in these circumstances the relevant tests in 53(3)(c)(i) and 53(3)(c)(iii) are linked. Paragraph 29 of this judgment outlines that the starting point is whether there is no right of way over the existing route. The key issue to be determined in light of the guidance outlined below is whether it can be shown that an error occurred at the relevant date of the original definitive statement, which in this case was 11 November 1952.
7. The *Trevelyan*² case provides judicial guidance regarding the deletion of rights of way. At Paragraph 38 of this judgment, Lord Phillips states "*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 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*".
8. Further guidance on the deletion of public rights of way is found in Department for Environment, Food and Rural Affairs Circular 1/09. Paragraph 4.33 of the Circular states "*The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... 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.*"

¹ Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs [2003]

² Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001]

Reasons

Discovery of evidence

9. There was a previous application by the appellants to delete a section of NT46 on the seaward side of Beach Cottage. An appeal to the Planning Inspectorate against the Council's decision was unsuccessful and a copy of the previous Inspector's decision has been provided. However, it is not disputed that there has been the discovery of some new evidence following the original appeal. In reaching my decision, I shall have regard to all of the evidence provided to me.

Consideration of the evidence

The definitive statement

10. The survey card for NT46 records that it was initially walked on 22 June 1950. NT46 is described after the sub-heading "*Name of path or ultimate destination*" as "*To shore then in front of Beach cottage to join path 38*". A fuller description then follows after "*starting point*" which states "*Boat House, then down metalled path to shore, then westward along the top of the sea wall in front of Beach Cottage, turn right up path beside a brook to join Path 38...*". It is apparent that this description was incorporated into the definitive statement. The Council proposes to modify the statement in terms of the continuation of NT46, beyond the section included in the application.
11. I find the full description included in the statement to be clear. It states that NT46 proceeds to the shore and then past Beach Cottage to join with Footpath NT38. This reveals that the footpath was considered to provide both a means of access to the beach and to NT38. Moreover, it specifies that NT46 proceeds along the top of the sea wall. From looking at the original definitive map, I see no reason to disagree with the previous Inspector that this shows NT46 on the sea wall albeit that the width of the route shown could extend over the foreshore. The current edition is less clear but there is no legal event to warrant a change in its alignment. It is apparent that there is a conflict between the map and statement for the section of NT46 to the west of the sea wall, where it is described in the statement turning right beside a brook. However, this section is not included in the application before me.
12. It is also apparent from the survey card that NT46 was walked by two people for the purpose of the survey. It is stated that the path was in a good condition. This is contemporaneous evidence that the route described in the statement was available to use. It will be for the appellants to show that an error occurred at the relevant date of the definitive statement.
13. The appellants have made some assertions regarding the process undertaken when the original definitive map and statement were compiled. It is alleged that scheduled parish meetings did not take place. However, they have provided no evidence to substantiate that this was the case. I note that the previous Inspector had access to parish council minutes and concluded that the footpath survey was considered at the time. It is supposition that the surveyors were misled when making two visits to the site due to the tide being further in during one of the visits.

Witness evidence

14. Statements have been provided in relation to people who were interviewed. Two additional people (Mr and Foulsham) responded by email to some questions put by the Council Officer. As outlined above, the issue to be determined is whether there was an error regarding the entry for NT46 in the original definitive statement at the relevant date of 11 November 1952. The witness evidence of most value will therefore originate from this time. Evidence relating to the site after this date may be of assistance, but its value will generally decrease as the recollections move further away from the relevant date.
15. Mr Eldridge was born in 1946 and recalls the site from 1951 onwards. His evidence is that the sea wall was private and there was a gate with a private sign at its eastern end. However, it is not possible to see the private sign he mentions on a photograph provided, which only dates back to the late 1960s. Although the public did use the sea wall, he viewed this use to be trespassing and reference is made to a former landowner challenging people. He says there was always a drop of 12 feet at the western end of the sea wall down to the beach. People could access the beach from the village green and walk westwards below the sea wall, but this was dependant on the tide.
16. In terms of the joint evidence of Mr and Mrs Foulsham, his knowledge dates back to well before the relevant date and she has known the area from 1966. They recall walking along the sea wall but state that it was rather pointless as the continuation had fallen away due to a landslip. Generally, they did not consider it to be a path or a route used by the public.
17. Mr Mogg was born in 1943 and recollects the site from 1950 onwards. He recalls using the sea wall to gain access to a small plateau at the western end of the wall and from there he and his friends occasionally scrambled down to the beach. Reference is made to the continuation of the path following the route described in the definitive statement.
18. Mrs Chessell is Mr Eldridge's sister and was born in 1950. She says there was a route along the sea wall to a small green area at the western end where people sat. It was possible to step down onto the beach from this area, but the land was subsequently lost to erosion. She recalls the path described in the statement along the western side of the cottage. Her evidence is supportive of the sea wall being part of a public footpath.
19. The recollections of three siblings (Mr Bowen, Mrs Filose and Mrs Bowen) in a joint statement date back to different periods of time between the early 1950s and early 1960s. Nonetheless, they remember being able to walk along the sea wall without any restriction. They state it was a popular route that provided access to the beach or the lighthouse. Reference is again made to the small green area at the western end of the sea wall from where it was possible to get to the beach. They also say that the route along the sea wall was not gated and was known as a public footpath.
20. The evidence of another witness (Mr Rodley) dates back to the mid-1960s. His statement is supportive of the footpath following the sea wall but does not add anything of note to the other statements outlined above. In terms of the evidence relating to previous owners of Beach Cottage, this only covers the period from 1972 onwards. However, I note from reading an extract of the

transcript of a planning inquiry in 2009 that a longstanding resident of the area (Mr White) refers to the path following the sea wall.

21. There is a conflict of evidence regarding whether the sea wall was a public right of way in the 1950s. However, the contemporaneous evidence in the survey card should not be lightly set aside. Mr Eldridge's perception that the path was private would not in my view be sufficient to demonstrate that an error occurred in the description of NT46 in the definitive statement. There is witness evidence that is supportive of people using the sea wall both before and after the relevant date. It is stated that the path continued onwards as well as providing access to a small plateau where people would sit. The witness evidence is not generally supportive of the footpath following the foreshore route put forward by the appellants. Some specifically say that this was not the case and point out that the beach contained groynes and large rocks.
22. The appellants draw attention to the drop down to the beach mentioned by Mr Eldridge. In response, the Council says the height down to the beach varies depending on circumstances. It is also apparent that some people did previously gain access to the beach in this locality. Nonetheless, the definitive statement indicates that the recognised access to the beach would have been towards the eastern end of NT46. Therefore, any additional means of access to the beach to the west is not relevant to whether the footpath proceeds on the sea wall. The path is clearly described as leading to NT38 via the sea wall.

Documentary evidence

23. Ordnance Survey ("OS") maps are generally taken to provide a reliable indication of the physical features present on the date of the relevant survey. The depiction of pecked or double pecked lines is indicative of the existence of a path or track that was discernible on the ground when the land was surveyed.
24. OS maps have been provided which span the period of 1866-1977. The sea wall and pecked lines leading to it are first shown on the 25-inch map of 1908. Double pecked lines leading from the western end of the sea wall generally correspond with the continuation of NT46 that is represented on the definitive map. A pecked line linking with the sea wall is also shown on the 6 inch-1939 OS map. This is supportive of the existence of a path at the time, whether for public or private use, connecting with the sea wall. The OS maps provide support for it previously being possible to continue on land to the west of the sea wall. The evidence is indicative of the land suffering from erosion to the extent that a section of NT46 shown on the definitive map is no longer available.
25. Historical photographs and postcards have been provided of the area, which were taken both before and after the relevant date. These vary in terms of their relevance. Some provide support for the existence of the area mentioned by witnesses at the western end of the sea wall or other land to the west of the wall. There are photographs that show people on the wall itself. The Council also draws attention to the photographs that show the nature of the beach and the groynes.

Other evidence

26. I view the wording "*The shore*" on a finger post sign for NT46 to merely point out that the shore can be accessed via this path. It does not reveal that an error occurred at the relevant date of the definitive statement. Whilst it is apparent that modifications were made to the sea wall in the 1970s, this has no bearing on the way that NT46 was originally recorded in the definitive statement.

Conclusions

27. I have concluded that the definitive statement clearly records NT46 proceeding along the sea wall in front of Beach Cottage and that this is consistent with the original definitive map. In light of my conclusions in relation to the witness statements and documentary evidence, I do not find on the balance of probabilities that there is evidence of such substance to displace the presumption that the definitive statement is correct in terms of the section of NT46 included in the application. I do not consider that there is cogent evidence of the occurrence of an error regarding the route of the path recorded along the sea wall. Nor do I conclude that the evidence is sufficient to show a public footpath subsists, or is reasonably alleged to subsist, over a route across the foreshore.

Other Matters

28. I appreciate the appellants concerns about the locality of the footpath and how it impacts on their privacy and security. However, such matters are not relevant to applications made under the 1981 Act. There is the potential for the appellants to make an application to extinguish the section of footpath under other legislation.

Overall Conclusion

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

Formal Decision

30. I dismiss the appeal.

Mark Yates

Inspector