



Appeal Decision

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 30 October 2019

Appeal Ref: FPS/D3450/14A/6

- The appeal is made under Section 53(5) and Paragraph 4(1) of the Wildlife and Countryside Act 1981 (the "1981 Act") against the decision of Staffordshire County Council (the "Council") not to make an order under s53(2) of that Act.
- The Application dated 17 January 2017 was refused by the Council on 8 February 2019.
- The Appellant claims that the definitive map and statement for the area ("DMS") should be modified by deleting a section of Footpath No 34 and adding a replacement section.

Summary of Decision: The appeal is dismissed.

Preliminary matters and background

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 1981 Act. If I consider that an order should be made paragraph 4(2) of Schedule 14 enables me on behalf of the Secretary of State to "give to the authority such directions as appear to him necessary for the purpose". I have not visited the site, but I am satisfied that I can make my decision without doing so.
2. The Council's decision follows a Direction¹ of the Secretary of State issued on 14 May 2018 to the Council to determine the application within 6 months.
3. The appellant seeks realignment of a short section of FP 34 in Swynnerton parish between Gorse Cottage and The Gorse (aka Green Gorse Cottage). The line of PF 34 is currently shown on the DMS as passing through the curtilage of Gorse Cottage. The current path physically follows what is alleged to be the correct alignment, as illustrated on the plan attached to this decision.

Procedural matters

4. The refused application is properly made under s53(2) of the 1981 Act. However the form as completed relies on the occurrence of the event specified in the second part of s53(3)(c)(iii), namely the discovery of evidence "*that any other particulars contained in the map and statement require modification*".
5. The applicant's agent struck out the sections applicable to the deletion and addition of a footpath. However, these are the appropriate matters to consider. In *The Queen on the Application of Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC*

¹ FPS/D3450/14D/52

171 Admin the court, in dealing with a similar application, stated at paragraph [32]:

"What is under consideration here is not any addition to the statement of particulars, but a modification to the map itself and an indication on that map of a different route for the right of way. Accordingly...the claimants...had to consider not only subsection (3)(c)(iii) but also subsection (3)(c)(i)..."

6. This procedural flaw, if it is a flaw, has not prejudiced the parties or the neighbouring objector. Each addresses in substance the matters set out the first part of sub-paragraph (iii) of s53(3)(c) and sub-paragraph (i) of s53(3)(c) to which it is necessary to have regard, as I explain further below.
7. The application is also unclear as to how precisely, if at all it is wished to modify the particulars in the statement part of the DMS (rather than the claimed realignment which the applicant clearly intends should be depicted on the map). The lack of clarity arises because, whilst the definitive statement has the briefest of description of the start and end points of FP 34, the application where it refers to "particulars relating to the (footpath)" is completed by adding grid coordinates which are not explained further and not repeated elsewhere in the parties' representations.
8. However if the appeal succeeds, the powers of direction described above, and the duty in s53(2)(b) on the Council as the surveying authority to include in the order "*such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event*" would enable me to direct how the statement part of the DMS should be proposed to be altered in the order that the Council would then make.

Legal framework

9. Section 53(2) of the 1981 Act requires surveying authorities such as the Council to modify its Definitive Map and Statement (DMS) on the occurrence of "events" set out in s53(3). The claimed realignment would involve deletion of the existing section of FP 34 in the DMS and the addition of a new section of FP 34. The relevant parts of s53(3)(c) require "discovery of evidence" which, when considered with all other relevant evidence available, shows:

(i) that a right of way which not shown in the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates, and

(iii) that there is no public right of way over land shown in the DMS as a highway of any description.

10. The burden of proof in these matters is on the balance of probabilities, except that, as can be inferred from the wording of (i) above, there is an alternative, lesser standard of proof to add a right of way to the DMS, by establishing whether it is at least "reasonable to allege" that a right of way subsists.
11. That said, the court in *Leicestershire* said that (emphasis supplied):

"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." [29]

12. Thus the lesser standard of proof available in sub-paragraph (i) cases would normally be irrelevant since the standard balance of probability test will apply to determine whether the alternative alignment of the route should be substituted for the definitive map version.
13. Further, the conclusive evidential effect of the DMS means that it is not for the Council to demonstrate that the map is correct, but for the appellant to show that an error was made. The evidence would need to clearly show that a mistake was made when the right of way was first recorded. In other words, evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. In s.53(3)(c) "evidence" is not to be restricted to new evidence or evidence not previously considered, but to be given its ordinary meaning. As modification depends on the "discovery" of evidence one cannot simply re-examine the same evidence considered when the definitive map was drawn up, rather the "new" evidence has to be considered in the context of the evidence previously given.
14. It would however be sufficient that a "drafting error" is found as a result of recent research.² Broadly speaking, this is how the appellant puts his case, relying heavily on his interpretation of the parish survey record made prior to adoption of the DMS, considered in the context of historical and more contemporary documents.

Main issue

15. The main issue is whether the route passes through the curtilage of Gorse Cottage to the front of the property or whether it turns at the boundary and onto the alignment as the appellant claims.
16. Referring to the plan attached to this decision, two sections of it are undisputed. From the road, Point A, to the brook or drain at Point B is accepted. From the field to the rear at Point C, and thence north easterly towards Yarnfield is not in doubt. The line between Points B and C is in contention.

Reasons

17. FP 34 was first recorded by its addition to the Draft DMS after the Parish Survey in 1951. There were no objections to its inclusion and it was added to the First DMS in 1954, and shown on all editions of the DMS since that time.

OS maps

18. None of the OS maps shows the field section of the path to the east of Gorse Cottage abutting its curtilage, such that it would continue within that curtilage passing close to the main building as shown in the DMS. Rather the maps show the path as abutting the triangular parcel adjacent to Gorse Cottage.
19. In the 1924 map the path is shown as running inside the northern boundary of that triangular parcel and connecting to the path from the public carriageway to the west of Gorse Cottage.
20. The 1880 map shows paths within the curtilage of Gorse Cottage which appear to be laid out for the convenience of the occupier rather than for members of

² See *Janusz Kotarski, Georgina Kotarski v Secretary of State for Environment, Food and Rural Affairs v Devon County Council* [2010] EWHC 1036 (Admin).

the public crossing the curtilage in the exercise of public rights of passage. The 1901 map only shows within the curtilage what appears to be the path leading to the front of the building from the triangular parcel of land to the south.

21. The 1959 and 1963 maps also show a path running from the field to the east and abutting the boundary of Gorse Cottage, and continuing in a southerly direction.
22. The appellant's agent asserts (paragraph 7 of his statement), that the OS maps all show a path running from the public carriageway to the west, toward Gorse Cottage, then turning in a southerly direction on reaching the drain adjacent to the boundary of Gorse Cottage rather than abutting directly on the boundary of the cottage which would be expected if it were running directly into the property.
23. However there are marked differences among the various OS maps. In the 1880 map, the line of this western oriented path reaches the brook at a point which aligns on the other side with the private path shown to be leading to Gorse Cottage. At this point, in the 1901 map the path appears to widen out to encompass land outside Gorse Cottage and leads to the triangular piece of land to the south. This configuration is shown more clearly in the 1924 map and, unlike the 1901 map, the path is seen to join with a section of the path now shown inside the northern boundary of the triangular piece of land to the south which then proceeds eastward to the undisputed section of FP 34. In the 1959 map, however, the path from the carriageway to the west stops abruptly at the brook and is not seen to widen out. Moreover it does not join with the eastern section of FP 34 which runs to the boundary of the curtilage of Gorse Cottage and then south into the triangular piece of land.

Tithe maps

24. The Swynnerton tithe map and apportionment of 1848 demonstrate that the access to Gorse Cottage was originally from the triangular piece of land to the south of Gorse Cottage rather from the carriageway to the west. The Eccleshall tithe map and apportionment of 1845 also indicate that access to the cottage was gained in this way.

Survey by Swynnerton Parish Council

25. Neither main party quotes the relevant part of the survey accurately or fully. It reads:

"Footpath No 6 enters parish from Norton Bridge Road at small brook at The Gorse Cottages. Passage across the brook is obstructed by a fence and lack of stepping stones. Crossing private pathway to the Gorse Cottages access to Brick Kiln Field is over a low fence."

26. The 1951 survey by the parish council refers to the line of FP 34. The appellant throughout his statement erroneously refers to the relevant part in terms of it crossing "private pathway to the Gorse Cottage". However the original handwritten notes as I have transcribed above, clearly read "*crossing private pathway to The Gorse Cottages*". The Council's report starts by correctly using the term "Gorse Cottages", but in the section where it examines more forensically the survey in relation to other evidence, also refers to "Gorse Cottage" in the singular.

27. The appellant emphasises that the survey does not describe FP 34 as entering the curtilage of Gorse Cottage but suggests the pathway which is crossed is the path leading southward through the triangular piece of land to the rear of The Gorse. If the survey record had read "Gorse Cottage" it is a possibility that the description was of the path crossing the pathway to Gorse Cottage but within its curtilage, bearing in mind that the 1880 and 1901 OS maps show a path within the curtilage leads to the front of the property from the south.
28. I have considered, although not a point taken by the appellant, whether a "*private pathway to The Gorse Cottages*" is less likely to refer to a pathway within the curtilage of Gorse Cottage itself, given the existence of the path within the triangular piece of land that leads to other properties including The Gorse. The appellant instead emphasises that the use of the word "to" identifies a location outside the curtilage of Gorse Cottage but "leading to it". However whichever interpretation is placed on the wording in the survey, it does not to my mind clearly indicate that the path is outside what was then the curtilage of Gorse Cottage.
29. The appellant himself accepts (paragraph 12 of statement) that the triangular piece of land is "*land [that] is open to the highway at its southern end, indeed it could form part of the highway or highway waste...*". If so its characterisation as a "*private pathway*" presents some difficulty, notwithstanding what the appellant also points out, and which I accept, which is that the 1959 and 1963 OS maps "show an unenclosed path or track running northwards from the highway through this parcel to Gorse Cottage".

Other documentation

30. The aerial image shows no break in the east to west running hedge in front of Gorse Cottage that would provide for the path to pass through as on the DMS. However the image, although said to be taken before 1987 is clearly taken in more recent times than the 1951 survey and first DMS.
31. The 1991 description of the circular walk around Yarnfield reflects no more than the situation on the ground in that the path follows the corridor of land to the south of Gorse Cottage, not through its garden as shown in the DMS.
32. The statement in the DMS describes the route in brief, listing only the starting point and terminus. The extracts of the maps that accompanied the parish surveys are at too large a scale and the marks made too imprecise to draw any useful conclusions. The old Definitive Maps are of little assistance and provide little detail. At best it could be said that a route exists in the vicinity but the line drawn in 1951 is too thick to be of use.

Statements

33. Statements were made on behalf of the neighbour who owns Green Gorse Cottage, and through whose land the claimed alignment of FP 34 runs, as follows. Mr Peace states that he lived at Green Gorse Cottage from 1957 to 1970 and that the route was then on the definitive line, that is, through the front garden of Gorse Cottage. He maintained the hedge and ditch from 1957 for several years and in his sketch is shown the line of the path entering from the brook into the grounds of Gorse Cottage through a wicker gate, then on a diagonal line exiting into the land between Gorse Green Cottage via another wicker gate and thence into the rear field over a stile.

34. Mr Foxley states that he is a long-standing resident and at one point rented the fields in the vicinity of Gorse Cottage. He states that the path ran some 6 feet from the front of Gorse Cottage, passed through the hedge and into the rear field, continuing towards Yarnfield.
35. Mr and Mrs Hughes state that they used the route from 1976. At that time the route, according to them, passed directly in front of the windows of Gorse Cottage which they felt was an invasion of privacy. When the route was moved they thought that this had been a diversion carried out by the County Council.
36. There are discrepancies among the statements and between them and the survey record. The current map in the DMS shows the line crossing in front of Gorse Cottage and exiting into the rear field, not turning into the land to the rear of Green Gorse as drawn by Mr Foxley and Mr Peace.
37. That said, the statements provided generally support the argument that the definitive line is the correct one when the DMS was adopted, and that it has subsequently been moved on the ground.

Summary

38. The existing definitive statement is of no assistance in identifying the route between the start and end points of FP 34, nor is it in conflict with the map, such that the presumption that the DMS is correct, would be disapplied. The presumption therefore is that the DMS accurately records the line of FP 34.
39. It is clear from the available maps that there was a footpath to the boundary of Gorse Cottage but no such map shows the line continuing into and passing by the buildings of Gorse Cottage. In the 1951 survey the FP is not mentioned in terms as passing through the curtilage of Gorse Cottage. The 1924 OS map shows a continuation of the path from the rear field into the land to the rear of the Gorse and to the south of Gorse Cottage.
40. These circumstances provide some support that the correct line of the path might run from the road towards Gorse Cottage and into the land to the south outside its curtilage. However I disagree that it is "strongly suggestive" as the appellants would have it, that the current definitive line is incorrect. The evidence such as it is does not persuade me on the balance of probability that an error was made when compiling the definitive map. It is just as likely in my view, that the definitive map shows the route across the front of Gorse Cottage consistently with what the parish survey intended to convey in its description.

Conclusion

41. I have considered carefully all other matters and arguments raised in the written representations. I conclude that the evidence presently available to me fails to show on the balance of probability that the section of the definitive map for FP 34 between Points B and C as shown on the attached plan is in error.

Formal Decision

42. I dismiss the appeal.

Grahame Kean

INSPECTOR



Staffordshire County Council Map

- Public Rights of Way
- Foolpath
- Section 53
- Parishes

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Produced by Staffordshire County Council 28/01/2019.