The Planning Inspectorate

Appeal Decision

Inquiry opened on 15 September 2015

by Peter Millman BA

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

Decision date: 2 October 2015

Appeal Ref: FPS/P0420/14A/1R

- 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 Central Bedfordshire Council ("the Council") not to make an Order under section 53 (2) of that Act.
- The Application dated October 2008 was refused by the Council in February 2013.
- The Appellant, Mr A Bowers, claims that the Definitive Map and Statement of Public Rights of Way should be modified by deleting from it public footpath 28 in Maulden.

Summary of Decision: The Appeal is refused.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to re-determine an Appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act (see paragraph 4 below). This type of appeal is usually dealt with by means of written representations. Very occasionally a non-statutory inquiry is held. This was one of those occasions. The proceedings at the inquiry were recorded and filmed for Mr Bowers.

2. Mr Bowers was assisted at the inquiry by two principal advisers, neither of whom had formal legal qualifications. I saw it therefore as my responsibility to ensure, as far as possible, that Mr Bowers was not disadvantaged merely because he did not have recourse to formal legal advice. I made it clear in my opening remarks that I could not assist Mr Bowers to make out his case, but that if at any time he was unclear as to what was required of him, or if he was confused about procedure, he should ask me for advice, and that as long as it did not advance his case or prejudice the case of objectors, I would advise him and, if he wished, he could heed that advice. I also stated that I would alert Mr Bowers, where I considered it appropriate, if it became clear to me that he was concentrating on material that could have no effect on the outcome of the inquiry.

Background

3. Footpath 28 in Maulden runs northwards for about 100 metres from Clophill Road at Hall End to join bridleway 24 shortly before it enters Maulden Wood. It is a narrow path which runs between the appellant's property and a neighbouring house, but it is on the appellant's land. Between 1946 and the 1980s the land was used as a market garden. Footpath 28 was not shown on Bedfordshire County Council's Definitive Map when it was first compiled in the

1950s, although for reasons now unknown it was recorded in the Definitive Statement. An application was made by Mrs H Izzard to Bedfordshire County Council in 1992 to add the route to the Definitive Map as a footpath. The County Council made an order in 1995, to which there was one objection, from Mr A Bowers, the appellant. Because of the objection the order was submitted to the Secretary of State. It was confirmed by an inspector in 1997 on the basis of written representations and an accompanied site visit, and no inquiry or hearing was held. The appellant states that his legal advisers at the time, Messrs Molyneux Lucas, advised him to agree to the written representations procedure.

4. In 2008 Mr Bowers made an application for an order to delete the path from the Definitive Map, following unsuccessful attempts to extinguish it under the Highways Act 1980. The Council refused the application in 2013. Mr Bowers appealed against that refusal to the Secretary of State. The Secretary of State appointed an inspector to consider the appeal. The inspector decided that it should be refused. Mr Bowers applied for judicial review of that decision, and was successful. The decision was quashed on the grounds that the inspector who considered the appeal erred in law when he refused to hear evidence which had not been considered by the Council Committee which decided to refuse Mr Bowers' application in 2013. The appeal must now be re-determined.

5. A non-statutory inquiry into Mr Bowers' appeal was to have been held in January 2015, but at the last minute the inspector directed to hold it became unavailable for personal reasons. The inquiry was therefore rescheduled for September 2015.

The Main Issues

6. Section 53(3)(c)(iii) of the 1981 Act provides that an order to modify the definitive map and statement must be made following the discovery of evidence which (when considered with all other relevant evidence available) shows that there is no public right of way over land shown in the map and statement as a highway of any description.

7. In the case of *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001], 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 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. 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.

9. Circular 18/90 has been superseded by Defra Circular 01/09. Circular 01/09 states 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.*

10. The principal issues therefore are whether any new evidence has been produced and, if so, whether, when considered with all other relevant evidence, it shows on the balance of probabilities that there is no public right of way over footpath 28 and that an Order should be made to delete it from the Definitive Map and Statement.

Whether any new evidence has been produced

11. The decision to confirm the order adding footpath 28 to the Definitive Map in 1997 was based primarily on evidence of the use of the route by people the inspector considered were members of the public. The inspector, Rear Admiral Holley, decided that this evidence satisfied the test in s31 of the Highways Act 1980: *(1) Where a way over any land… has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question…*

12. Inspector Holley found that the test was satisfied with respect to two separate 20 year periods. The first ended in 1956 when the route was obstructed for a short time, bringing the right of the public to use it into question. The second 20 year period ended in 1992 when the appellant blocked the route. The evidence considered included completed user evidence forms and records of interviews carried out by Council officers.

13. The Council accepts that new evidence, in the form of statements from local people, provided by the appellant in connection with his 2008 application for an order to delete footpath 28, shows that the statutory test for deemed dedication (paragraph 11 above) was not met for the period ending in 1992. What is at issue, therefore, is whether new evidence has been produced in relation to the earlier period between 1936 and 1956.

14. Mr Bowers argued that a letter written in 1957 by the County Surveyor to Mrs Izzard, the applicant for the 1995 order, (see below at paragraph 28) should be regarded as new evidence. It was not considered by the Committee which decided in 1995 to make the order, but it was, however, before Inspector Holley in 1997. It seems to me that 'new evidence' can only be evidence which was not before the ultimate decision maker, the Inspector. In a letter to the Development Management Committee of the Council dated 20 April 2013 Mr Bowers also referred to 'new evidence': *in the form of letters illustrating the collusion and impartiality* [sic] *of Rights of Way Officers when they presented their case to the meeting of members held 19 July 1995*. I have seen no evidence that relevant information was withheld from Inspector Holley in 1997.

15. When Inspector Holley considered user evidence in 1997, he noted at paragraph 11 of his Decision Letter in reporting the County Council's case: *A table has been drawn up to illustrate the years of claimed use; 13 of the users are related, some distantly, to the Applicant.* The Council produced, at the 2015 inquiry, a table, said to have been produced before the 1997 inquiry and possibly before the Committee meeting in 1995. It lists those who had given evidence of use. Beneath the column in the table headed 'Relationship to H Izzard', which shows the relationship of some users to the applicant for the order, whose family owned the land over which the footpath ran from 1936 to 1946, is the figure '13'. In my view it is likely that Inspector Holley took his figure of 13 from this table.

16. Mr Bowers argues that there has been a new analysis of the user evidence, and new information about the relationships of users to Mrs Izzard, which casts doubt on Inspector Holley's conclusions. He produced a chart at the inquiry, and in the evidence of one of his advisers, Mr R Connaughton, is a document headed *Analysis of user evidence forms submitted to Rights of Way officers presented to Committee members, 19 July 1995. Period to be considered 1935-1956.* Both these documents showed, they argued, that none of the user evidence considered by Inspector Holley was valid.

17. Counsel for the Council took Mr Bowers through his chart in great detail in cross-examination, comparing it with the 1995 table. In my view the cross-examination revealed that the evidence contained in the chart was essentially the same as that considered by the Inspector in 1997. It cannot be considered new evidence. The *Analysis* also contains no new relevant evidence.

18. I noted above at paragraph 13 that Mr Bowers' production of statements about footpath 28 persuaded the Council that the test for deemed dedication was not met for the period 1972 to 1992. Seventeen people provided information and the Council carried out additional telephone interviews with some of them. It was clear that this was new evidence, not before Inspector Holley in 1995.

19. Although this evidence only persuaded the Council to change its view of the later, 1972 to 1992, period, some relates to the earlier period of 1936 to 1956. Much of this is of minimal use in relation to that period; one person, for example, whose age was not stated, wrote that as a child she always walked along the nearby bridleway 'as footpath 28 did not exist.' Two of the seventeen people, however, had lived in Maulden from the 1930s. One had lived there since 1934 and stated that he did not walk the path and that the owner between 1946 and 1956 said it was not public. Another, who had lived there from 1937 to 1960, stated that he 'would not dream' of walking up the

appeal route. He stated further, 'It was only a track to the allotments, not a public footpath.'

20. The evidence considered in the previous paragraph is new. On its own it is far from cogent, and certainly would not outweigh the initial presumption that public footpath rights exist over footpath 28. But I now consider it in the light of the evidence available to Inspector Holley in 1997, bearing in mind, as noted by Andrew Nicol QC in *Burrows v Secretary of State* [2004], that an Inquiry: *cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification.*

Whether, when considered with all other relevant evidence, the new evidence is cogent and of sufficient substance to displace the presumption that the right of way exists

21. Although there is no new evidence of significance about those who stated that they had used the appeal route from 1936 to 1956, Mr Bowers and his advisers attacked Inspector Holley's conclusions about the user evidence on a number of grounds.

22. It was argued that the Inspector should have completely discounted the evidence of users who had not used the route throughout the 20 year period. If someone had walked the route for only 19 years, for example, his or her user evidence was invalid. Mr Bowers appeared to concede at the inquiry that this argument showed a misunderstanding of the law.

23. Mr Bowers also argued that Inspector Holley should have discounted a large amount of the use because users were family, friends and neighbours of the applicant for the 1995 order, whose family owned the land over which the appeal route ran from 1936 to 1946. Their use, it was argued, would not have been 'as of right' (paragraph 11 above); it would have been by permission or by a private right.

24. It is clear from his Decision Letter that Inspector Holley considered the relationship of users to the applicant's family in concluding that: *there is evidence from many other users who have not been shown to be other than members of the public.* In any event, no significant evidence was produced to the 2015 inquiry which suggested that permission was granted by a landowner between 1936 to 1956 to any person to use the path or that any private rights were granted or claimed.

25. Mr Bowers argued further that the users could not represent the public as a whole; they were a clearly defined part of it. His advisers referred to the judgment in *Poole v Huskinson* (1843), in which it was stated that there could not be a dedication to a limited part of the public. It is clear, however, that the law does not require a cross-section of users from the whole country to walk a path for dedication to the public to be deemed or implied. It is equally obvious that in a small hamlet such as Hall End would have been before 1956, with no wider attraction as a tourist destination, the great bulk of the users of local footpaths would have been local people. That does not mean that they are not representative of 'the public.'

26. Mr Bowers expressed his regret that he had chosen not to exercise his right to be heard at a public inquiry in 1997 (paragraph 3 above). I accept that the weight to be given to user evidence untested by cross-examination at a public inquiry may not carry as much weight as evidence which has been tested and which has stood up successfully to that testing. Nevertheless the new evidence referred to in paragraph 19 above, considered with the matters referred to in the preceding five paragraphs, is insufficient to lead to a conclusion that the user evidence considered by Inspector Holley in 1997 needs re-evaluation.

27. I consider finally other attacks on Inspector Holley's decision, mounted by Mr Bowers' advisers but not said to involve new evidence. I noted above at paragraph 14 a letter written to Mrs Izzard, the applicant for the 1995 order, in 1957. It read as follows: *Dear Madam, With reference to the interview you had with my assistant on Friday last, I enclose herewith a map showing the route of the public path* [this is agreed to have referred to the bridleway into which the appeal route runs (paragraph 3 above)]*. The broken red line indicates the occupation way* [now footpath 28]*, which of course, is not a public path and therefore is not shown on the Draft Survey Map.* Inspector Holley considered that letter, but his conclusions are attacked on a number of grounds.

28. First it was argued that if a route is an occupation way it cannot be a public right of way. In my view that argument is based on a misunderstanding of the law; an occupation way which carries no additional rights will be private, but public use of such a path which satisfies the test in s31 of the Highways Act 1980 (paragraph 11 above) will, subject to the proviso about evidence of a lack of intention to dedicate, be deemed to have been dedicated to the public.

29. It was argued by Mrs M Masters, another of Mr Bowers' advisers, that when the County Surveyor told Mrs Izzard that the appeal route was not a public right of way, it must be presumed that he carried out a thorough investigation of all the then available evidence relating to the route. It must be presumed that everything that should have been done, she argued, was done properly. This is, it seems to me, intended to be an expression of the presumption of regularity. Mr Connaughton put it a different way. He argued that the County Surveyor would not have made the statement he did 'without the truth to back it.' I do not accept these arguments; the presumption is that acts will have been carried out lawfully, not that whoever carried them out will have had knowledge of all relevant facts and will have come to the correct conclusion.

30. Mrs Masters also argued, on the same basis, that because the original Definitive Map for Bedfordshire did not show what became footpath 28, and because it must be presumed that those who compiled it carried out their investigations correctly, this was strong evidence that no public rights existed over the route. I reject that argument for the same reason that I reject Mrs Masters' argument about the County Surveyor's letter.

31. Mr Connaughton argued that, had the appeal route carried public rights, the fact would have shown up in the conveyance when the land was sold in 1946. That is, in my view, an assertion without evidential foundation.

32. Mr Connaughton also argued that all people 'of sound mind' would recognize the logic that no owner of a market garden (such as the owner of the land crossed by the appeal route from 1946 to 1956) who sold his produce to local people would allow the public to cross his land. That is not an argument based, as far as this route is concerned, on evidence.

33. Mr Connaughton noted the conclusion of the Inspector whose decision was quashed (paragraph 4 above) that the appeal route was not a 'designated right of way prior to 1997'. It followed, he argued, that it was therefore not a public right of way in 1956. It is clear to me that the Inspector's statement indicated nothing more than that the appeal route was not included in the Definitive Map and Statement prior to 1997.

34. Both Mr Connaughton and Mrs Masters argued, for various additional reasons, that owners of the land crossed by the path between 1936 and 1956 could not and would not have dedicated public rights of way across it. It seems to me that these arguments miss the fundamental point that to satisfy the test in s31 of the Highways Act 1980 (paragraph 11 above) actual dedication does not need to be proved. Upon the satisfaction of the test, dedication is **deemed** to have occurred, in other words, the effect of qualifying use of the route is the same as if dedication had actually occurred.

35. I conclude that the new evidence, considered together with all existing relevant evidence, is not cogent, and falls far short of displacing the presumption that the Definitive Map is correct in depicting footpath 28.

Conclusion

36. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Appeal should be refused.

Other matters

37. At the inquiry there was an attempt to air grievances about the conduct of the Council and its predecessors, as well as allegations about widespread malpractice within local authorities, the Planning Inspectorate and Defra. I made it clear that I could hear no such grievances and allegations or make any findings in connection with them.

Formal decision

38. I refuse the Appeal.

Peter Millman

Inspector

APPEARANCES

For Central Bedfordshire Council

Mr G Mackenzie	Of Counsel

He called:

Mr A Maciejewski	Senior Definitive Map Officer

Other objectors to the appeal

Mrs S Rumfitt	Of Sue Rumfitt Associates, representing the Open Spaces Society

For the appellant

Mr A Bowers	The appellant

He represented himself
assisted by:

Mr R Connaughton
Mrs A Masters

Supporter of the appeal

Mr B Hones

Interested party

Mr M Westley	Of the East Herts Footpath Society

Documents handed in at inquiry

1. Mrs Masters' statement
2. Mr Bowers' opening and statement
3. Mr Bowers' chart and analysis of user evidence
4. Additional page re Mr Lockey
5. Mr Hones' documents
6. Mr Westley's submissions
7. Handwritten copy of Mrs Masters' cross-examination questions
8. Mrs Rumfitt's submissions
9. Mr Mackenzie's submissions
10. Mrs Masters' final submissions
11. Mr Connaughton's closing submission