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# Appeal Decision

On papers on file

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 16 June 2015**

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## **Appeal Ref: FPS/V3500/14A/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 Suffolk County Council not to make an Order under section 53 (2) of that Act.
- The Application dated 22 November 2010 was refused by Suffolk County Council (the Council) on 16 January 2015.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by deleting part of footpath 7 Bramfield (shown by a broken line A – B – C on the plan appended to this decision) and adding a footpath (shown by a dotted line A - B – C) on the attached plan.

**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.

## **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 and the guidance given in Defra Rights of Way Circular 01/09 (version 2, October 2009).
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

*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. Footpath 7 runs from Bramfield to Thorington along the course of the road which once connected those villages. At TM 40829 73413 a spur of footpath 7 leads off to the east and runs to the parish boundary near Walnut Tree Farm. It is the alignment of the western end of this spur footpath which is at issue.
9. An application to modify the definitive map and statement was made by the Appellant in November 2010 as a result of works having been undertaken by the Council to make the route recorded on the definitive map available for use. It is the Appellant's case that the route currently shown in the definitive map is incorrect and should be shown on the south side of the hedge as it was shown on the first definitive map which had a relevant date of 1 January 1953. The Appellant contends that a mistake was made at the time the second definitive map was produced as the line of the path shown on the first definitive map was incorrectly copied to the second definitive map.
10. The evidence submitted in this case consists of the documents compiled as part of the process leading to the publication of the first definitive map of public rights of way, the documents associated with subsequent reviews of that map

and the recollections of landowners and other interested persons. None of the documentary sources published before 1950 (tithe map and apportionment, Finance Act 1910 records, Ordnance Survey maps and small scale commercial maps) which have been consulted show the existence of the spur footpath.

*Bramfield Parish Survey and statement*

11. The spur path is represented on the parish survey map by a thick purple line which is predominantly on the south side of the hedge boundary although parts of the line spill over the boundary onto the north side of the hedge. The written description of the path is of no assistance in determining which side of the boundary the path was considered to run; the spur is described as running from north of Potash Cottage "to Walnut Tree Farm at the parish boundary".

*First definitive map and statement*

12. The first definitive map has a relevant date of 1 January 1953 and shows the spur path by a thick red line wholly on the south side of the boundary. The definitive statement which accompanies this map retains the description given in the parish survey and is consequently silent as to which side of the hedge the spur path was considered to run.

*Second definitive map and statement*

13. The second definitive map has a relevant date of 1 January 1963 and shows the spur path by a thick broken line which is wholly on the northern side of the boundary. There is no change in the definitive statement which accompanies the map.

*The Council's rights of way file material*

14. A letter and sketch plan sent to the Council in January 1975 by Mr George sets out the difficulties which Mr George encountered when attempting to walk some of the footpaths in Thorington and Bramfield. The spur footpath is not mentioned in Mr George's report, although the sketch plan he made depicts the spur path as running on the southern side of the boundary.

*1979 review material*

15. Two maps have been submitted which were compiled as part of this review. One of the maps shows A – B running on the southern side of the boundary, with B – C being drawn running along the boundary. The second map appears to be a copy of the first although the line of the spur path and the underlying map detail has been covered by correction fluid; the line of the path has then been drawn on top of the correction fluid. As the underlying map detail is not visible, it cannot be determined which side of the boundary the path was considered to run at the time the review was conducted. There is no written material regarding what was considered to be the alignment of the path during the review.

*Current definitive map*

16. The current definitive map has a relevant date of 3 January 1993 and shows the spur path wholly on the northern side of the boundary. The definitive statement is unchanged from previous editions and is silent as to the alignment of the path.

*Landowner evidence*

17. Three landholdings are crossed by the spur path. The path as shown in the current definitive map on the northern side of the boundary crosses land owned by the Appellant (A – B) and by his neighbour Mr Peck (B – C). The line to the south of the boundary runs wholly on land owned by Mr Winter.
18. Mr Peck has been resident at Walnut Tree Farm for at least 54 years and his understanding is that the path between A – B ran on the south side of the boundary then crossed the boundary at B and ran on the northern side of the boundary between B – C. Mr Peck submits that this route had been used until the entry at A on the south side had been blocked up by Mr Winter.
19. The Appellant contends that the whole of the path runs on the southern side of the boundary whereas Mr Winter's view is that it runs wholly on the north side of the boundary.
20. The Appellant has attempted to obtain evidence of use of the path by long standing residents, but none of those contacted has completed a user evidence form. The Appellant's daughter had discussed the issue of the footpath with some residents and submitted details of those conversations. The gist of the reported conversations is as follows: Heather Philips recalled that the correct line of the path was south of the ditch. June Brereton remembered having walked through the blocked route (on Mr Winter's land) but not the route currently available (on the Appellant's land); in subsequent correspondence with the Council Ms Brereton stated that it had been a long time since she had walked the path and could not be sure as to which side of the hedge the path ran. Chris Collins had been a footpath warden for the parish but had not walked the spur path as it did not lead anywhere.
21. A letter from Mr Booth to the Appellant noted that there was a map dated 1957 which showed the spur path to be on the south side of the hedge; a copy of this map has not been submitted and Mr Booth did not provide any first hand knowledge of the position of the path.
22. Where it is claimed that the location of a footpath is incorrectly shown, the burden of proof lies with those making the claim. As noted above, the evidence required to displace the initial presumption of the correctness of the map has to be of some substance. The required standard of proof is the balance of probabilities.
23. In this case, the parish survey map and the first definitive map show the spur path on the south side of the boundary. All subsequent copies of the definitive map show the path on the north side of the boundary, including the current definitive map. Mr George's sketch plan of 1975 shows the path on the south side of the boundary despite the path having been shown on the north side on the definitive map since 1961. The review maps of 1979 are of little assistance in that the alignment is not clearly shown on one map and the underlying boundary detail is hidden by correction fluid on the second.
24. The landowner evidence and that of local residents is also inconclusive. The three landowners affected each have a different understanding of the position of the path. The appellant claims that it is wholly on the southern side of the boundary; Mr Winter contends that it is wholly on the northern side of the boundary; Mr Peck accepts that B – C runs on his land and considers A – B to

be on the southern side of the boundary. The user evidence is limited in quantity, and is inconsistent and unclear as to which path had been used.

25. The alignment of the path changed between the first and second definitive maps. Whilst the evidence is sufficient for a reasonable allegation to be made of an error having occurred, that same evidence is, in my view, insufficient to cross the higher hurdle posed by the balance of probability test which the Appellant is required to meet in order for the current line of the path to be deleted from the map and another alignment substituted in its place.
26. I conclude that whilst new evidence has been discovered, that evidence does not demonstrate on a balance of probabilities that there is no public right of way over the Appeal route and that a public right of way subsists on an alternative alignment.
27. I conclude that the evidence is not of sufficient substance to displace the presumption that the current definitive map is correct.

### **Conclusion**

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

### **Formal decision**

29. I dismiss the Appeal.

*Alan Beckett*

Inspector

APPENDIX

