The Planning Inspectorate

Appeal Decision

by Michael R Lowe **BSc (Hons)**

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

Decision date: 15 JANUARY 2018

Appeal Ref: FPS/P0119/14A/2

Appeal by Mrs Rose Mary Mastrangelo

against a decision of South Gloucestershire Council

- 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 South Gloucestershire Council (the Council) not to make an Order under section 53(2) of that Act.
- The Application by Mrs Rose Mary Mastrangelo, dated 27 March 2015, was refused by the Council on 12 July 2017.
- The Appellant claims that footpaths referenced LHO-30, LHO-31, LHO-32 & LHO-34 at Springfield Farm in the Parish of Horton, should be deleted to the definitive map and statement for the area.

Decision

1. I dismiss the appeal.

Preliminary Matters

2. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.

3. The appeal has been decided on the basis of the papers submitted.

Main issues

4. The application sought an Order under the provisions of Section 53(3)(c)(iii) of the 1981 Act. The main issue is therefore whether the definitive map and statement requires modification in consequence of the discovery of evidence which shows that there is no public right of way over land shown in the map and statement as a highway of any description.

5. In a case such as this in which it is contended that a route should be deleted from the definitive map, the starting point is that the definitive map is correct. Sufficient and cogent evidence is required to displace the presumption that the map is correct. To delete a route from the definitive map it must be shown that there was no public right of way at the relevant date of the first definitive map on which it was shown. In this case that is 1 January 1954 on the definitive map for Gloucestershire County Council.

6. In the case of John Trevelyan v SSETR [2001] EWCA Civ 266 in which Lord Phillips MR said:

> 38. 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.

Background

7. In September 2005 a similar application to the Council was refused. Mrs Mastrangelo appealed to the Secretary of State who dismissed the appeal by letter dated 27 March 2009[1]. A further application was made to the Council on December 2009 and was refused in November 2014.

Reasons

8. The essence of Mrs Mastrangelo's appeal is that Horton Parish Council did not follow the proper procedures in the preparation stages of the draft map in the early 1950s. The Council state that the issue of alleged irregularities in the decision making process of the Parish Council is not evidence of whether or not there was a public right of way in January 1954 as shown on the definitive map.

9. The provisions of section 32(6) of the National Parks and Access to the Countryside Act 1949 apply Part III of the First Schedule:

9 (1) If any person desires to question the validity of a definitive map prepared under Part IV of this Act on the ground that the map is not within the powers of this Act, or on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the preparation of the map, or of any draft or provisional map on which that map is based, he may, within six weeks after the date of publication of notice of the preparation of the map in accordance with the provisions of the said Part IV in that behalf, make an application to the High Court; and on any such application the court, if satisfied that the map is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any such requirement as aforesaid, may make an order declaring that, notwithstanding anything contained in the said Part IV, the definitive map shall not be conclusive evidence of any such matter as may be specified in the order.

(2) References in this paragraph to a definitive map, or to a draft or provisional map, shall be construed as including references to a revised map prepared in definitive form, or to a revised map prepared in draft or provisional form, as the case may be; references therein to a map shall be construed as including references to any statement required by the provisions of Part IV of this Act to be annexed to the map; and for the purposes of this paragraph a map shall be deemed to be based on another map if the particulars contained in the former map are required by the said provisions to be the particulars contained in the latter map as modified in accordance with those provisions.

10 Subject to the provisions of the two last foregoing paragraphs, an order, map, or statement to which either of those paragraphs applies shall not, either before or after it has been confirmed, made or prepared, be questioned in any legal

[1] Letter Ref NATRO/PO119/529A/08/02

> proceedings whatsoever, and any such order map or statement shall become operative on the date on which notice of the confirmation, making or preparation thereof is published as mentioned in those paragraphs respectively.

10. In my view Mrs Mastrangelo's appeal falls at this hurdle. It is not open to me to consider that there was any procedural irregularity in the Parish Council's procedures in the 1950s. In any event, it is clear that a Parish Meeting was held on 28 March 1951, it was advertised in the Sodbury Gazette, maps were displayed for inspection, "no one took the advantage". It seems likely that this meeting related to the early stages leading to the preparation of the definitive map.

11. Insofar as Mrs Mastrangelo's case is that the County Council misconstrued the evidence in the preparation of the draft map and statement, in my view, that amounts to the reinterpretation of evidence previously considered by the County Council in the 1950s. It is not the discovery of evidence.

12. A definitive map modification order based upon section 53(3)(c) of the 1981 Act is dependent upon the discovery of evidence (when considered with all other evidence available to the Council). In the case of Mayhew v Secretary of State for the Environment [1992] the meaning of 'to discover' is to find out or become aware. The phrase implies a mental process of the discoverer applying their mind to something previously unknown to them. More recently in the case of The Queen on the application of Dorset County Council v Defra [2005] EWCH 3405) it was stated:

> 5. The Secretary of State and the interested party submit that modification on the ground in question may indeed be made where there is the discovery by the authority of evidence; however, that the reinterpretation of evidence previously before the authority is not a ground for modification and that the claimant's case was based upon the interpretation of evidence previously before the authority which is not the discovery of evidence. The Secretary of State and the interested party further submit that this interpretation is consistent with authorities, including the decisions of the Court of Appeal in R v Secretary of State for the Environment ex parte Simms and Burrows [1991] 2 Queen's Bench 354, per Purchas LJ at 380, who refers to the discovery of new evidence, per Glidewell LJ at page 388, who refers to the finding of some information which was previously unknown, and per Russell LJ at 392; Fowler v Secretary of State for the Environment & Devon County Council [1992] 64 Property and Compensation Reports 16 per Farquharson LJ at 22, who referred to fresh evidence; and Trenchard v the Secretary of State [1997] EWCA Civil 2670 per Pill LJ, referring to further evidence becoming available and approving a definition of discovery as connoting a mental process in the sense of the discoverer applying his mind to something previously unknown to him.
> 9. In my judgment, the Council has wholly failed to show that it has discovered any evidence. What it has done is to reinterpret the evidence that had been before it all along. I cannot see that that can arguably come within section 53(3)(c)(i). There must be a discovery, but there has been none. One does not discover a different interpretation and if one could do so, the process of mind changing could go on indefinitely. ....".

13. I appreciate that Mrs Mastrangelo has undertaken extensive work to find the documentation of the process of the production of the definitive map. If an objection had been made when the definitive map was being prepared then the onus would have been on those seeking to record public rights of way to demonstrate that the rights existed. Now the definitive map has been prepared, it is an onerous task to prove an error. As Lord Denning said in R v Secretary of State for the Environment ex parte Hood [1975] 1 QB,

The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975. So it would be very unfair to re-open everything in 1975.

Conclusion

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

Michael R Lowe

INSPECTOR