



Appeal Decision

Inquiry opened on 9 January 2018

by Mark Yates BA(Hons) MIPROW

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

Decision date: 27 March 2018

Appeal Ref: FPS/Z1585/14A/13

- 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 Essex County Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 1 March 2016 was refused by the Council on 25 January 2017.
- The appellants (Mr and Mrs Duffin) claim that the definitive map and statement should be modified in respect of the alignment of Footpath 28 in the parish of Finchingfield.

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 held a non-statutory inquiry into the appeal on 9-10 January 2018 at Braintree Town Hall. Following the close of the inquiry I made a visit to the site accompanied by the interested parties.

Main Issues

3. 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)(i) and (iii) of the 1981 Act, namely:
 - a) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist; and
 - b) that 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.
 4. The appellants submit that the proposed realignment of a section of footpath could fall entirely within the second limb of 53(3)(c)(iii). Alternatively, it is submitted that the first limb of 53(3)(c)(iii) should be considered in conjunction with 53(3)(c)(i). The latter is the approach supported by the Council.
 5. Paragraph 37 of the case of *Marlene Peggy Masters and Secretary of State for the Environment, Transport and the Regions 2000* makes it clear that the
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second limb of Section 53(3)(c)(iii), namely that *"any other particulars contained in the map and statement require modification"*, does not relate to the deletion of a right of way from the definitive map and statement. It relates to matters such as the position and width of the right of way. I take the view that an application such as this one, which would delete a section of footpath and add a new section of path, falls more readily under the first part of 53(3)(c)(iii) along with 53(3)(c)(i). This approach was endorsed in the case of *R (on the application of Leicestershire County Council) v Secretary of State for the Environment, Food and Rural Affairs 2003* ("Leicestershire").

6. 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 map, which in this case is 1 January 1953. As outlined in paragraph 27 of the *Leicestershire* case the relevant tests in 53(3)(c)(i) and 53(3)(c)(iii) are linked. The appellants do not submit that an additional footpath has been dedicated. Rather they argue that Footpath 28 should be recorded over an alternative route. Bearing in mind the burden of proof to be satisfied when considering the deletion element, it seems appropriate to assess the addition element on the basis of whether a right of way subsists on the balance of probabilities. On this issue, I note the comments of the judge in paragraph 28 of the *Leicestershire* case. Further, paragraph 29 of the judgment outlines that the starting point is whether there is no right of way over the existing route.
7. The case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions 2001* ("Trevelyan") provides judicial guidance regarding the deletion of rights of way from the definitive map. 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."*
9. The appellants draw attention to the test for a way to be added to the original definitive map being that it was reasonably alleged to exist. Reference is made to an extract from the Court of Appeal judgment in the case of *Fortune v Wiltshire County Council and others 2012*, where it is stated that the judge may have given too much weight to the definitive map process. However, when considering the deletion element of the application, I consider that I should apply the burden of proof outlined above in *Trevelyan*.

Reasons

Background matters

10. The appeal is made against the Council's decision to not make an order to realign a section of Footpath 28 in the locality of Robjohns Farm. It is submitted that this section of path should be recorded around the historical farm buildings ("the application route") rather than through the original yard ("the existing route"). A copy of the application map showing these routes is attached to this decision for information. All of the points referred to below correspond to those that I have annotated onto the application map.
11. It is accepted that there is a difference between the application route and the path shown on various Ordnance Survey ("OS") maps around the farmyard. The parties dispute the extent of the difference between these routes and the significance of this matter in terms of the appeal. I do not accept that the appeal should necessarily fail if an issue arises out of the precise route plotted on the application map. However, any order made should accurately show the proposed modification of the definitive map. Clearly, I may need to re-visit this matter after I have considered the evidence. This appeal does not relate to a separate application made in relation to the recording of gates as limitations in the definitive statement.
12. Background information from the report by Ms Trevor, commissioned by the appellants, outlines that Robjohns Farm has been solely used for residential purposes since 1978. During the mid-twentieth century it was a small farm that operated as a satellite cattle yard to a larger farm nearby. By the 1960s it had become an independent pig farm. In 1983 Robjohns Farm was split in two when half of the land and buildings became Lake House and some of the outbuildings were converted for residential use.
13. Reference has been made to changes to the nature of the land in this locality since the relevant date. Mr Duffin has also provided further information arising from his occupation of Robjohns Farm and particular action taken by the Council in respect of Footpath 28. However, such matters are not material to my decision as they occurred well after the relevant date of 1 January 1953.

The discovery of evidence

14. Paragraph 26 of the judgment from the case of *Mervyn Darrell Burrows v Secretary of State for Environment, Food and Rural Affairs 2004* states, in respect of the discovery of evidence, that: "*It is plain that the section intends that a definitive map can be corrected, but the correction... is dependent on the 'discovery of evidence'. 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”.

15. Although the Council questions whether some of the evidence provided is newly discovered, there is clearly some new evidence in this case, most notably in the form of witness statements. As outlined above, this new evidence should be considered in conjunction with the previously considered evidence to determine whether an order should be made to modify the definitive map.

Consideration of the evidence

Map evidence

16. The early map evidence does not point to the existence of a through route that could correspond to a public right of way in the immediate locality of Robjohns Farm. The records provided from the 1910 Finance Act only reveal that there was a deduction for “*public rights of way or user*” through a large hereditament which encompassed Robjohns Farm. However, no conclusion can be reached in terms of the location of the way concerned.
17. A track is shown leading to the yard of Robjohns Farm on the 1878 OS map near to points A and B. The solid lines at the entrances to the farmyard would typically represent a boundary feature and it is likely that there was some means of access in these boundaries, most probably a gate. Another solid line is shown within the farmyard in the general locality of point E.
18. There are other paths shown in the locality, including one to the west of the C-D section of the application route. Although there is a boundary at around point D, it is quite probable that there was some means of access beyond this point. This is supported by the route depicted on the later OS maps, which directly continues on either side of this boundary. There is a slight gap shown on the 1878 map in terms of the path to the north of this boundary which is not evident on the later OS maps.
19. These features are broadly shown on the 1897 and 1921 OS maps. The 1921 map shows a pecked line near point B and no solid line is shown across the existing route within the farmyard. Ms Trevor says the pecked line represents a boundary feature and the gate may have been open on the date of the survey. Further, solid lines are shown near points A and B on the 1951 OS map, which again indicates that there were boundary features at these points. No such feature is again shown within the farmyard. Although the 1960 OS map postdates the relevant date, it shows the layout shown on the earlier maps with boundaries near points A and B. A 1960 aerial photograph appears to show signs of wear corresponding to the existing path and near to the application route but it cannot be determined what caused these worn features. It is also unclear from looking at this photograph whether there were any gates at particular points.
20. OS maps are generally taken to provide a reliable indication of the existence of the physical features present on the date of the relevant survey. The depiction of pecked or double pecked lines would indicate the existence of a path or track that was discernible on the ground when the land was surveyed. Nonetheless, OS maps provide no confirmation regarding the status of the particular paths or tracks shown.

21. The C-D section of the application route is not shown on the OS maps but there is a path depicted to the west of this section. There may also be some variation for the remainder of the application route. This feature could have been a private and/or a publically used path at the time. Further, it is quite possible that there was no public footpath through the farmyard and the tracks shown leading to the yard were used as private means of access. However, it is also possible that a public footpath continued across the hardstanding of the yard. In such circumstances, a path or track would not be depicted through the farmyard. Having regard to these matters, I do not consider that any significant weight can be placed on the OS mapping in terms of determining whether the existing route of Footpath 28 was placed on the definitive map in error.
22. Footpath 28 is not shown on the map prepared in relation to the 1932 Rights of Way Act ("the 1932 Act"). The fact that this footpath was not claimed at the time to be a public right of way does not have any direct bearing on the alignment of the path later shown on the definitive map. Nor is it argued that the later inclusion of Footpath 28 on the definitive map was an error.

The definitive map records

23. Copies have been provided of the survey map and card that were compiled at the onset of the process undertaken to produce the definitive map in accordance with the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"). Footpath 28 is shown on the survey map proceeding from the road north of Sculpin's Bridge to Mill House. A gap is annotated on the map at each end of the path. At Robjohns Farm the path is shown proceeding over the alignment A-E-B. The initials "FG" are shown at the farm to denote a field gate and indicate that at least one gate existed in this locality. To the north of point B, the continuation of the path is annotated with "x" symbols.
24. The survey card for Footpath 28 states "*commences on road to Sculpins Bridge and continues to Robjohns Farm. Path is well kept and used frequently*". The card had been completed by Edwin Cox and it is apparent that Mr Cox was the owner of Robjohns Farm between 1938 and 1944. There is clearly a potential conflict between the map and the card in respect of the extent of Footpath 28 to the north of the farm.
25. Footpath 28 was shown on the draft, provisional and definitive maps on the same alignment as the survey map between Sculpin's Bridge and Mill House. The description of the footpath in the original definitive statement is consistent with the route shown on the definitive map aside from a reference to the path proceeding to the parish boundary. However, it is apparent that the draft statement had made no reference to the parish boundary. Further, this feature is located to the south of Robjohns Farm and it is not claimed that Footpath 28 should follow the parish boundary. The Council says no objection was made to the inclusion of this footpath. In contrast, objections were made at the draft map stage to five other footpaths in Finchingfield.
26. There have been no material changes to the information contained for Footpath 28 in subsequent editions of the definitive map and statement. However, I note that an abandoned review statement of 1971 refers to the path proceeding near to the parish boundary. This may have been an attempt to rectify the error in the definitive statement.

27. In terms of the survey card, the reference to the path proceeding through to Robjohns Farm could indicate that it continued to the eastern entrance of the farm or where the section marked with "x" symbols commences. There is nonetheless no support in the survey documents for Footpath 28 following the application route. I address the "x" notation below.
28. A letter of 11 August 1950 from the Clerk of the Council outlines that OS maps provided to parish councils for the survey of rights of way would show those ways identified under the 1932 Act. This letter states that any way or section of way marked by the county council which was not considered to be a public right of way should be marked "x" and reasons provided in the schedule. It further states that where parish councils considered that a way not shown on the map is a public right of way they should mark it and give their reasons for doing so. A letter of 16 October 1950 from the County Planning Officer to Finchingfield Parish Council provided an OS map for the claimed ways to be marked. The ways shown on the 1932 Act map were stated to have been included on this map. Further guidance was provided by the Council in a letter of 16 January 1951.
29. Bearing in mind that no path was shown in the immediate vicinity of Footpath 28 on the 1932 Act map, I consider it unlikely that the Council would have marked this path on the map sent to the parish council. It follows in my view that the "x" notation is more likely to have been marked on the map by someone from the parish council.
30. There is no explanation for the "x" notation in the survey card. Nonetheless, it is quite possible that this notation and the description in the survey card meant that there was some uncertainty regarding the status of the section of Footpath 28 to the north of point B. On this issue, the Council points to this section being the subject of a highways diversion order in 1814. The witness evidence outlined later in this decision is supportive of people using the section from Mill House to near point B. This section was subsequently included on the draft map and is not part of the application before me. The appellants submit that no reasons were provided for the inclusion of Footpath 28, given that it was not included on the 1932 Act map. However, I agree with the Council that the reason for its inclusion can be taken to be that it was frequently used.
31. The appellants have provided extracts of minutes for meetings of Finchingfield Parish Council between November 1949 and May 1953. These provide no indication that a parish meeting was held to consider the information collated in relation to the claimed public rights of way, as required by Section 28(3) of the 1949 Act. The appellants submit that this undermines the definitive map process and falls within the example cited in *Trevelyan* of procedural errors that undermine the presumption the definitive map is correct. It is further submitted that subsequent stages did not remedy the situation.
32. The minutes reveal that the collating of information for the purpose of the 1949 Act was discussed at parish meetings. A pamphlet on the matter was read out at a meeting of 17 March 1950¹ and it was agreed to purchase a map of the parish. This was to be circulated to each councillor in turn to mark on the footpaths. A minute of 1 November 1950 records that a map of the parish had

¹ Most probably the publication 'Surveys and Maps of Public Rights of Way' of January 1950 endorsed by the Ministry of Town and Country Planning

- been received and each councillor would have it for a period to mark on the footpaths. I note that one of the parish councillors was Mr Cox.
33. There is no evidence from the minutes during the period covered of a specific meeting being held to discuss the surveyed rights of way within the parish. I find the Council's suggestion that the matter could have been considered at a sub-committee to be without foundation. Nor would it meet the relevant requirement of Section 28(3) of the 1949 Act. I consider this to be the case irrespective of the general guidance contained in Circular 81², dated 17 February 1950, regarding different types of arrangement in the country.
34. A parish meeting would have provided parishioners with the opportunity to comment on the surveyed rights of way. This could potentially mean that any error was not challenged at an early stage. However, there would be other opportunities to object to the proposed ways, most notably following the publication of the draft map. In particular, regard should be given to the completion of the survey card by Mr Cox who was the former owner of Robjohns Farm. Further, I concur with the Council that the appellants would need to show that any procedural error led to a mistake with the alignment of Footpath 28. They do not challenge the inclusion of this footpath on the definitive map. Overall there is nothing from the definitive map process to indicate that the path went around the farmyard.
35. In considering the alignment of the footpath I consider that significant weight should be given to the contemporaneous survey card and map given the involvement of Mr Cox. He completed the card and the minutes show that the map was to be circulated between the parish councillors. It is reasonable to presume that Mr Cox was familiar with the alignment of the public footpaths in this locality. However, it appears that there was initially some uncertainty regarding the status of the way to the north of the farm. I do not find the incorrect reference in the definitive statement to the parish boundary to have any particular bearing on this application given the location of this feature.
36. The Council points to the lack of objection when the route shown on the OS maps was obstructed, for instance by a storage barn in the 1960s. However, I see little merit in the point made on this issue. Clearly an inspection of the definitive map would have revealed that Footpath 28 went through the farmyard. The issue raised by one of the witnesses (Mr Collar) regarding the actions of a former clerk of the parish council (Mrs Gunnary) post-dates the relevant date of the definitive map by some time.

Witness evidence

37. Evidence has been obtained from people with longstanding knowledge of the area. In particular, eleven of these people signed a statutory declaration, eight of whom gave evidence at the inquiry. Mr Duffin undertook the interviews which led to the production of these submissions and he outlines how he attempted to gather the information fairly. He refutes the suggestion by an objector (Mr Kendall) that there was collusion in the preparation of these statements. Although the Council does not assert that there has been a deliberate intention to mislead in the way that the statements have been collated, its witness (Ms Morris) points to the possibility that witnesses may

² Issued by the Ministry of Town and Country Planning

- have been influenced in terms of their responses. She refers to the lack of a clear record of the questions asked.
38. I do not doubt the integrity of Mr Duffin on this matter but there will be some concerns regarding the written material being gathered in this unstructured way. However, weight should be attached to the fact that eight of these people appeared at the inquiry and were cross-examined on their evidence. The witnesses stated that they were not pressurised into giving their evidence.
39. There is an additional issue surrounding the written statement of Mr John Jervis. He subsequently signed a further statement prepared by Mr Kendall, which states that he and his friends walked through the farmyard if there were no animals in the yard. Mr Duffin strongly refutes the comment that Mr John Jervis did not sign his original statement and he refers to Mr Jervis' recent health problems. In the circumstances I treat all of Mr John Jervis' evidence with caution. In addition, it is apparent that his knowledge of the site post-dates the relevant date.
40. One of the witnesses (Mrs Blake) lived at Robjohns Farm until the age of 6³. The other witnesses were residents in the locality of Finchingfield village. They were for the most part children or teenagers during the period prior to the relevant date of the definitive map⁴. The witnesses are consistent in their recollections that they did not walk through the farmyard. A proportion confirmed that they walked around the side of the farm. In this respect, I note that reference was made to the application route but at the inquiry some referred to the route shown on the 1921 OS map. The use of this area was not confined to Footpath 28 and the activities of some of the witnesses focussed to a large extent on the gravel pits to the north of Robjohns Farm.
41. The witnesses were adamant that they would not have gone through the yard or past the farmhouse. This was based to a large extent on a respect for farmyards and safety concerns. Children and adults may have wished to avoid the farmyard if there was an alternative route around the outside of the yard. However, this would not mean that no footpath existed through the farmyard. It is also understandable that Mrs Blake as a young child was not allowed to go into the farmyard.
42. I do not necessarily have concerns about the ages of the witnesses prior to the relevant date but there must be some doubts regarding the extent that people can recall particular details over 60 years ago. I find this to be particularly so in relation to the stated lack of observed use of a route through the farmyard. It should also be borne in mind that a lack of observed use does not mean that such use did not occur. Further, the fact that the witnesses did not generally go into the yard will mean that they may be making assumptions about the nature of the farmyard. In terms of livestock there is evidence that cattle were penned within the farmyard and Mrs Lee recalls seeing a sign regarding the presence of a bull. Mrs Blake also remembers that geese were present in the yard.
43. The appellants cite the case of *Thornhill v Weeks 1914* to challenge the presumption that the definitive map is correct in recording Footpath 28 through the farmyard. However, the judgment outlines various reasons for the judge

³ Living at the farm between 1947 and 1954

⁴ Mr Guppy's knowledge of the site dates back to around 1955 and post-dates the relevant date

finding that a footpath had not been dedicated in that case. The fact that the claimed path went through a stable yard was only one factor in the decision. Accordingly I see very little value in the point pursued on this matter.

Conclusions

44. I have concluded that no significant weight should be attached to the OS maps. They provide support for a track linking with Robjohns Farm near points A and B and could be indicative of the existence of a through route which corresponds to the existing route of Footpath 28. The OS maps also provide support for the existence of a route which goes around the farmyard albeit not over the application route. The other map evidence provides no support for a footpath in this locality.
45. Some weight should be given to the evidence from people with knowledge of this area at or before the relevant date, particularly those who appeared at the inquiry. However, I have expressed particular concerns regarding the witness evidence bearing in mind the period that has elapsed since the relevant date. Their use of a route around the farmyard does not demonstrate that the footpath was wrongly recorded on the definitive map. The route chosen appears to have reflected the desire of the witnesses and the people they were with to avoid walking through the farmyard. Whilst there will be some uncertainty regarding the precise route they used, I consider that it is more likely to have corresponded closely to the one shown on the OS maps.
46. I have addressed the process undertaken in relation to the compilation of the original definitive map. The appellants have drawn attention to particular matters they consider weaken the presumption outlined in the *Trevelyan* case. The issue I consider to be of most concern is the absence of any record of a parish meeting to consider the information collated from the surveys. However, regard should be given to the survey of this path by the former owner of Robjohns Farm. Mr Cox should have been well acquainted with the position of any public right of way in this locality. The path was clearly marked on the survey map through the farmyard rather than to the outside of the yard. It is also apparent that other parish councillors were involved in this process. In terms of the "x" notation, this indicates that there was initially some uncertainty regarding the status of the way to the north of the farm. I have concluded above that significant weight should be attached to the survey documents. Further, no objection was raised at the time to the inclusion of Footpath 28 on this alignment on the draft map.
47. Overall I conclude on the balance of probabilities that the evidence as a whole is not of such substance to displace the presumption that the definitive map is correct. I do not find that there is cogent evidence of the occurrence of an error regarding the representation of Footpath 28 through the yard of Robjohns Farm. It follows that I do not consider on balance that the tests outlined in paragraph 3 above are satisfied.

Other Matters

48. Some additional matters have been raised which are not relevant to my decision. These include issues relating to whether it is desirable for Footpath 28 to follow a particular alignment or the need for the footpath.

Overall Conclusion

49. 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

50. I dismiss the appeal.

Mark Yates

Inspector

APPEARANCES

For the Appellants:

Ms K. Jones Counsel on behalf of the appellants

She called:

Mrs M. Lee
Mrs M. Blake
Mrs F. Turner
Mr D. Turner
Mr J. Dale
Mr E. Collar
Mr Jim Jervis
Mr R. Guppy
Mr R. Duffin

For the Council:

Mr J. Hutchon Principal Legal Assistant for the Council

He called:

Ms M. Morris Legal Executive

Other Interested Party:

Mr D. Kendall

DOCUMENTS

1. Opening statement for the appellants
2. Opening statement for the Council
3. Inquiry folder
4. Statement of Mr Kendall
5. Routes plotted by Mr Kendall
6. Closing submissions on behalf of the Council
7. Closing submission on behalf of the appellants