



Appeal Decision

On papers on file

by K R Saward Solicitor

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

Decision date: 30 October 2019

Appeal Ref: FPS/U1050/14A/10

- The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Derbyshire County Council ('the Council') not to make an Order under Section 53 of that Act.
- The application dated 30 March 2016 was refused by the Council on 29 October 2018.
- The appellant claims that the definitive map and statement for the area should be modified by adding a footpath from public footpath No 108 to public footpath No 107 in Belper.

Summary of Decision: The appeal is allowed.

Preliminary Matters

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 of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. For clarity, I have taken the description of the claimed path from the Council's Committee report rather than the grid references used in the application. A copy of the map prepared by the Council to show the claimed route is attached for reference purposes.
3. The landowners say that the application is invalid. However, there is no minimum number of signatures or forms required in order to claim a public right of way. The volume of evidence is not in itself determinative, and my considerations are not confined to numbers. I shall look at the evidence as a whole, including its quality and consistency.
4. Whether or not the path is needed because of other alternatives is not material to my considerations. I must determine whether there is sufficient evidence to support the existence of a public path under the legal framework. My decision shall be based on the evidence before me. Individual behaviour is relevant only to the extent of establishing whether use of the claimed route was with or without consent. Otherwise, matters of personal conduct arising in relation to the application fall outside the ambit of this decision.

Legal Framework

5. For an addition to be made to the definitive map and statement ('DMS'), section 53(3)(c)(i) provides that a modification order shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and

statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

6. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*¹ an Order to add a route should be made if either of two tests is met:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

Main Issue

7. The main issue is whether on the balance of probabilities a public footpath subsists along the claimed route or is reasonably alleged to subsist.

Reasons

Documentary evidence

8. The application is for a public footpath across a field lying south of Sandbed Lane which links the existing public footpaths known as FP108 to the west and FP107 to the north. The land belongs to the owners of No 101 Sandbed Lane.
9. The applicant partly relies upon documentary evidence in the form of Ordnance Survey ('OS') maps and satellite images. Such documents can reveal the physical presence of a path at particular times, but they do not assist in establishing if the path was used by the public.
10. In this case, the OS mapping does not assist the applicant in any event. Both the OS 6" map of 1888-1913 and 25" map of 1892-1914 show the sections of FP108 and FP107 to which the claimed path joins, but not the route itself.
11. The satellite images show a line broadly along the claimed route which is consistent with the presence of a path in 2007, 2009 and 2010. They help to demonstrate the existence of a path over those years, but not its status. Little weight can therefore be attached to the documentary evidence beyond it verifying that the line of a path existed during that period.

User evidence

12. Reliance is also placed on evidence relating to usage of the claimed route. In such cases section 31 of the Highways Act 1980 ('the 1980 Act') is relevant. It provides that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, 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.
13. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.

¹ [1994] 68 P & CR 402

14. The current landowners confirm that they erected fencing across the claimed path shortly after acquiring the land. They do not give a date, but it cannot have been before July 2015 when the new owners first erected signs to tell walkers to stick to the designated paths. From what users say, fencing (at point B) and a locked gate (at Point A) appeared in the summer or autumn of 2015. I take this to be the time when the public use of the path was called into question. In addition, a declaration was deposited with the Council under section 31(6) of the 1980 Act on 5 October 2015 to acknowledge FP107 and FP108, but not the claimed route.² Therefore, the relevant 20-year period for the purposes of section 31 is 1995-2015.
15. A total of 20 individuals have completed user evidence forms ('UEF's). The Council is critical of the applicant inserting some details into the UEF's before the users completed the form. Rather than each person describing and plotting the route they walked, all the UEF's refer to the same attached plan on which the route is already shown. The approximate width has been inserted as 1m.
16. It is better if users are not led in their evidence as it carries more weight. In this case, the users must have seen the plan when they completed the form and they could change the width if they so wished. Indeed, some users have marked the position of stiles on the plan and a couple have altered the entry for the width to 1m plus or 1m-2m.
17. Each user has signed the declaration on the form to say that the information given on it is true and accurate to the best of their knowledge. It is reasonable to conclude from this that, in the absence of evidence to the contrary, each user believed their use to have been of the same path as shown on the plan. The claim is for a footpath only. The stated width is relevant to the width that should be recorded in the Definitive Statement should it be found to be a public path. It has little or no bearing on whether or not a public footpath exists.
18. In cases such as this which rely on user evidence, it is common for applicants to canvass for users who have walked a path to come forward. I have seen the poster displayed by the applicant and there is nothing to lead me to believe that users have provided evidence other than of their own free will.
19. All the claimed use is on foot only. From the 20 UEF's, 11 claim use for 20 years or more on a daily, weekly or monthly basis. A further 8 claim use for less than 20 years but within the relevant period. One person claims use before 1995 but it is not entirely clear until when. Many of the users were dog walkers and all users used it as part of a longer route. In addition to the UEF's, one letter of support was submitted by a local resident claiming over 60 years use of the path but very few further details are provided.
20. The Council considers there to be sufficient evidence to suggest that the public used the field to access the area but insufficient to show that public rights have been acquired. The information provided by users is described as 'vague'.
21. Many of the users make comment to the effect that they must *now* use the recorded public footpaths which are wet and boggy in consequence of the claimed path closure. The Council identifies the bottom of the field which users describe as impassable due to flooding as FP108 which is confirmed in a

² The effect of such a deposit is that no additional way over the land identified in the declaration can be dedicated as a highway since the date of deposit, subject to certain provisions. This does not affect the existing claim that a public footpath had become established by 2015.

- photograph from the applicant. From my reading of the comments, users are making the point that the closure of the claimed path has resulted in no alternative but to use FP108 which can be impassable.
22. I note that one user describes the fenced off paths as impassable due to mud and water and describes the claimed path as the "diversionary route". To my mind too much emphasis is placed on the word "diversionary". That same user claims weekly use of the path which is unlikely to be the case if the claimed route was only a diversion in times of poor surface conditions along FP108.
 23. I do not interpret the comments made by users as indicating they were exercising a common law right to deviate from the recorded definitive line due to temporary obstruction caused by mud, boggy or flooding. The claimed route cannot in my view be considered a minor deviation around an obstruction. Whilst it starts along FP108, it is an altogether different route terminating much further away along FP107.
 24. One user has written to explain that although avoiding the flooded area was a reason for using the claimed route, the over-riding main reason that walkers continually used it was to exit the field at the east corner. This not only avoided a steep incline, but also offered a choice to walkers of continuing straight on to emerge onto Kilburn Lane or to use a connecting path to reach Sandbed Lane further to the east. Looking at the map of connecting paths this explanation seems entirely plausible.
 25. This same individual referred in his UEF to the presence of a pond which the Council suspected might mean he had walked another path. The user insists the position of the pond can still be seen by a depression in the ground. I have no reason to suppose that he is mistaken as to the path used.
 26. Nor can I see reason to conclude that users may have used a number of routes in order to avoid the unusable sections of FP108. On the face of the evidence, users walked the path on a daily, weekly or monthly basis. The only interruptions mentioned are when a small number of users say they chose not to use the path if cattle were in the field and two users refer to not walking the path during the foot and mouth outbreak. Overall, there is no indication that the path was closed over those periods and amount to an "interruption" in the 20-year period under section 31(1).
 27. The inference could be drawn that walkers have chosen the claimed route as it provides a preferable surface. However, that does not mean it has only been used when FP108 is unavailable. The answers in the UEF's provide a clear steer to the contrary.
 28. Several users refer to stiles at each end of the claimed route. The Council clarifies that they are probably those just outside the termination points claimed. If anything, it reinforces that those users were utilising the claimed path rather than one starting and ending elsewhere.
 29. There is a reasonable amount of user evidence spanning the relevant 20-year period before its use was brought into question. Not all forms have been fully completed and the witnesses do not individually describe the route used. Nevertheless, they have completed and submitted those forms to confirm their use was of the route shown on the plan provided. There is little evidence to

- contradict what they say or to suggest that it is unreliable. I do not consider there to be the level of uncertainty in the UEF's that the Council suggests.
30. For there to be a public right of way the use must have been 'as of right', meaning without secrecy, force or consent. If members of the public were confronted when attempting to use the path, then their use will not have been without 'force'.
 31. The current landowners maintain that from their own enquiries the public use was challenged. Three letters are produced from different local residents who recall the previous landowners (Mr and Mrs Kirkman) challenging anyone who strayed from the designated public paths. All the letters date from 2016. One resident who moved to Sandbed Lane in 1983, and whose land adjoins the landholding affected by the claimed route, explains that Mrs Kirkman particularly got frustrated with people trespassing on her land. The resident refers to witnessing on many occasions people being told to stick to the path provided.
 32. Another resident between 1983-1993 claims to have witnessed the landowners on many occasions directing walkers to use the correct footpath and sternly telling them not to trespass. The dates precede the relevant period under consideration and so do not suffice to defeat the claim.
 33. Other former residents who have provided a letter say they cannot recollect the general public straying from the footpaths in their 5 years or so living nearby prior to February 2016. They suggest that the landowners would not have tolerated people wandering across the fields, but do not give any first-hand knowledge of walkers actually being challenged. It is not enough to believe that the landowners would most likely have reacted to walkers using their land.
 34. Thus, there is evidence from one person who states that they personally saw walkers being challenged during the requisite period. This evidence is uncorroborated for that period and it is contradicted by all but one of the users who state that they were never challenged. The one user who was challenged say it was in 2015 once notices were already erected by the new landowners.
 35. Many of the users say they were using the path daily. If that is so, it might be expected that they would have encountered the landowner at some point if the land was being protected as fiercely from trespass as suggested. Over later years when Mrs Kirkland lived alone and had become elderly this could explain why users went unchallenged, but it does not account for earlier periods. There is a conflict of evidence on this matter which would be best tested in a public inquiry.
 36. A letter was also submitted in objection on the basis that the existing path is fit for purpose with livestock fenced securely to ensure public safety. However, these matters are not pertinent to the legal tests.
 37. All that is required at this stage is for the route to be reasonably alleged to subsist to fulfil the second test. Based on the evidence before me, and having considered all the objections, I consider that it has been shown that the route is reasonably alleged to subsist for statutory dedication.

Other Matters

38. The landowners say they would not have purchased the land had they thought

a public right of way existed across the field. They consider it to be a severe detriment to their future plans for a smallholding and give rise to safety issues to the public and livestock/other animals. Whilst I can sympathise with that position, only those rights of way recorded in the Definitive Map and Statement are usually revealed in searches undertaken upon the purchase of property. It does not mean that other public rights of way cannot have been acquired.

39. The owners also fear that their land will decrease in value and make it more difficult to sell. I understand those concerns, but they are not matters that can influence my decision.

Conclusion

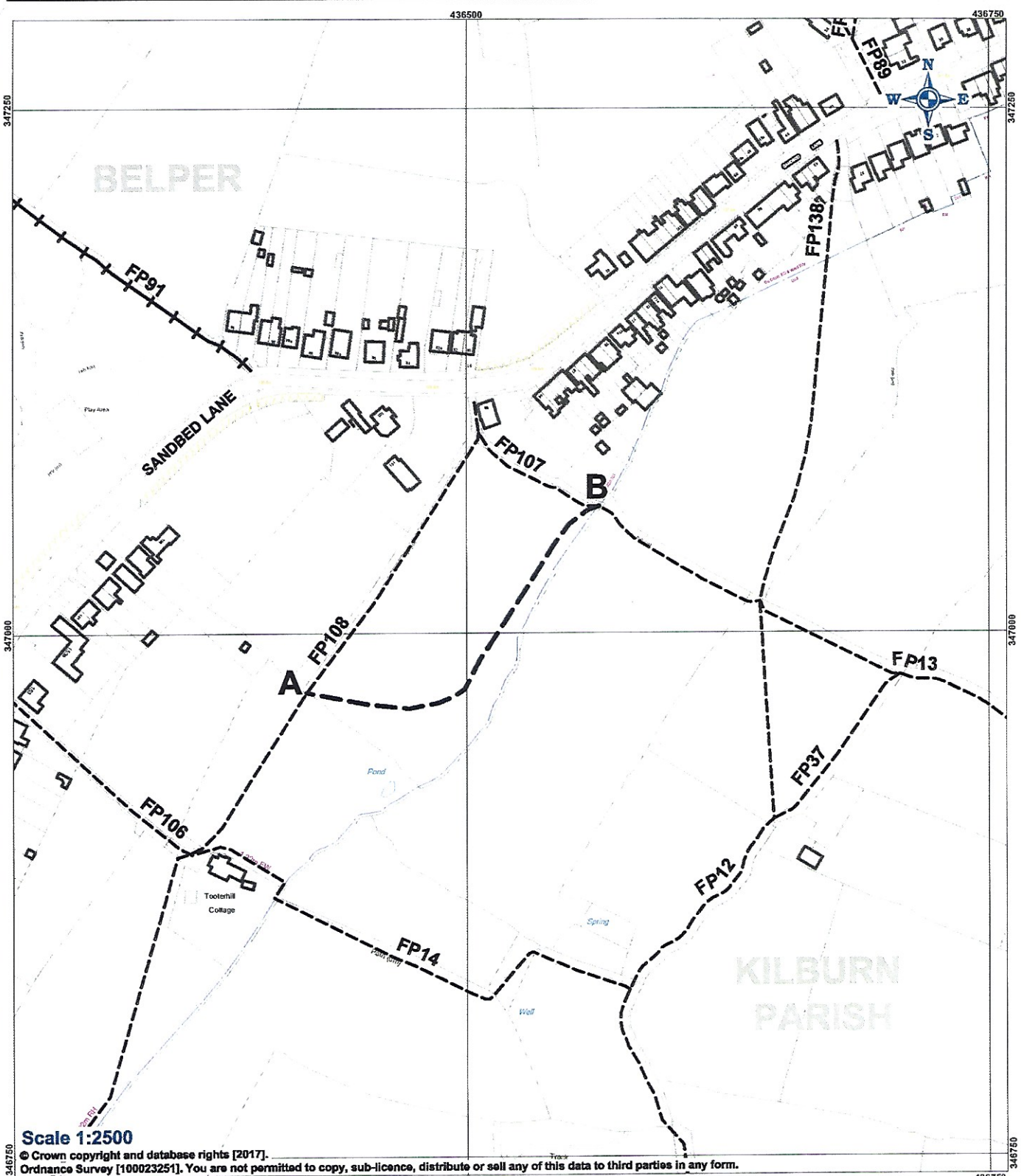
40. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that on the balance of probabilities a footpath which is not shown in the DMS is reasonably alleged to subsist.

Formal Decision

41. I allow the appeal. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Derbyshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a footpath as set out in the application dated 30 March 2016. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

KR Seward

INSPECTOR



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Wildlife and Countryside Act 1981 Section 53

Claim to add a footpath from Public Footpath No. 108 to Public Footpath No. 107 - Belper

Key:	Footpath to be added	-----
	Existing Footpath	- - - - -
	Existing Bridleway	+ + + + +
	Parish Boundary	- . - . - .

