The Planning Inspectorate

Direction Decision

by K R Saward Solicitor

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

Decision date: 25 February 2020

Ref: FPS/J1155/14D/7

Devon County Council

Application to add a footpath from Ordnance Survey land parcel 342 through Glebe Yard to Station Road

- An application was made by Mr WG Paton and Mrs TS Paton to for an order to modify the Definitive Map and Statement of Public Rights of Way under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act').
- The Council's reference for the application is Northlew FP3.
- The certificate attached to the application, as required under Paragraph 2(3) of Schedule 14 of the 1981 Act, is dated 4 September 2018.
- A representation has been made by the applicants under Paragraph 3(2) of Schedule 14 of the 1981 Act seeking a direction from the Secretary of State to be given to the Council to determine the application.
- The representation was received on 10 September 2019.
- The Council was consulted about the representation on 24 September 2019 and its response is dated 5 November 2019.

Decision

1. The Council is directed to determine the above-mentioned application.

Reasons

2. Schedule 14 of the 1981 Act sets out provisions for applications made under section 53(5) for an order which makes modifications to the definitive map and statement.

3. Authorities are required to investigate applications as soon as reasonably practicable and, after consulting the relevant district and parish councils, decide whether to make an order on the basis of the evidence discovered. Applicants have the right to ask the Secretary of State to direct a surveying authority to reach a decision on an application if no decision has been reached within 12 months of the authority's receipt of certification that the applicant has served notice of the application on affected landowners and occupiers.

4. An applicant's right to seek a direction from the Secretary of State gives rise to the expectation of a determination of that application within 12 months under normal circumstances.

5. It is the applicants' case that there is a conflict between the Definitive Map and Statement in relation to Footpath 3, Northlew ('FP3'). In their view the public footpath runs through Glebe Yard to Station Road based on the Definitive Statement. The application is to add that 'missing link' to the Definitive Map. Whilst the application is for an addition to the Map only, the Council flags up that there is 'unofficially' an application to delete part of FP3 also. The

applicants acknowledge that if the application were to succeed on the basis that an error has been made in recording FP3 on the Definitive Map, as alleged, then this has consequences for how FP3 is currently shown.

6. The applicants admit that their Schedule 14 application is a duplicate of that submitted in July 2009 in relation to the addition of a public footpath to the Definitive Map. The previous application had also sought to delete a section of FP3 as currently shown on the Definitive Map. That first application made was refused by the Council in November 2014 and an appeal against that decision to the Secretary of State followed. The applicants consider that when the Inspector appointed by the Secretary of State dismissed their appeal on 11 June 2015, he wrongly applied a presumption in favour of the Definitive Map at the expense of its Statement and failed to consider the particularity with which the terms of the Statement were drawn.

7. The Inspector's decision was subject to an unsuccessful legal challenge in the High Court. An application for permission to appeal was refused by the Court of Appeal in April 2016 as being totally without merit.

8. In the meantime, a complaint had been made in March 2011 by the applicants to the Crown Court under section 56(2) of the Highways Act 1980 for an order requiring the Council to put the claimed highway into proper repair. When that complaint failed, the appellants appealed by way of case stated against the decision to the High Court. In the judgment of 16 January 2013 Mr Justice Burton was "completely unpersuaded that the Recorder [in the Crown Court] erred in law in his primary conclusion that he was not satisfied that there was a path" along the claimed route.

9. The applicants maintain nevertheless that the Crown Court misdirected itself at law and asked itself the wrong legal question resulting in a substantial wrong or miscarriage of justice. The appellants consider there to be a discrepancy giving rise to an unlawful situation which the Council is duty bound to correct.

10. The Council determines applications in accordance with its Statement of Priorities contained within its Rights of Way Improvement Plan ('ROWIP'). An updated Statement of Priorities was ratified by the Council's Public Rights of Way Committee in November 2019.

11. Since 1989 the Council has operated a system of undertaking a parish by parish review in accordance with its ROWIP to ensure that existing public rights of way in each parish are correctly recorded. It is 83% complete and the Council's updated policy statement seeks completion of the current review before 1 January 2025.

12. The adopted policy provides for new claims, which arise in a parish where the review has been completed, to be deferred until the whole of that particular District has been reviewed.

13. Of the 180 applications outstanding only 36 are compliant with the 1981 Act to require determination. Six of those applications are within parishes yet to be reviewed and will be given priority. Northlew parish was last reviewed between 1993-1996 and so the application is not one of those six. There are six other applications on the list after this one. There is no estimated timescale for when it would fall to be considered, but on the rate of progress it appears unlikely to be within the next 5 years at the least unless an exception is applied.

14. It is undisputed that the only difference from the previous application and the section 56 complaint is that the applicants have introduced four additional pieces of case law[1].

15. Having exhausted the legal options available on the first application, it is a second attempt to secure a definitive map modification order. The Council argues the legal principle of '*res judicata'* meaning it is a matter judged already. However, I see nothing to prevent this second application being determined. Whilst the Council considers the application to be frivolous and vexatious, it has been accepted and added by the Council to its list of pending applications. The issue is whether, and if so, how much priority should be given to its determination in light of the Council's policy and in all the circumstances of the case.

16. The policy allows exceptions to be made for particularly contentious claims which are supported by a large amount of user evidence and where there is no nearby alternative route available, or where a route is likely to be affected by development, or where a route will result in significant road safety benefits. It goes on to say that negotiation with the landowner(s) to establish whether a quicker solution is available, for example, by express dedication, will be the first option.

17. The parties disagree on whether any exception applies.

18. The claim has proven to be contentious in the past because of the litigation the applicants have chosen to bring. I recognise how stressful this must have been for them and continues to be so especially in view of the financial burden. Nonetheless, there cannot reasonably be regarded a large amount of user evidence stemming from that described in the Definitive Statement and Parish Survey. The application is not supported by user evidence forms.

19. The applicants dispute that FP3 as recorded on the Definitive Map provides an alternative route, but it is possible to reach both points of termini from that path and Station Road without the claimed path.

20. The applicants consider the physical existence of the claimed route is threatened by ongoing development in Glebe Yard making the claim particularly urgent. They say three houses are presently under construction through Glebe Yard and a fourth house is subject to a pending planning application. In response, the Council says that the planning application process took into account the Definitive Map and Statement as well as the Court action. The site layout plan for four dwellings supplied by the Council identifies existing FP3 and mostly areas of landscaping where the claimed path would run. There is nothing before me to indicate that the claimed path is placed at risk in those circumstances.

21. As there is an existing section of FP3 already in public use, this does not appear to be a case where dialogue with the landowners will be an appropriate solution.

22. The applicants say their home is unsaleable and blighted until the conflict with the Definitive Map and Statement is resolved. This carries little weight when

[1] In fact, the application cites three authorities: L.E. Walwin & Partners Ltd v West Sussex CC [1975] 3 All ER 604; R aoa Norfolk County Council c SSEFRA [2005]; Ernstbrunner v Manchester City Council & Anor [2010] EWHC 3293 (Admin)

the first application had been finally disposed of with the decision of the Court of Appeal.

23. I am asked by the applicants to consider the length of time that has elapsed since the issue of inconsistency between the Map and Statement was first raised. Even so, one application was considered and disposed of albeit not in the manner that the applicants had hoped. The current application was made in September 2018 which is not that long in comparison to some outstanding applications which date back to 2005.

24. Much of the applicants' submissions are a rehearsal of previous arguments along with why the previous decisions were flawed. In this process I am tasked solely with considering whether to direct the Council to determine the application. It is not for me to assess the merit of the case.

25. The Council has put in place a system endorsed as adopted policy which it follows, and provision is made for applications to be taken out of turn in specified circumstances. That is not an unreasonable approach. I have not been satisfied that the application meets any of the criteria to warrant it being given priority over other applications. I am also mindful that this is a duplicate application with no new evidence. I appreciate that the applicants believe errors were made before which have prompted this further application, but the substantive issues have already been examined.

26. There are other applications ranked higher in the Council's list. To issue a direction to make a determination would disadvantage those who have been waiting longer. It could also potentially delay applications which warrant greater urgency under the Council's prioritisation system.

27. Despite all these factors, now that the application has been registered and 12 months have expired the applicants are entitled to expect a decision within a finite period. For that reason, I shall issue a direction. Given that this is a duplicate application which has already been subject to prolonged litigation, there is not the same imperative that might otherwise arise. I note that it is likely to be 2025 before the Council makes a start on applications for parishes previously reviewed. That is an excessive period to wait. As the evidence is unchanged, it should not take long for the Council to consider the case law now cited and reach a decision.

28. In the circumstances, a further 12 months would be a reasonable period to be allowed to make a determination.

Direction

On behalf of the Secretary of State for Environment, Food and Rural Affairs and pursuant to Paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981, **I HEREBY DIRECT** the Devon County Council to determine the above-mentioned application not later than 12 months from the date of this decision.

K R Saward

INSPECTOR