



Appeal Decision

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 2 March 2020

Appeal Ref: FPS/KO235/14A/1

- The appeal is made under Section 53(5) and Paragraph 4(1) of the Wildlife and Countryside Act 1981 (the "1981 Act") against the decision of Bedford Borough Council (the "Council") not to make an order under s53(2) of that Act.
- The Application dated 22 April 2014 was refused by the Council on 8 February 2019.
- The Appellant claims that the definitive map and statement for the area should be modified by deleting Footpaths WOO 7 and WOO 10 in the parish of Wooton.

Summary of Decision: The appeal is allowed in part.

Preliminary matters and history of the application

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 to the 1981 Act. I have not visited the site, but I am satisfied that I can make my decision without doing so.
 2. If I consider that an order should be made paragraph 4(2) of Schedule 14 enables me on behalf of the Secretary of State to "*give to the authority such directions as appear to him necessary for the purpose*".
 3. Footpath WOO 7 ("FP 7") and Footpath WOO 10 ("FP 10") are footpaths shown on the definitive map that run along the eastern and western sides respectively, of a field belonging to the appellant, Mrs Gates. The application form and grounds of appeal mentioned FP 7 only but the former indicated a route proposed to be deleted that in fact comprises the lengths of FP 7 and FP 10. Accordingly this appeal has been dealt with on the basis of a proposed deletion of both footpaths in accordance with all parties' expectations.
 4. It is undisputed that the appellant was advised by the Council in February 2014 that it had found "*some evidence that could show that FP 7 on the eastern side of the field was put on the map on the wrong side of the hedge and should have been where Bridleway No 4 is now*". (Prior to 1985 the definitive line of Bridleway No 4 ran diagonally across the field east of and adjacent to Mrs Gates' field. In 1985 that part of BR 4 was formally diverted to where the appellant claims is the correct line of FP 7, east of the boundary hedge).
 5. The Council wrote to the appellant on 4 April 2014 enclosing application forms with a covering letter which was informative and helpful, without in any way prejudicing the outcome of any eventual application. Mrs Gates made the application a few days later, which was in substance to delete FP 7 and FP 10 from the definitive map.
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6. Eventually, some two years later on 2 March 2016 the Council wrote to the appellant seeking further evidence as to whether the public rights of way in question existed, but it seems no further evidence other than what had already been submitted, was forthcoming. The Council's interim definitive map officer wrote to Mrs Gates on 17 June 2016, summarising the content of available map documents and invited her to seek further evidence by 28 July 2016 or he would the draft a report recommending the application be refused.
7. Another two and a half years elapsed before 8 February 2019 when the Council refused the application under delegated powers. A transcription of the report and recommendation to the Director of Environment is submitted but for reasons not entirely clear to me it has been edited "*to remove those parts required by the Authority to record the Senior Officer's decision*".

FP 7

Main issue

8. The main issue is whether the available evidence shows that, on the balance of probabilities, the Definitive Map and Statement (DMS) requires modification.

Legal framework

9. Section 53(2) of the 1981 Act requires surveying authorities to modify its DMS on the occurrence of "events" set out in s53(3). The relevant part of s53(3)(c) requires "discovery of evidence" which, when considered with all other relevant evidence available, shows: *(iii) that there is no public right of way over land shown in the DMS as a highway of any description*. The appellant must show this is so on the balance of probabilities.
10. *Norfolk County Council, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs*¹ establishes that for the purposes of s56 of the 1981 Act, the definitive map is the primary source document. If the definitive statement cannot be reconciled to it, the position shown on the map prevails and a degree of tolerance is permissible. However at review stage neither the map nor statement is conclusive evidence of its content. If there is a conflict between the map and statement there is no evidential presumption in favour of the map. A conflict would indicate an error in their preparation. The map and statement should then be accorded weight as appropriate, analysing the documents and circumstances at the relevant date.
11. The starting point must be that the map and statement were prepared following the correct procedures. On review, as here, neither the statement nor the map give rise to any presumption but the cogency of each is evaluated with available evidence to decide which, if either, describes the correct route.

Reasons

12. Whilst the position of FP 7 on the c1951 parish survey map is consistent with its description in the definitive statement part of the DMS, that description seems to conflict with its position as shown on the definitive map.
13. FP 7 is described in the Statement thus:

¹ [2005] EWHC 119 (Admin)

"It starts at north west corner of field in which is described Bridle Road number four, along the east side of hedge to bridle gate near to wood. This path is of good width and was used during wartime ploughing operations as a diversion of BR 4."

14. However the definitive map shows FP 7 on the western side of the boundary hedge. It is not disputed that "hedge" in the statement delineates the eastern boundary of the (only) field belonging to the appellant, or that from about 1953 to 1958 this and the adjoining field were however in the same ownership.
15. The Council refused to make an order, considering there was no new evidence that was not considered when the definitive map was compiled, and that the evidence did not displace the presumption that the definitive map is correct.
16. In s.53(3)(c) "evidence" is not to be restricted to new evidence or evidence not previously considered, but to be given its ordinary meaning. Although one cannot simply re-examine the same evidence considered when the definitive map was drawn up, the "new" evidence has to be considered in the context of the evidence previously given. It is sufficient that a drafting error is found as the result of recent research.²
17. That such a drafting error was made is the essence of Mrs Gates' appeal. She relies on the line of the path as shown in the parish survey map of c1951 which was made prior to adoption of the DMS, its consistency with the statement part of the DMS, and the discrepancy between the two parts of the DMS. She concludes that that the correct line of FP 7 runs east of the boundary hedge.
18. The Council's report says that the definitive statement reflects:
"some recollection in the parish that the line of the path originally ran to the east of the hedge and was used as the (probably unofficial) diversion route of the connecting Bridleway No 4 during the Second World War prior to its formal diversion in 1985".
19. By its letter of 17 June 2016 the Council maintains that "all four historic maps" (by which is meant the 1951 parish survey map, 1953 draft map, 1966 modified draft map, and draft definitive map c1975-80) show public rights of way on the alignment of FP 7 *"though with some slight early variance"*.
20. The 1951 parish survey map clearly shows the line of a path to the east of the boundary (and none on the western side); the draft 1953 map and modified draft map of 1963 do not. The parish survey map was the first produced in the definitive map process and the parish council recorded all routes considered to be public, based on local knowledge and customary use.
21. The Council's report notes that as there appears to have been no objection to the depiction of FP 7 (or FP 10) on the draft definitive map or subsequent modified draft, provisional or definitive maps, it must be presumed that the definitive map is a correct record. However there could be many reasons why no objection was made, difficult to verify from this distance in time. If the two fields in question were in single ownership it is possible, for example, that no great exception may have been taken to its exact alignment.

² See *Janusz Kotarski, Georgina Kotarski v Secretary of State for Environment, Food and Rural Affairs v Devon County Council* [2010] EWHC 1036 (Admin).

22. The definitive statement describes the route briefly but clearly, listing the starting point and terminus. The starting point is the "north west" corner of the field thereby indicating a position outwith the appellant's field which, had it been otherwise, would have specified the north-east corner.
23. Furthermore, it specifically records its use as a diversion of Bridleway No 4 during the second world war. I should think that during this time many field boundaries were removed and arable field margins were reduced to maximise the area over which we dug for victory, but no specific details pertaining to this site are available to me. Given that the bridleway went diagonally across the same field, east of the boundary in question, I find it likely that the informal diversion would have more conveniently brought it to the side of the same field rather than cross over into another one, which might in any case have been in different ownership.
24. There is a statutory duty to prepare a map but a discretion as to what, if any, particulars to include in the statement. That the discretion was exercised in relation to FP 7, demonstrates the importance which the surveying authority attached to those particulars, a point accepted as valid in the *Norfolk* case.
25. *Norfolk* also decided that the correct approach to interpretation of the DMS must be a practical one, examining them together to see if they are truly in conflict or the statement can properly be read as describing the position of the right of way. Only if they are in conflict must the map "*take precedence since the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map. Unless the statement can properly be interpreted as describing the same footpath as that shown on the map, then the statement cannot be regarded as conclusive evidence of the position of the footpath shown on the map.*" (Paragraph [38] of the judgment).
26. However there can be no reasonable doubt that the statement describes the same footpath as shown on the map. The court also said in *Norfolk* at paragraph [41], (not referred to by the Council in its report):

"41. During argument Mr Morshead accepted that if in a Leicestershire County Council situation³...the map had a path immediately to one side of the boundary, while the statement described a way across the land immediately on the other side of the boundary (therefore in different occupation or ownership) the statement could reasonably be held to be describing the position of the footpath marked on the map. In my view, this was an appropriate concession. It seems to me the judgment whether the statement was describing the position of the footpath marked on the map need not require the precision of a slide-rule."
27. This is the position that could be said to obtain with regard to FP 7, subject to matters such as how "immediately" proximate to the boundary the way is described or depicted, what was a reasonable margin of error in relation to the base map used, and so forth.
28. In *Norfolk* the measurement on the definitive map between the point at which the relevant footpath was depicted thereon, as opposed to how it was described in the definitive statement was 1–2mm, represented on the ground

³ *R. (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 Admin.* The applicant maintained that the map was incorrect and that the correct route should be that through his neighbour's curtilage.

by a distance of 30m.⁴ That was in the opinion of the court within the tolerance permitting a conclusion that the statement indeed provided particulars of the public right of way marked on the map.

29. I have not been provided with original scaled copies of the various maps. However based on the standard 1:1250 base OS map on which is depicted the computerised version of the definitive map showing the line of FP 7 and the line of Bridleway 4 (occupying the same line as is contended for in respect of FP7), the measurement between the two would be of a similar order of tolerance.
30. From the foregoing I find that although there is a discrepancy between the map and statement parts of the DMS relating to FP 7, the statement describes its position clearly, and even includes an explanation of its use in the position where it is so described.
31. Thus the statement can properly be interpreted as describing the same footpath as that shown on the map. Given all of the above factors, the precision with which the statement identifies the path as being to the east of the boundary hedge, should be regarded on the balance of probability as correctly defining the position of the footpath, and this is sufficient in my opinion to show that the correct route is other than that shown on the map.
32. The Council also refers to the decision of the Court of Appeal in *Trevelyan v. Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 1264 on the status of the definitive map, where there was no conflict between the map and statement:
- "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"* [38].
33. The court in *Trevelyan* did not have in mind the possibility of a conflict between the map and the statement when identifying and explaining the reasons for the presumption in favour of a public right of way shown on the map. The fact that in this appeal the map shows a discrepancy as between it and the statement tends indicates that an error occurred in the preparation either of the map or the statement.
34. In *Trevelyan* it was also held:
- "What is required at review is...a consideration which (or which other) route, on a balance of probability, is correct, if any, in the light of all the relevant evidence, including the terms of the map and statement. The judgment being exercised in a case such as this is whether, under section 53(3)(c)(iii), any particulars in the map and statement require modification unless it emerges that either a new footpath should be added or the footpath shown on the map, or part of it, should be deleted altogether"* [64]
35. In my view the evidence points to the likelihood that the initial parish survey was correct as being carefully carried out and a deliberate record made of the

⁴ See paragraphs [3] and [42] of the judgment.

exact position of FP 7 in written terms, as reflected in the written statement part of the DMS, and that the map has not reflected the position of the path with the same precision.

Other documents

36. The 1924/26 map annexed to the Council's report, is said in that report to show a track (arrowed) to the west of the field boundary in the position of FP 7. However the copy I was given is not annotated with an arrow and is so faint as to be inconclusive as to whether a path runs to the west of the field boundary.
37. The appeal refers to a letter from the former owner of the adjoining field, not supplied to me, and a conveyance of the property in question, dated 20 March 1958 which was supplied. The conveyance is of the two fields in question with a plan showing both fields as one plot, tinted red, but with no paths marked within it. Other paths are marked around the property and in the vicinity. It seems quite possible that in the process of colouring the plot, for whatever reason, markings on the base plan were eradicated. No firm conclusion can be drawn from this document as to whether paths or public rights of way then existed over either field.
38. The 1881/3 OS map shows no path either side of the boundary. In any event, OS maps do not indicate whether routes shown thereon carry public rights. The 1924/26 map was published many years before, and the 1975-80 map many years after, what I consider to be the more relevant period which is that within which the parish survey and the drafting of maps contemporaneous with efforts to produce a first definitive map, occurred.

Summary

39. It is clear from the available evidence that there is a conflict between the written statement and the map in the DMS, as regards the precise location of FP 7. I approach the issues untroubled by an evidential presumption for the map and against the statement. The statement precisely identifies the path as being to the east of the boundary hedge and on the information available it is likely that the description and the initial parish survey map correctly defined its position and therefore the correct route is other than that shown on the definitive map. As far as deletion of FP 7 is concerned the test is whether the modification order sought has been shown to be correct on a balance of probability. Again for the reasons set out above, I so find.

Other matter

40. Interestingly, in *R v. Secretary of State for the Environment ex parte Kent County Council* [1995] 93 LGR 322 at page 331 the court said:

"It seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath ... of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt ..."

41. Whilst the *Kent* case is good law, I see no reason why it need apply to the current appeal, where the appellant correctly observes that the alternative line for which she contends is subsumed within the line of Bridleway No 4. No purpose would be served, and I am not being asked by way of this appeal to do

so, to realign a footpath on a way already part of the definitive map network that carries commensurate public rights of passage. The application is made in relation to s53(3)(c)(iii) only. However if the Council considers it necessary to do so, it would not be prevented from making an order within its powers that, for example, made alternative provision for the coexistence of the various users of the bridleway. Confining myself to making an order for deletion only of FP 7 would thus be consistent with the court's view in *Trevelyan* of how judgment should be exercised under section 53(3)(c)(iii).

FP 10

42. I adopt the same main issue and legal framework as set out in relation to FP 7.

43. The relevant part of the definitive statement for FP 10 is as follows:

"It starts at Fieldgate in Hall End Road as described for BR 4 and is a rough cart track leading to north west corner of field joined by path seven leading to wood etc. This section is now subsumed within the route of Bridleway No 4. At north west corner of field is five barred gate through which path continues alongside hedge to other end of what used to be an allotments field. Here the path is poorly defined."

44. The appeal does not provide any substantive grounds in relation to FP 10. The application said that FP 10 has a footpath the other side of the hedge. This is true in that FP 11 lies parallel to FP 10 but outside the northern perimeter of Mrs Gates' field. The reference in the statement to a section being subsumed within the route of Bridleway No 4, is to a section of BR 4 that is also outside her field. Furthermore there is no discrepancy as between the map and the statement as far as concerns FP 10.

45. Considering this element of the appeal and on the balance of probability I find no basis for altering the DMS.

Conclusion

46. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available shows that it is reasonable to allege that no right of way subsists as FP 7 on the line shown in the definitive map.

Formal Decision

47. I allow the appeal in part. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Bedford Borough Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the DMS to delete Footpath WOO 7 as set out in the application dated 22 April 2014. 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.

48. No direction is made in relation to Footpath WOO 10.

Grahame Kean

INSPECTOR