



Appeal Decision

by **D. M. Young JP BSc (Hons) MA MRTPI MIHE**

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

Decision date: 28 February 2020

Appeal Ref: **FPS/R0660/14A/3**

- The appeal is made under Section 53(5) and paragraph 4(1) to the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Cheshire East Council not to make an Order under Section 53(2) of that Act.
- The application was made on 16 June 2016 and was refused by Cheshire East Council on 11 June 2019.
- The Appellant (Mrs M Cunningham) claims that the Definitive Map and Statement for the area should be modified by deleting Footpath No.15 (part) Parish of Rainow between Charles Head Farm and the Kettlethulme parish boundary and deleting of Footpath No. 23 Kettlethulme.

Summary of Decision: The appeal is dismissed.

Procedural 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 to the 1981 Act.
2. The appellant seeks to delete the footpath that runs east from Charles Head Farm to Neighbourway Farm. The route encompasses Footpaths Nos 15 and 23 on the DMS separated by the Rainow/Kettlethulme parish boundary. Accordingly, I have referred to it as "the appeal route" hereafter.
3. The application was considered in a report to the Council's Rights of Way Committee on 10 June 2019. This appeal relates to the Council's decision not to make an Order to delete the appeal route.
4. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

The Main Issues

5. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (DMS) under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
6. Section 53(3)(c)(iii) of the 1981 Act specifies that a Modification Order should be made by an Authority following the discovery of evidence which (when considered with all other relevant evidence available to them) shows that there is no public right of way over land shown in the map and statement as highway of any description.
7. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by an order under the provisions of Section 53 of

the 1981 Act to show that the path had been included in error, there having been no public right of way over the path when it was added to the DMS.

8. Guidance¹ provides that, *“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, and*
 - *the evidence must be cogent”.*
9. In considering the evidence, I also have regard to the judgement in the Trevelyan case² and in particular to the following statement by Lord Phillips M.R.:
- “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 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 into the balance, if it is to outweigh the initial presumption that the right of way exists”.*
10. Based on the foregoing, the main issue is whether the evidence shows that, on a balance of probability, an error had been made when the route was recorded, and that it should be deleted. In considering the evidence, and in view of the above, my starting point is that the route is presumed to exist. It is for those contending a mistake has been made to provide evidence which demonstrates that, on a balance of probability, no way existed when it was added to the DMS.

Reasons

The Route

11. Footpath 15 Rainow (part) commences just north of Charles Head Farm (point M) and proceeds in an easterly direction through a small paddock and then downhill towards Todd Brook (point I) whereupon it terminates at the parish boundary. Footpath 23 Kettleshulme commences on the western side of the brook (point I) and proceeds in an easterly direction first crossing Todd Brook, then passing through several fields and a sunken lane known locally as “Cow Lane” (point D) before terminating at Neighbourway Farm where it intersects with Footpath 14 (point C). The point references provided are taken from Plan: WCA/015 - attached as Appendix A to this decision.

¹ Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, Version 2 October 2009, paragraph 4.33

² Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001]

Documentary evidence - The Definitive Map

12. The DMS was prepared in response to the requirements of the National Parks and Access to the Countryside Act 1949 (the 1949 Act). The draft DMS for Cheshire was published in 1954 following the completion of parish surveys. Rainow Parish Council (RPC) carried out their survey on 1 December 1950 and 31 March 1951. This was then submitted along with a Schedule, to the Surveying Authority (Cheshire County Council). Footpath 15 is clearly shown on the Walking survey as well as the map produced by the Footpath Preservation Society (FPS) in 1950. The parish survey was carried out by Mr Rowbotham, a local resident. His notes of the appeal route and others in the area are detailed, display a good knowledge of the area and a diligent approach to the recording of rights of way.
13. The route is described in the accompanying Schedule as continuing into Charles Head farmyard, where it crosses Footpath No 9. It then continues through a steep field and crossing Todd Brook via a wooden footbridge which is later described as not being in a good condition. The path is then said to continue to the Kettleshulme boundary, aiming for Thorneycroft Farm. Although the reference to Thorneycroft Farm rather than Neighbourway is inconsistent with the termination point of the appeal route, it is not necessarily inconsistent with the initial north-east direction of the route immediately east of Todd Brook. RPC minutes from the early 1950s contain a wealth of information about the Definitive Map process.
14. The County Surveyor's letter dated 25 August 1955 records that no survey was received from Kettleshulme Parish Council (KPC). It appears that a map was prepared by Mr T Ewart and Mr Norman Radford on behalf of the Northern Counties FPS. This appears to have been used as the basis for recording footpaths in Kettleshulme parish. Although Footpath 23 is not shown on the FPS map, it was later included on the draft Definitive Map with the following description: "*From FP14 at Neighbourway in a westerly direction to Rainow parish boundary*". Along with Footpath 15 Rainow (part), Footpath 23 was subsequently included in the provisional and first DMS.
15. Why Footpath 23 was omitted from the FPS's original walking survey map of 1951 and how exactly it came to be included in the draft Definitive Map is not known. Mr Cedric Heathcote's witness statement recalls a route from Neighbourway Farm to Todd Brook so it seems likely that one did physically exist. The minutes from KPC meetings from the early 1950s would no doubt have shed light on the matter but are unavailable. Whilst disappointing, there was no requirement under the 1949 Act for parish councils to retain documents in perpetuity. Accordingly, the loss of the pertinent documents should not be construed as some kind of procedurally irregularity in the DMS process.
16. In the absence of documentary evidence demonstrating otherwise, the most likely explanation as to the initial omission of Footpath 23 is that those tasked with producing the Kettleshulme FPS Map were simply unaware of every path in the area. This is supported by correspondence between the FPS and County Surveyors office in 1955/56. The letter dated 7 October 1955 is particularly insightful and describes the position with the Kettleshulme map as "unfortunate". It goes on, to say that the omissions were due volunteers not correctly recording certain routes on the original 6" map.

17. Although the correspondence in 1955/56 was not specifically concerned with the appeal route, it is apparent that there were shortcomings in the recording of public footpaths in Kettleshulme parish. The reasons for this are open to speculation, however, the use of volunteers, some of whom, were probably unfamiliar with the area is likely to have been a factor. Indeed, neither Mr Redford nor Mr Ewart, who were instrumental in the recording of rights of way, lived in the parish. This lack of familiarity and the failure of KPC to produce its own parish survey are factors which would have militated against the accurate recording of footpaths in Kettleshulme parish.
18. I note the appellant is critical of the Council for making assumptions about the DMS process in the early 1950s. However, whatever the exact sequence of events, the salient point is that Footpath 23 was added to the draft map. Further information must therefore have come to light. I am struggling to think of an alternative explanation and the appellant has not offered one. As Lord Phillips puts it; *"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"*.
19. The whole of the appeal route from Charles Head Farm to Neighbourway was included on the draft and provisional Definitive Maps. It was hence recognised as being a public footpath by both parish councils at the time. Moreover, it was open to any person to make representations if they believed a mistake had been made. None were received. Although some of the original landowners may have passed away by 1968 when the provisional map was put on display, their successors would have been able to make representations on it. In addition, the original landowners were able to comment on the draft map.
20. I have considered the appellant's view that rather than the appeal route the correct route is Footpath 96/16. This route runs roughly parallel to the appeal route to the south of Charles Head Farm crossing Todd Brook via a footbridge. Based purely on an examination of the initial walking survey maps, there is some merit in that suggestion. Footpath 95 is not shown on the RPC survey, but Footpath 16 is shown on the FPS's map whereas Footpath 15 is shown on the RPC map but with no corresponding Footpath 23 on the Kettleshulme side. In effect the initial walking surveys show two cul-de-sac routes.
21. I accept that the evidence demonstrates there was a footbridge on Footpath 95/16 which was repaired in 1951. It also has to be assumed that there were not two cul-de-sac routes. So, the question arises was there one route or two? Given the very detailed written account provided in the Schedule regarding the appeal route and the fact that 95/16 crosses Todd Brook at a pronounced bend, I find it most unlikely that Mr Rowbotham, with all his local knowledge, would have conflated the location of the two routes and footbridges. In short, the presence of a footbridge on the line 95/16 does not preclude there being another footbridge further north on the line of the appeal route.
22. Of course, the DMS process had checks and balances specifically built into it to avoid any confusion arising from the identification of routes. All the footpaths in the area were shown on the draft and provisional maps and put on public display giving local people the opportunity to highlight any omissions and errors. It is clear from the correspondence that has been supplied that Mr Redford, Mr Ewart and Mr Rowbotham took a very "keen interest" in these

matters, understood the importance of the work being undertaken and took it upon themselves to do the best they could to accurately record footpaths.

23. Given the number of people involved in the DMS process in both parishes, I find it hard to accept that such a fundamental mistake i.e. the identification of the appeal route instead of 95/16 was not noticed by someone at either the draft or provisional stage especially when RPC, KPC, the FPS and local landowners were all known to be taking an active interest in these matters.
24. Overall, despite some missing documents and a few discrepancies, there is no cogent evidence to suggest the proper procedures were not followed. I am therefore satisfied that sufficient evidence existed in the early 1950s to support the existence of public rights along the appeal route. Following the approach in *Trevelyan*, there must be evidence of some substance, if the initial presumption that the right of way exists, is to be outweighed. I will now go on to consider the evidence that has been put forward by the appellant.

Documentary Evidence

25. The relevant date of the DMS is 1 November 1954. This means that as of that date, the routes on the DMS were public rights of way. Consequently, I have not considered the evidence that relates to events after the relevant date.

Historical Maps

26. Five historical Ordnance Survey (OS) maps have been submitted. Neither the 1840, 1875, 1881 or 1910 map depict the appeal route. The 1970 OS map post-dates the DMS and is not therefore relevant. There is also no evidence of the appeal route on the 1831 Bryant's Map, 1865 Estate Map or the 1846 Tithe Map. However, these maps are of little assistance as they only show that a route was not recorded between 1831 and 1910. It is entirely possible that the route came into being after 1910. It is also germane that other footpaths in the area are also not shown on the 1910 OS and other historical maps. Accordingly, I find the historical mapping evidence lends little support in favour of the appeal.

Finance Act records

27. The Finance Act records are incomplete and are therefore inconclusive either way as to the existence of the appeal route at that time.

Gunpowder hut records

28. The remains of an old gunpowder hut are still evident at the western end of Cow Lane. The appellant suggest that a public footpath would not have been sited so close to a building of this type. However, the evidence indicates that the hut became redundant around the end of the First World War. It is therefore possible that the route came into being after this time. In terms of any physical obstruction, the draft Definitive Map is annotated with the word "gap" close to the location of the hut. This supports the view that in the early 1950s there was a route past the hut, something which is corroborated by Mr Heathcote's user evidence.

Witness Evidence

29. In total 20 user evidence forms have been submitted by the applicant. 10 of these statements were completed between 1991 and 1994 and were originally

- submitted with a previous application to delete Footpath 23³. The 10 more recent statements were completed in 2015-16. The Council followed these statements up by interviewing 10 of the respondents in 2019. All the witnesses claim not to have been aware of the existence of the appeal route at various points in the past. However, as the Council rightly points out, evidence of non-use of a public right of way after 1954 even if it does exist, is of little assistance given the accepted legal maxim "*once a highway, always a highway*"⁴.
30. Due to their age in 1954, very few of the witnesses have first-hand evidence that relates to the period leading up to 1954. Accordingly, a large number of witness statements have little relevance to my consideration of this appeal.
31. Four of those providing witness statements⁵ were born in the mid-1930s and have lived in the local area all their lives. They all testify to having memories of the local area as children but do not recall a public footpath or a footbridge over Todd Brook. Cedric Heathcote did not live locally but occasionally came to visit relatives who owned Neighbourway Farm. Like the other witnesses he has no memory of a footbridge. It has to be borne in mind, that these witnesses would have been fairly young in the years preceding the DMS process in the early 1950s.
32. I have considered the evidence forms completed in the early 1990s⁶. These witnesses were born before 1930 and therefore would have been adults in the early 1950s. Mr Nixon's form states that he was a parish councillor and personally involved in the surveying of public footpaths in the early 1950s. He states that he has no memory of a public right of way between Neighbourway and Charles Head Farm. If that information is indeed accurate, it does beg the question, why Mr Nixon and the parish council made no representations at the draft map stage. The other witnesses all attest to there being no route or path along the line of the appeal route in the time they have known the area.
33. Of course, just because these witnesses did not see anyone using the appeal route, or were not themselves aware of it, does not mean it did not exist especially given there was no requirement to sign routes until 1968. Moreover, in the early 1990s, 2016 and 2019 when the statements were provided, the witnesses were trying to recall memories that were 40-60 years old. Unsurprisingly none of the relevant witnesses are able to date their recollections with any degree of certainty. Accordingly, the witness evidence in this case needs to be treated with significant caution and set against the detailed written evidence of contemporaneous adults who were intimately involved in the DMS process in the 1950s.
34. To highlight the problems of witness statements, I note that several of the witnesses testify to having no personal knowledge of the Definitive Map process in the early 1950s. However, the evidence provided by the applicant shows conclusively that there was such a process. To put it bluntly, just because the witnesses were not aware of something, does not mean it didn't happen.
35. The witness evidence regarding the absence of a footbridge across Todd Brook directly contradicts the detailed written account provided by Mr Rowbotham in

³Council Ref: MA/5/174

⁴ Harvey v Truro Rural District Council (1903)

⁵ Raymond Lomas, Kathleen Frost, Stan Heathcote and Dorothy Garlick

⁶ James Etchells, John Coward, Irene Mason, Arthur Jackson and E Nixon

the parish survey. A possible explanation is that the footbridge, which was known to be in poor condition in the early 1950s, was either removed or simply succumbed to the elements shortly after the Parish Survey was completed. Since the witnesses are unable to accurately date their memories, it is possible that the witnesses and the parish survey are both correct.

Conclusions on Evidence

36. Whilst I cannot categorically discount the possibility, the evidence in this case falls a long way short of demonstrating that an error occurred in the recording of the appeal route on the DMS. I am thus satisfied, that the proper procedures were adhered to and that sufficient evidence existed at that time to demonstrate that a public footpath subsisted along the appeal route.
37. Whilst some of the evidence may have been lost or forgotten over 60 years later, that does not mean it did not exist in the early 1950s when the DMS were prepared. In my view the discrepancies referred to by the appellant are relatively minor and are not persuasive.
38. For the appeal to therefore succeed there needs to be new evidence of sufficient substance if the initial presumption is to be outweighed. Very little 'new evidence' has been proffered in this case. The historical mapping and gunpowder hut information is of little assistance and would in any event have been available at the time the definitive map was surveyed and made in the early 1950s. The Finance Act records are incomplete and inconclusive.
39. The relevant witness statements are small in number and lack detail. This is no criticism of the witnesses themselves but more a reflection of the inherent difficulties of trying to disprove events that happened many decades ago. For the reasons I have set out previously, I do not find the witness statements offer any significant support in favour of the appeal.
40. Far from there being 'evidence of some substance', I have not identified any tangible evidence to suggest a right of way does not exist along the appeal route. Therefore, on the balance of probabilities, I am satisfied that a public footpath subsists over the appeal route.

Other Matters

41. I have noted the comments regarding obstructions and non-use of the appeal route over recent years. However, non-use and obstructions are irrelevant when considering if a public right of way exists.

Conclusion

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

Formal Decision

43. The appeal is dismissed.

D. M. Young

Inspector

APPENDIX A – MAP OF APPEAL ROUTE