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| **Order Decision** |
| Hearing held on 18 October 2022 |
| **by Sue Arnott FIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 November 2022** |

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| **Order Ref: ROW/3280233** | |
| * This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Kent County Council (Public Footpath ZR281 (Part) Doddington) Definitive Map Modification Order 2021. | |
| * The Order is dated 11 February 2021. It proposes to modify the definitive map and statement for the area by realigning a section of Footpath ZR281 where it joins The Street, Doddington, as shown on the Order map and described in the Order schedule. | |
| * There was one objection outstanding and two representations when Kent County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs. | |
| **Summary of Decision:** | **The Order is confirmed.** |
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Procedural Matters

1. I held a public hearing to consider this Order on 18 October 2022 at the Village Hall in Doddington, having visited the site of the footpath in question the previous afternoon, unaccompanied. I made a further inspection during the hearing, on that occasion being accompanied by both supporters of and objectors to the Order.
2. This hearing had been due to open on 22 March 2022 but regrettably was postponed at the last minute when the appointed inspector fell ill with Covid-19. All relevant documents were subsequently transferred to me to enable me to determine the Order. I have considered all the material I received alongside the evidence that was made available at the hearing.

**The Main Issues**

1. In essence, the case for the Order is that the public right of way at issue (Footpath ZR281) does exist but its alignment requires clarification at its southern end.
2. The questions for me are whether the available evidence shows, on a balance of probability, that this footpath is correctly shown to meet The Street along the line drawn on the Order map as C-D; if not, whether it should instead be shown along the line A-B-C, or alternatively (as argued by the objectors) whether there is no connection at all with The Street such that Footpath ZR281 exists as a cul-de-sac.

**Legislative framework**

1. The Order is made under section 53(2) of the Wildlife and Countryside Act 1981 (the 1981 Act) relying on the occurrence of events specified in sections 53(3)(c)(i) and (iii). Consequently, the legal tests to be applied here are whether the evidence discovered by Kent County Council (KCC), when considered with all other relevant evidence, is sufficient to show that, on the balance of probability,

(a) a public right of way which is not shown in the definitive map and statement subsists along the route shown as A-B-C on the Order map; and that

(b) there is no public right of way along the route shown as D-C on the Order map (and similarly shown in the definitive map and statement) as a highway of any description, and that other particulars contained in the map and statement relating to Footpath ZR281 in the Parish of Doddington require modification.

1. Whilst the evidence need only be sufficient to *reasonable allege* the existence of a public right of way to justify an order being made to add a path to the definitive map, the standard of proof required to warrant confirmation of such an order is higher. At this stage, and in relation to both the proposed addition and deletion, evidence is required to show *on the balance of probability* that a right of way subsists (or not) along the routes shown on the Order plan.

Reasons

***Background***

1. At the hearing the objectors queried whether there had been any ‘new’ evidence discovered such as to trigger consideration of this issue. In response KCC explained that it had become aware of a discrepancy between the route initially claimed as a public path in 1952 and the route shown on the current definitive map.
2. This approach was accepted in the case of *Kotarski v SSEFRA* [2010] EWHC 1036 (Admin) where, in comparable circumstances, Mr Justice Simon had concluded (at paragraph 26) that “*it is sufficient in the present case that the Council had recently discovered that there was a divergence between the definitive statement and the definitive map to bring the case within s.53(3)(c)(iii)*”.
3. A similar situation had occurred in the case at Doddington. It was when checks were carried out in response to a planning application to replace the garage at Victoria Bungalow that it was discovered the line representing the route of Footpath ZR281 was shown on the current definitive map running through the present garage and cess pit.
4. Investigation by KCC led it to conclude that successive re-drafts of the definitive map from 1951 onwards had seen the line gradually drift eastwards but without any formal legal process underpinning that change. It its submission, this was effectively a series of technical errors, rather than any deliberate realignment, but nonetheless the result is that the legal record of public rights of way now shows Footpath ZR281 running over the property known as Victoria Bungalow when, in KCC’s view, it should more correctly be shown over the neighbouring land, Yew Tree Cottages.
5. In fact Mr Grant for KCC and Mr May for the objectors both relied on the words of Mr Justice Collins in another similar case, that of *R on the application of Leicester-shire County Council v SSEFRA* [2003] EWHC 171 Admin at paragraph 29: “ … *where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around*.”
6. This is the approach I propose to adopt here. I will consider the evidence to support the claim that the route A-B-C is the true line of the public right of way before then considering whether there is no right of way over the present definitive line C-D. But before doing either, I intend to address the proposition put forward by the objectors that this footpath is, and should be recorded as, a cul-de-sac.
7. In order to consider these three questions, I will first summarise the main points of evidence which are relevant here.

***Evidence pre-dating the definitive map***

1. There are five main sources of information that have been examined:
2. **The tithe map for Doddington** of 1840 offers little useful information as regards the existence of a path in this location but does confirm the historical layout of the buildings at Yew Tree Cottage. At this date the building which is now 1, 2 and 3 Yew Tree Cottages is shown adjacent to an entrance from the village road (now The Street); this led into a yard at the back onto which faced two buildings which later became 4, 5 and 6 Yew Tree Cottages. On the east side of these buildings, on land now occupied by Victoria Bungalow and its neighbour ‘Woodstock’ were four small crofts.
3. This is very similar to the picture shown on the first **Ordnance Survey (OS) map** of the area at 6 inches to the mile published in the 1870s. However, the OS also showed very clearly as a physical feature a track along the line of Footpath ZR281 northwards from a point on the northern boundary of the Yew Tree Cottage yard. I shall refer to this point as X, this being located on the Order route between points B and C on the Order map. No gate is shown to separate the yard from The Street.
4. By the second edition in the late 1890s, on its 25” to one mile map the OS showed the buildings divided into 1, 2 and 3, and 4, 5 and 6, and a small building known as the wash house is visible in the north-west corner of the yard, immediately to the west of my point X. The route of Footpath ZR281 is labelled “FP” although that is not necessarily confirmation that it was a public one.
5. The objectors say the lack of any marked path through the yard and connecting with The Street is evidence that the path did not continue southwards beyond point X. They explain this on the basis that there were historical links between Yew Tree Cottage and Down Court to the north-west such that the path (now ZR281) would have been used only by people connected with these two places.
6. In response KCC submitted that the lack of any defined path through the yard was simply the usual practice of the OS. Its “Instructions to Field Examiners” published in 1905 made clear to surveyors that “No footpaths should be shown in private gardens or yards, except the principal ones in very large gardens.” KCC says this convention explains the depiction of this footpath stopping at the point it entered the yard.
7. It was suggested that Down Court provided a useful comparison to support the objectors’ interpretation, but I am not convinced by that. Neither do I find there to be any evidence that might support this being a private path purely for the benefit only of these two properties, irrespective of their historical origins.
8. The third edition OS map at 25 inches to the mile published in 1908 was almost identical in all material respects. It was this that was used as a base map for the records prepared under the **1910 Finance Act**. It is clear from these that Yew Tree Cottages and the crofts to the east lay within the same land ownership and that no deduction for any public rights of way were claimed.
9. No entries were made in relation to the field to the north which appears to have formed part of a large land holding (and may therefore have been assessed separately) so that it is not possible to ascertain whether or not any deduction was made in relation to the remainder of the footpath in question.
10. The objectors argue that the lack of any mention of a public right of way adds weight to the case that the footpath did not continue through the yard. Whilst I accept it offers no evidence at all in support of a connection with The Street, the lack of any deduction in value claimed by the landowner at the time adds relatively little weight (if any) to the case against the existence of such a link.
11. At the hearing I was able to view an enlargement of **an aerial photograph taken in 1946** showing the site. The two Yew Tree Cottage buildings are visible, together with the wash house and a small toilet block in the yard. The area that was once comprised of four small crofts is clear although some of the boundaries sub-dividing it had gone. There is no worn line visible within the field that might reveal use of the route along a particular line. There is a trace of a worn line through the yard along the line of the Order route but it is hard to confidently attribute this to use by the public when the line is not distinguishable within the field. There is no worn line connecting with The Street further to the east although there is nothing visible on this photograph that would preclude it.
12. I turn next to the documentary evidence in relation to the **planning process in 1959** when permission was being sought for Victoria Bungalow. My attention was drawn by the objectors to references amongst the correspondence to a “*10 feet strip () to be left for access to the back land*.” No plans are available to assist in interpreting what was meant by this comment from the County Planning Officer. (In fact the width of the driveway alongside the bungalow that was eventually built is a little over 8 feet wide.)
13. The objectors submitted that the concern for leaving access to the back land could have been prompted by the presence of a pre-existing route to the field behind the plot and that this may have been the line of the public footpath. Whilst I recognise that as a possibility, I cannot find evidence to support this theory sufficient to give it any significant weight.
14. In reaching a conclusion on this early evidence it is quite apparent that the only clear recognition of a path of any sort is found on the OS maps and that these show a footpath that appears to end at point X, the boundary of the Yew Tree Cottage yard. This physical feature was depicted by surveyors from the 1870s through to the 1908 edition. (Later maps have not been made available but I have noted the same path shown on the OS base map used in a Land Registry extract from 1959.)
15. Whilst the OS maps are not conclusive evidence of a public path between points C and X, there is no actual evidence of any alternative line being in use although neither is there anything that would preclude that possibility.

***The definitive records***

1. The National Parks and Access to the Countryside Act 1949 brought about the requirement for county councils to prepare a definitive map of public rights of way in their area. The process began with surveys of public paths by local people within each parish, leading to the preparation of a parish map, then a draft map, a provisional map and the final published map. In each case a written schedule was prepared alongside the map, and this eventually formed the definitive statement.
2. In Kent the relevant date of the survey was 1 December 1952 although the final map was not published until 1967. Whilst copies of the maps and statements from each stage are available, there is little in the way of correspondence or other documentation to explain or confirm the decisions made throughout the process.
3. Whilst the coloured pen lines drawn onto these maps make interpretation of the precise line challenging, it is not disputed that the first map in this process prepared within the parish of Doddington shows in red the line of ZR281 (then FP15) following the path on the OS base map but coming to a stop at the Yew Tree Cottage yard where the letter S is taken to denote a stile. Whilst the objectors suggest this stile may have been further to the east, the red line on this map indicates otherwise.
4. It is when the next map in the sequence was drawn (the draft map) that a change first takes place: the (purple) line is shown veering slightly to the east of C-X but then continuing close to the western frontage of 4, 5 and 6 Yew Tree Cottages to connect with The Street.
5. The provisional and final definitive map were all produced in black and white, thus necessitating a further re-draft although it appears the two maps are identical in respect of the path in question. On both maps the line of ZR281 (then numbered FP 281) again shifts slightly further to the east so as to run through the buildings 4, 5 and 6 before reaching The Street.
6. A review of the 1952 definitive map was carried out in 1970 but this appears to be the same as the version published in 1967. A further review occurred in 1987 which saw a further redraft onto a newer OS base map into which a very clear dog-leg in ZR281 was introduced along the line now shown on the Order map in purple as C-D, again meeting The Street. The route had again shifted slightly eastwards and the thickness of this line almost encompasses the whole of the Victoria Bungalow property. This is refined on a review in 2013 when the map was again redrawn so as to infer the dogleg again (the dashes representing the path are so widely spaced it is difficult to be certain) with the path now shown running within the Victoria Bungalow property along its drive and through its garage. This is unchanged on the current (2020) revision of the definitive map and is the version which would be modified by this Order (if confirmed).
7. Tracing these maps through in sequence illustrates the claim by KCC that the historical line of this path does not match that shown on the current definitive map but has been altered subtly eastwards on each redraft but with no deliberate intention in the form of a legal order to do so.
8. Following the written statements through the sequence is more curious and open to interpretation. Whilst the parish survey described the route as running “From “The Street” to Down Court””, the description began “Entrance by stile at The Yard, Yew Tree Cottages, north across field …”.
9. The objectors argue that it is significant that “The Street” is written in inverted commas and draw attention to the fact that the path is said to start at the stile. It is their contention that this would have been a stile to the east of point X enabling people to walk a route from The Street through what would have at one time been the yard on the eastern side of 4, 5 and 6 Yew Tree Cottages.
10. The parish statement later described the route as “*Footpath throughout living memory – slightly defined between commencement and junction with No 13* (that is the Order route and up the field) *Remainder no evidence of use for considerable period. Natural surface*”. The draft statement repeats this, stating the path “*Commences at stile by Yew Tree Cottages*” and the provisional statement confirms the details remain the same as the draft. When the final definitive statement was published Footpath 281 was described in reverse as simply leading from Down Court Road to Doddington. Later editions abbreviate it further still so as to refer only to connections with the relevant highways (C258 being The Street).
11. Whilst I would not rule out the possibility of a stile being located some way to the east of point X, there is no positive evidence to support it. In contrast, it was the evidence of long-standing local residents Mr and Mrs Gaze that the stile at point X had not altered in any way since the 1960s (until recently replaced) and the path had previously been signposted from point A.
12. I consider it highly unlikely there would have been any inspection of the site by KCC officials to check the route between redrafts of the map in the absence of any specific query. Until the very recent planning enquiry, there is no evidence that the definitive route has ever been questioned. On balance it does seem to me that the most likely explanation for the shift between C-X to C-D is simply down to technical error in interpreting lines when re-drawing these maps on several occasions.

***Conclusions on the evidence***

1. This leads back to the underlying question of whether the public right of way simply stops at point X or continues to The Street.
2. The objectors do not challenge the status of Footpath ZR281 as a whole. Instead they have argued that it stopped before entering the yard so that it was, in effect, a cul-de-sac. Mr May submitted that it is not unknown for such paths to exist in rural areas and that this path had originally been created simply to link two historic properties.
3. In response KCC referred to the case of [*Roberts v Webster*](https://pinso365-my.sharepoint.com/personal/sue_arnott_7n_planninginspectorate_gov_uk/Documents/Documents/Sue's%20Data/Reference/Case%20reports/Roberts%20v%20Webster.doc) [1967] 66 LGR 298, 205 EG 103 and argued that, except in extraordinary circumstances, a public path must connect with another highway or lead to a place of public interest. In its submission, Yew Tree Cottage is not (and never has been) a place to which the public might resort, nor are there any extraordinary circumstances here.
4. On this point I must agree. From the evidence before me, this is not a situation where a cul-de-sac might be found to exist. The conclusion I therefore draw from the evidence leading up to the 1950s is that the only route that has support as a possible public path is the Order route between points C and X given that this line had been visible as a feature on the ground for over half a century. But the objectors are right to argue that the OS convention which instructs surveyors to omit footpaths from private gardens and yards is not positive evidence in support of A-B-X. However, in the light of all subsequent evidence, I regard it as the most plausible explanation for the omission of any continuation.
5. I therefore reject the proposition that Footpath ZR281 was (and is) a cul-de-sac to and from point X.
6. On the basis of the positive evidence to support the line of this footpath, that is the Ordnance Survey records and the initial parish survey of rights of way in Doddington, and considered on a balance of probability, I conclude that the most likely explanation was that the public used the route A-B-X to then continue via X-C and along the remainder of Footpath ZR281.
7. Having reached that conclusion, and in the absence of any positive evidence to support use by the public of the line shown in purple on the Order map as C-D, I conclude that this route is incorrectly shown on the current definitive map and statement and should be deleted.

**Other matters**

1. I have examined carefully the tracings presented by Mrs McLeish which, in her submission, showed that the line intended to be recorded as the public right of way was the purple route C-D. Whilst I understand the aim of her exercise, I consider the slightly differing scales of the maps presented in evidence here do not allow for a sufficiently accurate direct overlay.
2. One of the arguments presented by the objectors concerned their submission that the occupiers of 4, 5 and 6 Yew Tree Cottages would have considered it intolerable for members of the public to walk the line A-B-X, in effect between their homes and the wash house and toilet block which served them. I have not been swayed by that submission. Expectations as regards standards of privacy are not a consideration in a case such as this, whether judged now or in the past, unless there is evidence to support direct action being taken in response.

Conclusion

1. Having regard to the above and all other matters raised at the hearing and in the written representations, I conclude that the Order should be confirmed.

Formal Decision

1. I confirm the Order.

Sue Arnott

**Inspector**

**APPEARANCES**

**In support of the Order**

Mr N Grant Of Counsel, instructed by Kent County Council

Mr W Barfoot Public Rights of Way Officer; Kent County Council

Mrs S Glover

Mr C & Mrs W Gaze

Mrs Wood & Mr Hughes

**Opposing the Order**

Mr Lee May Solicitor; on behalf of the objectors

Mr & Mrs McLeish Statutory Objectors

**DOCUMENTS**

1. Copy of the statutory objection from Mr & Mrs McLeish and representations from Mrs Glover and from Ms Walker & Mr Brown

2. Submission documents from Kent CC

3. Statement of Case of Kent County Council

4. Statement of Case of Ms S Glover (on behalf of Mr J Mobasheri)

5. Statement of case of Mr & Mrs McLeish

*Submitted at the hearing*

6. Additional correspondence in relation to application for planning permission in 1959

7. Extract from Land Registry record issued in 1959 showing site of Victoria Bungalow

8. Plan showing proposed bungalow

9. Enlargement of 1946 aerial photograph

10. Tracings submitted by Mrs McLeish

