

DECISION REPORT

Wildlife and Countryside Act 1981, Section 53

Report seeking approval to correct a drawing mistake on the Definitive Map relating to a short section of footpath 1 West Ashton

Purpose of the report

1. To seek approval for the making of an order under section 53 of the Wildlife and Countryside Act 1981 to correct a drawing error on the definitive map regarding the position of a short section of footpath 1 West Ashton as shown on the plan attached at Appendix 1 to this report.

Background

2. In January 2013 the council received an enquiry regarding the route of footpath 1 West Ashton in association with the exchange of Contracts for the sale of Manor View, Bratton Road, West Ashton. Footpath 1 was revealed as passing through Manor View and its garden.
3. Solicitors on behalf of the owners of Manor View applied to the council for an order under section 53 of the Wildlife and Countryside Act 1981 to delete that section of footpath 1 which runs through the property and add the route currently available for the public to use and signed by the council as a public footpath. The alternative route runs along the south eastern and north eastern boundaries of Montrose and 17a Bratton Road as shown on Appendix 1 to this report.
4. A statement from Mrs Morris, the owner of Manor View was submitted in support of the application, attached at Appendix 2 to this report. In her statement Mrs Morris explained a footpath currently exists on the ground between the properties Montrose and 17a Bratton Road. The path is signed and maintained by Wiltshire Council and this has been the case in her experience since 2006. Photographs of the alternative path are attached to the statement. Also attached to the statement are the title documents and plans for the property Montrose and 17a Bratton Road lodged with the Land Registry. These documents clearly show the strip of land from Bratton road to the field at the rear over which the footpath runs. The title documentation makes clear reference to the fact that 17a Bratton Road is 'subject to....any private or public rights of way affecting the said property'. The reference stems back to 1979 and therefore one can be certain that the footpath was in its present position between Montrose and 17a Bratton Road at that time.

5. The Warminster and Westbury Rural District Council area definitive map showed footpath 1 leaving the West Ashton to Bratton Road approximately 100 metres south of the vicarage. At the Second and Special review of the definitive map in 1972 on the application of the parish council the route of footpath 1 was amended to exist from the West Ashton to Bratton Road in the vicinity of Manor View, 17a Bratton Road and Montrose. Due to the small scale of the Second and Special Review map at two and a half inches to the mile it is not possible to see in detail the change at this location. A property in the plot containing 17A Bratton Road appears to have been built by the late 1940s or 50s and the plot within which Montrose has been constructed was a separate enclosure at that time with no footpath shown by the Ordnance Survey as passing through it. No footpath has ever been shown on an Ordnance Survey map passing through the plot Manor View is built upon. It would seem on the lack of evidence to the contrary that the change proposed at the Second and Special review in 1972 sought to reflect the line existing on the ground between Montrose and 17A Bratton Road and recorded by the Land Registry.

Legal considerations

6. Wiltshire Council is now the Surveying Authority for the county of Wiltshire excluding the Borough of Swindon. Surveying Authorities are responsible for the preparation and constant review of definitive maps and statements of public rights of way. Section 53(2)(b) of the Wildlife and Countryside Act 1981 states-

As regards every map and statement the Surveying Authority shall-

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

7. The events referred to in subsection 2 above which are relevant to this case are:

53(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:

- (i) 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, being a right of way such that the land over

which the right subsists is a public path, a restricted byway or, subject to Section 54A, a byway open to all traffic;

- (ii) that there is no right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

8. The Definitive Map Orders: Consistency Guidelines produced by The Planning Inspectorate make the circumstances of when an error in the definitive map can be corrected:

‘The Definitive Map and Statement are conclusive as to the status of highways described, generally without prejudice to the possible existence of higher rights (DEFRA circular 1/09). This conclusively is not, however, a permanent feature: as Lord Diplock put it in *Suffolk CC v Mason* (1979) The entry on the definitive map does not necessarily remain conclusive evidence forever. It had been held, in the case of *Rubinstein v Secretary of State for the Environment* (1989), that once a right of way was shown on a definitive map, it could not be deleted, but the judgments in *Simms & Burrows* 1981 made it clear that section 53 of the Wildlife and Countryside Act 1981 allowed both for the addition or upgrading of rights of way on the discovery of new evidence, and for their downgrading or deletion. In his judgment Purchas LJ stated that he could see no provision in the 1981 Act specifically empowering the local authority to create a right of way by continuing to show it on the map, after proof had become available that it had never existed. Parliament’s purpose, expressed in the Wildlife and Countryside Act 1981, he said, included the duty to produce the most reliable map and statement that could be achieved, by taking account of changes in the original status of highways or even their existence resulting from recent research or discovery of evidence.

Parish/community councils usually provided the information regarding the routes to be added to the Definitive Map and Statement and the status of those routes. It is not uncommon for witnesses (e.g. local inhabitants, parish/community councils or user organisations) to assert that the parish/community council’s imputes to the definitive map process are not reliable. It is variously argued that they did not have the proper guidance, to that they misinterpreted it, and these assertions then form the basis of the case for the modification. The Memorandum attached to Circular No 81 was distributed down to parish council/parish meeting level and the legal presumption of regularity applies. Unless claimants can demonstrate otherwise, it should be assumed that a parish/community council received this detailed guidance and complied with it. The diligence with which a parish/community council met the remit is a different question. The Council minutes can be a useful source of information on this procedure, and other local highway issues which have arisen since the relevant date. As the minutes are a public record of the perception of the parish/community council at that time, and therefore probably also represent the perception of

parishioners, they may carry significant evidential weight. Other procedural guidance was issued to surveying authorities in Circulars 91/1950, 53/1952 and 58/1953.

In *Burrows v Secretary of State for Environment, Food and Rural Affairs* [2004] the judge commented that modification of the definitive map requires the discovery of evidence. An inquiry cannot simply re-examine evidence considered when the definitive map and statement was first drawn up; there must be some new evidence, which, when considered together with all other evidence available, justifies the modification.

When considering whether a right of way already shown on a definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See section 4 of Circular 1/09.

Trevelyan confirms that cogent evidence is needed before the definitive map and statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of *Trevelyan* that;

‘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 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. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that it is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.’

9. The Council must consider all available relevant evidence.

Evidence considered by the council in support of modifying the definitive map

10. West Ashton Parish Council claimed footpath 1 at the preparation stage of the definitive map and statement. On a form dated 20th May 1952 the path was described as derelict and was drawn imprecisely by the parish council on the maps provided to the parish council for the survey. The parish council subsequently asked Wiltshire County Council which was the surveying authority in 1972 to amend what it said was a drawing error on the definitive map for West Ashton footpath 1 at the location which is the subject of this report. The parish council support the change to the route of the footpath as shown at Appendix 1 to this report.
11. The photographs submitted with the application show the alternative route proposed as a well established defined route of some antiquity obviously signed and maintained by Wiltshire Council. There is no evidence of a path through the curtilage of Manor View.
12. A consultation on the change proposed on the Plan at Appendix 1 was undertaken with the usual statutory and non statutory consultees and no objections were raised.

Safeguarding Considerations

13. Safeguarding considerations are not considerations that can be taken into account when the council is carrying out its statutory duty to keep the definitive map and statement under continuous review under section 53 of the Wildlife and Countryside Act 1981.

Public Health Implications

14. The implications of the proposal on public health are not considerations that can be taken into account when the council is carrying out its statutory duty to keep the definitive map and statement under continuous review under section 53 of the Wildlife and Countryside Act 1981, however it is not considered the proposed change will have any adverse implications on public health.

Environmental Impact of the Recommendation

15. The Environmental impact of the recommendation is not a consideration that can be taken into account when the council is carrying out its statutory duty to keep the definitive map and statement under continuous review under section 53 of the Wildlife and Countryside Act 1981, however it is not considered the proposed change will have any environmental impacts.

Risk Assessment

16. Issues relating to health and safety are not considerations that can be taken into account when the council is carrying out its statutory duty to keep the definitive map and statement under continuous review under section 53 of the Wildlife and Countryside Act 1981.

17. Wiltshire Council has a duty to keep the definitive map and statement under continual review and therefore there is no risk associated with the Council pursuing this duty correctly. Now evidence has been brought to the council's attention that there is an error in the definitive map which ought to be investigated it would be unreasonable for the council not to seek to address this fact. If the council fails to pursue this duty in this case it is liable to complaints being submitted through the council's complaints procedure potentially leading to a complaint to the Ombudsman. Ultimately a request for judicial review could be made.

Financial Implications

18. The continual review of the definitive map and statement are statutory processes for which financial provision has been made.
19. If an order is made and advertised and no objections are forthcoming, the council will not incur any further costs beyond advertising the confirmation of the order. If the order attracts objections or representations that are not withdrawn, it must be forwarded to the Secretary of State for determination. It may be determined by written representations which would be no significant additional cost to the council, a local Hearing with additional costs to the council in the region of £300, or a Public Inquiry, with additional costs in the region of £5000. The financial provision referred to in paragraph 18 above would cover these costs. There are no indications that any objections or representations will be received.

Decision

20. The judgement given by the Court of Appeal in R v Secretary of State for the Environment ex parte Burrows and Simms (1991) 2 QB 354 held, in effect that if evidence comes to light to show that a mistake had been made in drawing up the definitive map, such a mistake can be corrected in either of the three ways envisaged in Section 53(3)(c) of the Wildlife and Countryside Act 1981.
21. Under Section 53(3)(c)(i) the Surveying Authority is not required to prove 'beyond all reasonable doubt' that rights exist. The burden of proof lies on the 'balance of probability', i.e. that it is more likely than not, that the rights exist. An Order may be made under this section where rights can be 'reasonably alleged to subsist'; however, at the confirmation of an Order a more stringent test applies, that public rights 'subsist'. The wording for Section 53(3)(c)(iii) is different, as the Surveying Authority has to be satisfied that there 'is' no public right of way shown on the definitive map.
22. From the records the council holds it would appear an error was made at the preparation stage of the definitive map in 1953. An attempt was made to correct the error in 1972 however to provide clarity of the revised route required a plan to a larger scale than that used for the purpose at Second and

Special review map. This lack of clarity in the council's records is adversely affecting the owner of Manor View and their ability to sell their property.

23. No evidence has been discovered by council officers to confirm that West Ashton footpath 1 as currently shown on the definitive map through the grounds of Manor View is correct. Taking all the evidence before the council into consideration relating to West Ashton footpath 1, officers believe that an order ought to be made under section 53 of the Wildlife and Countryside Act 1981 to amend the definitive map and statement as shown on the plan at Appendix 1 to this report.

Barbara Burke

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