
Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 26 January 2016

Appeal Ref: FPS/V3500/14A/4

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Suffolk County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 25 November 1995 was refused by Suffolk County Council on 4 September 2015.
- The Appellant claims that Footpath 5 (part) and Footpath 26 Cavendish should be realigned by deleting them from the definitive map for the area and adding a public footpath on a different alignment to correspond with the description in the definitive statement.

Summary of Decision: The appeal is allowed

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. In writing my decision I have found it convenient to refer to a plan provided by Suffolk County Council ('the Council'), attached to this decision as Appendix 1. Existing public footpaths are shown on Appendix 1 by a dashed line (Footpaths 5 (part) and 26, Cavendish) and their claimed realignment ('the Appeal route') is shown by a dotted line between points A (the location of a former railway line), B (the River Stour¹) and C (the B1064) near Pentlow Bridge. South of the River opposite B lies Pentlow Mill, and Footpath 28 Pentlow.

Main issues

4. The application was made under Section 53(2) of the Wildlife and Countryside Act ('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). 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 a highway of any description, or any other particulars contained in the map and statement

¹ The River Stour forms the boundary between the counties of Suffolk (to the north) and Essex (to the south)

require modification. Here, the grounds of appeal are that there is a discrepancy between the way in which Footpaths 5 (part) and 26, Cavendish are shown on the Definitive Map ('DM') and how they are described in the Definitive Statement ('DS'). I have therefore approached this decision on the basis that it is the second limb of the test described above that is relevant.

5. In considering the evidence, I have regard to the judgement in *Norfolk*². It advised that "*...the correct approach to the interpretation of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way*". It went on to confirm that where there is a conflict between the DM and DS, the map takes precedence. However, it was held that "*At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the Trevelyan presumption. Each should be accorded the weight that analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate*".
6. However, should the evidence demonstrate that a footpath shown in the DMS should be deleted, then I shall have regard to the judgement in *Trevelyan*³ and in particular to the following statement, "*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*".
7. In this regard, guidance⁴ 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*
 - *the evidence must be cogent.*

² R oao Norfolk County Council v Secretary of State for Environment, Food and Rural Affairs [2005]

³ Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001]

⁴ Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, Version 2 October 2009, paragraph 4.33

Reasons

19th and 20th Century mapping

8. No route is shown on the Cavendish Tithe Map of 1848, but this is not necessarily evidence that none existed. An 1869 Railway Plan and Book of Reference identify a Footpath running in the direction of points A to B on Appendix 1, though not on either the definitive or claimed alignments. The Book of Reference lists this as in private ownership.
9. In 1892 a footpath equivalent to the Appeal route is shown on the Ordnance Survey ('OS') 6-inch map and again on the 1928 6-inch map where they meet a footbridge crossing the River at point B. However, the 1905 6-inch map shows both this feature (A-B-C) and a footpath between points A and C on a similar (though slightly more northerly) alignment to the definitive line, running more or less parallel and to the south of the railway. The 1904 and 1927 OS 25-inch maps show the same features.

Highways records

10. Minutes of the West Suffolk Highways and Bridges Committee of June 1933 refer to the poor repair of the footbridge over the River at Pentlow Mill, and conclude the footpaths leading to it appeared of no public benefit, and they had no liability in the matter. However, Minutes from July 1933 resolve that a new footbridge be constructed following the agreement of Essex County Council ('ECC') to pay half its cost. It appears, however, that this evidence was not considered later when the DMS was being prepared.

Definitive Map and Statement records

11. The footbridge, which by then had been washed away, is referred to in correspondence from Cavendish Parish Council to the Clare Rural District Council in 1951, during the early stages of the production of the DMS. The County Surveyor responded that there were no funds available to replace it, noting that few people used the route, for which an alternative was available.
12. Nevertheless, the Parish Council claimed a route from the village, crossing the railway to reach the River, and a branch from the Suffolk side of the River to the railway station. The Survey Statement describes the path from Cavendish Bull Hotel to Pentlow Mill and notes the missing bridge. However, the description ends by saying the path is diverted in OS 238 – this is the field through which the definitive and Appeal routes pass⁵. The Council interprets the wording as saying the route is diverted to the "topside" of the field. I do not see the letter 'p' between 'to' and 'side' but what could be a crudely inserted letter 'N', perhaps to indicate 'north', or, alternatively, something that has been crossed through by parallel lines. In any event, this would be consistent with a path marked on the 1904 OS map on the south side and parallel with the railway line and on the top or north side of the field (paragraph 9). In different handwriting it is noted that the path had been used as a right of way for over 50 years. The Parish Survey Map marks the Appeal route, numbered 4, continuing into Essex south of the River.
13. The Clare Rural District Council Draft Definitive Map shows a route (Path 4) that appears to be neither the definitive nor Appeal route, and which does not

⁵ Also described in the submissions as Stetch Meadow

meet with the River. The accompanying Draft Statement describes the path from the railway line continuing in a south easterly direction "to the north bank of the River Stour". This has been crossed through and in handwriting there is a reference I take to be to the county boundary. The description notes there was formerly a footbridge, and continues by describing the remainder of the route running north easterly as far as the County road.

14. The handwritten amendment to the description appears likely to have arisen further to an objection by ECC to the omission of the continuation of this path into Essex. A Council Report into a Hearing held in 1953 about the objections, comments that Path 4 had been shown stopping short of the County boundary, although it was shown continuing into Essex on their Draft Map. This was described as a draughtsman's error and it was recommended that Path 4 be shown continuing to the County boundary. The Report ends by stating a length of footpath should be added to the Draft Map and Statement from Path 4 north of the Mill southward to the River and County boundary.
15. A document detailing alterations to the Draft Statement includes a handwritten revision of the path's description to include the connection from the north bank of the River via a short path connecting with a path from Pentlow. Subsequently, and presumably by reference to this and the description above (paragraph 14), the Clare Rural District Council 1st Definitive Map of 1953 shows Footpath 26 together with Footpath 5 on their present definitive alignment, albeit this differs slightly to that shown on the earlier Draft Map.
16. The DMS were reviewed in 1979 when it was recommended that Footpath 5 be diverted onto the line of the Appeal route, but no action was taken as this was beyond the parameters of the Review.

Other documentary evidence

17. Correspondence from 1983 explains the footbridge at B was washed away in 1947, and around 1974 the path was moved to its "present position".

Current Definitive Map and Statement

18. Footpath 5 is shown on the same alignment as seen on the first DM of 1953. However, the DS describes the route from the railway line "in a S.E. direction to the north bank of the River Stour (where there was formerly a footbridge) then in a north easterly direction to the County road...". Footpath 26, from Footpath 5 to the Essex County boundary, is described as "From N. of the Mill in a S. direction to the River Stour and County Boundary".

Evidence submitted by Essex County Council

19. Chapman and Andre's 1777 Atlas shows a mill symbol and building apparently straddling the River.
20. A Minute Book of Pentlow Parish Council (1818-1921) includes separate correspondence concerning the footbridge at the Mill and an 1837 sketch plan. It shows the footbridge to the northeast of the Mill with a dashed line, probably representing the footpath, following a direct route from the south side of the River towards and continuing beyond A. The correspondence is difficult to decipher, but ECC concludes the footbridge was privately repaired and maintained at the time, and the responsibility for this was in dispute, although the Appellant points out it was not uncommon well into the 19th Century for the

liability for repair of public footpaths to lie with owners of the land over which they passed. Further correspondence dated 1845 indicates the bridge was destroyed and replaced at private expense. It refers to the path being well used by local people, including church goers, whereas earlier correspondence refers to it being for the convenience of the Mill.

21. ECC believes the Pentlow Tithe Map shows two separate crossings, of the Mill leat and the River, but the Appellant considers the extract insufficiently clear to reach such a finding. An 1845 Railway Act and Plan do not show a footbridge at B, although it is known that the bridge here was missing at some point in 1845 (paragraph 20). There is no relevant entry in the Book of Reference.
22. ECC refer to an 1876 County Surveyor's Report concerning a missing footbridge at Puddock Mill (to the west) and alternative routes available, one being via Pentlow Bridge. It does not mention a route via Footpath 28 Pentlow, the footbridge, or the Appeal route, although the Appellant considers they would have formed an unnecessary diversion for users in this case.
23. The 1874 OS 25-inch map shows a footbridge north of the north-east corner of the Mill. The second edition OS shows the route parallel with the railway, equivalent to the definitive line. A 1919 OS map shows the footbridge in the same location, and the 25-inch map shows it on the Suffolk sheet but not on the Essex sheet. I am unable to distinguish the footbridge on the reproductions of two photographs of the Mill taken in the 1880s, although ECC considers it is shown at least on the second of these.
24. The 1910 Finance Act plan and Valuation Book record a £10 deduction for 'public right of way or user' which ECC speculates refers either to Footpath 28 or to the land itself which it says is known to be a local landmark. The Appellant disputes that it refers to a public right of access to the land, arguing it is strong evidence to support the existence of a footpath at this location.
25. Footpath 28 is absent from maps prepared under the 1932 Rights of Way Act.
26. A 1930s photograph clearly shows the footbridge, together with a handrail, over the River. What appears to form a continuous feature with fencing and a field gate located at the corner of the Mill building is visible. A postcard also shows the footbridge and the other features, in the distance. ECC, however, considers the location of the footbridge is further west than shown on the OS mapping, nearer to where Footpath 26 Cavendish meets the River, although the Appellant does not consider such a conclusion can be drawn given the angle and distance. A photograph dated 1949, but which ECC considers more likely to date to 1947, they say, shows the footbridge without a handrail, positioned further to the west. The Appellant, however, considers ECC has mistaken a strip of land alongside the building for the footbridge, the position of which, given the angle of the photograph, is to the left and out of shot.
27. The County Planning Committee Minutes of March 1953 concern ECC's objection to the exclusion of the route in Suffolk (along with 3 others) and state the paths had been inspected and from the result of local investigations had been in use for a considerable number of years. The Parish Survey Map claimed Footpath 28 both within Essex and continuing over the footbridge, following the Appeal route B to A. The Survey Card describes the route running north westerly through Pentlow Mill to the River, noting the missing

footbridge (believed removed by the Mill owner), and continuing into west Suffolk to a stile in the High Street, Cavendish.

28. An undated note of a telephone conversation relating to the Survey refers to many witnesses being available, including a Mr Richardson of High Street, Cavendish, who had used the path for up to 40 years prior to the present owner's arrival. A letter from the Council to ECC following the 1953 Hearing confirms the omission of the path in Cavendish was due to a draughtsman's error "in that the footpaths have been coloured short of the County boundary".
29. The inclusion of Footpath 28 in Pentlow was contested by the Mill owner in 1955 who stated it had not been claimed by the Parish Council and had been included by Council officers, on the basis of over 40 years use by the public (the Parish Council having been unwilling at the time to undertake the Survey). He noted the missing footbridge and that historically it had been maintained by the Mill owners. His enquiries of the respective Councils found that no right of way existed and they had no liability in the matter. ECC replied that the survey undertaken found the path to be in good condition, apart from the absence of a bridge, with stiles at each end, and a number of residents in the parish of Cavendish had been interviewed, giving evidence of 40 years use prior to that owner's occupation of the Mill. A telephone response to this letter from the Mill owner indicated "he now afforded the public access to the road to Pentlow by means of a path alongside the s bdy of the rwy". This could be either the one shown on earlier OS mapping or the definitive line.
30. An undated ECC report of a contemporary complaint describes Footpath 28 as a useful one from the village of Pentlow to the public house in Cavendish.

Landowner evidence

31. Research undertaken by the owner of the meadow, the land crossed by the definitive and Appeal routes suggests that A-B originated as access for workers and villagers to Pentlow Mill. After the railway opened in 1865 the route B-C was created to provide access from the Mill to the railway station. Around 1904 a permissive path was created north of the railway line, and use of the Appeal route declined, with the footbridge at B lost in 1947 and not replaced. She concluded the Appeal route was added to the DMS as Footpaths 5 (part) and 26, but that these may not have been the paths in general use in 1949.
32. The owner of Pentlow Mill has examined maps dating back to 1793; each showing something different, but all indicating there has been a path across the meadow. He concluded the railway, loss of the footbridge and diversion of a brook had affected the line of the path such that there was no true course, but one that adapted to changes over the years. A map of 1835 for the Pentlow Hall estate shows the footbridge slightly further east to that shown on the OS mapping. He also comments that the final footbridge lined up with the east-facing front of the Mill, its pier visible in the River bed until recently, and provides a sketch of 1946 showing this.

Consideration of the evidence

33. From the above, it can be seen that the current DM shows Footpath 5 on an alignment equivalent to A-C, albeit turning southeast to meet the County road and Pentlow Bridge south of C. Whereas, the DS describes a route consistent with the Appeal route (A-B-C), specifically referring to it meeting "the north

- bank of the River Stour (where there was formerly a footbridge)”. Indeed, the non-existent footbridge is listed as a ‘Limitation or condition’ affecting the path. Accordingly, the path detailed in the DS does not describe the position of the footpath shown on the DM, but rather it describes the Appeal route.
34. Footpath 26 on the current DM runs south from Footpath 5 to the river bank, and is described south to the River and the County boundary. There is no mention of it meeting the former footbridge. Here the DM and DS are consistent save as regards the DM not showing the continuation of the path to the County boundary which the mapping indicates is in the centre of the River.
 35. The same is true of the 1st DM with its relevant date of 1953, for both paths. The accompanying DS has not been provided. However, an earlier revised Draft Statement incorporates in its description of (at the time) Footpath 4, a connecting path between the north bank of the River and the path from Pentlow. This Statement too describes the position of the Appeal route, rather than what was shown on the Draft Map. The description of the connecting path, however, is not consistent with what became Footpath 26 as shown on the DM given that it was described from the north bank of the River, implying merely a short connection to the path from Essex.
 36. Taking 1953 as the relevant date, the situation on the ground was, as acknowledged in the Statements, that there was no footbridge at B, it having been washed away some 6 years earlier. Therefore the Appeal route could not be used as a through route to and from Essex. Consequently, the public were probably using an alternative route to avoid the problem, as indeed it seems the landowner later invited them to do.
 37. It appears that confusion in the documents arose further to ECC’s objection to the omission from the Council’s Draft DM of a connecting path with the one shown in Essex to the County boundary at Pentlow Mill. This had been acknowledged at the 1953 Hearing by the Council as a draughtsman’s error which had failed to show the then Footpath 4 meeting with the County boundary. To correct this it had been recommended that a path be added between Path 4, the River and the County boundary. This became Footpath 26. However, this recommendation resulted in an amendment to the Statement rather than to the Map, despite the error having been identified as a draughtsman’s mistake. It also resulted in a length of path, Footpath 26, shown proceeding to the River but stopping short of the County boundary and, at a point where no connecting path was located, despite ECCs objection concerning the continuity into Suffolk of the path shown on its Draft Map.
 38. Prior to the preparation of the DMS the path began as a direct route passing between Cavendish and B, its alignment altering slightly following events such as the construction of the railway. Its likely purpose was originally a private one, associated with the Mill. OS mapping shows B to C later came into existence with both it and A to B consistently shown on mapping from the late 19th Century onwards (evident to surveyors as a trodden feature on the ground). By the turn of the 20th Century a worn feature was mapped running parallel and south of the railway on a similar alignment to Footpath 5.
 39. There is documented evidence of B-A from Pentlow being well used by the public in the mid-19th Century, and of previous occasions when the footbridge was missing. There is conflicting evidence regarding responsibility for the footbridge in the records of both Suffolk and Essex. Nevertheless, in the 1930s

both Councils agreed to replace it. There is map evidence that the footbridge was located a little further to the east in 1835, but the subsequent documentary record is consistent in showing it at B. I agree with the Appellant that photographic evidence from the 1930s and 1949 (possibly 1947) does not demonstrate the footbridge had been moved further to the west of B more in line with the southern termination of Footpath 26. Indeed there is nothing in the mapping or other evidence to indicate the existence of a footpath in this location or on this alignment.

40. There is some ambiguity in the Parish Survey Statement which describes the Appeal route, but refers to a diversion to what may be the path shown on OS mapping south and parallel with the railway, or the definitive alignment. However, its overall description is to Pentlow Mill, and this is not the destination of either of these alternative paths. Furthermore, the Parish Survey Map marks the Appeal route and a continuation into Essex along what became Footpath 28 Pentlow. The basis for recording the route was use by the public and this is supported in the evidence from ECC of the investigations undertaken regarding Footpath 28 Pentlow with residents of Cavendish, the route from Essex being shown continuing in Suffolk on the line B to A.
41. Having regard to the evidence as a whole, and on the balance of probability, I am satisfied that there is a conflict between the DM and DS with regard to Footpath 5 and that the DM should be corrected so as to show the Appeal route in accordance with that described in the DS.
42. As regards Footpath 26, there is no evidential basis for the existence of a footpath on this alignment. There is new evidence in the agreement to replace the footbridge at point B in the 1930s, along with the evidence brought forward by ECC, as well as the evidence regarding the recording of Footpath 5. Taken together as a whole, and on the balance of probability, I consider there is cogent evidence of sufficient substance to displace the presumption that the DMS is correct, such that Footpath 26 should be removed from it.

Other matters

43. Issues regarding amenity or suitable alternative routes are not ones I can take into account in considering this Appeal, and I have not done so.

Conclusion

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

Formal Decision

45. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Suffolk County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Suffolk County Council in respect of Footpath 5 (part) and Footpath 26, Cavendish as proposed in the application dated 25 November 1995. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

S Doran

Inspector