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## Order Decision

Site visit made on 8 August 2023

by **A Spencer-Peet BSc(Hons) PGDip.LP Solicitor (Non Practicing)**

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

Decision date: 6 November 2023

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### Order Ref: ROW/3305057

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Dorset County Council (Part of Footpath 48, Thorncombe) Definitive Map and Statement Modification Order 2014.
- The Order is dated 14 November 2014 and proposes to modify the Definitive Map and Statement for the area by deleting a length of footpath and adding a length of footpath as shown in the Order plan and described in the Order Schedule.
- There were three objections outstanding when Dorset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is confirmed.**

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### Procedural Matters

1. On the 8 August 2023, I made an unaccompanied inspection of the path at issue, and to the surrounding area.
2. The case concerns the deletion of part of Footpath 48 Thorncombe, shown as A - B on the Order plan (the Recorded Route), and for the addition of a length of footpath shown on the Order plan as A-C-D-E-F-G-H (the Order Route).
3. A number of objections were previously sent to Dorset Council and which sought to demonstrate that Footpath 48 Thorncombe in its entirety had been incorrectly recorded initially and should be deleted from the Definitive Map and Statement (the DMS) for the area. Whilst I have noted all the submissions that are before me in that regard, the Order plan does not show the whole of Footpath 48 Thorncombe. By reason of Schedule 2 of Regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, I am unable to consider the details provided in respect of the deletion of the whole of Footpath 48 Thorncombe from the DMS within this Order Decision, given that I cannot propose any modifications where such modifications cannot be shown on the Order plan.

### Background

4. Dorset Council are the Order Making Authority (the OMA). The OMA has put it to me that there is sufficient evidence to establish that, as a result of an error in the Definitive Map process, the Recorded Route is shown incorrectly in the DMS. The OMA maintains that the Recorded Route differs in alignment from the route as shown on the Thorncombe Parish Survey Map, the Draft Map and the Provisional Map. Upon review of evidence, the OMA determined that the Draft Map and Provisional Map, having been consulted upon and without objection, showed the correct route for Footpath 48 Thorncombe.

## **The Main Issues**

5. The criteria for confirmation of the Order are contained within the 1981 Act, in this case subsections 53(3)(c)(i) and 53(3)(c)(iii). These require me to consider whether the evidence discovered shows that a footpath should be recorded in the DMS between points A-C-D-E-F-G-H. For this to be the case, the evidence must show that that section of the Order route not currently recorded in the DMS subsists and should be recorded as a footpath. Furthermore, the evidence must show that in respect of the recorded footpath between points A-B, there is no public right of way over land shown in the DMS as a highway of any description, or any other particulars contained within the DMS require modification.
6. As regards to documentary evidence, Section 32 of the Highways Act 1980 requires that I take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. My decision is reached on the balance of probability.

## **Reasons**

### ***Documentary Evidence***

#### *Tithe Map*

7. The provided copy of the Tithe Map is not entirely clear. However, the Tithe Map does not appear to show the Recorded Route or the Order Route between Yawling's Farm and New House Farm. No apportionment records have been provided.
8. Tithe maps were prepared to indicate productive land rather than to indicate rights of way. From such records, it is normally only possible to infer that the routes existed on the ground at the time, and to determine whether or not they were considered to be productive in terms of tithe.

#### *Finance Act 1910*

9. The 1910 Act required that all land be valued. Where a route is shown uncoloured and unnumbered so that it is outside of hereditaments, it is indicative of a public highway.
10. The valuation maps provided show both the Recorded Route and the Order Route passing through hereditament numbers 2, 9, 14 and 40.
11. The field book entry for hereditament number 2, does not show any deductions for public rights of way. The field book entry for hereditament number 9 shows a deduction for public rights of way. In that respect, the field book entry for '*Fixed Charges, Easements, Common Rights and Restrictions*' includes the wording "*None*" in pen, with a further annotation in pencil which reads "*Footpaths across Ord Nos. 373, 323, 321, 318, 269*". The evidence before me indicates that both the Recorded Route and the Proposed Route cross Ordnance Survey parcel numbers 273 and 245.
12. With regards hereditament 14, the field book entry for '*Fixed Charges, Easements, Common Rights and Restrictions*' includes the note "*None*", with the second page of the Field Book entry including a deduction in respect of '*Restrictions*'.

13. The field book entry for '*Fixed Charges, Easements, Common Rights and Restrictions*' in respect of hereditament number 40 includes the note "*foot path & bridle path*". This statement could refer either to a separate footpath and bridleway or could refer to a bridleway in isolation. However, under "*Charges, Easements and Restrictions affecting Market Value of Fee Simple*" there is the annotation "*Rights of Way = Nil*". There are no deductions for public rights of way within the field book for hereditament 40.
14. In respect of the matter that is the subject of this decision, the Finance Act records do not provide any supporting evidence with regards to the correct alignment of this section of Footpath 48 Thorncombe.

#### *The Definitive Map Process*

15. The National Parks and Access to the Countryside Act 1949 required surveys to be undertaken further to the preparation of a draft map showing those routes that were considered to be public rights of way.
16. I have been provided with a copy of the Thorncombe Parish Survey map and a copy of the walking survey card for this route. The Parish Survey map appears to show a faint, continuous pencil line which runs from south of Yawling's Farm, before splitting into two continuous and almost parallel pencil lines approximately from Point C shown on the Order plan to an area west of New House Farm where the two faint pencil lines converge again.
17. The walking card, which numbered the route as "98", describes the route from Yawlings Farm to New House. The walking card initially describes "*Field 1*" as "*OK*" but that has been crossed out in red pen and the annotation "*Good*" has been added. The walking card continues by describing "*Field 2*" which, in my view and based on the description given, indicates that the notation has been used for the field located between points C-D on the Order plan. Under "*Field 2*" the walking card states, "*path not clearly defined, Boggy*". In respect of "*Field 3*" the walking card states, "*Very Boggy*" with an exit to New House Farm over a stream via "*3 rail fences*". The entire walking card has been crossed through with a diagonal line.
18. The 1953 Draft Map shows the route, then numbered "98", south of Yawlings Farm approximately following the continuous pencil line as depicted on the Parish Survey map. However, the Draft Map shows the then footpath "98" in a slightly different position to the two, almost parallel, pencil lines as included on the Parish Survey and described above. The OMA has confirmed that no objections were raised in respect of the production of the Draft Map.
19. The 1964 Provisional Map shows footpath numbers "98" and "76" have been combined into footpath "48". In respect of the section of the route which is located south of Yawlings Farm and which is the subject of this decision, the Provisional Map depicts the route on the same alignment as included on the above described Draft Map. The OMA has confirmed that no objections were raised in respect of the production of the Provisional Map.
20. The 1966 First Definitive Map shows the section of Footpath 48 that is the subject of this Decision on roughly the same alignment as shown on the Provisional Map. However, the section of the route which corresponds with that part of the route between Points D-E-F-G-H, appears to show the position of the footpath slightly to the northwest of the line of the route as shown on the Draft and Provisional Maps.

The OMA has confirmed that no objections were raised in respect of the production of the First Definitive Map and that, subsequently, the route was not subject to further investigation during the Special Review conducted in 1973. As such, the 1974 Revised Draft Map shows the route as depicted on the First Definitive Map.

21. Furthermore, the Current Definitive Map, sealed in 1989, also repeats the slight change in alignment of the route as included on the First Definitive Map and the Revised Draft Map.

#### *Ordnance Survey (OS) Maps*

22. I have been provided with details from a series of OS Maps which, it is maintained by the relevant respective parties, are dated 1889, 1903 and 1961.
23. The 1889 OS map shows other routes within the area surrounding Yawling's Farm annotated as "F.P" and which appear to correspond with Footpaths 49, 50 and 51 Thorncombe. However, that map does not show any such annotation or marking showing either the Recorded Route or the Order Route. The 1903 OS map similarly does not show either the Recorded Route or the Order Route.
24. The provided copy of the 1961 OS map is unreadable. However, both the OMA and the relevant objectors have concluded that neither the Recorded Route nor the Order Route is shown on that map.
25. The OS maps record the physical features, such as routes, present at the time of the survey, and the existence of routes are themselves physical features. In this instance, the OS maps do not record either the Order Route or the Recorded Route.

#### *Conclusions on Documentary Evidence*

26. The Tithe records, the Finance Act records, and the OS maps do not provide supporting evidence in respect of what is the correct alignment for this section of Footpath 48 Thorncombe.
27. As noted above, the Parish Survey shows two pencil lines in the vicinity of the Order Route and the Recorded Route. I have been provided with a copy of guidance given to Parish Councils by the Commons, Open Spaces and Footpaths Preservation Society entitled "*Surveys and Maps of Public Rights of Way*", dated January 1950, and which, amongst other matters, advises that all paths, even if disputed or where there was reasonable doubt about its existence, should be included on the parish survey, initially in pencil and then in ink once the route had been checked and confirmed.
28. Given that there are two, almost parallel, continuous pencil lines shown on the Parish Survey map, it appears on the balance of probability that there was some doubt as to the exact alignment of this public right of way. That doubt is supported by the wording included on the parish walking survey in respect of "*Field 2*" which, as noted above, states that within this field the path was not clearly defined.
29. Whilst it is noted that the alignment of the path as shown on the Draft and Provisional Maps differs slightly to the position shown by the two pencil lines on the Parish Survey, there is no evidence before me to suggest or confirm that any objections were received from the public regarding the route following publication of

- the Draft Map, nor any evidence to confirm that any objections were received from occupiers or landowners following publication of the Provisional Map.
30. However, it appears from the records provided that the alignment of the route as shown on the Draft and Provisional Maps, varies slightly to that shown on the First Definitive Map 1966. That variation in alignment is repeated on the subsequent Revised Draft and Current Definitive Maps. There is no evidence that, following the publication of the Provisional Map, there was any lawful diversion of the route that would have resulted in the change of alignment of the route as shown on the Revised Draft or Current Definitive Maps.
  31. The OMA have put it to me that the change in alignment of the route is as a result of a slippage error in the process used to produce the Definitive Map. The OMA maintains that a transparency containing rights of way data which had been laid over an OS base map in order to produce the Definitive Map, was used to transfer the data to the paper map and that as part of that process, which involved a reaction in the presence of heat and moisture, it is likely that that caused the paper map to stretch, shrink or distort. In that regard the OMA has referred me to other routes as shown on the Provisional Map, and how that compares to their position as shown on the Definitive Map.
  32. Upon closer inspection and comparison of routes as shown on the Provisional Map and the Definitive Map, a similar level of slippage, as described above, appears to exist for another nearby right of way within the parish.
  33. In objection to the Order, it has been put to me that any distortion in the records would have also resulted in features such as buildings changing position on the maps. However, it appears from the details provided by the OMA that the method used to produce the First Definitive Map involved a transparency, that only held rights of way data, laid over a base map. As described above, the process involved the interaction of heat and moisture and which could distort the paper copy map, not the transparency and, in that regard, it is likely that where distortions, stretching or shrinking occurred, it was to the paper base map. Overall, this is likely to have resulted in the rights of way data appearing displaced when having been transferred to produce the First Definitive Map.

### **Other Matters**

34. Further to the above matters, in objection to the Order as made, it has been put to me that there is no evidence of use of the route for a considerable period of time, that users of the route would not want to walk close to a private dwelling, and that confirmation of the Order would have an adverse effect on privacy and security. A further objection has been raised on the grounds that the Order Route did not reflect the route that had been walked.
35. In those regards, the lack of use of a route in living memory is not evidence that the Order Route was not previously a highway or that, by lack of recent use, the route does not continue to be a highway. Whilst it may be the case that the Order Route is not the same as that which had been previously walked, I have not been provided with any details of the alternative route taken nor any evidence that supports that any such alternative route is the correct alignment of this section of Footpath 48 Thorncombe. Furthermore, whilst I acknowledge the concerns raised regarding the position of the path within very close proximity to a private dwelling,

the law is quite clear that matters such as desirability, privacy, health and safety, security or otherwise of routes, are not considerations before me in terms of a Definitive Map Modification.

### **Overall Conclusions**

36. Section 56(1) of the 1981 Act provides that a "definitive map and statement shall be conclusive evidence as to the particulars contained therein". In the case of *Trevelyan v Secretary of State for the Environment, Transport, and the Regions* [2001] 1 WLR 1264, the Court of Appeal considered the correct approach to be adopted when considering whether a right of way should be deleted and the weight to be given to the DMS.
37. In this instance, by reason of the lack of any objections following the publication of the 1953 Draft Map and the 1964 Provisional Map, on the balance of probabilities it is likely that the alignment of the route shown on those maps is correct. There is no evidence to suggest that the change in the alignment of this section of Footpath 48 Thorncombe, was as a result of any objection which consequently led to lawful diversion of the route. Overall, the evidence supports that the change in recorded alignment of the path was as a result in the distortion of details at the time when the First Definitive Map was produced.
38. For the above reasons, on the balance of probability I conclude that the OMA has provided sufficient evidence to displace the presumption that the DMS is correct, by reason of a process error in the preparation of the First Definitive Map. Consequently, as a result of that error, the DMS requires the modifications as included within the schedule and map contained within the Order as made.
39. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

### **Formal Decision**

40. I confirm the Order.

*Mr A Spencer-Peet*

INSPECTOR

