Neutral Citation Number: [2024] EWHC 532 (Admin)

Case No: AC-2023-LON-000378

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th March 2024

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

(1) Mr DERREN McLEISH **(2) Mrs KATHRYN JOAN McLEISH**	**Claimants**
- and –	
(1) THE SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS **(2) KENT COUNTY COUNCIL**	**Defendants**

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Noemi Byrd (instructed by **Brachers LLP**) for the **Claimant**
Ned Westaway (instructed by the **Government Legal Department**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 29th February 2024
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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case Mr and Mrs McLeish have made an application pursuant to paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act") to challenge a decision made on 11th November 2022 by an inspector appointed by the First Defendant to confirm The Kent County Council (Public Footpath ZR281(Part) Doddington) Definitive Map Modification Order 2021 ("the Order").

The Background Facts

2. On 11th February 2021 the Second Defendant made the Order. The Order was made under the provisions of section 53(2)(b) of the 1981 Act. The Order states:

> "This Order is made by the Kent County Council ("the Authority") under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to the Authority that Map sheet 107 (TQ95NW) of the Definitive Map and Statement for the County of Kent require modification in consequence of the occurrence of events specified in Section 53(3)(c)(i), namely the discovery of evidence by the Authority which shows 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 or a restricted byway or, subject to section 54A, a Byway Open to All Traffic; and Section 53(3)(c)(iii), namely the discovery of evidence by the Authority which 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 require modification."

3. The right of way which is not shown in the map and statement which was said to subsist or be reasonably alleged to subsist was a route which runs from point C via point B to point A. Point C lies on the route of footpath ZR281 north of the northern boundary of the property known as Yew Tree House, The Street, Doddington, Kent, and south of the intersection of footpaths ZR281 and ZR283. Point B is a location within the courtyard to Yew Tree House. Point A is a location on The Street. The route from point B to point A passes along the eastern frontage of 1, Yew Tree Cottages.

4. The route over which it was said that there is no public right of way runs from point C, through a property known as Victoria Bungalow (which lies to the east of the Yew Tree House), to point D being a location on The Street.

5. The Claimants are the owners of Yew Tree House. The claimants objected to the Order. In their objection dated 14th April 2021, the Claimants put forward the following grounds of objection:

> "A. That the Council has failed to satisfy the statutory test in Section 53 of the Wildlife and Countryside Act 1981 for modifying the map in that it has not had regard to all of the relevant evidence available to it when making the Order. Accordingly, the procedure for making and confirming the order should be halted until such time as all of the relevant evidence is considered.

B. That, on the available evidence, the Council should have concluded that Public Footpath ZR281 terminates at a stile on the northern boundary of the Objector's property and did not extend southwards along any route to the Street. In which case the Order should be amended so that description of the path to be added is deleted from Part 1 of the Schedule to the Order and the map amended accordingly.

C. In the alternative, if it is concluded that Public Footpath ZR281 does extend southwards beyond the northern boundary of the Objector's property to the Street, then on the available evidence, the route shown on the existing map is the correct route."

6. Pursuant to paragraph 7 of Schedule 15 to the 1981 Act the Second Defendant submitted the Order to the First Defendant for confirmation. The First Defendant appointed an inspector to hold a hearing to consider the confirmation of the Order. The inspector's decision on the Order is set out in a decision letter dated 11th November 2022 ("the Decision Letter" or "DL"). The inspector decided to confirm the Order.

7. In the Decision Letter:

   i) The inspector noted that that there was one objection outstanding and two representations when the Second Defendant submitted the Order to the First Defendant for confirmation.

   ii) The inspector identified the main issues as:

   "3. 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.

   4. 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."

   iii) The inspector considered the legislative provisions at paragraphs 5 and 6:

   "5. 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 R281 in the Parish of Doddington require modification.

6. 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."

iv) The inspector set out the background:

"7. 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.

8. 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)".

9. 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.

10. 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."

v) At paragraphs 11 and 12 the inspector set out the approach she intended to take when making her evaluation and decision:

"11. 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 Leicestershire 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."
>
> 12. 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, l intend to address the proposition put forward by the objectors that this footpath is, and should be recorded as, a cul-de-sac."

vi) The inspector summarised the evidence predating the preparation of the definitive map and statement at DL paragraphs 14 to 28, and then summarised the evidence relating to the definitive records at DL paragraphs 29 to 40.

vii) The inspector then set out her conclusions on the evidence. Her conclusions on the 'cul de sac point' are set out at DL paragraphs 41 to 45. The inspector's final conclusions are set out at DL paragraphs 46 and 47:

> "46. 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.
>
> 47. 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."

8. Route C-D is a route through the Victoria Bungalow land. Route C-X-B-A is a route through the Yew Tree House land. Point X lies south of point C, and is at or close to the northern boundary of the Yew Tree House land.

9. The effect of the realignment of footpath ZR281 (as confirmed by the First Defendant) was to remove the section which passed through the property known as Victoria Bungalow to join The Street, and to replace it with a section of footpath running through the courtyard of Yew Tree House from point X to the Street.

The Grounds of Claim

10. The Claimants rely upon the following three grounds of claim:

i) Ground A: the inspector failed to direct herself on the evidential weight to be given to the 1952 Definitive Map and Statement in the light of section 56 of the 1981 Act.

ii) Ground B: the inspector failed to identify as the primary question for her determination, and to reach a reasoned conclusion on, the question of whether the 1952 definitive map and statement shows the correct alignment of the footpath.

iii) Ground C: the inspector failed to draw properly reasoned inferences from the primary evidential material before her, left relevant evidence out of account, and gave relevant evidence no weight without explaining why.

11. In the Claimants' Statement of Facts and Grounds there are seven sub issues to Ground C. In the Claimant's Skeleton Argument there are four sub issues to Ground C:

i) The cul de sac issue.

ii) The position of the stile.

iii) 1952 Alignment relative to 4, 5 and 6 Yew Tree Cottages.

iv) Conclusion on the 'correct' order route.

12. In oral submissions Ms Byrd, for the Claimants, said that the Ground C claim was limited to the points identified in her skeleton argument. She also re-ordered the submissions by addressing Ground C points (ii) and (iii) when making her submissions on Ground B.

The Legal Framework

Review of the definitive map and statement under the 1981 Act

13. Section 53 of the 1981 Act provides (so far as relevant):

"**53.— Duty to keep definitive map and statement under continuous review.**

(1) In this Part "definitive map and statement", in relation to any area, means, subject to [section 57(3) and 57A(1)] ,—

(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

(b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or

(c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

(2) As regards every definitive 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 those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows—

(a) …

(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) …; or

(iii) 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 require modification."

14. Section 56(1) of the 1981 Act provides:

"**56.— Effect of definitive map and statement.**

(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely

(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right;

…"

15. Section 57(3) of the 1981 Act provides:

"(3) Where, in the case of a definitive map and statement for any area which have been modified in accordance with the foregoing provisions of this Part, it appears to the surveying authority expedient to do so, they may prepare a copy of that map and statement as so modified; and where they do so, the map and statement so prepared,

and not the map and statement so modified, shall be regarded for the purposes of the foregoing provisions of this Part as the definitive map and statement for that area."

The approach to modifications under section 53 of the 1981 Act

16. In ***Trevelyan v. Secretary of State for the Environment, Transport and the Regions*** [2001] EWCA Civ 266 the Court of Appeal considered the effect of section 53 of the 1981 Act.

i) At paragraph 12 Lord Phillips of Worth Matravers MR (with whom the other members of the court agreed) referred to the Court of Appeal's decision in ***R v. Secretary of State for the Environment, Ex p Burrows*** [1991] 2 QB 354:

"12 However, *Rubinstein's* case was overruled by the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354. The court held, in effect, that, if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in section 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way."

ii) At paragraph 38 Lord Phillips considered the role of the decision maker when considering a modification order under the provisions of section 53(3)(c)(iii) of the 1981 Act:

"38 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 is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."

17. In ***R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs*** [2003] EWHC 171 (Admin) (at paragraphs 28 and 29) Collins J considered a case where both section 53(3)(c)(i) and (iii) of the 1981 Act were engaged:

"28. As I have already indicated, section 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, ie when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, section 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative Test B under section 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible -- it is dangerous to rule out any possibility -- but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.

29. As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality section 53(3)(c)(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."

The Highways Act 1980

18. Section 32 of the Highways Act 1980 ("the 1980 Act") provides:

"32. Evidence of dedication of way as highway.

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

Statutory challenges under the 1981 Act

19. Paragraph 12 of Schedule 15 to the 1981 Act provides:

"(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph."

20. The scope of any statutory challenge brought under the provisions of paragraph 12 of Schedule 15 was identified by Charles J in ***Elveden Farms Limited v. Secretary of State for Environment Food and Rural Affairs*** [2012] EWHC 644 (Admin) at paragraph 3:

"3. The correct approach to a challenge under paragraph 12 is, for example, set out by Mr Justice Langstaff in *Whitworth v Secretary of State for Environment Food and Rural Affairs* [2010] EWHC 738 Admin, where he discusses and applies the earlier cases. I adopt that analysis and his conclusion, which shows that the nature of the challenge is the one taken on judicial review. Therefore, it can be said that the Secretary of State, through an inspector, was not lawfully exercising the statutory powers, and the public law arguments for review or challenge to a decision made by a statutory decision maker would be available. In summary, those are well known and they are: was there an error of law; did the decision maker fail to apply the correct test; did the decision maker take all and only relevant factors into account, the weight to be given to them being a matter for the decision maker; fairness, both procedural and substantive; and a failure to give proper reasons. Additionally, there is a Wednesbury challenge in the sense of perversity, namely, absent the other grounds, and in particular when a decision maker has applied the correct legal test and taken all and only relevant factors into account, is the decision nonetheless perverse?"

Challenges to an inspector's decision letter

21. Inspector's decision letters should be read fairly and as a whole, without excessive legalism or criticism (***South Somerset DC v. Secretary of State for the Environment: Practice Note*** [2017] PTSR 1075 at pages 1076 to 1077).

22. The courts should respect the expertise of specialist inspectors (***Open Spaces Society v. Secretary of State for Environment Food and Rural Affairs*** [2022] EWHC 3044 (Admin) at paragraph 76).

23. The approach to be taken when considering a reasons challenge is that set out by Lord Brown at paragraph 36 in ***South Bucks v. Porter (No.2)*** [2004] 1 WLR 1953.

The Grounds of Claim

Ground A

24. The submissions on behalf of the Claimant:

i) Ms Byrd refined Ground A in her oral submissions. She submitted that the inspector failed to treat the 1952 definitive map and statement as conclusive evidence of the legal alignment of the footpath.

ii) The essence of the submission on this ground is that inspector's starting point should have been that there was a presumption that the definitive map and statement showed the correct route of the footpath and that cogent evidence was required to displace that presumption.

iii) The definitive map and statement to which section 56(1) applied was the 1952 map and statement.

iv) The inspector did not apply the presumption to any version of the definitive map and statement.

v) The inspector did not identify cogent evidence to displace the presumption.

25. Mr Westaway for the First Defendant submitted:

i) The definition of definitive map and statement in section 53(1) of the 1981 Act is subject to the provisions of section 57(3). The effect of section 57(3) is that if a definitive map and statement is modified, and a copy of the map and statement as so modified is prepared, it is the copy which shows the definitive map and statement as modified that becomes the definitive map.

ii) The 'conclusiveness' provision in section 56(1) applies unless and until there is a review. On a review section 56(1) does not apply, but the review is to proceed on the presumption that the map is correct. That presumption can be rebutted on the balance of probabilities.

iii) The presumption is generally rebutted by a positive finding that the alternative route is correct.

iv) At DL paragraph 11 the inspector referred to the presumption. At DL paragraph 12 the inspector said she would follow the ***Leicestershire*** approach. At DL paragraph 45 the inspector rejected the Claimants' cul de sac argument. At DL paragraph 46 the inspector came to a conclusion, on a balance of probability, that the route across the Yew Tree House land was correct, and at DL paragraph 47 held that the route shown on the current definitive map is incorrect.

Discussion

26. I will first consider the effect of section 56(1) of the 1981 Act. Section 56(1) provides that the definitive map and statement "shall be conclusive evidence as to the particulars contained therein …".

27. Two main issues arise in this case:

i) What is the effect of the 'conclusive' provision in section 56(1) when the surveying authority are considering whether to make modifications to the map and statement under the provisions of section 53 of the 1981 Act.

ii) What is the definitive map and statement which is to be considered when considering whether to make modifications pursuant to section 53.

28. Under the statutory scheme, a definitive map and statement are intended to establish, once for all, the existence of a right of way. That is the purpose and effect of section 56(1) of the 1981 Act. Parliament also provided a mechanism which allows addition of and removal of rights of way from a definitive map. When the surveying authority are considering whether evidence shows that a right of way which is not shown on the map and statement subsists, or evidence which shows that there is no public right of way over land shown in the map and statement as a highway, the map and statement is not conclusive evidence of the particulars contained therein. If, in those circumstances, the map and statement were conclusive evidence, section 53 would be of little or no effect.

29. The correct position, as explained by the Court of Appeal in ***Trevelyan*** (at paragraph 38), is that when an inspector has to consider whether a right of way that is marked on the definitive map in fact exists, he or she must start with the initial presumption that it does. In a case where an inspector is considering both whether a right of way not shown on the map and statement subsists (under section 53(3)(c)(i)) and whether there is no public right of way over land shown in the map and statement as highway (under section 53(3)(c)(iii)), the starting point is likely to be the section 53(3)(c)(iii) question. A finding, on a balance of probabilities, that an alternative way is the correct route would normally be sufficient evidence to show that the existing way is wrong. When considering the section 53(3)(c)(iii) question, the presumption is against change (***Leicestershire*** at paragraph 29).

30. It is necessary to consider the version of the definitive map or statement to which the presumption applies. Ms Byrd submits that the definitive map and statement to be considered in this case is the map and statement prepared in 1952 under the provisions of section 33 of the National Parks and Access to the Countryside Act 1949.

31. The definition of definitive map and statement set out at section 53(1) of the 1981 Act is subject to section 57(3). Section 57(3) provides that where a definitive map and statement has been modified, and where the surveying authority consider it expedient to, and do, prepare a copy of the map and statement as so modified, the map and statement so modified shall be regarded for all purposes of Part III of the 1981 Act (including section 53) as the definitive map and statement. In my judgment, if it were not already clear from section 53 itself, section 57(3) makes clear that the definitive map and statement to which the provisions of section 56(1) applies, is the definitive map and statement as modified. Once a definitive map and statement is modified it the map and statement as modified that is the definitive map and statement. For those reasons I reject Ms Byrd's submission that the definitive map and statement to which section 56(1) applied was the map and statement prepared in 1952 (with no modifications).

32. The inspector set out the legal tests to be applied at paragraphs 5 and 6 of the DL. At DL paragraph 11 the inspector referred to paragraph 29 of the judgment in ***Leicestershire***. The inspector then stated (at DL paragraph 12) that she would first 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 line C-D. The approach taken by the inspector in DL paragraph 12 is consistent with that referred to at paragraph 29 in ***Leicestershire***, namely that a finding that an alternative

route was right, is likely to be sufficient to establish that an existing route shown on the map and statement is wrong.

33. The inspector applied the approach set out at DL paragraph 12 when she came to set out her conclusions at DL paragraphs 45 and 46. Her first conclusion was that, on the balance of probability route A-B-X was correct, and therefore route C-D was incorrect. The inspector does not, in her conclusions, make express reference to a presumption against change. The inspector, at DL paragraph 11, included the passage from ***Leicestershire*** which refers to the presumption against change. At DL paragraph 12 the inspector said that she intended to adopt that approach. When the decision letter is read fairly and as a whole, and in particular when the reference at DL paragraph 46 to 'on a balance of probability' is understood, in my judgment it is clear that the inspector applied the approach set out in paragraph 29 in ***Leicestershire***, and found that the presumption against change was rebutted by evidence that route A-B-X was the correct route.

34. For those reasons I reject Ground A.

Ground B

35. Ms Byrd submitted:

    i) At DL paragraph 12 the inspector took the wrong starting point. The correct starting point was the presumption that the definitive map and statement showed the correct route of the footpath.

    ii) The presumption applied to the 1952 definitive map and statement.

    iii) That Ground C points (ii) and (iii) are not necessary to make good her submissions on Ground B.

36. Mr Westaway submitted:

    i) Ground B adds little to Ground A.

    ii) The presumption applies to the definitive map and statement as modified.

Discussion

37. I agree with Mr Westaway that Ground B adds little to Ground A.

38. For the reasons I have set out when discussing Ground A, I do not consider that, in DL paragraph 12, the inspector took the wrong starting point. At DL paragraph 11 the inspector quoted from the judgment of Collins J in ***Leicestershire*** and at DL paragraph 12 she said she proposed to adopt the approach set out in paragraph 29 of that judgment. At DL paragraph 12 the inspector did adopt the approach set out in paragraph 29 in ***Leicestershire*** namely to first consider whether the alternative route was correct, proceeding on the basis that, if on the balance of probabilities it was shown that it was

right, that would be evidence that the route shown on the existing map and statement was wrong.

39. Further, and for the reasons set out above, I do not consider that the map and statement to be considered was the 1952 version. If a map and statement has been modified following the statutory procedures that is the definitive map and statement; it is the map and statement as modified to which the presumption against change applies.

40. For those reasons I reject Ground B.

Ground C

41. On behalf of the Claimants Ms Byrd:

i) Stated that she was not advancing a reasons challenge.

ii) Identified that the errors of law relied upon were a failure to take a material consideration into account and Wednesbury irrationality.

iii) Submitted that when considering the 'cul de sac' point the inspector did not take into account an obviously material consideration being the map evidence, in particular the Ordnance Survey ("OS") 3rd edition map, and the 1910 Finance Act records which showed a historical pedestrian path running from Down Court to the northern boundary of the Yew Tree House land.

iv) Although not put forward as an argument at the hearing, the inspector failed to consider the possibility that the path from point X running north to the intersection of footpaths ZR281 and ZR283 was not a public right of way. It would not have been necessary for further evidence to be produced as the relevant maps were already before the inspector. The effect of section 32 of the 1980 Act was to require the inspector to take into account such map evidence.

v) The conclusion at DL paragraph 46 was irrational as it was not supported by evidence.

42. Mr Westaway submitted:

i) The interpretation of maps may require factual interpretation and facts are the province of the inspector not the High Court (***Whitworth v. Secretary of State for Environment Food and Rural Affairs*** [2010] EWHC 738 (Admin) at paragraph 11 (upheld in the Court of Appeal at [2010] EWCA Civ 1468)).

ii) The map evidence relating to the path between Down Court and the northern boundary of the Yew Tree House land was not an obviously material consideration. In any event the inspector did take that evidence into account and refers to it at paragraphs 18-20 of the DL.

iii) The contention that there was a possibility that the path from point X to the intersection of footpaths ZR281 and ZR283 was not a public right of way was not put to the inspector in writing or at the hearing. Consideration of that point would have required further evidence, and findings to made by the inspector on

the basis of that further evidence and any associated arguments. In addition land not subject to the order under consideration by the inspector would be affected. Those are factors which weigh strongly against allowing the new point to be argued in the High Court. In making those submissions Mr Westaway relied upon paragraph 77 in the judgment of Holgate J in ***Trustees of the Barker Mill Estates v. Test Valley BC*** [2017] PTSR 408.

Discussion

43. The inspector considered the Claimants' 'cul de sac' argument at DL paragraphs 18 to 20, and 41 to 45. At DL paragraph 20 the inspector said that she did not find there to be any evidence that might support the contention that the route from Down Court to the northern boundary to Yew Tree House was a private path. At DL paragraph 42 the inspector considered and referred to the Claimants' argument that the footpath was a link between two historic properties.

44. In the analysis set out under the heading 'Evidence pre-dating the definitive map' the inspector refers to the tithe map for Doddington of 1840, the first OS map published in the 1870s, the second edition of the OS map of the late 1890s, the third edition OS map of 1908, and records prepared under the Finance Act 1910. Given the reference to those maps, there can be no legitimate complaint that the inspector failed to take into account maps, plans and history of the locality, or other relevant document, as required by section 32 of the Highways Act 1980.

45. It is clear that the inspector did take into account the OS 3rd edition map, and the 1910 Finance Act map, along with the other maps and records referred to in the Decision Letter. Therefore whether or not those maps were an obviously material consideration, they were taken into account.

46. Further, as is clear from ***Whitworth*** the interpretation of maps, and the conclusions drawn as a result of that interpretation are matters for an inspector.

47. For those reasons the argument that the inspector failed to take into account the map evidence when considering the 'cul de sac' point is rejected.

48. The argument that the path running from point X to the intersection of footpaths ZR281 and ZR283 was not a public right of way was not put to the inspector. Further, it was an express part of the inspector's reasoning (at DL paragraph 42) that the objectors had not challenged the status of footpath ZR281 as a whole.

49. The principles to be applied in statutory planning challenges when considering whether a point not put to an inspector can be raised in the High Court were summarised by Holgate J at paragraph 77 in ***Barker Mill***:

"77 In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs

strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information): see e g the *Newsmith Stainless Ltd* case [2001] EWHC Admin 74 at [13]—[16]; *HJ Banks & Co Ltd v Secretary of State for the Environment* [1997] 2 PLR 50; *R (Tadworth and Walton Residents' Association) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin) at [95]; *Kestrel Hydro v Secretary of State for Communities and Local Government* [2015] LLR 522, paras 66—67; and *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1083, para 49."

50. The application of those principles has not been restricted to statutory challenges under planning legislation. For example the ***Tadworth*** case concerned a challenge by judicial review of a decision made under the Commons Act 2006. In my judgment the principles set out in ***Barker Mill*** apply with equal force to challenges made under paragraph 12 of Schedule 15 to the 1981 Act.

51. The new point taken raises issues of fact. If the point had been raised as part of the objection, it could have been considered at the hearing, and the inspector would have been required to make findings of fact. Even if the Claimants are right, and no additional map evidence would have been required, the inspector would, nonetheless, have had to make additional findings of fact, based upon her own interpretation of the maps, and on any other relevant evidence.

52. In addition, the fact that the new point raised affects land other than that affected by the Order also raises issues of fairness. There may be parties who would be affected by a determination that the path running from point X to the intersection of footpaths ZR281 and ZR283 was not a public right of way who would not have been affected by the Order, or not affected in the same way. If the point not taken before the inspector was allowed to be raised in these proceedings such parties would be deprived of an opportunity to put forward a case on that issue.

53. For those reasons, the point raised in relation to the status of the path running from point X to the intersection of footpaths ZR281 and ZR283 should not be allowed to be taken in these proceedings.

54. The inspector's conclusion at paragraph 46 of the DL has to be read in context. The inspector set out her approach at paragraph 12 of the DL. The inspector then identified the evidence which she had considered, and came to conclusions of fact based upon that evidence. Those conclusions included (at DL paragraph 27) the statement that it was quite apparent that the only clear recognition of a path of any sort is found on the OS maps and these show a footpath that appears to end at point X (the boundary of Yew Tree Cottage yard). The inspector also considered the 'definitive records' (at DL paragraphs 29 to 40). At paragraph 31 of the DL the inspector says that the first map in the 1952 survey process shows the red line of footpath ZR281 (then known as FP15) following the path on the OS based map coming to a stop at Yew Tree Cottage yard.

55. At paragraph 46 of the DL the inspector applied the approach set out at paragraph 12 of the DL to the evidence that she had assessed. The inspector identified the evidence on which she relied in coming to her conclusion on the route used by the public namely the OS records, and the initial parish survey of rights of way, both of which she had found showed a path which appeared to end at point X (on the northern boundary of the Yew Tree Cottage yard). The evidence to which the inspector referred in paragraph 46 of the DL had been referred to and assessed in the earlier paragraphs of the DL, in particular paragraphs 27 and 31. When the decision letter is read as a whole it is clear that it sets out a rational analysis, identifying the approach to be taken, referring to and assessing the evidence, and then applying the identified approach to the evidence. The conclusion (at DL paragraph 46) was supported by the evidence to which earlier reference had been made. The decision letter, when read as whole, discloses no irrationality.

56. I reject this ground of claim.

Conclusion

57. For the reasons I have given the claim is dismissed.