

Report for Cheshire West and Chester Council

Wildlife and Countryside Act 1981: Schedule 14

Application for a Definitive Map Modification Order re Footpath 7 Cuddington

Instructions

1. Cheshire West and Chester Council (“the Council”) requires a report into the relevant available evidence relating to the alignment of Footpath 7 Cuddington. My instructions are to prepare a report making recommendations to assist the Council in determining Definitive Map Modification Order application. Details of my qualifications and experience are at **[Doc 48 page 168]**. (References in this report are to the accompanying bundle of appendices).

Background

2. In 2006 Mr R A Bennion and his late mother, Mrs Peggy Bennion, raised the issue of the correct alignment of Cuddington Footpath 7 with the former Cheshire County Council (“the County Council”). Of particular concern to Mr Bennion and his mother was the alignment of the footpath in the vicinity of farm buildings to the east of Crab Tree Lane. Mr Bennion refers to this part of the farm as “the Homestead yard” (and the term Homestead or Homestead yard is used in this report) and this distinguishes it from Crabtree Farm farmhouse and associated buildings which lie to the west of Crab Tree Lane. The general layout of the Homestead buildings and Crabtree Farm in relation to Crab Tree Lane, together with line of the footpath as currently shown on the Definitive Map and the line as Mr Bennion considers it should be shown can be seen on plan MO568 **[Doc 1 page 1]**.
3. It is understood that Mr Bennion accepts that a public footpath exists; it is the line of that public footpath that he disputes.
4. To the extent that it is material to the determination of the subsequent application for a Definitive Map Modification Order (“DMMO”), what prompted the issue to be raised with the County Council (on 24 February 2006) was the erection of a footpath sign and a visit to the Farm by a County Council officer who asked Mr Bennion to remove an obstruction to the line of Footpath 7 as it entered the Homestead yard. For reasons that are expanded on in his witness statement, Mr Bennion considers that the alignment of the footpath identified on the ground by the County Council (and subsequently by the Council) is in error and that the Definitive Map is therefore incorrect. Although Mr Bennion and his mother provided evidence (in 2006) which they considered showed that the line of Footpath 7 did not run on the alignment as shown on the Definitive Map, the County Council did not investigate the matter at the time.
5. In 2018, when Mr Bennion became aware that the matter had not been resolved he made a formal application for a DMMO to the Council. The application was for a DMMO that would delete the line shown as A-B on the plan MO568 and replace it with the line shown B-C. Mr Bennion also applied for an amendment to be made to the particulars of the Statement; but he provided no details of the amendments sought in his application and it is understood that what is sought is an amendment of the particulars of the Statement alongside the change to the alignment, detailed above, in order that the precise line of the footpath can be readily understood.

6. The Council did not determine the DMMO application within 12 months of receipt. Mr Bennion exercised his right of appeal. The Council was directed by the Secretary of State to determine the application by 18 December 2021.
7. The evidence considered in this report is contained in a paginated bundle, divided into folders. The evidence in support of Mr Bennion’s application has been provided on three separate occasions: (1) to the County Council, (2) to the Council and (3) to the Secretary of State as part of the appeal against non-determination. This has resulted in some duplication of documents. Other documents have been considered and these, together with case law and guidance are included in the bundle. In this report documents in the bundle are referred to in this way **[Doc x page x]**.
8. The investigation has been carried out during a period of restrictions in place to deal with the global pandemic which has necessarily restricted the possibility of research in record offices. However, the internal records available to the Council together with all the documents submitted by Mr Bennion are available and it has been possible to view online documentary sources.
9. The Council carried out statutory and non-statutory consultations but no response has been received.

The legal context

10. The Definitive Map and Statement (together the “DM&S”) is the legal record of public rights of way in England and Wales. Inclusion of a route in the DM&S is legally conclusive¹ evidence of the public’s right, at the relevant date² without prejudice to the existence of other public rights. The Wildlife and Countryside Act, 1981 (“the 1981 Act”) provides a mechanism by which errors and omissions in the DM&S can be corrected by means of a DMMO.
11. The application falls to be considered under Section 53(3)(c)(i) & (iii) of the 1981 Act:
 - (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) [omitted] or

¹ By reason of Section 56 of the 1981 Act

² 1 November 1956

(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.

12. It will be noted that there is no provision for a DMMO to simply amend the line of a right of way shown on the Definitive Map. Therefore, in order to make a 'positional correction' it is necessary to conclude that there is no public right of way on the alleged incorrect line and that instead there is a public right of way, not currently shown on the Definitive Map, on the alleged correct line. As this, in effect, would involve making a DMMO to add a "new" route to the DMS, it is considered that current DEFRA guidance [**Docs 46 & 47 pages 157 & 163**] about the requirement to specify a width applies.
13. The case of *R (oao) Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin)* ("the *Leicestershire case*") [**Doc 44 page 134**] provides the Council with guidance on how it should approach the matter of an application that seeks a 'positional correction'. Particularly relevant to this case are paragraphs 27-29 of the judgment.
14. It should also be noted that it is necessary for there to be 'discovery' of evidence which when considered with all other available relevant evidence shows that an Order or Orders should be made. It is this 'discovery' of evidence rather than the fact that there has been an application that is the trigger for any Order making process.

The evidence re Footpath 7

15. An extract of the Definitive Map is at [**Doc 3 page 3**]. The lines representing public rights of way were drawn on to an Ordnance Survey base at a scale of 6 inch to 1 mile. The relevant date is 1 November 1955. The Statement says:

"Footpath 7: Length 1860 yards From the unclassified County Road UC/8/116 almost opposite Crabtree Farm in an easterly direction to the unclassified County Road UC/8/115 at Primrose Cottage."
16. From the Council's records it is known that this route with this description was included in the Draft Definitive Map and Statement published under the provisions of the National Park and Access to the Countryside Act, 1949 ("the 1949 Act"). Although there were objections to other routes shown on the Draft Map in the parish of Cuddington, no objection was made to Footpath 7 at either the Draft or Provisional Definitive map stages under the 1949 Act.
17. Under the 1949 Act, routes that were not removed or amended at the previous stages of the process went on to be shown on the DM&S for the area. Under Section 32 of the 1949 Act the depiction of Footpath 7 on the DM&S for Cheshire was conclusive evidence of the public's rights on foot over the route.

18. The Definitive Map comprises a base Ordnance Survey map at 6 inch to 1 mile scale with a copyright date of 1954 on to which lines have been drawn by hand to indicate public rights of way. In this case the line is purple, indicating a public footpath.
19. The line of the footpath as shown on the Definitive Map has been overlaid (by the Council using its Geographical Information System) onto modern mapping [**Doc 6 page 10**].

The weight to be given to the inclusion of Footpath 7 in the DM&S

20. The evidential basis upon which Footpath 7 was put forward for inclusion in the Draft Map is not known. In the case of *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 226 (“the *Trevelyan* case”) [**Doc 45 page 144**] the Court had to consider a challenge to the confirmation of a DMMO to delete a right of way shown on the DM&S. In the *Trevelyan* case there was also no evidence as to why the right of way had been put forward for inclusion in the Draft Map. In considering the weight to be given to the inclusion of rights of way in the DM&S, Lord Phillips MR disapproved judgments in the courts below to the effect that limited or no weight be given to the inclusion of rights of way in the DM&S. He said that approach was wrong in principle: a decision-maker must start with an initial presumption that what is marked on the DM&S is properly recorded. He then said that “evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists” and went on to approve the view that: “the evidence needed to remove a right of way needs to be clear and cogent”.
21. The *Trevelyan* case differs from the matter to be considered in respect of Footpath 7; in *Trevelyan* the contention was that the evidence taken as a whole showed that the right of way had been included in the DM&S (for Lancashire) in error, not that it was recorded on an incorrect alignment. But the principle, in respect of the weight to be given to the inclusion of Footpath 7 in the DM&S (for Cheshire), applies. Taken together with the guidance in the *Leicestershire* case, the evidence put forward in support of Mr Bennion’s application as respects the application for an Order to delete the line of Footpath 7 needs to be clear and cogent for it to outweigh the evidence of the DM&S.

Documentary evidence prior to the DM&S

1838 Tithe map of Cuddington in the parish of Malpas: scale 3 chains to 1 inch, First Class map [**Doc 26**]

22. This map does not show a footpath in the vicinity of the Homestead. The general arrangement of the buildings in the Homestead yard are shown, including the L shaped building³ that Mr Bennion dates to 1872 (there is a date stamp on the building). The buildings do not abut on the northern boundary of the Homestead yard.

First Edition 1875 Ordnance Survey map Cheshire LX13: 25 inch to 1 mile scale, surveyed 1874, published 1875 [**Doc 27**]

23. This shows a double pecked line from the eastern boundary of the Homestead yard (NB this is labelled Crabtree Farm on this map), initially southeast, then turning east to run alongside

³ This is shown coloured red indicating it was lived in.

the field boundary between parcel no 234 and 233, turning south east at the corner of 236 to join the double pecked line track at the eastern boundary of 234.

Second Edition 1898 Ordnance Survey map Cheshire LX13: 25 inch to 1 mile scale, revised 1897, published 1898 (revised OS) parcel numbers [Doc 28]

24. This shows a double pecked line from the eastern boundary of the Homestead yard (NB this is labelled Crabtree Farm on this map), initially southeast, then turning east to run alongside the field boundary between parcel no 215 and 179, turning south east at the corner of 216 to join the double pecked line track at the eastern boundary of 215. This replicates what is shown as respects the double pecked line on the First Edition.

Map from the deeds to Crabtree Farm: Mr Bennion dates this as 1910 [Doc 14]

25. This appears to be based on an Ordnance Survey plan; the parcel numbers of the shaded parcels are the same as appear on the Ordnance Survey 25 inch map published 1911 (but revised in 1909) and like the 1911 25 inch, shows a double pecked line extending from the eastern boundary of the Homestead yard running easterly to join another double pecked line feature at the eastern boundary of field number 179. Immediately to the east of the Homestead yard this path runs to the south of a small enclosed feature, the northern boundary of which continues across the northern end of the Homestead yard to the road.

Third Edition 1911 Ordnance Survey map Cheshire LX13: 25 inch to 1 mile scale, revised 1909 [Doc 29]

26. This shows a double pecked line marked FP from the eastern boundary of the Homestead yard running south of an enclosed feature to the eastern boundary of OS parcel 179 where it joins a path coming from the southwest. It shows the footpath in relation to the features in OS parcel 179 as described above in respect of what is shown on the Second Edition map.
27. There is a well, marked with a dot (.) and a W. The double pecked line is to the north east of the well.
28. The Council has produced a copy of the 1911 map with the line of Footpath 7 as shown on the Definitive Map. Footpath 7 does not follow the line as shown on the 1911 map as a double pecked line (east of the Homestead yard) and appears to be obstructed by buildings.

Oblique aerial photograph c 1950s (this may post date the relevant date of DM&S; 1st November 1955) [Doc 20]

29. This is a view of Crabtree Farm and the Homestead yard. It shows that the northern boundary of the Homestead is a roughly straight boundary, running east west and joining the road to the south of Crabtree Farm farmhouse. Mr Bennion describes this as the 'internal' boundary. There is a partial hedge to the north of this which appears to equate to Mr Bennion's external boundary. Whilst there is clearly a solid wall on the eastern boundary of the Homestead yard it appears to end at a point level with the northernmost edge of the northernmost building. It is unclear what, if any, structure exists north of this, but there does appear to be the remains of a wall. There is a gap between the end of the northernmost

building and the northern boundary of the yard. Mr Bennion asserts that there is a roadside gate at point A; this is not clearly visible in the copy supplied. There is no gap visible in the roadside hedge at point C.

30. Mr Bennion's view of what the oblique aerial photograph shows is that it shows a block wall across point D on Mr Bennion's plan 2 **[Doc 21 at page 42]**. He notes that there are no signs of exit of entry at point D – no tractor marks, cattle tracks or a footpath. He says that the outer boundary posts and barbed wire fence can faintly be seen around point D but the scrub is clearly visible. Mr Bennion does not mention what it may or may not show as respects the route he asserts to be the correct line of the footpath.

31. Mr Bennion has provided sketch plans of the layout of the Homestead yard at 1940 to approximately 1955 and pre 1972. Neither of these plans completely equate to the layout as on the oblique aerial photograph.

Documentary evidence that post-dates the DM&S

32. Mr Bennion relies on a number of maps and photographs of the Homestead area that post-date the relevant date of the DM&S. He particularly refers to some maps in paragraph 4 of his statement. Looking at these in turn:

Appendix 4 map provided by the Rural Payments Agency (RPA); no date given [Doc 15]

33. This shows the Homestead buildings and what Mr Bennion describes as a "ruin" to the east of the homestead boundary. The northern boundary of this 'ruin' is in line with the northern boundary of the other buildings in the Homestead yard. It does not show Footpath 7; but equally does not show any footpath.

Appendix 6 Ordnance Survey map (provided to Mr Bennion by Defra); no date given, but likely to be the 1973 1:2500 Ordnance Survey map [Doc17]

34. This shows a double pecked line path extending to a point to the northeast of the Homestead yard buildings. There is an area between the northern extent of the of the buildings and the northern boundary. Comparison of this map with the map from Mr Bennion's deeds shows that the northern boundary to the Homestead yard has altered from a straight line running roughly east-west to a stepped line. The effect of this has been to alter the junction of the boundary of the Homestead yard with the road to a point further north.

Appendix 2 extract from the Definitive Map produced by the Council [Doc 13]

35. This is an enlargement of the Definitive Map (apparently to 1:2500) reproduced in black and white, a colour version can be found at **[Doc 5 page 9]**. As Mr Bennion notes, the line of Footpath 7 has been hand drawn on to the Ordnance Survey base. This is how the DM&S for Cheshire was produced in the 1950s⁴. The line (purple on the original) obscures some of the detail on the underlying Ordnance Survey map, nevertheless it clearly shows the route of the footpath broadly following the double pecked line in the Ordnance Survey map, going to the south of the enclosure and to the north of the buildings, but to the south of the Homestead yard boundary. Comparison of this map with the map from Mr Bennion's deeds and the

⁴ This was common practice at the time.

Ordnance Survey maps discussed above shows that the underlying Ordnance Survey map does not show a track through the area to the immediate north of the buildings.

Appendix 5 – map given to Mr Bennion by Mr Taylor (a former Cheshire County Council officer) 2006
[Doc 16]

36. This is a print out from the then open access website on the government website⁵, accessed in 2006. As such, in respect of the footpath it simply reflects what is on the underlying Ordnance Survey base, which in turn derives public rights of way information from the DM&S. It therefore adds nothing to the evidence in this case.

Mr Bennion’s own recollections and photographs, and oblique aerial photography

37. Mr Bennion’s evidence is that:
38. His grandfather, William Bennion purchased Crabtree Farm in 1940. Crabtree Farm was purchased for Mr Bennion’s parents, Arthur and Peggy Bennion. The Bennion family knew the previous owners of Crabtree Farm.
39. Arthur and Peggy Bennion moved to Crabtree Farm in the spring of 1940 and immediately started to farm the land. They remained at Crabtree Farm till they retired in 1998.
40. Mr Bennion was born in February 1949 and has lived on the Farm since shortly after his birth. His earliest recollections (relevant to this matter) concern watching his uncle, George, help take down a brick building. Mr Bennion recalls that he was no more than five at the time (so around 1954). He recalls that the building was in the position he has marked at point D on his sketch plan at **[Doc 22 at page 41]**. He remembers being told not to stand on some wood nearby, as there was a well that he might fall into. He has marked the position of the well on the sketch plan at **[Doc 22 at page 41]**. Along with this recollection, more generally Mr Bennion remembers feeding the chickens in the henhouse and the animals in the yard and buildings in the Homestead yard. Mr Bennion gives further details of the locations of relevant features in his letter of 17 January 2021 and annotated an aerial photograph to show locations.
41. As one would expect, when Mr Bennion was not at school he generally worked with his parents on the farm from a young age. He left school at 16 (1965) and from then on worked full time on the family farm, becoming a partner along with his parents and taking over the management of the farm in 1979. In all that time he doesn’t remember any stranger trying to use the route between points B and D on his sketch plan **[Doc 22 at page 41]** and he says that there was no physical opening at point D until 1972, when he made an opening and installed a field gate to allow for the movement of machinery into and out of the Homestead yard. This opening appears to be shown on the oblique aerial photograph Mr Bennion dates to 1972/3 at **[Doc 19 at page 32]**.

⁵ The URL is cited at the bottom of the page.

42. Mr Bennion has provided photographs to show the brick foundation under the soil on the field side of this field gate. Additionally, bricks from the former buildings are stockpiled in the yard and sandstone slabs have been unearthed in the field (these have now been used to make a path in the garden of Crabtree Farm). Mr Bennion gives further details of the locations of relevant features in his letter of 17 January 2021 [Doc 41 page 192] and has annotated an aerial photograph to show locations. In his letter of 17 February 2021, he says that the L shaped building in the homestead yard has a date stamp of 1872. He notes that he is unable to align the outline of this building on maps with aerial photographs and concludes that this is because the position of buildings on the maps are an approximation.
43. Mr Bennion says, in his letter of 17 February 2021 that the footpath stopped in the field.
44. Mr Bennion has also provided an account of correspondence and interactions with County Council and Council officers and some photographs. His wife, Susanne Bennion has also provided a statement. None of this information is directly relevant to the question of the correct line of the footpath as at 1 November 1955.

The evidence taken as a whole

45. Before considering the evidence further it is necessary to take into account some general points about Ordnance Survey maps. The Ordnance Survey rightly has a worldwide reputation for accuracy, but all maps, however accurately they are surveyed and drawn, cannot reproduce a three-dimensional landscape in two dimensions. Differences in levels of accuracy of surveying between editions and differences in the difficulty of surveying different features mean that it not always possible to directly compare maps and it is necessary to bear in mind the Ordnance Survey's own published data about 'relative accuracy' (that is, how accurately features on a map are shown in relation to other nearby features); particularly when considering matters such as alignment of unsurfaced tracks and paths. In general, maps surveyed and produced at large-scale (25 inch or 1:2500) will have a greater level of positional accuracy than maps that are surveyed and published at a smaller scale. Maps that are surveyed at large scale and then reduced to a smaller scale may be 'generalised' and this too may adversely affect accuracy. It is with this in mind that overlay maps produced by the Council (see Overlays of OS Maps) have to be considered.
46. Ordnance Survey material has to be considered in light of the disclaimer found on all Ordnance Survey published mapping since 1888; namely "The representation on this map of a road, track or footpath is no evidence of the existence of a right of way". Nevertheless, Ordnance Survey material and the published maps in particular are an important source of historical information about the physical features on the ground at the date of survey or later revision, and such features may have a bearing on the question of public rights.

What does the evidence say about the line and extent of Footpath 7?

47. Importantly the Statement clearly describes the footpath as running from the unclassified County Road...almost opposite Crabtree Farm. There is therefore no doubt that the footpath connected to the road. The fact that the Ordnance Survey maps show a pecked line track terminating at the eastern boundary of the Homestead yard reflects the Ordnance Survey

practice of showing tracks and paths across fields and open land where such were visible on the ground at the time of survey or revision. If there were no visible and distinguishable track across a farm yard (or other area), then the Ordnance Survey would not show a track or path. This is not cogent evidence that no public right existed across the Homestead yard. Set against the clear evidence of the Definitive Statement, the evidence as a whole does not amount to evidence sufficient to show that there was no public right of way joining Crab Tree Lane.

48. On balance it is reasonable to conclude that Footpath 7 followed the double pecked line shown on the First, Second and Third Edition Ordnance Survey maps. As the Third Edition (1911) map is the nearest in date to the relevant date of the DM&S it is reasonable to take the double pecked line from that map as being the one intended to be shown on the DM&S.
49. The Council has produced a copy of the 1911 map with the line of Footpath 7 as shown on the Definitive Map **[Doc 35 page 117]**. Footpath 7 does not follow the line as shown on the 1911 map (east of the Homestead yard) and appears to be obstructed by buildings. This is consistent with Mr Bennion's evidence about the gateway he opened up in around 1972, his recollection of a building in the area demolished when he was a young child and the finding of slabs and brick foundations in the field.
50. This leaves the question of where the route ran between the easternmost boundary of the Homestead yard; this is a short distance and given the lack of any obstacles on the tithe map or on the First, Second or Third Edition Ordnance Survey maps on balance it is reasonable to assume that the footpath continued in a straight line to the road. The Council has projected a line from the double pecked line to the road, this is shown on the map at **[Doc 37 at page 117]** and is overlaid on modern mapping at **[Doc 37 at page 118]**. On balance the evidence shows that the line of Footpath 7 is not as shown on the Definitive Map and that changes to the boundaries mean that it lies to the north of the current northern boundary to the Homestead yard.
51. There is no evidence as to the width of the footpath.

What does the evidence show in respect of B-C?

52. There is no evidence to suggest that the footpath followed the precise line B-C; the evidence taken as whole suggests that the alignment is further to the south than the line B-C.

Has there been discovery of evidence?

53. It is not known what evidence was or was not taken into account in respect of the inclusion of Footpath 7 when the DM&S was first drawn up. Mr Bennion's evidence as respects the demolition of the building he observed as a child is unlikely to have been known to the surveying authority at the time. On balance therefore evidence has been 'discovered' for the purposes of the 1981 Act.

Recommendations

54. Taken as a whole the relevant available evidence discovered by the Council supports the making of a DMMO to delete part of Footpath 7 as currently shown on the DM&S. At the same time the Council has discovered evidence that shows the correct line of Footpath 7 should be

recorded on an alignment to the north of the current boundary of the Homestead yard and a DMMO should be made to add this line.

55. Taken literally, the evidence does not support the application made by Mr Bennion; however, it should be acknowledged that there is an error in the current DM&S and a DMMO should be made as recommended above to correct the records.

56. As noted above, there is no evidence as to the width of the footpath; in the absence of any evidence the Council should follow DEFRA's guidance at [**Docs 46 & 47 page 157 & 163**] as respects citing a width in the DMMO.

Sue Rumfitt

14 September 2021