

# Case Decision

---

## **Definitive Map Modification Order Case 390**

### **Alleged public right of way between River Witham cycle way and Hall Drive, Lincoln**

---

**Summary of Decision: Not to make a definitive map modification order to record a public bridleway running between River Witham cycle way and Hall Drive, Lincoln**

---

## **The Modification Order Application**

1. The Modification Order Application (“the application”) was made by Gary Hewson on 12 June 2017 seeking the addition to the Definitive Map and Statement for the area, the legal record of public rights of way, a public bridleway on the north bank of Catchwater Drain between the cycle way at the River Witham and Hall Drive. This route will be referred to hereafter as “the application route”. A copy of the plan ref. DMMO/390/Lincoln/CDP (“the plan”) is attached and shows the application route by a broken black line between points A-B-C.

## **Requirements and tests of the legislation**

2. Section 53 of the Wildlife and Countryside Act 1981 (“the 1981 Act”) requires the County Council as the Surveying Authority for Lincolnshire to keep the Definitive Map and Statement, the legal record of public rights of way, under continuous review. This is achieved through the making of definitive map modification orders where evidence is discovered which suggests that the Definitive Map and Statement require amending.
3. The issue to be considered is whether the evidence demonstrates that a public right of way subsists or is reasonably alleged to subsist over the route applied for to warrant the making of a definitive map modification order under section 53(3)(c)(i)

of the 1981 Act for it to be added to the Definitive Map and Statement. It should be noted that the combined effect of sections 53(3)(c) and 53(5) is that the County Council may reach a different conclusion other than simply to make or not make a definitive map modification order for the route applied for. This means that the decision of the Surveying Authority must be reached on the basis of all the evidence available to us and not just on the application itself.

## **Documentary Evidence**

4. Historical documents may provide evidence supporting that a public right of way had been created or dedicated in the past. If a public right of way is shown to have been dedicated or created, then the public right of way will continue to exist indefinitely<sup>1</sup> unless it is shown to have been stopped up, extinguished or diverted by virtue of a statutory provision such as a public path diversion or extinguishment order made under the Highways Act 1980 or the Town and Country Planning Act 1990, for example.
5. The application route is not shown on any of the 19<sup>th</sup> century commercial maps, including the 1779 Armstrong Map, 1819 Ordnance Survey Drawing, 1824 Ordnance Survey Old Series, 1928 Bryant's Map, 1830 Greenwood's Map, 1848 Marrat Map and 1856 Ordnance Survey First Series. The 1842, 1851, 1868 and 1883 Padley Plans show embankment markings on the north bank of Catchwater Drain, with a "white space" between them, however this is not marked as a public right of way. The JW Ruddock & Sons Maps of pre 1920 and 1945 show the application route as a 'footpath'.
6. The 1804 Act for Embanking, Draining and Improving Lands in the City of Lincoln and County including Boultham enacts the creation of Catchwater Drain, but does not have an accompanying plan. Catchwater Drain is located in the Parish of Boultham. The Act states '*...Provided, that no Road or Way whatsoever shall be set out....over any of the Lands or Grounds in the said Parish of Boultham, without Consent of the Lord of the said Manor of Boultham, or the Owner or Owners of said Lands*'.
7. Documents relating to Lincoln Waterworks and Ordnance Survey Commissioners of Sewers do not show a right of way. The 1845 Lincoln Waterworks Plan & Book describe Plot 31 as a 'bank' on the north side of Catchwater Drain. Plots 35 and 36 are situated on the west bank of the River Witham and are described as '*Bank and Footpath*' suggesting that if a footpath existed on Plot 31 this would have been described as such. Similarly, the 1873 Lincoln Waterworks Plan of Boultham shows a '*footpath*' on the River Witham west bank, but no right of way on the north bank of Catchwater Drain.
8. The 1863 Great Eastern Northern Junction Railway Plan and Book of Reference show the area of Catchwater Drain. Plot 40 relates to Catchwater Drain, Plot 41 is the

---

<sup>1</sup> The judgement *Dawes v Hawkins (1860)* held that '*it is also an established maxim, once a highway always a highway: for the public cannot release their rights, and there is no extinctive presumption or prescription*'

northern bank and is described as '*Bank and Footpath*' belonging to Richard Ellison, owner of Boultham Hall and Estate.

9. It was not possible to locate the Tithe Award for this area of Boultham. However, a Tithe Glebe Award of Exchange 1873 does relate to land surrounding Catchwater Drain. The Second Schedule and Plan referred to in the Award of Exchange includes Plot 97 which forms the north bank of Catchwater Drain. Plot 97 is described as '*part of Bank and Swamp*'. The plan does not show a right of way on the north bank.
10. There are a number of Boultham estate documents at Lincolnshire Archives dating from the 19<sup>th</sup> and early 20<sup>th</sup> centuries. Most of these documents do not mark a right of way on the north bank of Catchwater Drain. Only one, Drain Plans and Plan of Boultham Estate c 1881-1916 shows a possible footpath on the north bank although it does not show the full extent of the north bank nor is there an annotation to describe the markings as a footpath.
11. The application route is not shown on any of the Ordnance Survey Maps viewed, including Ordnance Survey County Series Maps spanning 1887-1950, One Inch Series spanning 1891-1968, Half Inch Series spanning 1905-1939, Scale 1:25,000 or about 2½ Inch Maps spanning 1949-1966, Scale 1:1,250 or about 50 Inch Maps of 1967 and 1971, Pathfinder Map of 1989, Landranger Map of 1991, Explorer Map of 2000 or Philip's Street Atlas of 2003 and 2005.
12. The 1909-10 Finance Act Map does not show a right of way on the application route. The Book of Reference does not record a right of way deduction for the relevant hereditament (22).
13. The 1929 Highways Handover Maps for the City of Lincoln do not show the application route as a right of way. There is an adopted carriageway and adopted footpath marked on the south bank of Catchwater Drain (Altham Terrace).
14. There are a number of City of Lincoln Engineering plans relating to Boultham Baths, Pumping Station and Allotments from the 20<sup>th</sup> century. None of these marks the application route as a right of way.
15. A number of aerial photos confirm the use of all or part of the application route over a number of years. The aerial photograph from 1971, although not of good quality may show a worn path along the length of the application route. Aerial photographs dated 1999 and 2003 that are available to the County Council clearly show a worn path along the length of the application route. However, it is not possible to identify from these photographs alone if the worn path is a result of use and enjoyment by the public at large as of right.
16. In summary, only three of the maps viewed show a footpath in the location of the application route, but it is not possible to identify from these documents if it is a public or private way. Therefore, documentary evidence is not supportive of the

existence of a public right of way in the location of the application route and is not sufficient to *reasonably allege* that a public right of way exists over the route.

## **User Evidence**

17. Under section 31(1) of the Highways Act 1980, a route may be deemed to have been dedicated as a public right of way if it has been subject to sufficient public use and enjoyment, as of right and without interruption for a period of 20 years immediately prior to the date when the status of the way was brought into question, unless there is sufficient evidence on the part of the landowner showing a lack of intention to dedicate it as such during this period. A public right of way arising by this manner is known as “statutory dedication”.
18. Should the case for statutory dedication fail, then common law dedication may be considered. There is no fixed period of use required for common law dedication, but it is generally accepted that the level of public use of a route should be greater where shorter periods are relied on. The evidence must demonstrate that there has been sufficient use of the route by the public at large and as of right to show that it has been accepted by the public and that the landowner had intended to dedicate it as a public right of way either expressly or impliedly. The person or people who had owned the land throughout the period of use relied on must have had the legal capacity to dedicate the route as a public right of way, and their actions or acquiescence towards people using the way are important in establishing if a public right of way has arisen by common law dedication.

### **Statutory dedication – section 31(1) of the 1980 Act**

19. It is important to identify when the public’s right to use the route was brought into question so that the 20-year statutory term can be calculated retrospectively from that date. For the right of the public to use the application route to have been brought into question, the landowner must have challenged it by some means sufficient to have brought home to the public that their right to use the way is being challenged, so that they are informed of the challenge and have a reasonable opportunity of meeting it.<sup>2</sup> The landowner can challenge the public’s right to use the route by putting a barrier across it, locking a gate or by putting up a notice forbidding the public to use the path, for example. Not every user needs to be aware of the challenge, but by whatever means are employed it must be sufficient to make it likely that some of the users of the application route are made aware that the landowner has challenged their right to use it.<sup>3</sup>
20. User Evidence Forms submitted by witnesses suggest that locked gates and fencing were erected in June or July 2017 to prevent unauthorised access along the

---

<sup>2</sup> Lord Denning in *Fairey v Southamton CC (CA)* [1956] 2 All ER 843

<sup>3</sup> Mr Justice Dyson in *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset CC* [1999] EWHC Admin 582, para.17

application route. A notice was also erected stating 'Private Grounds. NO THRU ACCESS' along with a further notice stating 'Warning. These premises are under 24 hour CCTV surveillance'. Ten user witnesses reported that they stopped using the route because of the gates and notices. They state that a gate, fencing and notices were at the western end of the application route where it meets Hall Drive, marked as point C on the plan. A further locked gate was erected at point B. This demonstrates that the installation of the locked gates, fencing and notices across the application route in June or July 2017 was sufficient to have brought home to the public that their right to use the way had been brought into question. Calculating 20 years retrospectively from June 2017 gives rise to the statutory term June 1997 – June 2017. This period will be referred to hereafter as "the relevant statutory term".

Comments on the user evidence

21. The evidence of use of one user has been partly discounted because of omissions in the user evidence form relating to use by bicycle where it is not possible to ascertain the period of time they had used the route on a bicycle. The discounting of the use by bicycle means there is no evidence to corroborate the use of the application route as a public bridleway. Therefore, the evidence of use of nine users and partial use of one user can be taken into consideration in determining if a public footpath has arisen by statutory dedication.

Use and enjoyment by the public at large

22. The user evidence suggests the route was predominantly used to connect Boultham with the High Street. Reasons for use include pleasure, dog walking, exercise, leisure, the school run and to avoid cycle and car traffic.

Use on foot

23. The user evidence suggests that there was public use by nine users on foot spanning the relevant statutory term.
24. A further one user claimed public use of the application route on foot for part of the relevant statutory term. This period of use is 2016-2017.
25. The user evidence suggests that the application route was subject to pedestrian use by nine users throughout the first 18 years of the relevant statutory term (1997-2015). Usage increased to ten users from 2016 to the end of the relevant statutory term in 2017.
26. Frequency of pedestrian use of the application route varies with five users claiming to have used it daily, one user twice weekly, one user 2-3 times per week, one user 3-4 times per week, one user weekly, and one user '*variable*' (being sometimes five times a week, others monthly).

*Interruptions and evidence of an intention not to dedicate the application route as a public right of way by the landowners*

27. In the judgement *Fairey v Southampton County Council* [1956] 2 All E.R., Lord Denning stated that for there to be sufficient evidence that there was no intention to dedicate the route as a public right of way, there must be evidence of some contemporaneous, overt and objective acts by the landowner such as to show the public at large, namely the people who used the path, that they had no intention to dedicate. This view was upheld by the judgement *R (Godmanchester Town Council and Drain) v Secretary of State for Environment Food and Rural Affairs* [2007] UKHL 28.
28. Images available on Google Street View between 2009-2015 show a padlocked metal field gate and fence railings at the western end of the application route, marked as point C on the plan. The gate and railings appear to be old and rusty. There is a gap (measured as 30 centimetres during a site visit) to the right between the field gate and a brick bridge. To the left of the field gate are metal fence railings which appear to have been bent to allow a gap (measured as 34 centimetres during a site visit) between the railings and the field gate. Seven of the users stated that a gate had been in position for many years. Three users stated that the gate was locked, three that it was not locked, and one did not comment. The earliest recording of a locked gate was the 1960s, with various dates since then. The gate was thought by the users to be to prevent vehicular access and to allow for mowing of the bank. However, the Google Street View images and site photographs taken by the County Council in 2017 support that gate was closed and padlocked from at least 2009 to 2017, and evidence of several users corroborate this and suggest that the gate was locked much earlier than 2009. The railings and closed padlocked gate would suggest that there was an intention by the landowner to prevent access by the public at large. In *R v Secretary of State for the Environment ex parte Blake* [1984] JPL 101, Walton J stated '*it would....be impossible ever for a landowner to prevent the acquisition of a right of way over land....by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way round and then....claim that they were using the way....*'. The existence of the padlocked gate and railings is not consistent with an intention to dedicate, and they amount to an interruption to the public use and enjoyment of the application route in the meaning of section 31 of the Highways Act 1980.
29. The neighbouring property owners allege that in 2017 the metal railings were sawn off and removed, which is evident from the site visit photographs taken in 2017. A new metal gate and fencing were then erected.
30. As stated at paragraph 17, for long usage of the application route to give rise to a presumption of dedication, the user must have been as of right, that is without force, without secrecy and without permission. In this case, the bending and eventual removal of the fence railings to the left of the gate at point C on the plan would constitute use of force to access the application route.

31. In the case *Betterment Properties (Weymouth) Ltd v Dorset County Council & Anor* [2010] EWHC 3045 (Ch), Morgan J considered the application of the principles of user without force and contentious user. He stated ‘...a reasonable person using the land and knowing the facts which I have found existed would appreciate that the landowner objected and continued to object to that use of the land and that the landowner would back the objection by physical obstruction to the extent possible.’ He continued ‘I find that a reasonable user of the land would have known that the fences and hedges had been broken down or cut. Many users of the land came on to the land by means of gaps in the fences and hedges. It would have been clear enough to such a reasonable user of the land that one of the purposes of the fences and hedges being there was to prevent the public accessing the land at those points. It would have been clear enough to a reasonable user of the land that the gaps had been created (against the wishes of the landowners) by persons wanting to gain access at such a point’.
32. The existence of the locked gate and fencing at point C on the plan is sufficient to make it clear to the public that the land beyond it was not accessible to them. The gap to the right of the gate was not of sufficient width to allow reasonable access to the bank. It would have been clear to a reasonable user of the application route that the fence railings to the left of the gate were there to prevent access to the bank and that the railings had been bent out of position in order to gain access to the bank against the wishes of the landowner. Therefore, the use is considered to be with force and contentious (i.e., not as of right) throughout the whole or during part of the relevant statutory term. For this reason and because the existence of the closed padlocked gate and railings across the westernmost end of the application route during the 20-year relevant statutory term June 1997 – June 2017 is not consistent with an intention to dedicate on the part of the landowner and that they amounted to an interruption to the public use and enjoyment of the application route, a public right of way cannot be *reasonably alleged* to have been established by statutory dedication over the relevant statutory term.

### **Dedication at Common Law**

33. As the evidence fails to satisfy statutory dedication, dedication at common law is considered. There is no record of the path being expressly dedicated so whether dedication is implied is assessed.
34. The process that should be employed to assess whether implied common law dedication of a public right of way has arisen is outlined at paragraph 10 of the judgement *Slough Borough Council v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 1963 (Admin), where Ouseley J stated ‘the dedication is found at or before the start of the period of use, as the more probable justification for the subsequent use, rather than trespass or tolerance. In effect, the decision-maker works back through the evidence of use to determine whether proper inference from it is that the use began with a dedication. But drawing that inference requires no set

*period of use to be examined, but rather the whole period of use has to be considered, to see if dedication is the more probably explanation for the use, than trespass or toleration’.*

35. It has not been possible to identify a common law term. The fencing and gate have been in existence for longer than the relevant 20-year statutory term. User evidence suggests they were in place from at least the 1960s. There is no user evidence available prior to this to support a common law term.
36. Whilst there is no statutory minimum level of public use required to raise implied dedication at common law, the judgement *Mann v Brodie* [1885], a Scottish public highway case heard by the House of Lords, held that the number of users must be such as might have been reasonably expected if the road in dispute had been an undoubted public highway. Given that the basis of the implied dedication arises from a landowner's acquiescence to factual public use of a route *as of right*, there must have been a sufficient level of open use of the application route by the public throughout the term identified to show that had the landowner been observant or present they would have been aware of that use and that they had acquiesced with it. This means that the level of use required to give rise to implied dedication at common law is lower for a route located in a rural setting or small village compared to an urban area where use would be expected to be greater, for example.
37. Generally, most of the use would originate from the local area, which is the case here as all the people who completed user evidence forms resided either in or just outside the Boutham electoral ward. When taking into account the size of the Boutham ward (the population was 7,428 in 2002, 7,433 in 2011 and 10,350 in 2017) and that the application route would connect Boutham to the High Street, one would have expected to have seen evidence of greater usage of the route over the statutory term 1997-2017 than just the ten people (or 0.13% of the population of the ward when taking the 2011 census data into consideration) to *reasonably allege* that a public right of way has arisen by implied dedication at common law.
38. Furthermore, the existence of the closed padlocked gate and metal fence railings across the westernmost end of the application route outlined in paragraph 28 above is fatal to common law dedication for the same reasons as it is fatal to statutory dedication, i.e., use is considered to have been by force and contentious. Also, for common law dedication the evidence must show that the landowner had intended to dedicate the route as a public right of way, but these structures do not support such an intention. For these reasons, the case for common law dedication also fails.

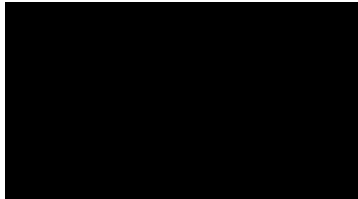
## **Decision**

39. **That a Definitive Map Modification Order under section 53(3)(c)(i) of the 1981 Act should not be made.**



40. The decision is made on two grounds. Firstly, there is insufficient documentary or map evidence to *reasonably allege* that a public right of way exists in the location of the application route. Secondly, the user evidence suggests that there has been an insufficient level of use and enjoyment of the application route by the public to *reasonably allege* that a public right of way has arisen by statutory or common law dedication, and the existence of the locked gate across the start of the application route at Hall Lane shows that use was both contentious, by force and that the landowner had no intention of dedicating the route as a public right of way.

**Signed:**



**Name:**

Andrew Pickwell

**Position:**

Senior Definitive Map Officer

**Dated:**

4 June 2025