



Order Decision

Inquiry opened on 19 September 2023

Site visits undertaken on 19 and 20 September 2023

by Mark Yates BA(Hons) MIPROW

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

Decision date: 20 November 2023

Order Ref: ROW/3311104

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Lincolnshire County Council, Addition of Restricted Byway Number 1188 Lincoln, Definitive Map Modification Order 2021.
- The Order was made by Lincolnshire County Council ('the Council') on 28 May 2021 and proposes to add a restricted byway ('the claimed route') to the definitive map and statement.
- There were three objections and eighty-two representations of support outstanding at the commencement of the inquiry.

Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.

Procedural Matters

1. A number of people raised concerns about a photograph taken by the main objector (Mr Hawes) prior to the opening of the public inquiry. However, I was subsequently informed that this photograph had been deleted. Additionally, I understand that a photograph taken by a reporter on the second day on the inquiry only included those people who were willing to be shown in this image.
2. I have reached my decision on the basis of the evidence tendered at the public inquiry and the only documents accepted after the close of the inquiry comprise of legal authorities cited in the closing submissions.

Main Issues

3. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, for me to confirm the Order, I must be satisfied that the evidence shows on the balance of probabilities that a public right of way subsists.
 4. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ('the 1980 Act'). This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
 5. If statutory dedication is not applicable, I shall consider whether the evidence is supportive of dedication under common law.
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Legal Submissions

6. I shall first consider the legal submissions made by Mr Dunlop on behalf of Mr Hawes and the Council's responses regarding three matters, namely, Article 6 of the European Convention on Human Rights ('ECHR'), the laches doctrine and Section 72 of the 1835 Highways Act.

Human rights

7. Article 6(1) of the ECHR states: *'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'*
8. The inquiry constitutes a public hearing for the purpose of Article 6. No issue is taken with the fairness of the inquiry or my independence and impartiality. The matter of concern stems from the time taken for this case to be determined. A period of 15 years has passed since the application was made to add the claimed route to the definitive map. In essence, it took 13 years for the Council to reach its decision to make an Order.
9. I must stress from the outset that I do not consider it acceptable for parties to have to wait such a lengthy period for an application to be determined. Surveying authorities, such as the Council, should make sufficient resources available to meet their statutory duties. It also appears that the granting of planning permission for a residential property in the locality of the claimed route prompted the Council to reach a decision in 2021. Had this not occurred it may have taken even longer for this application to be determined.
10. Schedule 15 to the 1981 Act sets out the procedure to be adopted following a decision by a surveying authority to make an Order. If a duly made objection or representation is submitted to the Order and not withdrawn the authority is required to refer the matter to the Secretary of State for determination. Therefore, the inquiry itself arises out of Schedule 15 and can only take place after an Order has been made. The initial investigation of the application in accordance with Schedule 14 to the 1981 Act is a separate process.
11. Having regard to the above, it is likely that what constitutes a reasonable period of time for a public hearing for the purpose of Article 6 in these circumstances should be taken from the date that the objections and representations were submitted in response to the making of an Order. However, in any event, it cannot be earlier than the making of the Order. I do not consider the periods between the submission of the objections and representations, or the making of the Order, and the holding of the inquiry to be unreasonable. A further point arises in that the issue in dispute is whether a public right of way subsists. There is an overriding public interest in determining whether or not this is the case.

The laches doctrine

12. The laches doctrine is applicable where a claimant has delayed in asserting a right. Mr Hawes considers he has been disadvantaged by being prevented from calling witnesses who have passed away.
13. There is a statutory duty to modify the definitive map and statement following the discovery of evidence that a public right of way subsists, and I have been

appointed to determine this matter. I am not satisfied that the time taken for the Council to investigate the application removes the need to now reach a decision on the available evidence.

14. In terms of any potential prejudice arising from the length of time taken to determine the application, this issue could potentially apply to those supporting an application and those who oppose it. Mr Hawes could have gathered evidence when he was made aware of the application in 2008. Further, given my later assessment of the evidence in relation to those who have had an interest in the land crossed by the claimed route, I find there to be little substance in the argument that Mr Hawes has been disadvantaged by the delay in determining the application.

The effect of Section 72 of the 1835 Highways Act

15. In light of the evidence in support of use of the claimed route by pedestrians and cyclists, the Council made an Order to record the route as a restricted byway. The claimed route links at its southern end with the footway of Doddington Road and at the northern end it joins with the footway of Boswell Drive. Evidence was provided at the inquiry in support of people continuing beyond the claimed route on a cycle, for instance by riding along the Doddington Road footway.
16. The Council accepts that riding a pedal cycle on a footway, being a way on foot beside a carriage way designed for vehicle use, if proven, is a criminal offence in accordance with Section 72 of the 1835 Highways Act. However, attention is drawn to the claimed route linking with a highway at either end rather than private land to which the public have no right to access.
17. I find the submissions of Mr Dunlop to be more persuasive on the issue of whether the claimed route could have been dedicated as a restricted byway. The route terminates at each end with a highway over which it is a criminal offence to cycle. There is also the potential for cyclists riding on the footways to constitute a public nuisance. In essence, the designation of the claimed route as a restricted byway would lead to cyclists not having the right to continue at each end unless they were to dismount. The oral evidence did not point to cyclists dismounting at each end of the claimed route. This pattern of use is unlikely to change if the route were designated as a restricted byway.
18. I consider on balance that as cyclists are not lawfully permitted to cycle when joining or leaving the claimed route at either end the route cannot be found to be a restricted byway. Accordingly, the user evidence should be assessed to determine whether a public footpath subsists.

Reasons

When the status of the claimed route was brought into question

19. The Council submits that the claimed route was first brought into question by the application, dated 25 September 2008, to add the route to the definitive map and statement. I accept that this application would have clearly served to bring the status of the route into question. It is therefore not necessary to consider any later action undertaken in relation to the claimed route.
20. However, I note that a letter from the applicant (Mrs Parker), dated 22 September 2008, outlines that she had started to gather evidence in support of her application in 2007, but she had been told that the landowners were at the time agreeable to

dedicating the route. Additionally, she refers to building works commencing in 2007 which made the route unstable and the builder informing people that they could not walk over this track. There is a lack of information regarding the extent of the challenges and whether they only related to the situation whilst works were being undertaken in the immediate locality of the route. Further, there is a lack of corroborating evidence from people who used the route of challenges being issued during this period. It appears that the works related to the construction of 112 Doddington Road.

21. I shall proceed initially on the basis that the application of 2008 served to bring the status of the claimed route into question. Therefore, the relevant period to be initially considered for the purpose of statutory dedication is 1988-2008 ('the relevant period'). However, I acknowledge that the potential challenges in 2007 could have served to bring the route in question earlier and I shall have regard to this matter when reaching my conclusions.

Assessment of the user evidence

Background

22. The documentary evidence is supportive of the claimed route previously forming part of a private access track between Doddington Road and Middlebrook Farm. Land in this locality has subsequently been the subject of housing development undertaken in stages between the late 1960s and the early 1980s. A consequence of this development is that Middlebrook Farm ceased to exist. This is relevant given that the use detailed below largely relates to local residents and visitors to properties in the locality. Any earlier use is likely to have been of a permissive nature to access the farm.
23. Over 120 user evidence forms ('UEFs') were submitted at different stages in support of use of the claimed route on foot and cycle. In light of my conclusion in paragraph 18 above, the cycling use should be discounted. Additionally, I have not had regard to the evidence of use which sits outside of the relevant period. The Council also does not rely on those forms which fail to include relevant information regarding the alleged use of the route. I address below the issue of permissive use. The availability of other potentially shorter routes to particular destinations does not mean that a person did not use the claimed route in the manner set down in their evidence.
24. A number of people have submitted letters of support which in some cases provides details in relation to use of the route. However, given the amount of information provided, the evidential value of these letters will generally be limited.
25. Mr Dunlop draws attention to the case of *Gestmin SGPS v Credit Suisse (UK) Ltd & Anor 2013 EWHC 3560* in terms of the comments of the judge regarding various issues arising out of evidence given by witnesses. Notwithstanding that it related to a commercial case, I note the points raised in this judgment. However, the purpose of the written and oral evidence presented to the inquiry is to enable me to reach a conclusion on what is most likely to have occurred in relation to various relevant matters.
26. It is apparent that the UEFs were distributed or obtained on request for people to complete. It may be the case that requests have been made for people who have used the route to complete a UEF but there is no evidence of people being told what responses should be included in the forms. Furthermore, it was outlined at

the inquiry that the additional witness statements were compiled following an interview held using Microsoft Teams. The Council officer produced a draft statement in light of the information provided at the interview, and this was sent to the person concerned for approval. Some of the witnesses signed their statement without the need for amendment and others asked for changes to be made before signing it. Witnesses called by the Council spoke to the information contained in their statement and were cross-examined on its contents and other relevant matters.

27. There may be gaps in the knowledge of some witnesses or they may not recall certain events given the time that has elapsed since the end of the relevant period. Although, I note that the initial set of UEFs were completed in 2008. Conclusions can only be reached from looking at the totality of the evidence. In doing so it would usually be expected that greater weight is attached to those people who gave evidence at the inquiry which was subjected to cross-examination. Further clarification on certain matters may be provided by other sources, such as site photographs and correspondence. There will invariably be a need when considering conflicting evidence to determine what is the most credible explanation.

Permission

28. The Council draws attention to a conveyance of 7 January 1958 which granted a right of access along an occupation road, which encompassed the claimed route, for the purchasers of an adjacent parcel and their successors in title. Particular properties on Eastbrook Road and Boswell Drive are now located on the land within the 1958 Conveyance.
29. The same occupation road is included in an abstract of title of 1912 as providing access to another parcel of land on which particular properties on Doddington Road, Boswell Drive, Boswell Grove and Bramley Court are now located. Potential private rights of access were also identified in connection with certain properties on Doddington Road. Two additional people acknowledge that permission was granted to them to use the route. However, it was clear from the evidence at the inquiry that in contrast to what had been stated in a UEF, this was not the case for another user.
30. In light of the above, the Council considered that a number of the UEFs should be discounted as the person lived at a property which may have the benefit of a private right of access over the claimed route. There are no deeds presently available in relation to the relevant properties. This means that it is not certain that the people concerned do have a right of access over the route. Nonetheless, I accept that there is clearly the potential for this to be the case and it would be appropriate to err on the side of caution. I have therefore discounted the evidence of use from the relevant users of the route as use by them may have been '*by right*' as opposed to '*as of right*'. However, a distinction needs to be drawn between the use by people to visit a property which may have the benefit of a private right of access and their use on other occasions that was not for this purpose.

Interruptions

31. A number of the users refer to the erection of a five-bar gate across a proportion of the claimed route. Mr Hawes says that this was erected on his behalf in the early part of 2008, and this is supported by other pieces of evidence. It is apparent that the purpose of this gate was to stop vehicles from continuing along the whole

length of the route. This structure did not interrupt pedestrians as they could pass by way of a gap on either side of the gate.

32. A written statement from one of the users from 2010 refers to heaps of earth being placed on the route to stop vehicles using it following a recent development. The Council believes this is likely to have corresponded to the development undertaken in relation to 112 Doddington Road. Mr Hawes also refers to a ditch that was dug across the claimed route and various matters that would have obstructed the route during the construction of 1a Bramley Court in 2004-05.
33. None of the users recall any action that served to interrupt their use of the claimed route during the relevant period. This is supported to some extent by photographs taken of the site. Photographs taken by Mrs Parker in June 2007 show the route to be open and unobstructed and nothing is apparent on the aerial photographs that span the years 1999, 2003, 2005 and 2006. It is also apparent that the route was available to use in 2005 in light of photographs and notes from a site visit undertaken by a Council officer in relation to a proposed dedication (see paragraph 41 below). Overall, there is no evidence in support of Mr Hawes' assertion that there was a ditch across the route.
34. It may have been the case that action was taken at times to deter unauthorised use of the route by motor vehicles. There is also the potential for parked vehicles or works to have hindered access at times when development was taking place in this locality. However, I am not satisfied on balance that action was taken that served to physically interrupt pedestrian users of the claimed route to any significant extent during the relevant period.

Conclusions in relation to the evidence of use

35. I have discounted the UEFs from those people who could potentially have a private right of access over the claimed route and the incomplete forms. Nonetheless, there remains a significant body of written evidence of use on foot which can be viewed as of right (without force, secrecy and permission). It is supportive of widespread public use of the claimed route in order to walk to or from various locations in the area. I attach significant weight to the evidence of the users who spoke at the inquiry. The evidence is supportive of the route being used on a regular basis throughout the relevant period.
36. Having regard to the written submissions and oral evidence presented at the inquiry, I find that the evidence is sufficient to raise a presumption of the dedication of a public footpath over the claimed route in light of the use during the relevant period. Given the extent of the use for the twenty-year period prior to 2007, I would have reached the same conclusion if the action mentioned in Mrs Parker's letter were taken to have brought the status of the route into question.

Whether any landowner demonstrated a lack of intention to dedicate a public footpath

Background

37. I shall first outline my understanding of the main legal interests in the land crossed by the claimed route following the initial development undertaken in the area. The majority of the land was owned by Mr Noel Norman (1973-1983) and Mrs Frances Norman (1983-2018). Mr Hawes acquired a private right of access over the route in 2003 before purchasing part of the land in 2008 and the remainder in 2018.

Aside from a period of seven months, Mr and Mrs Mills owned a small part of the route before they sold it in 2018. The only other person specifically mentioned at the inquiry was Mr Jarrett who owned a property adjacent to the route prior to passing away in 2015.

38. Mr Hawes' had a private right of access during the relevant period, and he gave evidence at the inquiry. The late Noel Norman had passed away prior to the submission of the application. John Norman was one of the executors for his mother and he has not responded to a request from the Council to provide a statement. A statement from Mr Mills outlines that he recognised that people had used the route throughout the relevant period, and he had not required people to ask for permission. There is also correspondence from Mr Mills which is supportive of him having taken no action to prevent use of the claimed route.
39. Any action to demonstrate a lack of intention to dedicate a public right of way needs to be undertaken by a landowner or be made on their behalf. Action adopted by others could only potentially serve to bring the status of the way into question.

Dedication proposals

40. There were two occasions when John Norman entered into discussions for the dedication of the claimed route as a public right of way. The first occasion spanned the period 1981-87 and involved the City of Lincoln Council. One issue that appears to have arisen was the cost of bringing the path up to a suitable standard for adoption as a highway. Secondly, the City Council was made aware of the existence of private vehicular rights over the route. Correspondence from Mr Jarrett in January 1986 sought clarification regarding the impact on his private right of way and the potential development of his garden. The dedication proposal was not progressed potentially due to these issues. Clearly this occurred well before the commencement of the relevant period.
41. The second occasion spanned the period 2005-2010. This proposal involved Mr Norman, Mr and Mrs Mills and the Council. Mr Norman stated in a letter of 28 July 2008 that the executors had withdrawn their support for the proposal. He later wrote to the Council on 12 April 2010 to say that there had been a change in circumstances and the executors were now willing to enter into an agreement to dedicate a public right of way. However, this proposal was abandoned later in 2010 as the Council could no longer commit to taking on the liability and maintenance of the route or the costs of bringing it up to a suitable standard. Additionally, the application to add the route to the definitive map had been submitted in 2008.
42. These proposals related to the voluntary dedication of a public right of way, presumably in accordance with Section 26 of the 1980 Act. However, this issue would not prevent a public right of way from being dedicated in accordance with Section 31 of the 1980 Act. The correspondence does not indicate that the landowners were opposed to public use of the route on foot or had taken steps to deter it. Notwithstanding that the first proposal had been abandoned prior to the onset of the relevant period, Mr Jarrett's concern appears to relate to the retention of his private right of access and the potential to develop his garden. However, there is nothing from the correspondence to suggest that he had taken any action in relation to pedestrian use of the route.

43. A file note, dated 15 December 2005, records that a Council officer had spoken to Mrs Linda Hawes regarding the second proposed dedication and the main issue highlighted related to the prevention of unauthorised vehicular use. Another file note of 16 February 2005 refers to discussions with Mr Jarrett and Mr Hawes in relation to the erection of bollards to prevent unauthorised vehicular use. No reference is made to there being opposition to use of the route by pedestrians. A further Council file note of 12 April 2010 records a comment by Mr Norman that he *'believed the route was a public right of way and that this had been the case since at least the 1960s'*.

Sign

44. Some of the users have referred to a sign previously being in place towards the southern end of the claimed route. It is not surprising that others did not mention seeing the sign given that it is shown largely covered by vegetation on a photograph taken by Mrs Parker in 2007. The wording on the sign is unclear on the photograph and differing views have been provided regarding what the sign actually said. However, most of the people who recall the sign believe that it referred to the former Middlebrook Farm. Whilst there is a suggestion that the sign could have historically also referred to the route being a private road, this would not indicate that there was no intention to dedicate a footpath. In any event the farm had ceased to exist before the commencement of the relevant period.

Barriers and obstructions

45. As outlined above, a five-bar gate was erected in 2008 to prevent unauthorised use by motor vehicles and a gap was left on either side by Mr Hawes. In terms of other matters raised in relation to potential interruptions to use of the route, I did not find that action was taken which served to interrupt use of the claimed route to any significant extent during the relevant period. It cannot be concluded from the evidence as a whole that any action was taken to obstruct the route to such an extent in order to bring it home to the public that their use of the route was contentious.

Verbal challenges

46. Mr Hawes has referred to informing people that the claimed route was not a public right of way since he acquired a right of access over the route. Three statements have been provided in support, which refer to the parking of vehicles on the route and Mr Hawes speaking to people regarding the status of the route. The statements contain little information, and these people did not give evidence at the inquiry. Accordingly, I consider that limited weight should be given to them.
47. Mr Hawes was unable to provide any other corroborating information regarding the extent of these challenges. The same is applicable to the assertion that Mr Jarrett challenged people on the claimed route. Nor is it evident that any challenges by Mr Hawes, or permission for the public to use the route, during the relevant period were at the request of the landowners. It is also evident that during the discussions involving the proposed dedications that the concerns expressed by those with a right of access over the route centred on unauthorised vehicular use. This was reflected by the erection of a gate by Mr Hawes to stop such use.
48. None of the people who have completed a UEF or submitted a statement in support of use of the claimed route state that they were challenged when using the route during the relevant period. In contrast, there is evidence from some of the users

that point to challenges being issued by Mr Hawes in conjunction with the erection of fencing in more recent years to deter use of the claimed route.

49. The user evidence is substantial in volume and there is a lack of additional evidence regarding the alleged challenges. Overall, the evidence weighs more heavily in favour of no action being taken during the course of the relevant period which was sufficient to make the public aware that there was a lack of intention to dedicate a public right of way.

Conclusions on the actions of the landowners

50. Having regard to the above, I do not find on balance that action was taken during the relevant period which was sufficient to demonstrate to the public that there was a lack of intention to dedicate a footpath over the claimed route.

Conclusions

51. I have found it more likely that the status of the claimed route was first brought into question by means of the application. Whilst I acknowledge that this could have occurred earlier than 2008 by virtue of potential challenges in 2007, the evidence as a whole does not point to this being the case.
52. I have concluded that the evidence of use during the relevant period is sufficient to raise a presumption of the dedication of a public footpath over the claimed route. I would have reached the same conclusion from the evidence of use between 1987-2007. Additionally, I find on balance that no action was taken which was sufficient to demonstrate to the public that there was a lack of intention to dedicate this path.
53. Therefore, I conclude on the balance of probabilities that a public right of way subsists, and the Order should be modified to record a footpath.

Width

54. A width of 2 metres was included in the Order on the basis that this was considered to be an appropriate width for a restricted byway in this location. This width is challenged by Mr Hawes, and he refers to the acceptance of a 1.5 metres width for a right of way when planning permission was approved for his property.
55. In light of my conclusion that the claimed route should be recorded as a footpath rather than a restricted byway, I consider that a width of 1.5 metres would be a reasonable width to be included in the Order. The Order should therefore be modified to include a width of 1.5 metres for the route.

Other Matters

56. Reference has been made to various matters, including the availability of other rights of way, the impact of recording this route, safety concerns and the potential diversion of the path. However, these matters are not relevant to my decision, which is concerned with determining whether a public right of way has been shown to subsist.

Overall Conclusion

57. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

58. I propose to confirm the Order subject to the following modifications:

- Delete all references in the Order to '*restricted byway*' and insert '*footpath*'.
- Delete '*2 metres*' from the first line of the description in Part I of the Order Schedule and insert '*1.5 metres*'.
- Delete '*2 metres*' from the eighth line of the description in Part II of the Order Schedule and insert '*1.5 metres*'.
- Replace the notation for a restricted byway on the Order Map with the notation for a footpath and amend the map key accordingly.

59. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

COPY OF MODIFIED MAP - NOT TO SCALE

