



## Order Decisions

Inquiry opened on 11 August 2015

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 8 October 2015**

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### **Order Ref: FPS/K2800/7/17**

### **Referred to as 'Order A'**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as The Northamptonshire County Council (Public Footpath FD18 – Parish of Staverton) Definitive Map Modification Order 2013.
- The Order was made by Northamptonshire County Council ("the Council") on 11 July 2013 and proposes to add a footpath ("the claimed route") to the definitive map and statement, as detailed in the relevant Order Map and Schedule.
- There was one objection outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision.**

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### **Order Ref: FPS/K2800/4/20**

### **Referred to as 'Order B'**

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and is known as The Northamptonshire County Council and The Warwickshire County Council (Public Footpath FD5 (part) – Parish of Staverton in the County of Northamptonshire and Parish of Wolfhampcote in the County of Warwickshire) Public Path Diversion Order 2013.
- The Order was made by the Council on 11 July 2013 and proposes to divert a section of Footpath FD5, in the parish of Staverton, as detailed in the relevant Order Map and Schedule.
- There was one objection outstanding at the commencement of the inquiry.

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

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### **Procedural Matters**

1. I held a public inquiry into the Orders on 11 and 12 August 2015 at Staverton Village Hall having undertaken an unaccompanied visit to the site the previous day. I undertook a further site visit accompanied by the interested parties on 11 August 2015.
2. At the inquiry, I highlighted various matters arising out of Order A and the Council requests that modifications are made to the Order. No objections were made to the requested modifications. I address these proposals and the structures on the claimed route in paragraphs 22-25 below. Details of the grid references I requested from the Council have been circulated to the other parties for information.
3. The objector to Order A (Mr Fitzgerald) has concerns about the extent of the consultations undertaken by the Council. In respect of the making of this Order, the Council confirms that it complied with all of the statutory requirements of Schedule 15 to the 1981 Act. Mr Fitzgerald was notified of the making of the Order and he made an objection to it. In the circumstances, I am not satisfied that any procedural issue arises out of the making of the

Order. It is not my role to investigate the procedure undertaken in accordance with Schedule 14 to the 1981 Act, prior to the making of the Order.

4. Staverton Parish Council ("the Parish Council"), the objector to Order B, did not pursue the issues raised regarding the notice advertising the inquiry and there is nothing to suggest that anyone was misled in their understanding of the purpose of the inquiry.
5. All of the points referred to below correspond to those delineated on the respective Order Maps.

#### **Main Issues – Order A**

6. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence shows that a right of way which is not shown in the map and statement subsists. The burden of proof to be applied is the balance of probabilities.
7. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the 1980 Act. This requires consideration of whether there has been use of a way by the public, as of right<sup>1</sup> 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.
8. If the statutory test fails, I shall give consideration to whether common law dedication is applicable. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Evidence of use may support an implication of dedication by the landowner and acceptance of the dedication by the public.

#### **Main Issues – Order B**

9. The Order is dependent upon the confirmation of Order A and is made under Section 119 of the 1980 Act. For me to confirm the Order, I must be satisfied that:
  - (a) it is expedient, in the interests of the owner of the land crossed by the footpath, that the path should be diverted;
  - (b) any new termination point for the path<sup>2</sup> is substantially as convenient to the public;
  - (c) the new path to be provided will not be substantially less convenient to the public; and
  - (d) it is expedient to confirm the Order having regard to:
    - (i) the effect of the diversion on public enjoyment of the path as a whole, and

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<sup>1</sup> Without force, secrecy or permission

<sup>2</sup> It should be on the same highway or a highway connected to it

(ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and the land over which the new path would be created together with any land held with it.

10. I shall also have regard to any material provision contained in a rights of way improvement plan ("ROWIP") for the area when considering the Order.

## **Reasons – Order A**

### ***Background***

11. The claimed route commences from the junction with Footpath FD7 at point A and continues, via points B, C, D, E and F, through to the junction with Footpath FD5 at point G. Footpaths FD5 and FD6 can then be used in order to return to point B. The route as a whole is referred to by some of the parties as "the loop".

### ***Statutory dedication***

*When the status of the claimed route was first brought into question*

12. The Council asserts that the status of the claimed route was brought into question by action taken by Mr and Mrs King after they acquired some of the land crossed by the route. This is supported by the evidence of particular users of the claimed route. The action appears to relate to the erection of permissive notices and obstructions on the route.

13. There is uncertainty regarding when this action was first undertaken from the written and oral evidence. I am not necessarily convinced by the Council's suggestion that the bringing into question can be taken to arise from the earliest possible date that these measures were undertaken by Mr and Mrs King. However, another landowner (Mr Jeffries) has provided evidence that notices were also erected towards the end of 2004 at point C and near to point G to indicate that use of the route was by permission. This action was confirmed by others at the inquiry.

14. Having regard to the above, I conclude on balance that the status of the claimed route was brought into question towards the end of 2004. This means that the period for the purpose of statutory dedication is 1984-2004 ("the relevant period").

*Evidence of use by the public*

15. It is apparent that fourteen preliminary user evidence forms ("UEFs") were sustained, on behalf of sixteen people, in support of use of the claimed route. The Council undertook interviews with eleven people and this yielded the information set out in more detailed UEFs. Six people gave evidence at the inquiry in relation to their personal use. In assessing the user evidence, I give greater weight to the later forms and the oral evidence.

16. I have disregarded the evidence of Mrs Weaver as it is apparent that her use did not encompass the claimed route. Further, a few of the users only used a proportion of the route. Whilst the number of users in each year of the relevant period is not substantial, they have provided evidence of use with friends and family and observed use by others on occasions. The extent of the use is generally stated to have occurred on a frequent basis. Mr Fitzgerald and Mr Jeffries also acknowledge that the claimed route was used by the public.

The fact that this use was for recreational purposes over a broadly circular route does not prevent a public right of way from being dedicated.

17. I note that there are some references in the original UEFS to permissive use but the later forms and oral evidence are not supportive of the use of the claimed route being by way of permission from a landowner. This was most notably covered in the oral evidence of Mr Maplethorpe. There is nothing to suggest that the use was conducted in secret or by force.
18. It is also apparent that some people continued between points B and G over an alignment that does not correspond to the existing public rights of way. This route was pointed out by Mrs Hurst during the accompanied site visit and is evident on some of the maps attached to the later UEFs. I accept that there has been use of this additional route. However, I am not satisfied from looking at the user evidence as a whole that it can be determined that the use of the alternative route was sufficient to raise the presumption of the dedication of a footpath.
19. Overall, I consider that the evidence is sufficient to demonstrate on balance that there was use of the claimed route throughout the relevant period to such a degree to raise a presumption of the dedication of a public footpath over the claimed route in accordance with Section 31 of the 1980 Act.

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

20. There is no evidence of any challenges being made to users of the claimed route during the relevant period.

*Conclusion*

21. For these reasons I conclude on the balance of probabilities that the claimed route has been dedicated as a public footpath in accordance with Section 31 of the 1980 Act and the test set out in paragraph 6 above is satisfied. Therefore, there is no need for me to consider the issue of common law dedication.

***The Order***

22. The Regulations<sup>3</sup> specify that this type of Order should take effect on the date of confirmation and I agree with the Council that paragraph 3 of the Order should be modified accordingly. I also consider that Part III of the Order Schedule and paragraph 6 of the Order should be removed as they are not necessary. The modification of the definitive statement, including the recording of any limitations, falls within Part II of the Order Schedule.
23. Although the locations of particular features on the ground may not correspond entirely with the ways marked on the definitive map, I am not satisfied that it has been shown that this issue has any bearing on the alignment of the claimed route on the Order Map. In respect of point G, I concur with the Council that, for the avoidance of doubt, it is appropriate to describe this point as being to the "*east of the stream*".
24. There is evidence of structures being sited at particular locations during the relevant period. However, there is a little uncertainty regarding whether people obtained access by way of a stile or gate at certain points. From the evidence of Mr Jeffries and the users I consider on balance that the route was dedicated subject to the limitations of structures at points which correspond to

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<sup>3</sup> The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993

three longstanding boundaries, as outlined below. It will be for the Council to address any other structures that have been erected more recently.

25. It is accepted that the location of the stile marked at point 1 is incorrect and the Order should be modified to record its correct location. I consider that the evidence suggests that people proceeded through the gate at point C as well as by means of a stile. There is also evidence to indicate that a gate was in place at the boundary to the north of point G.

### **Other Matters – Order A**

26. I acknowledge the concerns of Mr Fitzgerald regarding particular matters, such as the private right of access over a section of the route and safety and security issues. However, these matters are not relevant to whether a public right of way subsists.

### **Reasons - Order B**

#### ***Background***

27. It is clear that protracted discussions were undertaken by the Council in an attempt to gain support from the affected landowners for Order A. This ultimately resulted in the making of the Order to divert a section of Footpath FD5 where it crosses two fields in the ownership of Mr Jeffries. I accept that it is not my role to explore the merits of any alternative proposals to divert this footpath. Nor do any alternative proposals have the support of Mr Jeffries or the Council. Further, it is not appropriate for me to consider whether it was unreasonable for the Council to pursue the diversion in light of the opposition from the Parish Council.

#### ***The obstruction of the footpath***

28. On the whole, the objection relates to the diversion of the path where it crosses the northern of the two fields. This field is currently set aside for the growing of wheat and a bio fuel crop often referred to as elephant grass<sup>4</sup>. It was apparent from the accompanied site visit that the existing path, as recorded on the definitive map, is obstructed by these crops. An alternative route is available across the field between the two crops. The proposed path in the Order is also available for the public to use and follows a field headland.
29. The Parish Council has made submissions regarding the obstruction of the footpath, which is alleged to have occurred over a period of years. A copy of a letter of 9 June 1997 from the Council to the Parish Council, which includes a reference to the obstruction by crops of Footpath FD5, has been supplied. The evidence of the Council's Rights of Way Officer (Mr Wedgbrow) is that there have been no reported obstructions of this path within the last 10 years. Whilst the route of the footpath recorded on the definitive map was obstructed during the time of my visit, it is not possible to determine how often this has been the case. Further, the pragmatic approach taken by Mr Jeffries appears to have been an attempt to provide the public with a route across the field in the locality of the footpath.
30. The Parish Council submits that some Council policies can be inferred from its published application form for the diversion of rights of way, notwithstanding that no application was made by Mr Jeffries in this case. It is submitted that

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<sup>4</sup> This term is used for ease of reference but I note that its correct name is *Miscanthus Giganteus*.

the Council did not follow its normal reasonable policy of requiring paths to be free of obstructions beforehand. In support, reference is made to the case of *R (on the application of Kate Ashbrook) v East Sussex County Council [2002]* ("Ashbrook").

31. I am not convinced that the circumstances in the present case are comparable with those in the *Ashbrook* case. However, it is my view that the extent to which the path has been obstructed by crops has no material bearing on the tests that I need to apply in considering the merits of the diversion. The obstruction of a public right of way is a matter that an aggrieved party should pursue with the highway authority.
32. I note the comparison made by the Parish Council to the powers available to extinguish public rights of way under Section 118 of the 1980 Act and in particular 118(6). It is accepted that the tests are different to those contained in Section 119 of the Act. However, paragraph 30 of Advice Note 9 published by the Planning Inspectorate advises that, when considering the convenience to the public of the existing and proposed paths in a diversion, an equitable comparison can only be made by similarly disregarding any temporary circumstances preventing use of the existing path by the public.

***Whether it is expedient, in the interests of the owner of the land crossed by the footpath, that the path should be diverted***

33. The Parish Council submits that there is no gain for the landowner as he has the tacit agreement of the Council to obstruct the footpath. However, I need to consider whether the route of the footpath shown on the definitive map should be diverted irrespective of the extent to which it is obstructed by crops. I do not accept that a landowner can reasonably expect to be allowed to obstruct a footpath on an indefinite basis. Mr Jeffries spoke in support of the diversion of the path at the inquiry notwithstanding the current situation regarding its obstruction by crops.
34. I find that the diversion would assist Mr Jeffries with his agricultural operations by diverting the path around the edge of an arable field. It would make it lawful for him to make the best use of his land. I also accept that the diversion of the southern section would benefit Mr Jeffries by removing a section of the footpath that runs parallel with a section of the route included in Order A.
35. In light of the above, I consider that the diversion would be advantageous to the landowner. In my view, it is expedient, in the interests of the owner of the land crossed by the footpath, to divert the path.

***Whether the new path will be substantially less convenient to the public***

36. As outlined in paragraph 27 of Advice Note 9, the judgment in the case of *R (on the application of Young) v Secretary of State for Environment, Food and Rural Affairs [2002]* confirms that convenient should be given its natural and ordinary meaning and encompasses matters such as the length of the diverted path, the difficulty of walking and its purpose. It would not therefore cover matters such as the loss of views, as suggested by the Parish Council. The issue of views is more appropriately dealt with in relation to the impact of the diversion on public enjoyment.
37. Nothing is apparent from my observations of the site or the submissions provided to indicate that the diversion would lead to the path being less convenient to the public. The diversion would provide the public with a wider

path<sup>5</sup> within a well-defined 5 metres wide headland. It follows that I do not find that the proposed path would be substantially less convenient than the existing path.

***Whether any new termination point is substantially as convenient to the public***

38. My comment above regarding the meaning of convenient is also applicable to this test. The diversion would lead to the public having to use a section of the connecting footpath<sup>6</sup> from point C in order to reach the original termination point included in the Order at point A. Nothing is apparent to me to suggest that the new termination point for the path is any less convenient for the public. The Council confirms that point A is correct for the purpose of the Order.

***The effect that the diversion would have on public enjoyment***

39. The Parish Council submits that the diversion would lead to a considerable loss of wide ranging views of the surrounding landscape. Reference is also made to notes issued by the Council to applicants for diversions which specify that a proposal should not result in lower quality or diversity of views for path users. However, I need to consider whether it is expedient to confirm the Order having regard to the impact that the diversion would have on public enjoyment. It was confirmed at the inquiry that this issue relates to the northern field crossed by the existing and proposed paths.

40. Whilst the preference for particular views is often a subjective matter, there are attractive views of the surrounding landscape from various points in this locality. In respect of this issue, regard should be given to the views available from the existing path and not the alternative route across the field. The majority of the existing path within the northern field proceeds through the elephant grass. Mr Jeffries confirms that it is a perennial crop which gradually grows from early May and it will be above head height by August. It continues to grow until October and is harvested in March or early April. This means that the views of the surrounding landscape are obscured for around 8 months of the year. During this period the views will be limited to locations where the path proceeds towards each edge of the field.

41. There are limited views of the surrounding landscape from the majority of the proposed path. However, more wide ranging views are available at some points and I particularly noted the views turning south-westwards along the connecting path from point C. To some extent I agree with the Council that the proposed path provides a pleasant route. It is also likely to provide a more enjoyable experience than walking through the elephant grass, particularly if only the recorded width of 4 feet is provided.

42. Bearing in mind the above, there may be some loss of views at particular points arising out of the diversion. However, I consider the loss of views to be fairly limited. Overall, I do not find from the evidence provided and my observations of the site that the diversion would lead to any significant loss of public enjoyment of the path as a whole.

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<sup>5</sup> The proposed path has a width of 1.8 metres compared with the current recorded width of 4 feet for the footpath.

<sup>6</sup> A section of the path created by virtue of Order A

***The effect of the diversion on other land served by the existing path and the land over which the new path would be created***

43. No issues have been identified in relation to any land served by the existing path. The proposed path proceeds over land in the ownership of Mr Jeffries who clearly supports the Order.

***The consideration of the Order in light of any material provision contained in a ROWIP***

44. There is nothing to suggest that the Order is contrary to any material provision contained in the relevant ROWIP.

***Conclusions***

45. I have concluded that it is expedient to divert the footpath in the interests of the landowner and that the proposed path is not substantially less convenient than the existing path. Further, the proposed new termination point is substantially as convenient as the one that presently exists. Having regard to the other relevant matters, including the impact on public enjoyment, I find that it is expedient to confirm the Order.

**Other Matters – Order B**

46. The future maintenance of the footpath is a matter for the Council to determine.

**Overall Conclusions**

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

**Formal Decision – Order A**

48. I confirm the Order subject to the following modifications:

- Delete “twenty eight days from the date of confirmation” from the paragraph numbered 3 in page 1 of the Order and insert “on the date of confirmation”.
- Delete “Part 3” from the paragraph numbered 5 in page 1 of the Order and insert “Part II”.
- Delete the paragraph numbered 6 in page 1 of the Order.
- Insert after “FD5” in the thirteenth line of the description in Part 1 of the Order Schedule, “east of the stream”.
- Delete the text in relation to Part III of the Order Schedule.
- Delete the text in the second row of the sixth column in Part II of the Order Schedule and insert “Stiles to NCC/G1/SD3-2-4 specification at NGR SP 53701 61384 and SP 53521 61524. Gates at NGR SP 53521 61524 and SP 53459 61809”.
- Remove points 1 and 2 from the Order Map.

**Formal Decision – Order B**

49. I confirm the Order.

*Mark Yates*

**Inspector**

## **APPEARANCES**

### **For the Council**

Ms S. Ismail

Barrister employed on behalf of the Council

She called:

Mr R. Hayes

Definitive Map Officer

Mr N. Wedgbrow

Rights of Way Officer

Mr R. Godber

Mr N. Godden

Mrs P. Godden

### **Supporter of both Orders**

Mr T. Jeffries

### **Additional Supporters of Order A**

Mr K. Maplethorpe

Mrs J. Hurst

Mrs D. Weaver

### **For the Parish Council**

Dr S. Hollowell

### **Objector to Order A**

Mr I. Fitzgerald

### **Interested Party**

Mr I. Weaver

## **DOCUMENTS**

1. Opening submission on behalf of the Parish Council for Order A
2. Statement of Mr Fitzgerald
3. Letter of 6 December 2004 from Mr Jeffries to the Council and copy of notice
4. Closing submissions for the Council in respect of Order A
5. Opening submissions of the Council for Order B
6. Letter of 9 June 1997 from the Council to Mr Golding
7. Closing submission on behalf of the Parish Council for Order B
8. Closing submissions of the Council for Order B

