



## Order Decision

Inquiry held on 21 August 2018; site visit on 20 August 2019

**by Sue M Arnott FIPROW**

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

**Decision date: 09 October 2019**

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### **Order Ref: ROW/3188167**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Parish of Broughton Moor: District of Allerdale) Definitive Map Modification Order (No 1) 2017.
- The Order is dated 3 August 2017. It proposes to modify the definitive map and statement for the area by adding a footpath in Broughton Moor between Chapel Terrace and Footpath 219014 as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm the Order with modifications. Two objections have been submitted in response.

**Summary of Decision: The Order is confirmed subject to the modifications previously proposed.**

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1. If confirmed with the modifications set out in paragraph 58 of my interim Order Decision issued on 31 August 2018, the Order would record on the definitive map and statement the public footpath claimed but on a slightly different line and without some of the limitations noted in the Order Schedule.
2. Two objections have been submitted following advertisement of my proposal to confirm the Order with modifications. One of these focusses on the basis for my previous conclusion that the Order should be confirmed (albeit with these modifications); the second objection relates only to the effect of my decision to remove reference to a particular gate.

### **The Main Issues**

3. The main issue remains whether the evidence is sufficient to show that the Order route (as proposed to be modified) has been used in such a way that a public footpath can be presumed to have been established.
4. If that question is answered in the affirmative, then an issue arises as to whether this public right of way is limited by the existence of gates.

### **Reasons**

5. In support of their objection Mr and Mrs Crayston have provided copies of a number of documents which were not previously before me. I have therefore had the opportunity to reconsider my previous conclusions in the light of this new evidence. Although their submissions cover a wide range of points, I shall start by addressing their 6 initial grounds for objection.
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6. Mr and Mrs Crayston challenge my conclusion that the circumstances here at Broughton Moor are different to those in the case of *Dawes v Hawkins* to which I was previously referred. They take issue with my conclusions (at paragraphs 44 and 45 of my interim Decision) that “for over 20 years members of the public have had the opportunity to choose which route to take so as to avoid the roadside wall which continues to obstruct Footpath 219014” and that “they positively opted to use the Order route” in preference to a line closer to the original definitive footpath. In their initial submission<sup>1</sup>, they say I should not have “declined to follow the rule set in *Dawes v Hawkins*”.
7. They highlight a letter submitted by Mrs Strong in which she states that she assumed Footpath 219014 had been officially re-aligned onto the Order route many years ago. They argue that members of the public were misled by the Council’s signpost and genuinely believed the definitive line had been diverted.
8. I fully accept that submission. Local people did clearly believe, as did previous owners, that the right of way had been formally diverted whilst in fact it remained on its original line and still does today. However the subjective belief of the users (as to whether or not they were following the public footpath) is not a factor here<sup>2</sup>. The fact is that they did walk along the Order route ‘as of right’ and the landowner was content that they should do so; indeed the landowners also thought the path had been moved although it appears they had no documentation to show the required legal process was ever completed.
9. However I do not agree that my conclusion that the principle established in *Dawes v Hawes* can be distinguished “has no credibility given the evidence available”. In that particular case the public were unable to use the definitive line when it was obstructed and therefore the chosen deviation could not establish a new public right. The right to deviate around an obstruction on land in the same ownership extends only to what is reasonably necessary to get around the blockage.
10. I concluded (at paragraph 45 in my interim Decision) that once the white fence had been removed from the Tukes’ garage site, the public was then able to take a much more restricted deviation simply around the roadside wall obstructing the definitive line of Footpath 219014 but they did not do so. That may well be because they thought the path had been diverted but, in my view, the fact remains that the use of the Order route thereafter cannot be construed as being referable to the obstructed definitive line; this use was ‘as of right’ and capable of establishing a new right of way.
11. I have again noted a letter dated 4 January 2017 from Cumbria County Council (CCC) to Mr and Mrs Hogarth in which the highway authority refers to removal of obstructions on land belonging to the Hogarths, and also to Mr and Mrs Crayston. Mr and Mrs Crayston argue this was prompted by complaints from members of the public who wished to use Footpath 219014 once they knew it still existed, rather than calling for the re-opening of the Order route.
12. It is clear to me that this enforcement action relates to the definitive public right of way for which CCC holds a number of powers and duties. Unless and

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<sup>1</sup> In a later submission (their Statement of Case) they state “this case does not reflect that of *D v H*” but I have interpreted the thrust of their argument to be that *Dawes v Hawkins* should be followed.

<sup>2</sup> A conclusion endorsed in the case of *R v Oxfordshire County Council and others ex parte Sunningwell Parish Council* (HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385

until the status of the Order route is recognised as a public path, through the confirmation of this Order or otherwise, CCC has no duty to ensure it is open and available to the public. I therefore read nothing more into this letter than that CCC was pursuing the re-opening of a highway that had been obstructed.

*OBJECTION 1:2*

13. This objection concerns the lawful limitations on the rights of the public that would be recorded. In my interim Decision I proposed that gates at points B and D be removed from the Order Schedule and that a gap at point C is instead recorded at my point X<sup>3</sup>.
14. As I noted previously at paragraph 19 of my interim Decision, the gate that now stands at point B was installed in September 2016. This is not disputed. There is therefore no doubt at all that the right of the public to use the Order route throughout the relevant 20 year period was not subject to a gate being maintained in this position. It was installed after the qualifying use had taken place; indeed it was this gate that brought into question the status of the way. It cannot therefore not be recorded as a lawful limitation.
15. Mr and Mrs Crayston do not challenge the removal from the Order of the gate at point D<sup>4</sup>, nor the recording of a gap at X. However they take issue with the statement at paragraph 34 of my interim Decision that the evidence given by witnesses at the inquiry indicated there had been "*no limitation of any kind along the route from the road until a gap (located at a point I shall call X) beside the field gate which enters the access strip which lies to the east side of Sunstones*". They point to the evidence of two witnesses who mention a gate at point C. In 2016 when they purchased Sunstones, parts of this gate were still attached to the gateposts but the gate itself was in a bad state and the middle section had collapsed.
16. Having re-examined the written evidence of Mr Tuke and Mr Armstrong and re-considered the evidence given by both men verbally at the inquiry, I am still not convinced that this gate was functioning as a barrier of any kind during the 20 year period at issue here. Mr Tuke does indeed indicate a gate and stile at this point but his evidence was that he moved from the village in 1982. He therefore cannot provide evidence that either the gate or stile were still present between 1996 and 2016.
17. In response to a question about gates on his written statement, Mr Armstrong wrote "*The top one used to be locked*". At the inquiry he referred to using a gap next to the gate, it being clear that the locked gate was the one at point D.
18. Mr and Mrs Crayston submit that at point C: "*the field gate has existed and as it is written into deeds it cannot be extinguished under this order*". They provide evidence in the form of a conveyance of the farm known as "Standing Stone" dated 9 January 1951 referring to this gate (which is marked as "B" on the accompanying plan). The land conveyed included what subsequently became the garage site and the land on which Sunstones now stands.
19. Although the objectors submit they have an obligation to maintain a gate at point C<sup>5</sup>, my reading of this document is that it was to be maintained by the

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<sup>3</sup> Identified as at grid reference 305088 533285

<sup>4</sup> This is challenged by Mrs Hetherington; see Objection 2 at paragraph 54 below

<sup>5</sup> Point B on the conveyance plan

(then) vendor, Mr Harker who retained land on the southern and eastern sides of the property conveyed.

20. Along with his successors in title, Mr Harker retained a right of way 12 feet wide (3.66m) "*at all times for all purposes connected with the use of adjoining land with or without horses, carts, carriages and other vehicles*". Whilst that clearly acknowledges a private right of way, not a public one, I recognise that a right to maintain a gate in this position has existed ever since<sup>6</sup>.
21. Witnesses at the inquiry did not recall a gate ever restricting their use from 1996 onwards and until they were prevented from using the Order route in September 2016. Having looked again the evidence at a photograph dated 2008 (noted previously at my paragraph 43) in which there is no gate visible at point C, I can only conclude it was usually left open during its gradual demise.
22. The objectors are correct to say that this Order cannot alter the maintenance obligation for this gate as prescribed in the 1951 conveyance but I am not satisfied that there is sufficient justification for its inclusion as a limitation on public use (or the stile/gap to one side) when the evidence supports the deemed dedication of a public right of way without any such restriction.

### *OBJECTION 1:3*

23. Mr and Mrs Crayston have provided information about the more recent planning history of the site that was not previously available to me and which has enabled me to revise some of my previous findings. They submit that neither the previous owners who made the planning application for development of the former garage site, nor any members of the public, acknowledged the existence of the Order route in 2014.
24. Here, once again, the evidence shows there to have been confusion and misinterpretation leading to misunderstanding. The site plan attached to the planning application in 2014 clearly marks a brown line labelled 'Public Right of Way' along what, at first sight, appears to be the Order route. Although the accuracy of this plan is doubtful, there is no question that, at that time, a public path was acknowledged to exist, albeit not identified on its definitive line.
25. Communications between the planning officer and CCC's rights of way officer illustrate the uncertainty around the precise route of the public right of way. Although CCC indicated the footpath passing through one of the proposed dwellings, the planning authority seems to have accepted the position of the path as shown on the (inaccurate) site plan; indeed the decision notice for application 2/2014/0854 contains an advisory note which incorrectly refers to Footpath 219014 being adjacent to the development when in fact it would be obstructed by it.
26. This was eventually remedied in the decision notice for a later application (2/2017/0355) which sought to revise the site layout. The decision notice issued on 17 November 2017 reminded the applicant/developer of the existence of a public right of way through the site and that any works commenced should not obstruct the route of this footpath.

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<sup>6</sup> It may be that, over time, the gate at D became a substitute for this but that is speculation.

27. I was told that the 2014 application was made by relatives of Mr and Mrs McDougall after their deaths, being (then) owners of the land over which both the definitive line and the Order route pass. Whilst I am reluctant to place any great weight on identification of the public right of way ostensibly along the Order route as an indication of acceptance by the owners that this was regarded as a public path since the application itself was made by an agent on their behalf. Even so, it is consistent with the local view that the Order route was thought to be a public footpath.
28. I make no comment on the fact that implementation of the 2017 planning permission has now commenced and that on the day of my recent visit to the site I observed that a new dwelling has been constructed across the line of definitive footpath 219014. That is a matter for the highway authority, CCC.
29. Returning to the main point raised by Mr and Mrs Crayston, I consider it more than likely that when the parish council (and other local residents directly consulted by the planning authority in 2014) viewed the site plan for the proposed development, they noted that provision was apparently made for the public right of way along the east side of the site, this being where, at that time, local people believed it to be.
30. In the circumstances and given the inaccurate site plan accompanying the planning application, I do not find it surprising that no objections were raised to the development in 2014.

*OBJECTION 1:4*

31. At the inquiry in August 2018, Mr and Mrs Hogarth produced a hand-written letter from the son of Mr McDougall, former owner of the garage site and Sunstones, in which he acknowledged his family's belief that the public right of way ran along the Order route<sup>7</sup>.
32. Mr and Mrs Crayston challenge the authenticity of this letter. However I have no other evidence from which to judge whether this was actually written by Mr McDougall himself. That aside, I consider his statement to be entirely consistent with all other evidence which suggests that both landowners and the local public believed that the public right of way had been diverted onto the Order route long ago.
33. The Craystons submit that this is not consistent<sup>8</sup> with an approach made to them before they purchased their property from the vendors (Mr and Mrs McDougall's family); they were asked to agree to a right of way along part of the Order route for maintenance purposes for the benefit of the properties proposed in the development of the garage site. They argue that if a right of way had been accepted by the owners, there would be no need to ask for an additional right.
34. I give this argument very little weight. A public right of way on foot is a right of passage for the public; that is quite different from a private right to enter onto the property of a third party in order to carry out maintenance.

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<sup>7</sup> Paragraph 52 of my interim Order Decision refers

<sup>8</sup> They submit that neither is this consistent with information given to them prior to the sale. However this is essentially a private matter between the parties.

*OBJECTION 1:5*

35. Mr and Mrs Crayston challenge the basis for CCC pursuing this Order when, for over two years, it has allowed the definitive footpath to be seriously obstructed. They argue that prior to commencement of the construction works, people were using Footpath 219014 on a regular basis; had they been able to continue, there would have been no need for the Order.
36. In response, CCC refers to its statutory duty to process applications for definitive map modification orders to add unrecorded public rights of way. Evidence that the Order route is (or would have been) unnecessary is not relevant to the argument. I agree; the need for the Order route is not at issue here and is not a matter I can take into consideration in determining this Order.

*OBJECTION 1:6*

37. In my interim Decision in paragraph 26 (footnote 3) I noted that a signpost which previously stood near to point A was no more than 10 years old. Mr and Mrs Crayston point out that there is no actual evidence to show when this sign was moved. I agree; it is surprising that CCC does not have a record of this but this is not a crucial factor in my analysis of the evidence as a whole.

*OTHER ISSUES RAISED BY MR AND MRS CRAYSTON*

38. A copy of (part of) an extract from the London Gazette from 1989 is new evidence that was not previously before the inquiry. Whilst I had previously noted (at paragraph 47), from evidence given by claimants, that a number of paths in the area had been temporarily closed to facilitate mining operations, there was no documentary evidence to offer greater detail.
39. The document submitted is headed "THE LONDON GAZETTE, 16<sup>TH</sup> MARCH 1989". It shows two columns of text, the first concerning matters in Westminster but the second clearly relates to Broughton Moor. However what is visible on the extract is the second part of the notice since its title and first part must be shown at the bottom of the first column which is not visible on the extract.
40. The extract reveals that a "*copy of the Order and of the map referred to therein*" had been deposited at three locations and could be seen at all reasonable hours. The notice was then signed by the "*duly authorised*" representative of the British Coal Corporation. The following "*SCHEDULE*" listed the "*Rights of way suspended*", including "*3. Part of Footpath No. 219014 in the Parish of Broughton Moor which runs from Seaton Road at Highfield Place in a south-easterly then easterly direction to terminate at its junction with Church Road about 10 metres south-east of Fell View being that part which runs from a point about 40 metres from its commencement*".<sup>9</sup> The date of the notice is then added: "*9<sup>th</sup> March 1989*".
41. It is Mr and Mrs Crayston's submission that, with time allowed for objections following the advertisement, the closure would not have come into force until some considerable time later. They argue that notices seen on site in 1990 by Mr Armstrong indicate that the footpath closures had not yet been implemented by British Coal. Since Mr Armstrong recalled the paths being closed for 7 years, they submit that the path would not have re-opened until

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<sup>9</sup> My underlining

- 1997 at least, and consequently the public could not have been using the Order route for the requisite 20 years prior to September 2016.
42. Having now had the benefit of at least part of a notice relating to the path closures, the process is a little clearer but still not fully clarified. I previously noted that the mining operations were authorised in 1988; that has not been challenged and in fact the date of the London Gazette notice would be consistent with that.
  43. The part of the notice that has been submitted does not identify the legislation under which the suspension of public rights over the three footpaths listed was made. In my experience, this is most likely to have been Section 15 and 15A of the Opencast Coal Act<sup>10</sup> 1958 but that is a deduction on my part.
  44. Assuming that is the legislation employed, then the process<sup>11</sup> required that before submitting an application to the Secretary of State for an order, "the Board"<sup>12</sup> was to publish a notice stating that it was proposing to apply for an order suspending the stated rights of way and providing a 28 day period for the submission of objections. This notice was to be published in the local press for two successive weeks as well as the London Gazette.
  45. If the Secretary of State decided to make the Order<sup>13</sup> (after holding an inquiry if necessary), as soon as may be afterwards the Board was to publish another notice giving details the rights of way suspended, the date on which it was to come into operation and details of where the order could be inspected.
  46. Despite the limits of the extract provided in this case, it is clear that an order had already been made and the notice gives details for where it could be inspected. What cannot be established with any certainty from the part available is when the suspension was to start. However the notice does confirm that this was the end of the process, not the beginning and therefore there would be no further delay from processing possible objections.
  47. As I set out in my interim Decision, the Order route was brought into question in September 2016. The relevant twenty-year period for examining use by the public begins in September 1996. I have no evidence available to me to pinpoint when the suspension of rights over part of Footpath 219014 began other than that it would have been after March 1989. I have only Mr Armstrong's recollection that the closure was to continue for 7 years but it is entirely possible that a 7-year suspension ended before September 1996. I am therefore not persuaded that use claimed by members of the public of the Order route could not have continued throughout the full term of twenty years.
  48. Even if evidence in the part of the notice I have not seen proves that the closure extended beyond that date, it is clear from the notice that (a) it applied to the definitive line of Footpath 219014, not the Order route (although at that time they may have been thought to be the same thing); and (b) the closure only related to the definitive line eastwards from a point 40 metres east of Seaton Road. Although the exact location at which rights were suspended is somewhat equivocal, this tends to support the conclusion I reached in paragraph 48 of my interim Decision that "*other witnesses said that they still used the Order route*

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<sup>10</sup> As amended by the Housing and Planning Act 1986 Schedule 8 Paragraph 6 (but before later changes made by the Coal Industry Act 1994)

<sup>11</sup> Section 15A(1)

<sup>12</sup> The National Coal Board

<sup>13</sup> Section 15A(10)

*because it was possible to continue beyond it by walking below the baffle bank that had been constructed to screen the works, not on the public path".* It seems entirely possible they did so without contravening the suspension order referred to in the 1989 notice.

49. Turning to other issues raised by Mr and Mrs Crayston, I reject criticism of the written evidence of claimants where these people also gave evidence verbally at the inquiry. All those who did so responded to questions put to them such that I was able to have a clearer picture of their recollections and use.
50. I also reject the suggestion that the motives of people who submitted written statements or those who gave evidence in person has influenced the outcome of this Order. Insofar as I have been presented with relevant evidence, my determination of the Order has been framed by the legal tests set out in paragraphs 3 and 4 of my interim Decision, based on an assessment of facts where these have been established and on a balance of probability where there has been a degree of doubt.
51. Mr and Mrs Crayston submit that the owners of the site in 2014 had no intention of dedicating an additional right of way. In essence, if they had known that the Order route was not the definitive line of Footpath 219014, they would not have allowed use of the Order route. That may be true but the facts remain that local people used the Order route over a period of 20 years at the invitation of the landowner and without challenge. Whatever the beliefs of users or owners, this is sufficient evidence to establish the existence of a public right of way.
52. Yet it is important to note that the lack of use of the (obstructed) definitive line of Footpath 219014 over a lengthy period does not show that it has ceased to exist, nor does it necessarily indicate that it is not needed. Any proposal to legally divert or stop up any public path must follow procedures set out in the Highways Act 1980.
53. In summary, having considered all the various issues raised by Mr and Mrs Crayston, I remain of the view that the Order should be confirmed with the modifications proposed.

## **OBJECTION 2**

54. Mrs Hetherington expresses concern over the removal from the Order Schedule of a gate at point D. This lies on the boundary of her land and affords private access to the woodland to the south.
55. She refers to the conveyance of 1951 (noted above at paragraph 18). This made provision for the access road (A-D) leading to what is now Mrs Hetherington's land; later this also formed the access drive to Sunstones when this was built in 1970/71. As I have already stated, the 1951 conveyance clearly provided for a private right of way along A-D *"at all times for all purposes connected with the use of adjoining land with or without horses, carts, carriages and other vehicles"* for the then and all subsequent owner(s) and occupiers of land to the south of the site.
56. Obstruction of this vehicular right of way is a private matter. Although some claimants refer to the route as a byway, there is insufficient evidence of use by members of the public (as opposed to persons with a legal right of access) to substantiate a public highway over and above a right of way on foot.



57. As noted at paragraph 55 of my interim Decision, I concluded that the line walked by the claimants was not through the gate at point D which leads south westwards into the fenced track. The evidence suggests that this gate was kept locked and that people instead walked through a gap at the side, via the point I marked as X. Since the gate at D does not lie on the public right of way as shown by the modified Order route A-B-C-X-Y, it is not appropriate to record it as a limitation on public use of this footpath.
58. However, that does not affect the continued existence of a gate at point D where this is clearly required for private purposes.
59. In summary, I am satisfied that the reference to a gate at point D should be removed from the Order.

### **Conclusion**

60. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed with the modifications previously proposed and subsequently advertised.

### **Formal Decision**

61. The Order is confirmed subject to the following modifications:

#### In the Order schedule

##### **In Part 1: Modification of the Definitive Map**

- Delete 'References on plan' "A-B-C-D-E" and substitute "A-X-Y";
- Amend 'Description of length of right of way to be added' to: "A new length of public footpath in Broughton Moor from Chapel Terrace at Point A (GR 305062 533323) south south eastwards for about 47 metres to a gap at Point X (GR 305088 533285) continuing south south eastwards for a further 16 metres to join Footpath 219014 at Point Y (GR 305094 533270)";
- Delete 'Width' as stated and substitute "A to Y = 3m"

##### **In Part 2: Limitations and Conditions**

- Delete two field gates listed and amend details for gap to "Grid reference: 305088 533285" and "Width 1.0m"

##### **In Part 3: Modification of Definitive Statement**

- Amend 'Width' to "3m"; amend 'Length' to 63 metres; amend 'Description' to read "From Chapel Terrace Broughton Moor south south eastwards to a gap at GR 305088 533285; then south south eastwards to join FP 219014";
- Delete 'Limitations & Conditions' as listed and substitute 1.0m gap at GR 305088 533285";

#### On the Order map

- Add point X at GR 305088 533285 and Point Y at GR 305094 533270;
- Amend the line of "Footpath to be added" via Points X and Y.

*Sue Arnott*

**Inspector**

## **ADDITIONAL DOCUMENTS**

16. Letter dated 4 November 2018 from Mrs S P Hetherington
17. Email dated 8 November 2018 from Mr & Mrs Crayston
18. CCC's statement of case submitted on 3 April 2019
19. Mr & Mrs Crayston's statement of case submitted on 22 April 2019 with appendices A-J
20. CCC's comments on the objectors' statement of case
21. Emails to the Planning Inspectorate from Mr & Mrs Crayston sent on 4 September 2019 and 11 September 2019
22. Email to the Planning Inspectorate from CCC sent on 2 October 2019

