



## Order Decision

Site visit on 19 July 2016; inquiry opened on 18 July 2017

**by Sue Arnott FIPROW**

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

**Decision date: 04 August 2017**

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### **Order Ref: FPS/X1355/7/4M**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the County Council of Durham Public Rights of Way Modification Order No.3 (Public Footpath No. 128 Durham City) 2015.
- The Order is dated 13 August 2015. It proposes to modify the definitive map and statement for the area by recording a cul-de-sac public footpath from Framwellgate Peth into Wharton Park, Durham, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Durham 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. In response one objection has been submitted together with one representation in support.

**Summary of Decision: The Order is not confirmed.**

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### **Preliminary Matters**

1. If confirmed with the modifications proposed in paragraph 99 of my interim Order Decision issued on 7 October 2016, the Order would record the original route in question on the definitive map and in the definitive statement together with extensions leading to North Road and to the north side of Durham Railway Station.
  2. These modifications have been duly advertised and one objection was submitted. I therefore held a public local inquiry into the Order at County Hall in Durham on 18 and 19 July 2017.
  3. Initially, as the order-making authority, Durham County Council (DCC) had taken a neutral stance in relation to confirmation of the Order. However, at the inquiry, the authority actively opposed confirmation, with or without the proposed modifications.
  4. The case in support of the Order and the modifications was presented by Mr Hayes, the original applicant for the Order, and by Mr Gosling who had made representations in support of the proposed modifications. Further submissions were made in writing by Mr Reed who was unable to attend the inquiry; in his absence he was represented by Mr Hayes. (In this decision I shall refer to these claimants collectively as 'the supporters'.)
  5. In short, DCC submits that no public right of way should be recorded through Wharton Park whereas Mr Hayes and other supporters contend that the Order as modified should be confirmed.
  6. For consistency, I shall refer to Footpaths A, B and C and to points X, Y and Z as described in paragraph 3 of in my interim Order Decision.
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## The Main Issues

7. In my interim Order Decision I noted that the main issues are whether, on a balance of probability, the evidence shows that a public right of way has been established along the Order route and, if so, whether this extends beyond the Order route A-B.
8. On the basis of the evidence previously provided and the submissions made at that stage, I concluded that the evidence was sufficient to show that the public had acquired rights on foot over Footpaths A (X-Y), B (X-Z) and C (A-B-X) and that these paths should therefore be recorded on the definitive map and in the definitive statement.
9. Since advertising my intention to modify the Order, new evidence and further submissions have been presented by both supporters and objectors. However the tests I set out previously remain the same and the standard of proof required is still the balance of probability.
10. Although the case for the Order and the proposed modifications has been based on the provisions of Section 31 of the Highways Act 1980 (the 1980 Act), I will consider the common law approach in the alternative if appropriate.

## Reasons

11. In my analysis of the evidence before me previously, I reached a number of conclusions which eventually led to my interim decision.
12. I accepted that the status of the paths at issue had been brought into question in January 2015 by Mr Hayes' application (although I considered this to have been prompted by public notice of intended "improvements" to the Park in the previous November<sup>1</sup>). No other possible dates were canvassed at that time but the supporters have raised a new possibility that requires consideration.
13. As regards evidence of use by the public between 1995 and 2015, I previously recognised that the number of claimants was not high but was prepared to accept that the worn surface of the route around point A where people walked over grass added weight to the case for use by the public. Consequently I found sufficient evidence of use that was not interrupted by locked gates or challenged by notices, was not in secret or by express permission. That conclusion has been challenged by DCC; it submits that the quality of the user evidence is poor and does not counter its own evidence that a gate at point Y was locked overnight.
14. Previously I considered submissions relating to the basis on which the relevant land is held by DCC and concluded that, in the case of the old park, this was most probably Section 164 of the Public Health Act 1875 (the 1875 Act). I remained unconvinced that the new park was held under the Open Spaces Act of 1906 (the 1906 Act) (and DCC has criticised my interim decision for failing to suggest any alternative basis.) My conclusions are questioned by the supporters and require further examination.
15. I addressed submissions made in respect of the *Barkas*<sup>2</sup> case and *Billson*<sup>3</sup>, identifying the nub of the issue here as being whether the claimants, and any

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<sup>1</sup> Again, I note that nothing appears to turn on this.

<sup>2</sup> R (on the application of Barkas) v North Yorkshire County Council and another [2014] UKSC 31

<sup>3</sup> R v Secretary of State for Environment ex parte Billson (QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374

other members of the public who walked the paths claimed by the applicant, were entitled to do so by virtue of Wharton Park being held by DCC for public walks or as a pleasure ground (or as public open space).

16. My conclusion was that use by the public as a through-route was distinguishable from general use of the park. However that has been strongly disputed by DCC and the issue will need to be reconsidered in the light of new submissions.
17. Finally I concluded that there was insufficient evidence to show that, during the relevant 20 year period, the landowner had shown a lack of intention to dedicate the paths in question as public rights of way. Since DCC called witnesses to support its position that gates into the park were locked nightly, this too is a matter that falls to be re-examined.

### *Bringing into question*

18. The Order was made on the basis of statutory dedication under Section 31 of the 1980 Act. The first step in this approach is to establish when the public's rights were brought into question. DCC's conclusion was that this occurred in January 2015 when Mr Hayes' application was made. This was not disputed, but the supporters reacted to the evidence of Mr Robinson by suggesting that the status of the paths must have been challenged many years before this.
19. Mr Robinson is an employee of DCC (and previously Durham City Council). He gave evidence to the inquiry of locking and unlocking park gates on a daily basis from sometime around 1996 to 2005. He described the sequence in which he would do this, starting with the vehicle gate at point A, then driving via the north end of North Road, stopping to lock the gate at the 'historic' pedestrian entrance (opposite Victoria Terrace), and lastly locking the gate at point Y beside the toilet block. In the summer months he said he locked up at around 8.30pm and in the winter time about 6:30pm; the gates were re-opened at around 6:30am<sup>4</sup>.
20. Mr Robinson had been asked to undertake this task by his manager, Mr Punton, who lived at the park keeper's house from 1989 to 2007. (Mr Punton continued to take responsibility for locking the vehicular gate into the park that provided access to his home.)
21. In 2005 or thereabouts, reliance on Mr Robinson for locking the gates changed to a rota system with a team that worked on a four weekly basis, including Mr Lee. In his written statement Mr Lee explained that he followed a similar routine to Mr Robinson (although he also locked the North Road vehicular gate). However he candidly admitted that although he was instructed to lock all the gates, he saw little point in locking the gate at Y "*because people would find ways to avoid the locked gate by climbing over and were causing damage. The priority was to keep vehicles out of the park.*"
22. Although there is no evidence from park users to corroborate Mr Robinson's evidence, it was Mr Lee's opinion that "*he (Mr Robinson) always followed his manager's instructions*". There is therefore good reason to accept that during Mr Robinson's appointment, the gate at point Y was locked overnight but that after 2005 locking of this particular gate was intermittent.

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<sup>4</sup> I note that in fact the tenancy agreement offered to Mr Punton's successor required the gates to be closed at 8pm in the summer months, at dusk in winter and to be re-opened at 9am each morning. No particular point was made in relation to the discrepancy in times and I attach little weight to it.

23. Mr Gosling queried the date on which Mr Robinson began to lock the gates, suggesting that it was slightly later than 1996. Mr Robinson was unable to be quite sure when he took on this duty.
24. Nevertheless, the point made by supporters is that if it is accepted that the gate at Y was locked by Mr Robinson as asserted by DCC, then the start of this action should be interpreted as a challenge to the public's right to walk through as claimed.
25. That is a fair argument and I would be prepared to accept it had there been any reaction to the newly locked gate at the time. Whether it was in 1996 or a year or two later, there is no evidence before me of anyone noticing or taking issue with the new regime.
26. There may be several explanations for this, the most obvious being either that people did not notice because there was no use by the public during the hours of closure, or that people did not complain because they did not consider it a public right of way. Alternatively, it may be that the gate had been locked on a regular basis before Mr Robinson took over so there was no noticeable change in 1996.
27. At the inquiry I heard evidence from Mr Dodds who worked for Durham City Council at Wharton Park from 1980 until 1992 as an apprentice gardener/greenkeeper. He recalled park keepers Mr Billy Wood, Mr Billy Dale and Mr George Robson, all of who preceded Mr Punton. They likewise lived in the keeper's house and were responsible for the security of the park.
28. Although Mr Dodds did not lock the gates himself, he was aware of the locking regime carried out by all these men. His recollection was that all four gates into the park were locked at dusk and re-opened around 7:30 each morning. However, he did acknowledge that there were times when they were not locked. He recalled that the aim was to discourage people from entering the park at night so as not to disturb local residents, not necessarily to secure the boundaries.
29. Again, there is no evidence from users to corroborate Mr Dodds' recollection of locked gates prior to 1996 when Mr Robinson took over. Nevertheless I have been referred back to the minutes of Council Committee meetings which, as I noted previously, recorded arrangements being made to close the park at night as far back as 1943. Mr Dodds' evidence is entirely consistent with this although there remains a degree of uncertainty over whether or not past park keepers took the same pragmatic approach as Mr Lee in sometimes leaving unlocked the gate at Y.
30. To conclude, I am not convinced that the evidence shows there to have been a significant switch in practice in or around 1996 such as to prompt questions being raised over the public's right to walk into and out of the park at Y at all times. Consequently I do not accept that the status of the routes now at issue was brought into question in the mid-1990s when Mr Robinson began his duties.
31. However, I will nonetheless examine use during the period dating back to the 1960s when I consider the common law.

*Evidence of use by the public*

32. Following the statutory approach, Section 31 of the 1980 Act provides for a presumption of dedication to be raised, where qualifying use by the public during the relevant period is shown to have been actually enjoyed 'as of right', without

interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission of any kind.

33. There are several elements to this which require further, careful analysis, especially in the light of the additional evidence presented, both in support and in opposition. In particular this includes written evidence from an additional 5 people claiming use of the routes, and statements from employees of Durham City Council who were able to confirm that the gate at Y was locked overnight for certain periods.
34. The essential point is that the quantity of qualifying user must be sufficient to represent the public. I previously concluded that, although finely balanced and limited in terms of numbers, the evidence of the 18 people before me at that time was sufficient to raise a presumption of dedication for Paths A, B and C.
35. However, DCC argues that, despite the additional claimants, the extent of the *qualifying* use still falls a long way short of that required to establish a public right of way in these circumstances.
36. To establish whether or not claimed use can contribute to the establishment of a public path it is necessary to examine the separate requirements for that use if it is to qualify.

The use must continue throughout the full twenty year period

37. There are now a total of 23 people<sup>5</sup> who have provided evidence of their use of Paths A, B and or C. Whilst I have some sympathy with DCC's submission that this is a relatively low number of claimants given the location of the paths, I would nonetheless be prepared to accept the evidence of 23 people as being representative of the public in principle.
38. At the inquiry I received contrasting analyses of this evidence from Mr Hayes and Ms Christie, the most noticeable difference being DCC's apparent disregard for use by claimants for periods of less than the full 20 years. It is my understanding that use of a way by different individuals, each for lesser periods, may be taken together and combine to cover a continuous period of 20 years or more<sup>6</sup>; there is no requirement for each to have used the way for the whole period although those that have done so may contribute more in terms of evidential weight.
39. By my calculations 15 people claim to have used one or more of the paths throughout the whole period (although not with the same frequency), leaving 8 people having done so for fewer years. Whilst many other aspects of their evidence require close scrutiny to ascertain the extent to which their use qualifies, I would consider this to be sufficient, purely in terms of numbers, to raise the necessary presumption of dedication.
40. However, the weight to be attached to the evidence of each claimant will vary considerably, depending on the period of use, the route(s) used, the clarity of the detail given especially in relation to the purpose, frequency and timings<sup>7</sup> of

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<sup>5</sup> For clarity these are Attfield (D & J), Conlong, Coppock (F & B), Duffy, Evans, Ford, Fox, Gosling, Hayes (J & P), Hird, Humphries, Ibbott (L & JM), Lund, Ramsden, Reed, Taylor, Wardle, Wilson, Wright.

<sup>6</sup> Based on the case of *Davis v Whitby* [1974] 1 Ch 186, [1974] 1 All ER 806

<sup>7</sup> Whether daytime or after park opening hours

journeys recalled; the availability of the witness for cross-examination at the inquiry, and the answers to questions put to them about their use.

41. DCC criticised the extent of the information provided by many of the claimants, with most still relying on the forms prepared by Mr Hayes. As I noted previously at paragraph 20 of my interim decision, there are limits to the amount of information that can be extracted without elucidation from the individual concerned. With only three of the 23 claimants giving evidence in person at the inquiry<sup>8</sup>, the potential for seeking clarification of the many issues raised by DCC's further submissions was extremely limiting. Only Messrs Hayes, Gosling and Reed had provided additional statements to expand on their original submissions.
42. However I note that, when making the application, Mr Hayes was never advised by DCC that his forms fell short in any respect or that clarification was required from his witnesses. As I previously observed, and despite its duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate applications in a 'quasi-judicial' capacity, DCC did not consider it necessary to interview claimants to obtain further details of their use. At the inquiry Ms Christie justified this by explaining that this had been because it appeared clear to the Council from the outset that the tenure of the land (it being held under the 1875 and 1906 Acts) would preclude the establishment of any public right of way through the park.
43. Wherever the responsibility lies, the paucity of detailed evidence to substantiate the original claims in the light of new challenges from DCC leaves serious omissions which inevitably affect my weighting of the evidence.
44. DCC submitted evidence which it said showed that the routes at issue were in fact not 'short-cuts' if walking from points outside the park. As I explained at the inquiry, the merits of Paths A, B and C are not in question here. I recognise that people do sometimes choose to use paths for a variety of reasons, even though the distance travelled is slightly longer not shorter. However, other than the three supporting witnesses present at the inquiry, the majority of the claimants were not able to explain their motivation for preferring to walk routes through the park when, according to DCC, Paths A, B and C were either longer or steeper than options around the park. Without further explanation from the claimants I accept that this sheds a degree of doubt on their evidence but I regard the point is a minor one.

The claimed use must be 'without interruption'

45. From the evidence previously available I concluded that "*the continuous and regular use by the claimants during the relevant period was not interrupted by locked gates and nor was it directly challenged by notices*". An examination of the new evidence from users does not lead me to alter that conclusion.
46. However I now have before me evidence, tested at the inquiry, from Mr Robinson and Mr Dodds, together with a written statement from Mr Lee, all supporting DCC's claim that between 1996 (or thereabouts) and 2005 the gates at Y were locked overnight.<sup>9</sup>

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<sup>8</sup> I understand Mrs Coppock also attended but she did not give evidence.

<sup>9</sup> In addition, there is one other, largely unexplained, record of the gate being locked at 11.41 in the morning on 8 November 2006 provided in a photograph taken by Mr Green whilst undertaking survey work in advance of proposals to improve the park. Without further details, I give this only limited weight since this does not easily fit within the nightly locking regime described.

47. Of the three supporting witnesses at the inquiry, none had ever encountered a locked gate here. Yet closer scrutiny reveals that this is perhaps not surprising: Mr Gosling's main period of regular use (probably) pre-dated the relevant 20 year period<sup>10</sup>, his early morning runs ceasing after he changed jobs in 1993; Mr Hayes' regular use of the paths dates from 2007 onwards after he moved to Durham; and Mr Hird used paths A and C during his lunch break to go from County Hall into the town centre.
48. With none of the remaining 20 claimants available to help me reconcile the locked gates from dusk till dawn with the claim that the public has used Path A along with either B or C, I can only conclude that they must have done so during the times when the gates were open and therefore not seen them when locked.
49. To be effective, an interruption must involve the interference with enjoyment by the public of a right of passage<sup>11</sup>. It must also be with the intent to prevent public use of the way<sup>12</sup>. Both those requirements appear to be satisfied.
50. Therefore, in the absence of any substantive evidence to counter that provided by DCC, showing that for a significant period during the relevant twenty years (from 1996 to 2005 at least) the gate at Y was locked overnight, I am bound to conclude that use of Path A was interrupted on a daily basis whilst the park was officially closed to the public.
51. However, that conclusion does not affect the uninterrupted use of Path B with Path C neither of which have had gates or notices restricting access at any time.
- The claimed use must be 'as of right'
52. Previously it had not been argued that the claimed use was either by force or in secret. Both possibilities have now been raised by DCC.
53. It submits that the wording of a notice at point Y which asked people not to climb on the walls was intended to discourage those who found the gate locked but tried to gain access to (or egress from) the park nonetheless. Consequently, any use claimed by people who did so would be by force.
54. I do not disagree but none of the three claimants who gave evidence had encountered a locked gate, let alone climbed over the wall to get around it. Neither had any of those who supplied written evidence although this was not tested at the inquiry.
55. DCC further contends that use of the routes between 8:30pm and 6.45am (or variations thereof) by people who did so knowing the park was officially closed amounts to use in secret.
56. On this point I do not agree. It must not be forgotten that along Path B was a notice (erected by Durham City Council) which read "FOOTPATH OPEN ALL YEAR ROUND". That may have been somewhat ambiguous but it does not make clear that the public may use it only during certain hours of the day. Similarly at point A, there has never been a notice of any kind. The sign beside the vehicular entrance gate from Framwellgate Peth may have been visible from Path C but this was at a different level and stated that it was "... CLOSED TO PREVENT VEHICULAR

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<sup>10</sup> Mr Gosling thought there might be an overlap between his later use and Mr Robinson starting his locking duties but he acknowledged that this was possible, not probable.

<sup>11</sup> Jones v Bates (CA)[1938] 2 All ER 237

<sup>12</sup> Lewis v Thomas [1950] 1 KB 438

ACCESS AT THE FOLLOWING TIMES ...". It seems to me that even if the claimants were aware that the park was closed to vehicles, the open gateway at point A and the sign at point Z could quite reasonably have been interpreted as an open invitation to pedestrians to walk thorough at all times.

57. Turning to the issue of permission, two further arguments were made in relation to the basis on which the old and new park areas were held by DCC and previously by Durham City Council and Durham City UDC.
58. Firstly, Mr Reed challenges my conclusion that the old park was held by Durham City UDC under the 1875 Act. Since the authority created a new entrance into the park from point Y (via Path A) after it acquired the land in 1932 and installed a bus shelter and public conveniences immediately adjacent to it, he submits this is more consistent with a coordinated programme of urban improvements, generally associated with the railway, and giving benefits to highway users and visitors to the County Hospital as well as to park users.
59. Unfortunately Mr Reed did not suggest any alternative legislation under which the authority may have been entitled to acquire the land at that time. (At paragraph 14 above I have already noted DCC's criticism of my failure to identify any alternative basis for the new park being held if not satisfied that it was the 1906 Act.) Whilst I understand the thrust of Mr Reed's argument, with no other evidence to explain the basis for the Council's land holding that might displace the presumption that it was the 1875 Act, I am bound to maintain my previous conclusion. As pointed out at the inquiry, there is a similarity between the wording used in the conveyance and Section 164 of the 1875 that tends to imply this was in the minds of those responsible for the transaction in the 1930s.
60. The second submission, from DCC, sought to add weight to its previous assertion that the new park is held under the 1906 Act. It pointed to the references in the 1946 conveyance to the covenant in which 'the Corporation' undertook to use the land for no other purpose than "*as a burial ground or as a public open space or for road improvements*". DCC is firmly of the opinion that this reflects the language of Section 9 of the 1906 Act which states:
- "9. Power of local authority to acquire open space or burial ground.*  
*A local authority may, subject to the provisions of this Act, -*  
*(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not".*
61. Immediately after the close of the inquiry I made a further inspection of Path C at the request of DCC and for which I was accompanied by Ms Christie, Mr Hayes and Mr Gosling. Ms Christie pointed to the distinct differences in the character of the new and old park areas, the latter being more formally laid out and the former being more open with remnants of the original pre-park hedges. Indeed the difference was clear, DCC's submission being that this closely resembles the type of 'open space' defined by Section 20 of the 1906 Act:

*"20. Definitions*

*The expression "open space" means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered*



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*with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation<sup>13</sup>, or lies waste and unoccupied*

62. As I previously found with the old park and the 1875 Act, I consider the evidence available to support the basis for holding the new park under the 1906 Act quite tenuous. Yet, given the absence of any other likely legislation, I must agree that it seems the most probable conclusion.
63. To summarise, I conclude that the old park was (and is) held by the local authority under the 1875 Act and the new park under the 1906 Act.
64. Next I return to the question I (previously) identified as being the nub of the issue here: was the claimed use of Paths A, B and C by the public by virtue of Wharton Park being held by the relevant authority for public walks, as a pleasure ground or as public open space?
65. DCC submitted that the claimed paths within the old park were formally set out as 'public walks', albeit they also lie within 'pleasure grounds'. From the Ordnance Survey maps submitted by Mr Reed (1861 and 1895), Mr Hayes (1939) and DCC (1856-7, 1896, 1919 and 1939) it is clear that Path B and parts of paths A and C were laid out in the late 19<sup>th</sup> century, long before the 1917 lease, perhaps even before the 1875 Act<sup>14</sup>. The remainder of Path A down to North Road was set out between 1919 and 1939, probably after the 1932 conveyance.
66. The majority of Path C (between A and B within the new park) was formalised post-1962, this being the date when the minutes of the Durham UDC's Park Committee meeting note the decision to create a new vehicular access from Framwellgate Peth. It seems to me likely that the short section leading into the park from Point A via the old gate posts pre-dated this 'new' road, quite possibly being the "*public access to Wharton Park from Framwellgate Peth*" that the minutes in 1955 note was to be preserved. However I can draw no conclusion from this that the path at that time was a public right of way but only that the public appears to have had access to it.
67. Neither do I make any assumptions about the status of the paths through the old park prior to the 1917 lease. As I noted previously, records from 1914 prepared under the Finance Act 1910 describe the land as "*Park open to public with walks*" but no deduction was made for any public right of way.
68. Since I have accepted that the old park is held under the 1875 Act, in this context I consider it reasonable to conclude that Paths A, B and part of C (X-B) were set out as formal 'public walks'. However that concept does not extend to the part of path C within the new park (A-B) held under the 1906 Act since this legislation deals essentially with open space laid out as garden or used for recreation. The original Order route and the proposed modifications clearly require different consideration.
69. In essence, the argument put by DCC is that if the Order is to succeed, the claimants must show that, in effect, they were trespassers on the land so that their use was clearly 'as of right' rather than being 'being right'. As Lord Neuberger observed in the case of *Hall v Beckenham* [1949]<sup>15</sup>, "*third parties on*

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<sup>13</sup> Emphasis as added by DCC

<sup>14</sup> I have noted Mr Reed's submissions on the history of Wharton Park, the Wharton family's interests in the development of the railway and their philanthropic civic improvements in the area.

<sup>15</sup> *Hall v Beckenham* [1949] 1KB 716

*the land either have the right to be there and to do what they are doing, or they do not” adding “I cannot see how someone could have the right to be on the land and yet to be a trespasser”<sup>16</sup> (unless acting unlawfully in some way).*

70. Whilst the supporters reiterated their reliance on the Court judgements in the *Barkas* case and on *Billson*, for DCC Mr Lewis made wide-ranging legal submissions challenging my previous conclusions which had been largely influenced by Mr Hayes’ interpretation of both cases.
71. In the absence of any byelaws, Mr Lewis argued that the local authority had a limited right to interfere with use of the paths by the public, submitting that it would be *“wholly fanciful ... to suggest that the Council has been in a position to challenge those who claim to have asserted highway rights in the Park for the requisite period”*. Relying on the *Hall v Beckenham* case, he contended that DCC was not in a position to exclude public use, the claimants had a lawful basis for using the paths and that it would be wrong in law to consider them as trespassers.
72. At the inquiry I explained my difficulty in reconciling DCC’s argument that it was not in a position to contest any assertion of a right of way with the indisputable fact that it clearly has stopped up the public’s right to use one of the formally set out ‘public walks’. It seemed to me that it cannot work both ways: if the public used Path A ‘by right’ on the basis that they were using a route acknowledged to be a designated public walk under the 1875 Act, such a right cannot be simply extinguished without following appropriate statutory procedures.
73. In response to this point, Mr Lewis referred to the temporary closure for refurbishment works and to the historical locking of entrance gates (to prevent vagrancy or vandalism), both of which he argued were incidental to and consistent with the Council’s obligations under both the relevant Acts. He acknowledged that if the Council were to deny access for a purpose that was not aimed at facilitating the statutory purpose for which the land is held, that would be reviewable in court.
74. It is not my role to determine whether or not the closure of this ‘public walk’ in the vicinity of point Y is lawful or not. (Neither would it be appropriate for me to prescribe works to re-open it, as requested by Mr Gosling.)
75. However I accept the premise put forward by Mr Lewis that within Wharton Park DCC can *“only act against people in the park who offend against their by-laws<sup>17</sup>, or who commit some offence or crime for which criminal action could be taken.”<sup>18</sup>* It follows from this that my previous paragraph 93 need reappraising. In that paragraph I agreed with the applicant that it would have been open to DCC to take measures to prevent a public right of way arising for example by putting up notices expressly granting permission for use<sup>19</sup>. In the light of Mr Lewis’ submissions, I now accept that granting express permission for walking through the park would be wholly irrelevant where the public may already enjoy that activity ‘by right’ on the basis of either the 1875 or 1906 Act.

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<sup>16</sup> At paragraph 27

<sup>17</sup> Of which there are none here.

<sup>18</sup> The words of Finnemore J in *Hall v Beckenham*

<sup>19</sup> I also agreed that DCC *could* have displayed notices “referring all pedestrian use to the provisions of the 1875 (or 1906) Act or by lodging a deposit and statutory declaration as to what ways (if any) were admitted to have been dedicated”. It is still my view that both options would have been possible.

76. Turning back to the guidance provided in the *Barkas* case, Mr Lewis drew my attention to the words of Lord Neuberger at paragraph 24 of the judgement:

*"I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. [...] It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so [...]"*.

77. Mr Hayes commented on the text omitted from this quotation, submitting that Lord Neuberger's comments were made in relation to village greens, not public rights of way, but in this instance I do not think any distinction need be made.
78. This leads me to return to the analysis in my previous paragraph 73: I noted that "where, as here in the present case, the land is in public ownership and where there is an arguable case that the public is entitled to walk the claimed routes 'by right', that ambiguity is such as to require the claimed use of Footpaths A, B and C by the public to be distinguishable by being of an amount and of a character as to be reasonably regarded as being the assertion a public right of way."
79. This brings into play the principle established in the *Billson* case which was outlined in my previous paragraph 76. In that case it was accepted that, in principle, simply walking between two points across a common over which the public enjoyed the right to air and exercise under the provisions of Section 193 of the Law of Property Act 1925 might be capable of establishing a public right of way over the track despite the authority that was provided for other purposes.
80. Mr Lewis argued that the use of land "for air and exercise" differed from the use of public open space "for the purposes of recreation" insofar as the latter was much broader. In his view there is no reason why walking across an open space from end to end is not consistent with its enjoyment as open space.
81. It seems to me that the same might also apply to using land for air and exercise, but I recognise that the key consideration is whether walking from A to B across the land in question, in the manner of a highway, is distinguishable from the type of use that is covered more generally 'by right' over the area. To quote the words of Sullivan J in the *Billson* case: *"if that distinction can be drawn on the evidence, a right of way over a track may in principle be established even though it runs across a common."*
82. At paragraph 81 of my interim decision I noted that, when deciding to make the Order, DCC had accepted that the claimed use of Footpath C was sufficiently recognisable as being the assertion of a public right over the new park to raise a presumption of dedication to the public. Whilst it had not considered the evidence sufficient to confirm the Order, on the advice of Counsel it has now revised its position. In the circumstances I place no weight on this change of opinion.
83. Through cross-examination of the supporting witnesses and in his legal submissions, Mr Lewis made the point quite forcefully that trying to distinguish between occasions when an individual might be walking on Paths A, B or C through the park on a general recreational visit or when simply going from one side of the park to another was a futile exercise. In any event, he said, even if

the different nature of the use had been identified on any occasion, DCC was not in a position to challenge anyone simply walking through the park.

84. I understand the very difficult challenges facing the supporters in demonstrating how their 'highway use' might be distinguished from 'use of a public walk' through the old park or 'use for the purpose of recreation' through the new. Yet that is the crux of the matter and, in the light of the new evidence and revised submissions before the inquiry, I have altered my previous view.
85. In the context of Wharton Park, I now recognise that the claimants (whilst walking directly from one entrance to another) could not reasonably have been distinguishable from other more general park users walking the same paths. Consequently their use could not have been seen as the assertion of a public right as opposed to use of the park in accordance with their rights as a member of the public as provided under the 1875 Act and the 1906 Act.
86. It follows from this that the use claimed by the 3 supporting witnesses and the 20 other people who walked Paths A, B and/or C over many years was not 'as of right'. Whilst the users themselves may not have been aware of it, the park has (most probably) been held by DCC and previous councils in trust for the enjoyment of the public under the 1875 Public Health Act and the 1906 Open Spaces Act. As a result, any use of the claimed routes by the public on foot will have been 'by right', that is by virtue of the statutory permission granted through the legislation.
87. Therefore irrespective of the quantity of evidence from claimants, the use claimed cannot qualify for the purposes of establishing a public right of way under the provisions of Section 31 of the Highways Act 1980. In summary, I must now reverse my previous finding and conclude that the evidence provided is not sufficient to raise a presumption of dedication of a public right of way within Wharton Park.

#### *Intentions of the landowner(s)*

88. Having reached that conclusion, there is no need for me to consider whether my previous conclusion in relation to the owners' intentions still stands. However I will record that in the light of the additional evidence provided by DCC, I consider the over-night locking of the gate at point Y would have been sufficient to rebut any presumption of dedication of Path A. Although it is now immaterial, my previous conclusion as regards Paths B and C would have remained unaltered.

#### *The Common Law approach*

89. The supporters submitted that if I accept the evidence of Mr Robinson, that the gates at Y were locked from 1996 to 2005, thereby defeating the case for dedication between 1995 and 2015, I should look instead at an earlier period, namely 1976-1996. Since I failed to find any actual event or action which brought into question the status of Paths A, B or C in 1996, the process provided by the 1980 Act is not triggered. However that does not prevent analysis of the same evidence under the common law.
90. This approach requires me to consider whether, during any relevant period, there was express or implied dedication by the owner(s) of the land in question (having the capacity to dedicate a public right of way) and whether there is evidence of acceptance of the claimed right by the public. In this instance, the burden of proof lies with those that assert the existence of a public path.

91. There is no evidence which leads me to conclude that DCC, or its predecessors did not have the capacity to dedicate public rights of way over Paths A, B and C if so minded. Although I have noted that the wording of the notice at or near point Z was ambiguous, I have found no evidence at all of express dedication. Whilst I agree with the supporters there is a good body of evidence from claimants showing all three paths were used by the public from the 1960s through to the mid-1990s, I am bound to conclude that none of this was 'as of right'. Since I have accepted that the old park and the new park were held by the relevant council under the 1875 and 1906 Acts respectively, this means that all such pedestrian use dating back to the acquisition of the land (in two parts) would be 'by right' as described above.
92. Consequently the case at common law must fail, largely for the same reason as through the statutory approach.

### **Conclusion**

93. Having regard to the above and all other matters raised at the inquiry in the written representations, I conclude that the Order should not be confirmed.

### **Formal Decision**

94. I do not confirm the Order.

*Sue Arnott*

**Inspector**

## **APPEARANCES**

### **In support of the Order**

Mr DC Gosling	Supporter
Mr P Hayes	Applicant
Mr R Hird	Supporter

### **Opposing the Order**

Mr G Lewis	Of Counsel; instructed by Ms L Renauden (Solicitor & Interim Governance Manager) representing Durham County Council
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#### *Who called*

Mr N Dodds	Strategic Manager for Culture & Sport, Durham County Council
Mr D Robinson	Gully Wagon Driver; Durham County Council
Mr S Green	Chartered Landscape Architect; Southern Green Ltd, 221 Durham Road, Low Fell, Gateshead, NE9 5AB
Ms A Christie	Senior Rights of Way Officer, Durham County Council

## **DOCUMENTS**

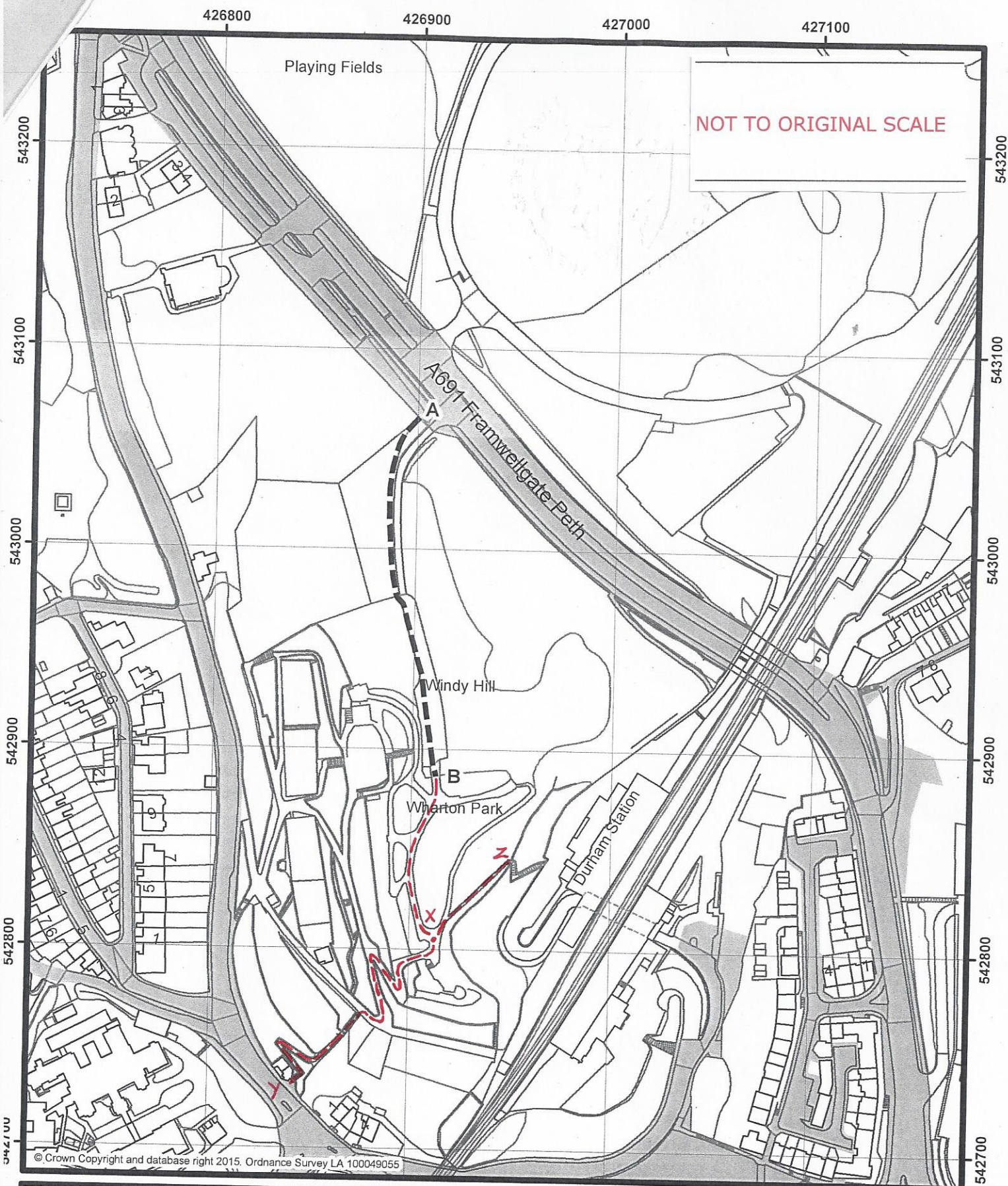
### *Documents previously considered*

1. Copy of the original statutory objections and representations and those in relation to the proposed modifications
2. Statement of case submitted by Durham County Council together with bundle of relevant case documents submitted 15 January 2016
3. Statement dated 28 April 2016 by DCC Neighbourhood Services Department
4. Email sent on 30 April 2016 by Mr D Gosling to the Planning Inspectorate
5. Statement of case of Mr P Hayes dated 28 April 2016
6. Letter dated 9 June 2016 from Mr P Hayes to the Planning Inspectorate
7. Email sent on 13 June 2016 from Mr N Dodds (DCC Neighbourhood Services Department) to the Planning Inspectorate

### *Documents submitted in response to advertisement of proposed modifications*

8. Statement of case dated 5 April 2017 submitted by Mr D Gosling
9. Statement of case dated 6 April 2017 submitted by Mr P Hayes
10. Statement of case dated 10 April 2017 submitted by Mr M Reed (& annex)
11. Statement of case submitted on 12 April 2017 submitted by Durham CC
12. Proof of evidence and summary proof submitted by Mr D Gosling (received 15 June 2017)
13. Proof of evidence dated 19 June 2017 submitted by Mr P Hayes
14. Proof of evidence and summary proof of Ms A Christie (DCC) submitted on 20 June 2017
15. Proof of evidence of Mr M Reed dated 20 June 2017
16. Letter dated 27 June 2017 from Mr A Wilson to the Planning Inspectorate





**Durham**  
County Council

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CORPORATE DIRECTOR  
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DURHAM COUNTY COUNCIL  
COUNTY HALL  
DURHAM DH1 5UQ

**The County Council of  
Durham  
Public Rights of Way  
Modification Order  
No. 3 (Public Footpath  
No. 128 Durham City)  
2015**

**Footpath to be added**

— — — — —

August 2015

Scale 1: 2,500

**Adopted Highway**

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**Durham**  
County Council



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The County Council of  
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August 2015