
Order Decision

Inquiry held on 21 February 2017

by Martin Elliott BSc FIPROW

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

Decision date: 21 March 2017

Order Ref: FPS/U1050/7/106

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Derbyshire County Council (Footpath from School Lane to Storth Lane - Parish of Pinxton) Modification Order 2012.
- The Order is dated 16 August 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were seven objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry at The Hub, Shiners Way, South Normanton on 21 February 2017. I carried out an unaccompanied site inspection of the Order route and surrounding area on the afternoon of 20 February. My inspection of the Order route was limited to viewing it from public vantage points as I did not have all the necessary permissions to inspect the whole route. I did not carry out a further site visit following the close of the inquiry and none of the parties required me to revisit the site. Although I was unable to inspect the Order route I am satisfied that I am able to determine the Order on the basis of my site inspection and the evidence before me.
2. The Order arises from an application made by Pinxton Parish Council in accordance with section 53(5) and Schedule 14 of the 1981 Act. The Council initially supported the making of the Order. However, on receiving objections to the making of the Order the Council reanalysed the evidence and concluded that in light of the objections the route could only be reasonably alleged to subsist¹. As a consequence the Council no longer supported the confirmation of the Order and took a neutral stance at the inquiry. At the inquiry the case for confirmation of the Order was made by Pinxton Parish Council.
3. Notwithstanding the neutral stance of the Council I sought clarification from them in respect of the width of the Order route as raised by a Mrs Johal in her original letter of objection. I also sought information as to landownership. The Council were unable to address these matters fully at the inquiry but provided information thereon following the close of the inquiry. This information was

¹ For an order to be made under section 53(3)(c)(i) it is only necessary for the right of way to be reasonably alleged to subsist. However, confirmation requires that the higher test, that the route subsists, must be satisfied.

circulated to the parties and I will consider the ownership and width issues, if necessary, later in this decision.

The Main Issue

4. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show, on the balance of probabilities that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
5. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
6. Should the test for statutory dedication fail under section 31 of the 1980 Act then it may be appropriate to consider the dedication of the way at common law in consequence of use by the public. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. For a dedication at common law the burden of proof rests on those claiming the public right of way.
7. In support of their case Pinxton Parish Council relied on two reports to the Derbyshire County Council Regulatory Licencing and Appeals Committee. The first report, 21 May 2012, being the report recommending the making of the Order. The second report dated 29 February 2016 recommends that the Council adopts a neutral stance in regards to confirmation of the Order on the basis that the evidence could only support a reasonable allegation that the right of way subsists. The Parish Council also submitted two additional statements, documents relating to the planning permission for change of use of land to the rear of 3 to 7 Honey Croft Court and also relied on the evidence of use forms submitted with the original application.
8. The Parish Council did not make any specific case that the evidence demonstrated a statutory dedication or dedication at common law. Whilst the Parish Council relies, in part, on the 2016 report, the report only supports a case that the footpath is reasonably alleged to subsist. However, as noted above (footnote 1) for me to confirm the Order it needs to be demonstrated that a footpath subsists; this is a higher test.

Reasons

Background issues

9. Storth Lane, which formed the Order route, was a public highway until it was stopped up by an order made under section 209 of the Town and Country Planning Act 1971² dated 10 September 1976. Although the Parish Council contend that the Order route has been a roadway since the 1700s any highway rights, including public footpath rights, would have been stopped up in consequence of the order made in 1976. For me to confirm the Order it is necessary for it to be shown that a dedication of a public footpath has arisen since 1976. Historic evidence prior to 1976 has no bearing on my determination.
10. Mr Street contended that provision of a right of way was a condition of planning permission. However, the planning permission granted by Bolsover District Council for the change of use of land to the rear of 3 to 7 Honey Croft Court includes no such condition. The 'Notes to Applicant' refer to the possibility that public rights may have been acquired 'since the 'Stopping Up' Order' and that the granting of planning permission does not override any subsequent claims for a right of way. However, this does not amount to evidence as to the existence of public rights.
11. No Planning Permission has been put before me which includes a condition that the Order route should be established as a public right of way. As such I can give no weight to the contention of Mr Street.

When the right to use the way was brought into question

12. The twenty year period to be considered in respect of a statutory dedication under section 31 of the 1980 Act is calculated retrospectively from the date when the right of the public to use the way is brought into question.
13. It is not disputed that the right to use the way was brought into question in 2003 when Frederick Gents School erected a fence which obstructed the route. This sets a relevant twenty year period of 1983 to 2003.

Evidence of use 1983 to 2003

14. I have examined the 16 evidence of use forms (UEFs) which were submitted with the original application; one of the forms relates to two individuals. The UEFs indicate use on foot on a weekly or monthly or less than monthly basis with some daily use.
15. The UEF of Yvonne Power provides no dates as to when she used the way and states that she had been stopped or turned back by people living on the route; she cannot recall any dates of these instances. The form also states that she was told that the route was private property. In the absence of any dates it is difficult to give this form any weight in respect of use during the twenty year period. In any event her use was challenged. A Sandra Boxall indicates that she moved from the area but no dates are provided as to when she moved from the area. The Statement of Reasons submitted by the Council suggests

² In their submissions to the inquiry the Council referred to an order under section 116 of the Highways Act 1980. However, the copy order submitted by the Council is under the 1971 Act which is the relevant Act in this case.

that following further investigation her period of use is 1999 to 2005. James Wright provides no information as to when he used the Order route.

16. The 2016 Committee report indicates that Maurice Parkin and Kenneth Ladyman are no longer interested in supporting the application although Kenneth Ladyman used the route from 1950 on a monthly basis. Maurice Parkin only used the route as part of the 'Bolsover Walk' between 1983 and 1996 but most of the questions on the UEF are answered 'cannot remember'. The weight that can be given to this UEF is very limited. Christine Bird also used the route as part of the Bolsover Walk 'just a few times' but provides no dates as to when this was. The attached plan shows two routes and although the Order route is marked this diminishes the weight which can be given to the form which, in any event, only provides limited evidence of use. The 2016 report also indicates that Maggie Bunker did not complete the UEF herself, that she just signed it and that she has no interest in the matter. In the circumstances whilst the UEF indicates use of the Order route on a monthly basis it is difficult to give the form any great weight.
17. The 2016 Report indicates that 13 users have used the route 'to visit places on the route'. The Report suggests that this implies that these individuals were not going from highway to highway and may have had permission to cross the land. However the maps accompanying the UEFs show a route which extends beyond the ends of the Order route and the places visited may have been elsewhere other than the Order route. There is no indication that permission, express or implied, was given to use the route. It may however be the case that some visited properties on the Order route itself but no information is offered in this respect. The absence of such information does in my view diminish, to some extent, the weight which can be given to these forms.
18. Mrs Dooley used the route as a child although this is outside the relevant twenty year period and prior to the stopping up order. She also used the route more recently when leafleting the area, this was three times a year but she could not recall which years. She said that the route was a popular route between Pinxton to South Normanton for a considerable number of years. Mr Street used the route as a child up to the 1970s and had always walked that route until 2003. The statement from Mr Coyle indicates that he used the route for many years to visit friends on Broadmeadows; he moved to the area in 1982 and in 1988 moved to Paddocks Close. Although Mr Holloway questioned whether Mr Coyle used the route the statement clearly states that he did. However, the details of frequency and which years he used the route is lacking and therefore it is only possible to give the statement limited weight in respect of use during the relevant twenty year period.
19. Mr Holloway has lived on School Lane for 35 years. He said that there was no recognisable footpath or any signs to indicate that the route was a public right of way. He said that the land was very muddy and overgrown and was used for dumping rubbish, was fouled by dogs and subject to anti-social behaviour. He contended that no one had walked the route for 35 years and any track was used for unauthorised access to the School.
20. Mr Whitehead said that when he moved to his property on Honey Croft Court in 2000 there was a right of way behind his boundary fence but it was a derelict mud path about 1 metre wide. It was not possible to get through when it was overgrown. He said the route was walked every now and again but not every

day. Mr Upcraft purchased a plot of land off School Lane in 1983/4 and built his own house. He said that there was a muddy path which he used for jogging. He said that children went that way to school and there were regular complaints about anti-social behaviour. Mr Belshaw said that the route was used as part of a route to and from the school playing fields and anyone who wanted to get to the school. His letter of objection makes the point that before he purchased his property and the 'footpath' was available the police were constantly being asked to visit the area.

21. The objection of Jonathan Price and Adele Staimar indicates that they had been made aware that when previously used as a footpath the land brought anti-social behaviour, vandalism, crime and litter to the area. The objection provides no information as to when the route was used as a footpath or who provided the information to them. Mr and Mrs Brooks are opposed to the reopening of the footpath which they say was re-routed about 30 years ago; they refer to antisocial behaviour and criminal activities. The objection of Laura Woodward and James Stokes states that the route has not been dedicated as a public right of way and on the rare occasion it was used people presumed it to be one. They had been informed by other residents that anyone seen walking towards the footpath were challenged and told that the route was not public. Mrs Moss in her objection indicates that she has lived in her property on Honey Croft Court since 2006 and says that the footpath had been closed for quite a few years, no further details have been provided as to when the route was closed.
22. Having regard to the above, the UEFs provide limited evidence as to the use of the way by the public. However, for the reasons identified above, the weight which can be attributed to some of the UEFs is diminished. Further, in the absence of any live witness evidence it has not been possible to test the evidence of user and therefore the weight which can be attributed to the UEFs as a whole is also limited. It should also be noted that Yvonne Power was challenged in her use of the way and this is consistent with the indirect evidence of Laura Woodward and James Stokes (paragraph 21 above). Again the absence of any live evidence from those completing UEFs means that the issue of challenges to users has not been tested.
23. Evidence of use is supported by the evidence of Mrs Dooley and Mr Street and to some extent Mr Coyle although the weight to be given to the evidence of this latter individual is limited due to a lack of detail of his use of the route.
24. The objections to the Order also suggest that the route was used. However, Mr Holloway stated that no one had used the route for 35 years although he does acknowledge the use of a track to the school. The evidence of Mr Whitehead is that the route was walked now and again but not on a daily basis. The objection of Laura Woodward and James Stokes states that the route was used on the rare occasion.
25. For a statutory presumption of dedication to arise the user must be sufficient to carry to the mind of a reasonable person that a right to enjoyment is being asserted. Taking all the evidence into account, although finely balanced, I do not consider that the evidence of use is sufficient to raise a presumption of dedication of a public footpath. I note the assertion of Mrs Dooley that the route is a popular route between Pinxton and South Normanton. However, for me to conclude that the way has been dedicated as a public footpath it is

necessary for there to be sufficient evidence of use; this is not borne out by the evidence. Given my conclusion it is not necessary to consider whether any landowner demonstrated a lack of intention to dedicate. It follows that the evidence is insufficient to demonstrate that a right of way subsists.

Dedication at common law

26. In view of my findings it is appropriate to consider dedication at common law. As noted above, the burden of proving any dedication rests with the claimant. However, Pinxton Parish Council have not put forward a case for dedication at common law. In any event bearing in mind the evidence of use before me since the stopping up order in 1976 I do not consider that it is sufficient to raise an inference of dedication such as to demonstrate that a right of way subsists.

Other Matters

27. The objection of Mrs Johal raises issues in respect of the recorded width. However, in view of my conclusions I have not considered this matter further.
28. The objections raise a number of concerns in respect of anti-social behaviour, criminal activities, privacy, security, future maintenance, cost and need. Reference was also made to pecuniary interests. Whilst I note and can appreciate these concerns and issues they are not matters which I can take into account in reaching my decision. The statements submitted by the Parish Council raise queries as to the authority for the blocking up of the Order route and refer to being unaware of any consultation to authorise this action. One objector also requests that the County Council exercise their powers under section 118 of the Highways Act 1980. These are not matters for my consideration. The relevant tests are those set out at paragraphs 4 to 6 above.

Conclusions

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

Formal Decision

30. I do not confirm the Order.

Martin Elliott

Inspector

APPEARANCES

For Derbyshire County Council:

Mrs J Gale

Solicitor, Derbyshire County Council

In support of the Order:

Mrs M Dooley

Councillor, Pinxton Parish Council

Mr Street

Pinxton Parish Council

In opposition to the Order:

Mr S Upcraft

Local resident

Mr G Holloway

Statutory objector

Mr A Whitehead

Local resident

Mr J Belshaw

Statutory objector

Documents handed in at the inquiry

- 1 Statement of Derbyshire County Council



Wildlife and Countryside Act 1981 S.53

The Derbyshire County Council
(Footpath from School Lane to
Storth Lane - Parish of Pinxton)
Modification Order 2012

KEY

Footpath to
be added



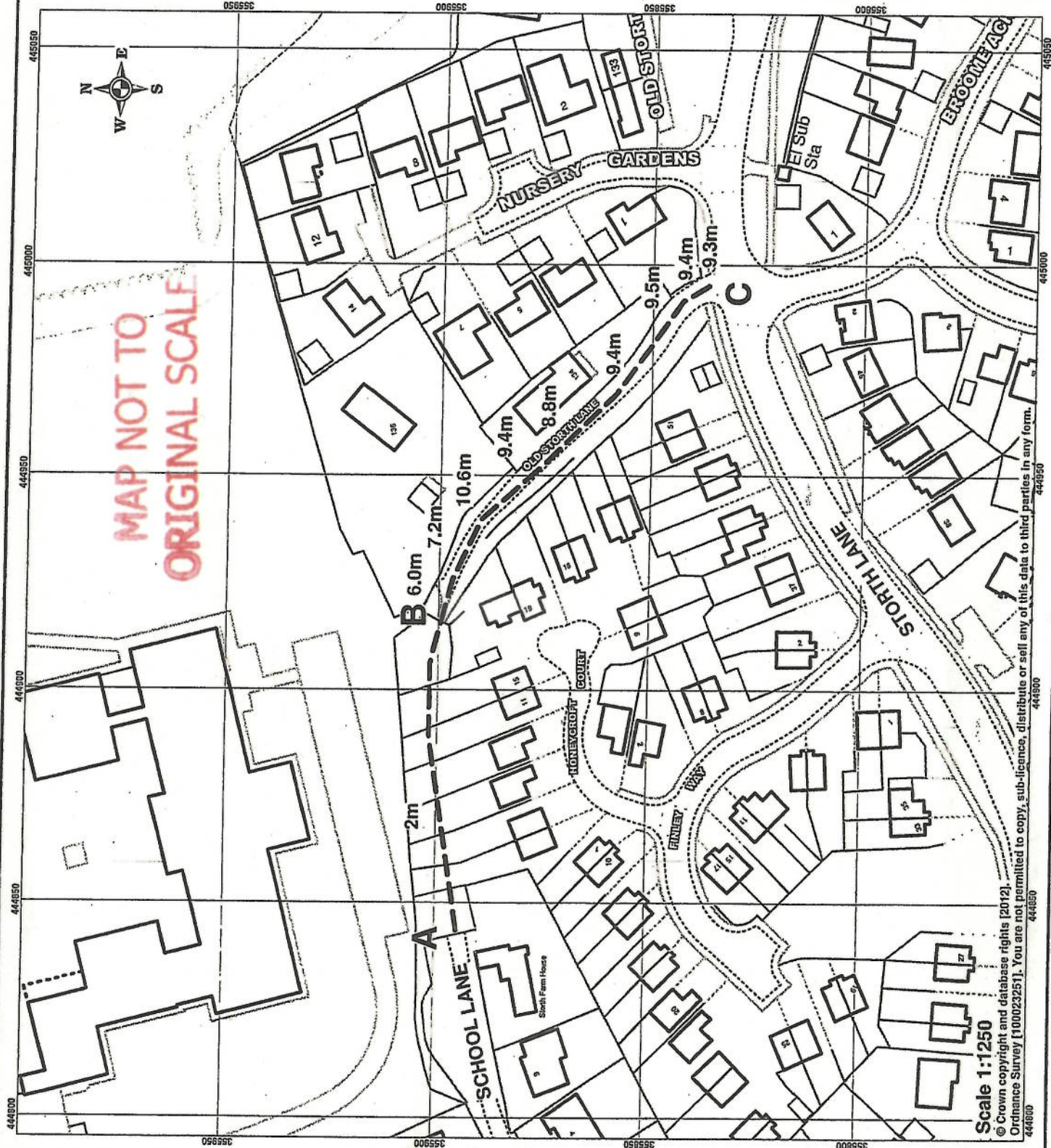
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Improving life for local people

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MAP NOT TO
ORIGINAL SCALE



Scale 1:1250

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