The Planning Inspectorate

Order Decision

Inquiry opened on 2 September 2015

by Peter Millman BA

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

Decision date: 6 October 2015

Order Ref: FPS/M2460/7/23

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Leicestershire County Council (Addition of Public Footpaths H108 and H108A, Frisby Lakes, Frisby on the Wreake in the Parish of Asfordby in the Borough of Melton) Definitive Map Modification Order 2013.
- The Order is dated 4 October 2013 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were six statutory objections outstanding when Leicestershire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I have confirmed the Order.

Preliminary matter

1. The objectors are owners of land crossed by the claimed public footpaths, and they were represented at the inquiry by Mr M Orlik of Lodders Solicitors.

Main issue

2. The main issue is whether the evidence shows, on the balance of probabilities, that public footpath rights exist over the route shown on the Order plan (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980. It reads as follows: *(1) Where a way over any land… has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question…* The standard of proof is the balance of probabilities.

Reasons

Background

3. The following general history of the area crossed by the Order routes is not disputed, except where indicated.

4. In the parish of Asfordby, north of the River Wreake and close to the village of Frisby on the Wreake, sand and gravel were extracted from the 1940s until not long before 1970. The sand and gravel pits were subsequently flooded to form two lakes which were used for sailing and fishing. There was also some

industrial activity close to the lakes. There was a car breaker's yard, a garage, and a concrete works.

5. In the early 1980s Severn Trent Water (now superseded by the Environment Agency) decided that the lakes should be used for flood alleviation, and works to construct banks around the western lake were carried out in 1986. When water levels in the Wreake rise to a certain point, water is automatically diverted into the lakes, draining out again when the river level falls.

6. Members of the public had come onto the land surrounding the lakes (mostly from the bridleway which runs between A and E (see the Order plan below) before 1986, but after 1986 there was more use of routes which utilised the banks.

7. Use continued until 2011, when dykes were dug across the routes near A and E and fences were erected on the western side of the bridleway between A and E. In 2008, planning permission was granted for the construction of a number of holiday lodges near the lakes. The Order route between D and E would pass through the area where these are to be positioned.

8. In brief, the County Council's case is that the public began to use particular routes around the lakes for walking (rather than wandering at will), particularly after 1986, and that such use continued, in the absence of challenges and notices forbidding use, until mid-2011, when the barriers mentioned in the previous paragraph put an end to it. The objectors, on the other hand, maintain that there were no single routes as shown on the Order plan, apart from where they ran on embankments, that members of the public were frequently challenged when walking around the lakes from before 1986 to 2011, and that there had always been notices in place, albeit frequently removed or destroyed and re-erected, indicating that there were no public rights of way over the land.

The statutory test

Whether there is a way

9. Both A – B and D – E cross areas of land which were, prior to 2011, fairly wide and grassy, where it would have been possible to take differing routes or, in fact, to wander at will. The forty-nine people who completed user evidence forms attached maps or aerial photographs on which they marked lines to show where they walked. The lines on these between A and B and between D and E differ somewhat, but it does not seem to me that this is significant; people cannot be expected to show a route across an open area with a great deal of precision; they are unlikely to be expert cartographers. They will show what one witness called an 'indicative' line. Nor is it necessarily to be expected that the applicant for an Order would have any more expertise at plotting a route on a map, representing precisely the route walked, especially where it is not constrained by physical boundaries. What is more important in this case is that an experienced officer of the County Council inspected the site with the applicant for the Order and referred to a number of very clear aerial photographs taken in 1991, 2000, 2006 and 2011 before drawing the route on the Order plan, and that, as one user put it in oral evidence 'there was no doubt about the route on the ground when we were there'.

10. Some maps attached to user evidence forms showed additional routes to those ultimately claimed, for example seven showed an additional route leaving E-D

near D and cutting the corner at D on the way to B, and three showed a route leaving B-A to join the bridleway (A-E) just north of A. This does not demonstrate wandering at will, but that there were some additional, probably less used, routes.

11. There is also an issue of precision with regard to the Order route west of point D, between there and where it begins to run parallel to the Hoby Road. The notices of an application for a modification order, as well as some of the maps attached to completed user evidence forms, showed routes that differed from what was ultimately recorded on the Order plan. It does not seem to me that this is crucial, particularly where the land concerned is in a single ownership and the alleged path does not follow a route between clear physical boundaries which can easily be plotted on a map or plan. The landowner will have been alerted to the fact that there is a claim of the existence of a right of way across his land and will not have been prejudiced. Again, it is what is shown on the Order plan and how the plotting was carried out which is crucial.

12. I noted above (paragraph 9) that a County Council officer walked the alleged route with the applicant when a route was still visible on the ground. She stated at the inquiry that there was a clear route and that she was confident that it was shown with reasonable accuracy on the Order plan. There is no route now visible to the west of D because of 4 years of the growth of vegetation, apart from at one particular point where there is still a pedestrian gate. I accept that the route shown on the Order plan probably does not represent the route walked on the ground to within centimetres of its actual position, but I am satisfied that it shows it to a sufficient degree of precision.

13. I conclude that there were ways as shown on the Order plan.

The date when use was brought into question

14. The County Council argues that although the Order routes were blocked in May 2011, the date when public use of them was brought into question was the date of application for a modification order on 28 March in the same year. The objectors argue for a date of 31 December 2010, on the basis that when Celtic Lakes was granted a licence to develop the holiday lodge park in 2010 it immediately adopted a 'vigorous policy of challenging walkers'.

15. Celtic Lakes, however, in an open letter to Frisby Parish Council in 2012 (see below at paragraph 35) stated: *we have never once, and still don't, want to stop people walking round the pits*. It seems to me, therefore, that March 2011 is likely to be the correct date. The relevant 20 year period for the purposes of the statutory test (above at paragraph 2) is thus from March 1991 to March 2011. It would make no significant difference, however, if it was from December 1990 to December 2010.

Whether the public used the routes

16. The application was supported by 49 completed user evidence forms and thirty-three supplementary questionnaires. Of the 49 user forms, 35 indicate use of the routes for more than 20 years, and 28 weekly or more frequent use. Objectors referred to public use of the land, for example one letter of objection stated: *In past years, we have been made aware of the general public entering our site to exercise their dogs and the like but at no point have we received a written request…*

17. I accept that the use of a few of those people who completed user evidence forms may be discounted because they were members of the sailing club or anglers and may not, therefore, have been using the Order routes as members of the public. Four stated that they were sailing club members, and it may be inferred that half a dozen others could have been because they seem to have parked in the sailors' car park and walked around the lakes from there.

18. One witness noted in oral evidence, 'We witnessed numerous other people also enjoying the route; many dog walkers and also other families and individual walkers.' The others who gave evidence at the inquiry in support of the Order referred either to the large number of other people they had seen using the routes or to the fact that the paths were well-used. It is likely that some users of the routes exaggerated the amount of their use; it seems unlikely that anyone would have walked them every single day of the year, as a few people claimed, unless they never took holidays. Otherwise the user evidence provides a good level of support for the view that paths around the lakes were very well used by the public.

19. Frisby Lakes are in a rural area, although with two nearby villages. The quantity of use likely to have occurred is, in my view, clearly sufficient to represent use by the public in such an area rather than use by a few individuals.

20. Mr Orlik argued that because most users of the paths around Frisby Lakes came from Asfordby or Frisby, and because the Leicestershire and Rutland Area of the Ramblers and the Leicestershire Footpaths Association were not aware of their existence, they had only been used by a limited part of the public, and therefore, following the judgment in Poole v Huskinson (1843), there could have been no dedication to the public. I do not accept that argument. It is undoubtedly the case that most paths in rural areas which are not tourist attractions are used almost exclusively by the people who live in those areas. It does not follow, however, that dedication occurs, or is deemed to have occurred, only to those people. Neither is it surprising that a county-wide organisation representing footpath users would not have heard of a path not shown on the definitive map or depicted on an Ordnance Survey map.

21. I conclude that the Order routes were used by the public during the relevant 20 year period.

Whether use was as of right and uninterrupted and for the full period of 20 years

22. Use of a route which is 'as of right' is use which is peaceable, open, and not based on any licence from the owner of the land. It was not argued by the objectors that use was not open. A very few of those people who completed user evidence forms described their use as permissive, permissible or concessionary, although none stated from whom permission had been obtained. Objectors stated that no-one had asked for permission to use the routes, nor had any permission been given. One, for example, wrote *The other people have been trespassers, as far as I am concerned, because at no time over the past 40 years have I been approached, written to or spoken to, about being able to walk around Frisby Lakes.* A user of the Order routes tried to explain to the inquiry what he had meant when he had used the word permissive. He explained that he meant that he was free to use the paths, but that they were not clearly designated as permissive rights of way. They were not, for example, shown as permissive paths on Ordnance Survey maps. I conclude that use of the Order routes was not by licence of the owner.

23. It is not so straightforward, in this case, to ascertain whether use was peaceable or, by contrast, contentious.

24. The County Council's case was simple. The public had used the routes. Although they had seen notices referring to water safety, notices telling people not to ride horses on the banks and 'private' notices not on the line of the Order routes, none of its witnesses or those completing user evidence forms had seen notices telling them that they should not go along those routes. Nor had any been challenged verbally while walking along the Order routes.

25. Mr Orlik suggested that those who had been challenged might have chosen not to give oral evidence to the inquiry. I accept that as a possibility, but I have seen no evidence suggesting that this was the case.

26. The objectors' case was equally simple. Throughout the 20 year period they, or their licensees or employees, had constantly erected notices on the Order routes with explicit messages denying the existence of public rights of way, but these had, just as frequently, been torn down or destroyed. They, their licensees or employees had also frequently challenged people using the Order routes and told them that they should not be there.

27. Use which continues when people have been challenged verbally or by notices is not peaceable use.

28. The objectors conceded that notices might have been torn down with such frequency (perhaps by irresponsible youths) that otherwise responsible walkers would not have seen them. In my view that is unlikely, given that many people claimed to have walked the Order routes daily yet never to have seen a notice denying the existence of a public right of way.

29. Mr Orlik suggested that it was odd that no question about rights of way was raised when it was first known, in around 2004 or so, that the holiday lodges were planned. If people were using the Order routes as suggested by the County Council, he implied, surely they would have raised the issue at an earlier stage.

30. In October 2005 a report in *Melton Today* quoted Mr R Weighton (one of the objectors' witnesses at the inquiry) as stating, concerning the application for holiday lodges, that there was no intention of threatening the existence of the Sailing Club or any other persons who used and enjoyed the site of Frisby Lakes.

31. Mr R Cowman, one of the objectors, attended a meeting of Frisby Parish Council, also in October 2005. He attached a copy of the minutes to his witness statement. The minutes record: *It was also noted* [by Mr Cowman] *that there are no official rights of way across the land but that the family owning the land have allowed access for many years and intend to continue to do so.* At the inquiry, Mr Cowman stated that the 'access' that was referred to was access for members of the sailing and angling clubs.

32. In my view, the clear implication of the words reported in 2005, at a time when there was no dispute about an alleged right of way, is that public access to the site for walking had been, and would continue to be, tolerated. If that was the message that was being promulgated it is hardly surprising that no-one raised the issue of rights of way earlier than they did.

33. In 2010, Mr Cowman stated, he granted a licence to Celtic Lakes Resort to construct the holiday lodges. A director of that company had been Mr Carney. Mr Cowman implied in his statement that Mr Carney was confrontational and challenged walkers.

34. A statement made by Mr and Mrs Carney dated 1 July 2011 (it is not clear to whom it was addressed) complained about abusive dog walkers and stated: *there are clearly signs around the park asking for dogs to be kept on leads at all times*.

35. A letter from Mr S Cowman to the County Council in May 2012 enclosed a copy of a statement read out by Mr Carney at a previous meeting of Frisby Parish Council. It stated, among other things, *after all we have only ever asked that you put your dogs on a lead and clean up your dog mess… we have never once, and still don't, want to stop people walking round the pits…*

36. It does not seem likely to me that Mr Carney would have arrived at Frisby Lakes in 2010 to develop a holiday lodge resort only to reverse a previous policy of excluding the public by encouraging them to walk there. It seems more likely that he would have been continuing a policy of tolerance of walkers.

37. I appreciate that these last two pieces of evidence refer to a time after the end of the 20 year period, but nevertheless, taken together with the evidence in paragraphs 30 and 31 it suggests a situation somewhat at odds with that put forward at the inquiry, which emphasised frequent challenges and the continual replacement of notices indicating 'no public right of way'.

38. The evidence of users of the Order routes, which, on the whole, seemed to me truthfully given, is consistent with the owners of Frisby Lakes tolerating or acquiescing in, prior to 2011, the use of the Order routes for walking.

39. Mr Cowman's Managing Agent at Frisby Lakes from 1972 onwards, a chartered surveyor and land agent, made a statement for the inquiry but did not appear in person. He could have advised – and Mr Cowman said it was a pity that he had not – of the provisions of Sections 31(5) and 31(6) of the Highways Act 1980. Section 31(5) states: *where a notice erected as mentioned in subsection (3) above* [inconsistent with the dedication of a way as a highway] *is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.* Section 31(6) states: *an owner of land may at any time deposit with the appropriate council:- (a) a map of the land… (b) a statement indicating what ways (if any) over the land he admits to having been dedicated as highways; and… statutory declarations made by that owner… to the effect that no additional way… has been dedicated as a highway… are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner… to dedicate any such additional way as a highway.*

40. Mr Orlik suggested that these provisions might not be particularly familiar to those who are not 'rights of way professionals'. I do not know what chartered surveyors and land agents might be expected to know about preventing the deemed dedication of rights of way. However, it seems to me at least possible that the surveyor knew of the provisions in Section 31 of the 1980 Act, but did not mention their use to Mr Cowman because Mr Cowman did not, at the time, intend to exclude the public from Frisby Lakes.

41. The objectors called witnesses who told of their experiences erecting notices and seeing them repeatedly torn down or destroyed. They also described challenges they had made to member of the public. Generally this evidence seemed to be consistent. However, only one photograph of a notice stating or including the words 'no public right of way' (or words to a similar effect) said to have dated from before 2011 was produced, and that was not on one of the Order routes. Mr Cowman stated that he had had more records of such notices, but his office had been vandalised in 2009 and his records destroyed.

42. A photograph of a notice produced by Mr Cowman was stated to read PRIVATE LAND KEEP OUT NO RIGHT OF WAY. His photograph was too small to make out the words. A witness called by the County Council produced a Google Street Scene photograph dating from 2009 which showed what appears to be the same sign. It reads PITSTOP GARAGE, and contains details, including telephone numbers, of services offered. This notice is not on any of the Order routes, but it does suggest a lapse of memory.

43. Mr Orlik drew to my attention the Appeal Court judgment in the case of *Betterment Properties (Weymouth) Ltd and another v Taylor* [2012]. Patten LJ referred at paragraph 33 to Lightman J's judgment at first instance where he said: *As regards the evidence of people from the local area who appeared at the public inquiry, I do not get any sense that they were setting out to mislead the inquiry. I think that they were attempting to describe matters as they genuinely saw them. However, in some respects, I must be cautious about some of the things which they said. For example, if a witness said at the inquiry in 2000 that he or she had never seen a sign near to the registered land, it is entirely possible that such a witness may have forgotten that he or she had seen a sign say some 15 or 16 years earlier…* Mr Orlik suggested that those remarks could be applied here. I do not agree. In this case, user evidence forms denying the existence of notices were not completed 15 or 16 years after the end of the 20 year period, but shortly after public use was challenged.

44. One of the objectors' witnesses recalled patrolling the Lakes with his father and, when he was old enough, challenging walkers himself. When given the opportunity to comment on why County Council witnesses could not recall being challenged he seemed able only to recall one particular incident which he had described in his witness statement. I found this surprising.

45. These inconsistencies in the objectors' case, and the fact that it cannot readily be reconciled with the evidence given by County Council witnesses, lead me to conclude that I should prefer the evidence of those who stated that they had seen no notices and not been challenged. I do not conclude that there were notices unseen by those who gave evidence and challenges directed towards other people; I conclude that the evidence of those who stated that they had put up notices and made challenges is not convincing. I conclude finally on this issue that use of the Order routes by the public was probably as of right.

The intentions of landowners

46. The evidence discussed in paragraphs 22 to 45 above leads me also to the conclusion that the objectors acquiesced in the use of the Order routes in the period 1991 to 2011. There is not sufficient evidence that during that period the owners of the land crossed by the Order routes did not intend to dedicate them as public footpaths.

Conclusions on the statutory test

47. I conclude that the statutory test for deemed dedication is met.

Conclusion

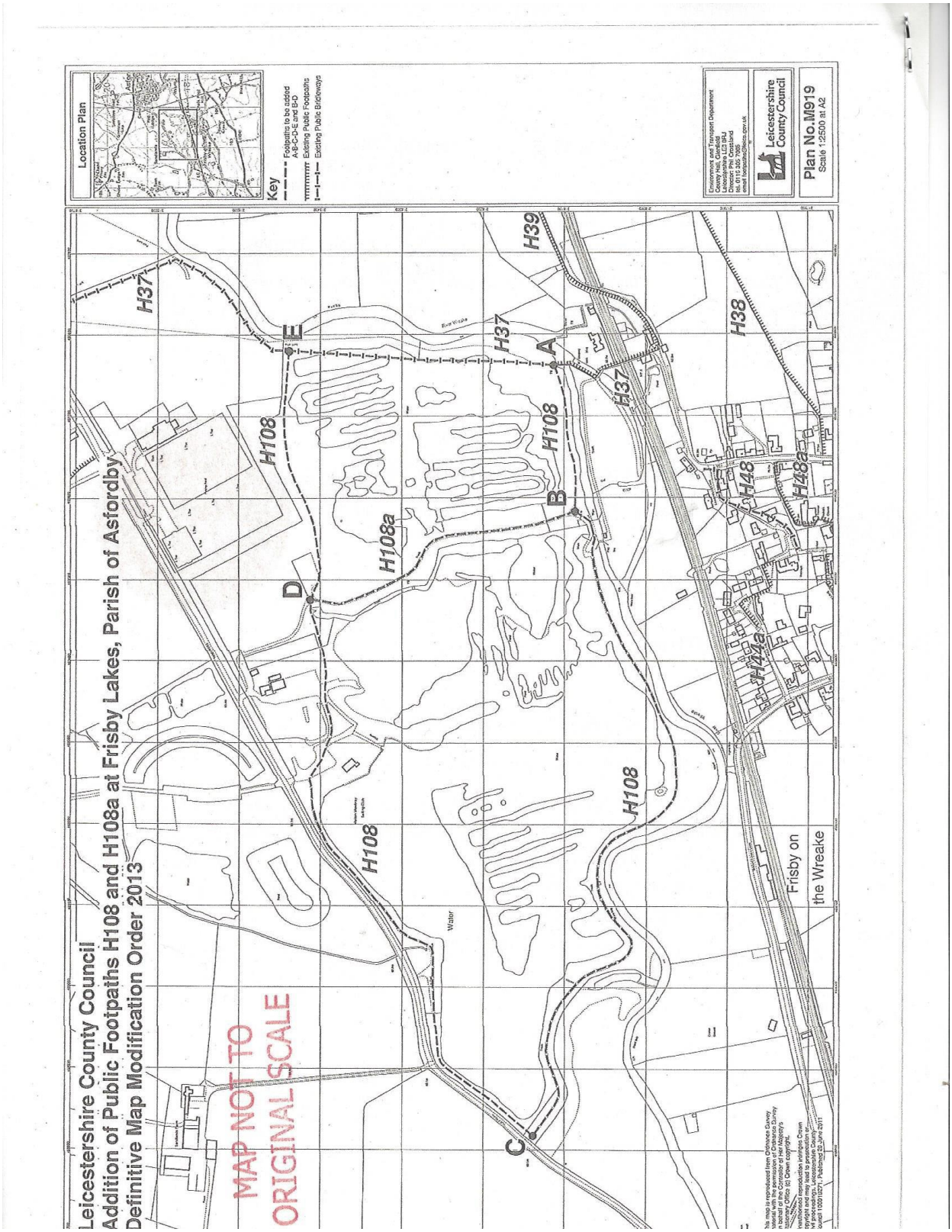
48. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed.

Formal Decision

49. I confirm the Order.

Peter Millman

Inspector


Leicestershire County Council
Addition of Public Footpaths H108 and H108a at Frisby Lakes, Parish of Asfordby
Definitive Map Modification Order 2013
Location Plan
Key
Footpaths to be added
A-B-C and D-E
Existing Public Footpaths
Existing Public Bridleways
Environment and Transport Department
County Hall, Glenfield
Leicestershire LE3 8RJ
Director: Paul Crissell
tel: 0116 305 7000
email: transport@leics.gov.uk
Leicestershire County Council
Plan No.M919
Scale 1:2500 at A2
MAP NOT TO ORIGINAL SCALE
H37
H108
H108a
H39
H38
H48
H48a
H44a
Frisby on the Wreake
A
B
C
D
E

APPEARANCES

For Leicestershire County Council

Mr A Cross	Solicitor, Leicestershire County Council

He called:

Mr J Coleman	
Mr D Hazlewood	
Mr B Howes	
Mrs E Senior	Access Officer, Leicestershire County Council
Mr I Riley	
Mr J Guy	
Mr G Goldby	

Objectors

Mr M Orlik	Lodders Solicitors LLP

He called:

Mr R Cowman
Mr D Irving
Mr B Irving
Mr B Hill
Mr M Scattergood
Mr R Weighton

Documents handed in at inquiry

1. Confirmation that the Order was advertised
2. LCC's opening statement
3. Letter from Caryl Pell dated 1 September 2015
4. Three notices of application for a modification order
5. Additional photos to be attached to Mr R Cowman's witness statement
6. Mr Hazlewood's photos of signs
7. Report of the Chief Executive LCC, August 2013
8. Mrs Howes' user evidence form and questionnaire
9. Photos of both sides of a copse (near point D on the Order route)
10. Mr Bullimore's additional statement
11. Benjamin Irving's witness statement
12. Letter from Mr Weighton to Mr Orlik, 1 September 2015
13. Letter from F B Baker dated to inspector dated 27 August 2015
14. Map showing route walked by Mr Goldby highlighted yellow
15. Photos of 'Keep out of plantation' notices
16. LCC's map of Order route showing differences from Mr Weighton's plotting
17. Mr Orlik's closing submissions
18. Mr Cross's closing submissions