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## Order Decision

Inquiry held on 14 December 2016

Site visit made on 13 December 2016

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 13 January 2017**

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### **Order Ref: FPS/Z4718/7/45**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Kirklees Council (Kirkburton Public Footpath 254 – Low Fold, Kirkheaton) Public Path Modification Order 2013.
- The Order is dated 17 December 2013 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 4 objections outstanding at the commencement of the inquiry.

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

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#### **Procedural Matters**

1. This case concerns the addition of a public footpath along a route commencing on Bankfield Lane, opposite Bankfield Avenue (point A on the plan attached to the Order), and running in a southerly direction to St Paul's Road (point B).
2. In addition to the 4 objections outstanding, a further objection was withdrawn in writing. Two representations were made in support of the Order.
3. I visited the location of the Order route on the afternoon before the Inquiry, but was unable to walk it as it is presently obstructed. No-one requested that I make an accompanied visit following the close of the Inquiry. I am satisfied I can reach my decision taking into account the comprehensive photographic evidence, including aerial photographs, of the Order route itself in the evidence bundle provided by Kirklees Council (the Council).
4. At the commencement of the Inquiry, I accepted late items of evidence, some of which had recently come to light and, in consultation with the parties, agreed short adjournments to enable them to be examined.

#### **The Main Issues**

5. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires me to consider whether, on a balance of probabilities, the evidence shows that a footpath subsists along the Order route.
6. There is some historical documentary evidence to consider. However, the evidence relied on by the Council is of claimed use by the public and a presumption of dedication arising under Section 31 of the Highways Act 1980 (the 1980 Act). This requires me to establish the date when the public's right to use the Order route was brought into question. The evidence can then be

examined to determine whether use by the public has been as of right (without force, secrecy or permission) and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner(s) to dedicate public footpath rights.

7. Should these tests not be met, I shall consider the evidence under common law whereby a right of way may be created through expressed or implied dedication and acceptance.

## **Reasons**

### ***Documentary evidence***

8. A range of historic Ordnance Survey maps were provided covering the period 1854 to 1994, all showing the Order route as a feature, unobstructed and connecting with the highway network at either end. Aerial photographs dating between 1999 and 2012 show the Order route and changes to the land following residential development. Whilst this evidence is helpful in confirming the physical existence, appearance and character of the Order route over the years, it does not provide any evidence as regards its status, public or private.

### ***User evidence***

#### *When the claimed route was brought into question*

9. There are a number of possible dates to consider. The Council relied on 2008 as the date the public's right to use the way was brought into question when the Order route was blocked by fencing and access prevented. Several of those giving evidence to the Inquiry, including Mrs Comer, believed they were unable to use the route in the mid 2000's: Mr Smith guessed around 2006. Mrs Johnsey spoke of wheelie bins being placed across the route initially she believed to discourage use, followed by the permanent closure. Some of the witnesses said they had been told of the closure rather than having encountered it themselves.
10. Prior to this, in 2004, the Council had been contacted by a member of the public regarding debris on the route. Some of the user evidence forms (UEFs) also referred to building materials and garden waste that made use difficult; and Mr Toothill said there was always a pile of sand at one end of the route during building works. However, whilst access may have been impeded at these times, there is nothing to suggest it was prevented.
11. However, Mr Toothill stated the route had been obstructed for a period of up to 12 months from July 1998 when scaffolding poles had been placed at either end of the boundary of his property No.23a<sup>1</sup>, to prevent access for reasons of health and safety. This was to allow the reconstruction of a boundary wall. Mr Barber recalled building works around this time, just prior to his moving away from the area. Yet none of those giving evidence to the Inquiry or indeed the remaining UEFs referred to being unable to use the Order route at this time. A letter to the former highway authority from a resident at 5 Stead Lane, dated August 1998, does, however, refer to this event. The resident was seeking to regain access to their boundary wall. The Council conducted a site visit noting that the route was "obstructed", but took no further action as it was not

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<sup>1</sup> Situated on the east side of the Order route

recorded as a public right of way, and the issue regarding access was a private matter.

12. I consider that the route was obstructed, at least in August 1998. However, that none of the users mentioned this suggests any obstruction was short-lived, use on foot was possible, or there was little or no use during this period. It may be, as Mr Barber suggested, that users took the alternative route along Stead Lane whilst the building work was carried out. In any event it did not result in the public seeking to claim a public right of way at the time.
13. I agree with the Council and conclude that the fencing which blocked the Order route in 2008 was a clear challenge to use, an act from which the public became aware that their right to use it was being questioned. It follows, in my view, that the 20 year period for me to consider is 1988 to 2008.

*Use by the public*

14. Evidence of claimed use of the Order route is provided in 18 UEFs. I heard from two people who had completed forms, Mr Barber and Mr Clarkin, and in addition from four other users. I attach greater weight to the evidence that has had the benefit of being tested. I further note that some of the UEFs claim use after the route was blocked by fencing in 2008 which seems to me unlikely.
15. Mr Smith recalled using the route from the age of about 10 with his father. This would have been in 1969, and his use continued from then. He recalled a sweet shop on the corner at point A (No.23), which Mr Harrison stated closed in 1972. His use varied over the years being initially weekly, later 5 times a week, then about twice a week. Mrs Comer had lived in the village between 1959 and 1979 before moving back in 1989. She recalled as a child of 5 or 6 years old going to the sweet shop on her own along the Order route, and using it with her mother 2 or 3 times a week, and later with her own children once or twice a month. Mr Barber had used the route between 1975 and 1998, at least weekly. Mr Clarkin walked his dog along the Order route at weekends from 1988, and from the mid-1990s he used it to go to the village once a week or less. Mr Booth's use began in December 1990 and varied from twice a day when taking his children to and from school, to 2 or 3 times a month to visit places in the village. Mrs Johnsey used the route as a child to visit friends at least 3 times a week and from the mid-1980s several times a week. By 1987 her use was every other day.
16. Most spoke of using it in fine weather as a short cut to and from the village, cutting off the corner. Use described was to visit friends and family, access village facilities such as shops and the 'pub', going to various clubs such as scouts or brownies, dog walking and taking children to and from school.
17. None spoke of having been challenged or interrupted in their use of the way, although some referred to the building materials and garden waste that made passage difficult at times. In addition there is the scaffolding referred to by Mr Toothill, said to have been in place for up to 12 months, and described in the 1998 correspondence between a local resident and the former highway authority. The question is whether this interrupted use.
18. For an interruption to use to be effective it must be carried out by the landowner, or someone acting on their behalf, and there must be an interference with the enjoyment of the right of passage. Further, the intention

of the interruption must be to prevent use of the way by the public, rather than for other purposes such as building works or parking vehicles. Accordingly, provided that use is sufficient to demonstrate actual enjoyment of the way, it does not have to be constant during the 20 year period: there may well be periods when, for a variety of reasons, a way has not been used. A short length of the Order route is registered with property on Stead Lane. Otherwise it may be presumed that adjacent landowners own the land to the centre line. This it seems would have been the situation as regards Mr Toothill in 1998. His evidence to the Inquiry was that the scaffolding on the route in 1998 was put there for health and safety reasons whilst a boundary wall adjacent to his property was rebuilt. In the circumstances, I do not find that the scaffolding across the Order route in 1998 constituted an interruption to use for the purposes of Section 31 of the 1980 Act.

19. None of the users had seen any notices indicating there was no public right of way or that they should not be using the Order route.

*The evidence of the landowners*

20. Both Mr Harrison and his daughter spoke of having challenged people using the Order route if they considered they had no right to be there. Mr Harrison acknowledged that people used it. He spoke of dog walkers every day, some of whom allowed their pets to foul the way; and of drinkers on Friday and Saturday nights engaging in anti-social behaviour, that he had "chased off". Miss Harrison stated she had always challenged people that she saw or that their dog had alerted her to through barking: some had retraced their steps, whilst others had continued along the route. Mr Toothill also said he had challenged users. He acknowledged that people used the route but described this as "one or two, not a lot".
21. None of those giving evidence referred to such challenges, and the evidence in this regard is therefore conflicting. Mrs Johnsey said that her mother had been challenged about 8 years ago, which is consistent with the route being blocked off in 2008. On balance, it seems mainly that people engaging in anti-social behaviour were challenged. Indeed the evidence points to the route having been closed at that time largely due to this.
22. Mr Toothill provided various documents relating to Mr Baxter's property on Stead Lane, on the west side of the Order route, comprising local land search and conveyance records. I do not find it surprising that the search document dated 1975 does not contain any reference to the Order route, since it is not recorded as a public right of way (Question 24 on the form). I agree with the Council that Question 1 on the form concerns Stead Lane rather than the Order route: it states that the roadways/footpaths abutting Stead Lane are maintained at public expense. Whereas, the Council in response to enquiries from Mr Harrison seeking that the Order route be repaired, had stated that it was not a way maintained at public expense.
23. As regards the conveyances (dated 1972 and 1973), and plans showing part of the Order route included within the boundary of the property, I agree with the Council that they refer to private rights, including contributing to its upkeep in part. This raises the question of why a private right would have been necessary if public rights existed. However, such documents dealt with private rights rather than defining public rights. Further, there were no acknowledged or recorded public rights over the Order route at this time. Reference to a

private right is not conclusive evidence of there being no public right over the way. As the Council said, it is common for public and private rights to co-exist.

### *Conclusions on presumed dedication*

24. I conclude that during the 20 year period 1988 to 2008 there has been regular use of the Order route by the public, as of right and without interruption, sufficient to raise a presumption of dedication. The type of use described is consistent with that of use of a public right of way to access local facilities and for recreation. As regards the intentions of the landowners, I do not consider that the actions described, such as challenges which appear to have been directed mainly at people engaged in anti-social behaviour, were sufficient to indicate that there was no intention to dedicate the Order route as a public right of way. Accordingly, the presumption of dedication has not been rebutted. It follows, on a balance of probabilities, that a public right subsists over the Order route and the Order should be confirmed.
25. My conclusions would be the same had I taken 1998 as the date of bringing into question the public's right to use the Order route, when Mr Toothill placed scaffolding poles there when rebuilding a wall. The user evidence is very similar, from some 14 people completing UEFs and claiming use during this 20 year period, 1978 to 1998 (compared to some 15 for the later period), together with the additional evidence given by four other users at the Inquiry. Again use described is regular and consistent with use typical of a public right of way. There is nothing to suggest that claimed use during this period was not as of right or was interrupted. Further, there is no evidence of any lack of intention to dedicate, other than the verbal challenges to users which appear to have been ineffective, directed mainly at anti-social behaviour, and insufficient in my view to rebut the presumption of dedication. Accordingly, I conclude that a presumption of dedication is also made out for the 20 year period 1978 to 1998.
26. As I have concluded the statutory tests under Section 31 of the 1980 Act have been met, it is not necessary for me to consider the evidence at common law.

### **Other matters**

27. The existence of an alternative route providing access between points A and B is not a relevant consideration in my determination as to whether or not a public right of way subsists over the Order route. Neither am I able to take into account concerns about anti-social behaviour previously experienced on the Order route, and which residents consider may recur, as the legislation does not permit me to do so.

### **Conclusions**

28. 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**

29. I confirm the Order.

*S Doran*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mr A Gill <i>of Counsel</i>	<i>instructed by</i> Kirklees Council Legal, Governance and Monitoring Department
who called	
Mr A Barber	
Mr C Smith	
Mr S Booth	
Mrs R Comer	
Mr D Clarkin	
Mrs J Johnsey	
Mr G Cheetham	Definitive Map Officer, Kirklees Council

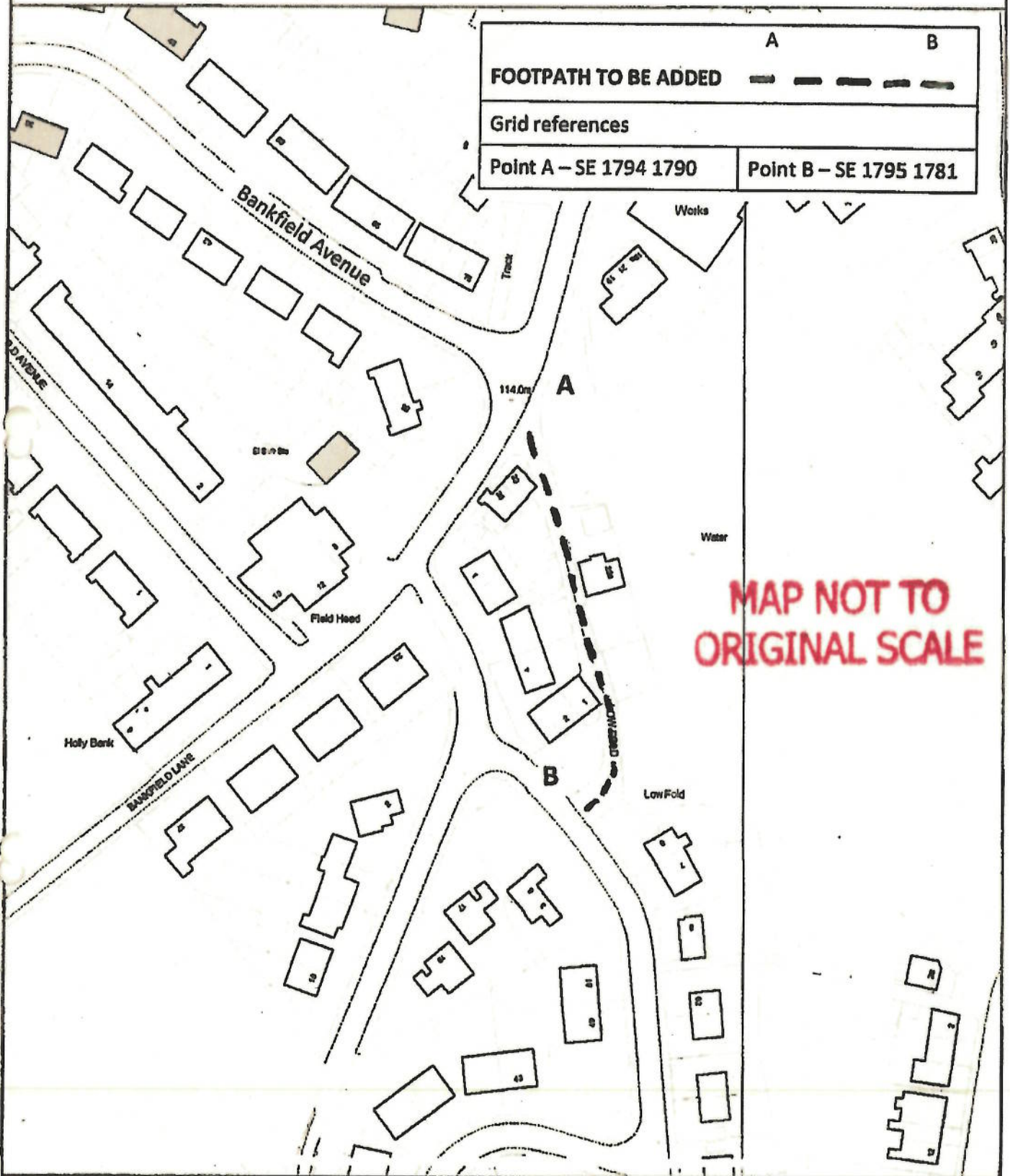
### **Speaking against the Order:**

Mr G Harrison	Objector
Mr J Toothill	Interested party
Miss M Harrison	Interested party

## **DOCUMENTS**

1. Undated letter from Trish Mellor, Chair Yetton Together community group
2. Correspondence dated 3 August and 1 September 1998 from F G Smith, and 18 August on behalf of the Chief Engineer, Kirklees Metropolitan Council; Ordnance Survey plan showing the Order route together with note of a site visit carried out by Mr S Mills on behalf of the Council, submitted by Kirklees Council
3. Local land charges search and conveyances relating to property at 7 Stead Lane, submitted by Mr Toothill

**Wildlife & Countryside Act 1981, section 53. Modification order to add a footpath**  
**Kirkburton 254, Low Fold, Kirkheaton**



A B	
FOOTPATH TO BE ADDED	
Grid references	
Point A – SE 1794 1790	Point B – SE 1795 1781

