

Order Decision

Site visit made on 1 June 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 5 July 2016

Order Ref: FPS/Q2500/7/77

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Wildlife and Countryside Act 1981, Lincolnshire County Council (New Leake Public Footpath Nos. 1107 & 1113) Definitive Map Modification Order 2014.
- The Order is dated 27 October 2014 and proposes to modify the Definitive Map and Statement for the area by adding two public footpaths as shown in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when Lincolnshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the site on Wednesday 1 June 2016.

The Main Issues

2. The main issue in this case is the requirements of section 53 (3) (c) (i) of the 1981 Act namely, whether the evidence discovered, when considered with all other relevant evidence available, shows on the balance of probabilities that a right of way not shown in the map and statement subsists over the land in question.
 3. The Council did not pursue a case for the confirmation of the Order on the basis of deemed dedication of a public footpath under the statutory provisions of section 31 of the Highways Act 1980 ('the 1980 Act'). In the Council's view, the evidence of use submitted in support of the application made on 21 May 2012 did not demonstrate sufficient use of the claimed paths during the 20 years prior to the date of the application; the application being taken to be the event that called the public's right to use the claimed footpath into question.
 4. The Council therefore relied upon dedication of a public right of way being inferred at common law. At common law, the burden of proof lies with those who assert that a public right of way has been dedicated to demonstrate, on a balance of probabilities, that the relevant landowner had the ability to dedicate a public right of way; that the conduct of the landowner was such as to demonstrate an intention to dedicate and that the user evidence is sufficient to demonstrate acceptance by the public of that implied dedication.
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Reasons

Background

5. Footpath 1107 commences on Spilsby Road (point A on the Order plan) and runs in a westerly direction over an access road known as Drainside to point B before turning to run in a generally northerly direction on the eastern side of an agricultural field to point C. At Point C the path runs in a generally easterly direction to Spilsby Road over a track which gives access to Anglian Water's sewage works. Footpath 1113 runs from point C in a northerly direction at the eastern edge of an agricultural field terminating at point E where the path meets an open drain.
6. The field alongside which part of footpath 1107 and the whole of footpath 1113 runs is currently in the ownership of Mr Kevin Smith. Prior to Mr Smith purchasing the land in 2012 it had been owned by a Mrs Vere, who had let the land to the Eastville, Midville and New Leake Group Parish Council. I understand that from at least 1969 (and perhaps earlier) the Parish Council had sub-divided the land into individual allotments which had been rented out by license to a number of individuals. Those licences had been terminated prior to Mr Smith purchasing the land.
7. On behalf of the objector it is submitted that the Council had failed to provide sufficient evidence to satisfy the tests applicable at common law and that no inference of dedication could be drawn from the available evidence.

Common law

Use as of right

8. In support of the application, the Council received 14 user evidence forms which represented 15 individual users. The Council acknowledged that these forms described six different routes taken by the users and that it had been necessary to sift the user evidence to ascertain the extent of use of those two routes which are the subject of the Order. Of these forms, two users failed to specify their periods of use and one failed to include a plan of the routes used; consequently, the Council discounted the evidence contained in these forms and I am satisfied that it was correct to do so.
9. Of the remaining 12 users, all claimed to have walked footpath 1107. For most of the 1990s only 4 users walked the route with the absolute numbers rising until 2009 when all 12 individuals were walking the route. Frequency of use varied between daily and weekly use.
10. With regard to footpath 1113, use of the path ceased for some users around 2004 when a bridge over the drain at E had been removed although 6 other users continued using the path as a cul-de-sac after that date and a further 3 users commenced using the path after 2009. Frequency of use was similar to the use of footpath 1107 and varied between daily and weekly use.
11. None of the users had sought or been given permission to use the claimed paths, none had seen prohibitory notices on site and none had been challenged as to their use.
12. In support of his objection to the Order, Mr Smith submitted a number of statements from individuals who had been tenants of the parish council when

Mr Smith's land had been sub-divided into allotments. Collectively, these individuals provided evidence of use and occupation of the allotments between 1969 and 2012. Mr Smith recalled use since 2009 by the person who applied for the modification order but not by other members of the public. The remaining individuals had no recollection of use of Drainside for access other than to the allotments and none recalled seeing anyone other than allotment holders using the path at the side of the allotments. It is submitted on behalf of Mr Smith that these statements demonstrate that use of the track was by allotment holders and not use by the public at large.

13. The two sets of written evidence relating to use of the path by the public are clearly in conflict with each other, but the objector's evidence does not demonstrate that use of the claimed footpaths by the public had not taken place, only that such use had not been observed, other than the recent use acknowledged by Mr Smith. I saw at my site visit that there were no obstacles along the claimed path which would have prevented use from taking place and I did not observe anyone on the land during the time of my visit. I consider it entirely possible that the low level of use of the claimed footpath may have gone unnoticed by those with an interest in the land.
14. There is no evidence before me that use of the path had been by force, stealth or permission or had been effectively interrupted. I conclude that the evidence of use adduced is evidence of use 'as of right' by the public.

Capacity to dedicate

15. It is submitted on behalf of Mr Smith that the capacity of Mrs Vere to dedicate a public right of way over her land would have been limited by the lease of the land to the Parish Council and by the subsequent sub-division by licence of the land by the Parish Council to individual allotment holders. On the basis that one of Mr Smith's witnesses had held his allotment since 1969, this arrangement between the freeholder and the Parish Council appears to have been active during the whole of the period of claimed use by the public.
16. Although the Council suggest that a landowner not wishing to dedicate would make efforts to prevent such an event occurring, to my mind this submission misses the point being put by the objector which is that as a result of the demise of the land to the parish council and then the further sub-division of the land, there was at all material times, no-one with the capacity to dedicate. Dedication would have been possible by Mrs Vere, but only with the agreement and consent of those who were in possession of the land; no evidence has been submitted to demonstrate that such agreement had been sought. In such circumstances, it would not be possible for dedication to be inferred at common law when during the material period of use, the freeholder did not have the capacity to dedicate without the agreement of others.
17. It follows that an inference of dedication at common law of that part of footpath 1107 between points B and C and the whole of footpath 1113 cannot be drawn and these sections of the claimed paths cannot be recorded as public rights of way.
18. With regard to the section of footpath 1107 along Drainside, the Council did not submit evidence which identifies the owner of the land crossed by the footpath between points A and B. In its statement of case, the Council states that it had written to all the landowners adjacent to Drainside regarding ownership and

that the responses had been inconclusive; only one resident claimed ownership outside their property. A subsequent Land Registry search was made which showed that there were no registered owner of the land between points A and B.

19. It is submitted on behalf of Mr Smith that in failing to identify an owner or owners, the Council cannot begin to demonstrate that the relevant landowner (whoever he, she or they may be) had the intention to dedicate or factually did dedicate a public right of way. It is not asserted that there was no-one who had the capacity to dedicate, but simply that the identity of that person has not been established. In the absence of an identifiable owner, it is possible to draw and inference of dedication if the conduct of the anonymous owner in relation to the land was such that use by the public could be said to have been facilitated in some way, such as by the erection of stiles, thus giving an indication that the owner intended the public to use the way.
20. With regard to that part of footpath 1107 between points C and D, the evidence regarding ownership is not entirely clear. It is known that a Mr Wood owns that part of the land crossed by the claimed footpath along the northern boundary of the sewage works and that Anglian Water own that part of the access track between the sewage works and the property boundary of The Old Chapel. The Council had not been able to identify the owner of the track between Anglia Water's property and Spilsby Road.
21. I conclude that the identity of an owner not being known is not a bar to an inference being drawn that there was an owner which had the capacity to dedicate. With the exception of Mr Smith's land, it appears that at all material times there was someone with the capacity to dedicate a right of way over the Order routes.

Intention to dedicate

22. The section of claimed path which runs over Drainside provides a means of vehicular access to the houses on its northern side and to Mr Smith's field. There is no feature along Drainside which I saw which could be construed as having been placed or created for the purpose of facilitating or encouraging access by the public on foot. Although the public have used Drainside as part of the claimed footpath, there is no feature about it from which it could be said that the unknown owner intended to dedicate it as a public right of way.
23. Accordingly, an inference of dedication at common law of that part of footpath 1107 between Spilsby Road and Mr Smith's land cannot be drawn.
24. In the Council's analysis of whether the relevant landowners could be said to have had an intention to dedicate the Order routes as public rights of way, the Council says that it had not discovered evidence to show that the landowner had no intention to dedicate. I concur with the submission made on behalf of Mr Smith that this is the wrong test to apply; at common law the claimant has to produce evidence from which it could be positively concluded that there was an intention to dedicate not that there was no evidence of a lack of intention. The test which the Council appeared to apply is that found in the proviso to section 31 (1) of the 1980 Act.
25. It may be possible to draw an inference of dedication if the evidence of use is of a quantity and frequency that the absence of any action on the part of the

landowner could be ascribed to acquiescence in that use. In this case, there is no evidence that the relevant landowners had at any time taken any steps to discourage use of the claimed paths. However, the evidence of use in the case is of such limited extent that it is likely that the relevant landowners would have been unaware of it.

26. In the circumstances of this case and the use which has been demonstrated from a limited number of people, it would not be possible to reasonably ascribe the inaction of the landowners to toleration or acquiescence of the claimed use as he, she or they are unlikely to have been aware of it. I consider that there is little or no evidence from which it could be concluded that the relevant landowners intended to dedicate a public right of way.

Conclusions

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

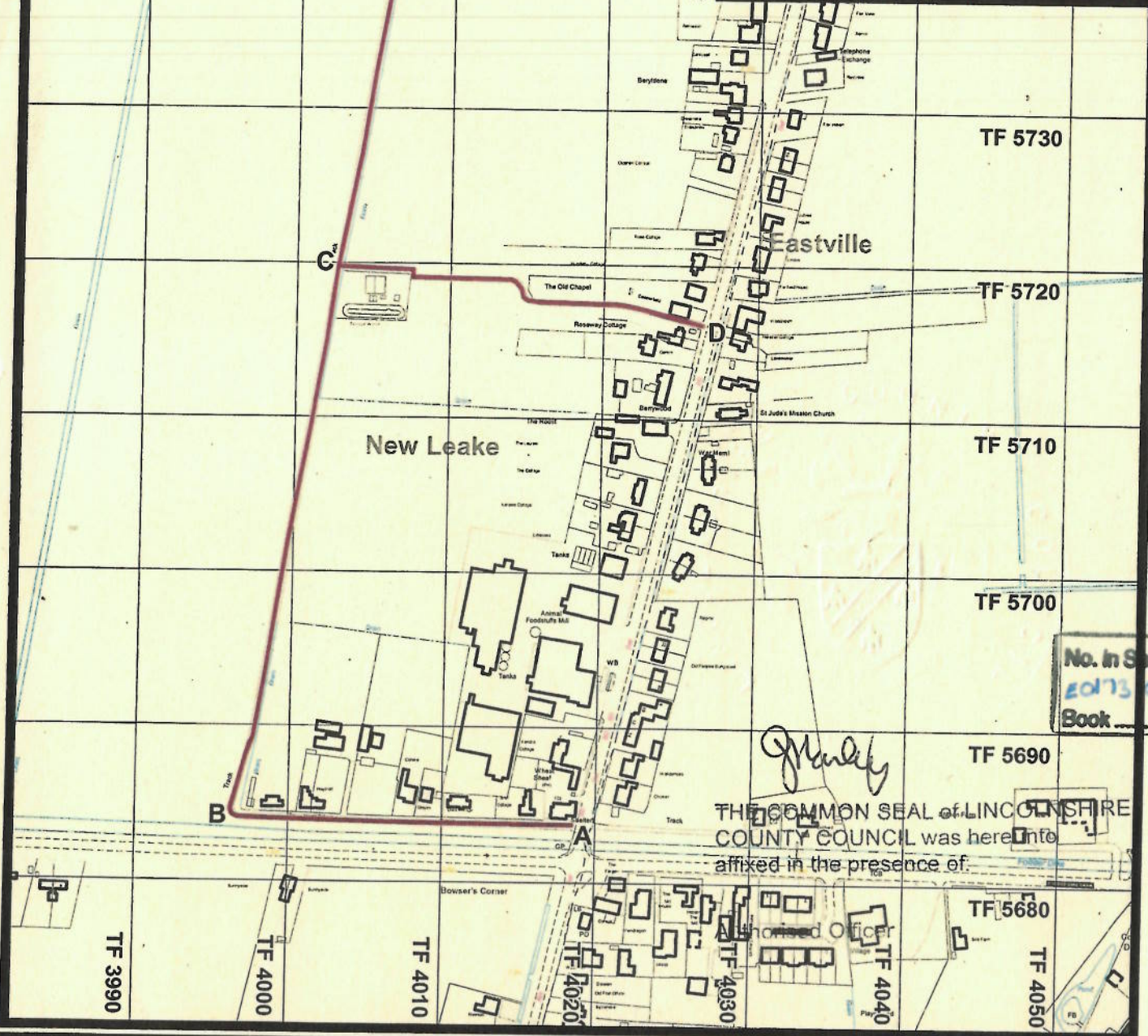
Formal Decision

The Order is not confirmed.

Alan Beckett

Inspector

MAP NOT TO
ORIGINAL SCALE



No. in Seal
2013 09
Book

THE COMMON SEAL of LINCOLNSHIRE
COUNTY COUNCIL was hereunto
affixed in the presence of

Authorised Officer

Key:

Addition of Footpath



Lincolnshire
COUNTY COUNCIL

NEW LEAKE

(Definitive Map Modification Order)

Addition of public footpath to and from
Spilsby Road

Dm. LD Date 14/10/2014

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Scale: 1:4000

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