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## Order Decisions

Hearing held on 29 November 2016

Site visit made on 29 November 2016

**by Martin Elliott BSc FIPROW**

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

**Decision date: 3 January 2017**

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### **Order Ref: FPS/Q2500/7/81**

### **Order A**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lincolnshire County Council (Amendment of Kesteven County Council (Rural District of West Kesteven) Definitive Map and Statement – Evidential Events (No 1) Modification Order 1985.
- The Order is dated 22 November 1985 and proposes to modify the Definitive Map and Statement for the area by adding a public bridleway as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding at the commencement of the hearing.

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

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### **Order Ref: FPS/Q2500/7/82**

### **Order B**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lincolnshire County Council (Amendment of Kesteven County Council (Rural District of West Kesteven) Definitive Map and Statement – Evidential Events (No 1) Modification Order 1991.
- The Order is dated 19 June 1991 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 three objections outstanding at the commencement of the hearing.

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

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## **Procedural Matters**

1. I held a hearing at Great Gonerby Social Club on 29 November 2016. I carried out a site visit of the Order route<sup>1</sup> following the close of the hearing. The visit was part accompanied and part unaccompanied.
2. The Council only seek confirmation of Order A, subject to modifications to record the route as a footpath and other administrative modifications. The Council do not consider that there is sufficient evidence to demonstrate public bridleway rights. They contend that should Order A be confirmed it would not be necessary to confirm Order B as public footpath rights will have been recorded on the definitive map and statement in consequence of Order A. Bearing this in mind I will consider the evidence in the context of public footpath rights along the Order route. If I confirm Order A it will not be necessary to confirm Order B as public footpath rights will have been recorded

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<sup>1</sup> Order routes A and B are the same

in consequence of the confirmation of Order A. If I do not confirm Order A then it follows that it would not be appropriate to confirm Order B as there is no additional evidence submitted in support of Order B. No party has advanced any case that the Order route should be recorded as a bridleway and no evidence has been produced in support of bridleway rights.

3. At the hearing Mr Hollingworth submitted documents relating to walks programmes of the Grantham group of the Ramblers Association. Mr Hollingworth was a new party to the proceedings. Copies of the documents were made available and there is no evidence that anyone will have been prejudiced by their late submission.
4. The Orders arise from an application under section 53(5) of the 1981 Act made on 1 November 1983. Roythornes Solicitors (Roythornes), providing a 'Notice of Objection' on behalf of Mr N Thompson, Mr and Mrs K Beale and Mr P Gibbs<sup>2</sup>, contend that the application was invalid and of no effect.
5. I note the submissions of Roythornes however, I have been appointed in accordance with Schedule 15 of the 1981 Act to determine the Orders before me. The application in accordance with section 53(5) of the 1981 Act and Schedule 14 is not a matter for my consideration. Roythornes have submitted a number of authorities which it contends show the strict requirements of Schedule 14. Whilst the authorities identify the need for strict compliance with Schedule 14 this is in the context of savings under section 67 of the Natural Environment and Rural Communities Act 2006.

### **The Main Issues**

6. The Orders have 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). The main issue with both Orders is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show 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.
7. The test to be applied to the evidence is on the balance of probabilities.
8. The Council contend that a statutory dedication under section 31 of the Highways Act 1980 has arisen in consequence of use of the way by pedestrians. 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.
9. Should the case for a statutory dedication fail then it may be appropriate to consider dedication at common law. This requires consideration of three issues: whether any current or previous owners of the land in question had the

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<sup>2</sup> For convenience I shall refer to these as the objectors, where necessary I refer to other objectors and those speaking in opposition to the order by their names.

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. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.

10. The Council also submitted a number of items of documentary evidence.

## **Reasons**

### *Background issue*

11. The objectors make the point that the plan attached to the application of Mr Mitchell differs significantly from the Order plans and in particular the distance between the two routes in the vicinity of Gonerby Grange is approximately 150 metres.
12. Whilst I note the view of the objectors, the plan accompanying the original application, although appearing to have been carefully prepared it is nevertheless a sketch plan. Further, the map evidence, which I consider below, where it shows a route, does not identify any other route other than the Order route. In the absence of any other route it is more likely than not that the route shown on the application plan is the same as the Order route.

### **Documentary evidence**

13. The Council has submitted a number of maps dating from 1806 to 1959 including the base map used for the 1910 Finance Act, an aerial photograph dated 2 June 1971 and various walks guides.
14. The maps and the aerial photograph provide a record of the physical existence and characteristics of the Order route but do not provide any evidence in support of public rights.
15. In 1975 the Grantham group of the Ramblers' Association published a booklet of walks, one of which was a route 'From Grantham Borough Boundary.... To Gonerby'. The booklet describes a route over the railway line to Gonerby Grange and its dovecot. The walk continues through a field gate before swinging left with the rutted track to Great Gonerby. A further guide 'Rambling in the Grantham countryside' by Mr N Mitchell, the applicant for the Order, provides a similar description to the route identified in the 1975 guide. The guide also includes a map which in my view depicts the Order route.
16. I note the assertion of Mr Thompson that the route identified is not the Order route. I accept that Gonerby Grange is shown on the map being to the north of the route however, the map is somewhat schematic. Furthermore, in the absence of any other route passing through or in the vicinity of Gonerby Grange it is more likely than not that the route shown is the same as the Order route. It is also significant that reference is made to the dovecot which was located at Gonerby Grange.
17. The guide of country walks in Kesteven published in 1985 and written by Mr N Mitchell also describes a route to Gonerby Grange and Great Gonerby which is

identical to the earlier guides. The guide was produced to mark the Golden Jubilee of the Rambler's Association. The guide also includes a map showing a route to the south of Gonerby Grange. I refer to my comments at paragraph 15 above in respect of the route shown.

18. No evidence has been provided as to how the guides were compiled although it is of note that the 1975 and 1985 guides were written by Mr Mitchell who, bearing in mind his application in 1983, must have considered the route to be public. However, there is nothing to indicate the basis of his belief and it is possible that the inclusion of the route in the guides is based solely on his view. Mr Hollingworth was unable to confirm whether the 1975 and 1979 guides had been checked for accuracy although he said that later guides were checked by Ramblers Association members. Although the guides provide supportive evidence as to a walking route through Gonerby Grange, in the absence of details as to how the guides were compiled, the evidence in support of public rights is very limited and, even when considered with all other documentary evidence, is insufficient to demonstrate that public rights on foot subsist.
19. As identified above Mr Hollingworth submitted extracts from the Ramblers Association walks programmes from 1970 and 1985. The walk held on 11 January 1970 started from Belton and the details refer, amongst other locations, to Gonerby Grange. A walk held on 3 February 1985 also refers to a number of locations including Gonerby Grange. Mr Hollingworth accepted that it was not certain if the walks went through or around Gonerby Grange and accepted that inclusion in the programme did not mean that the route was public. In my view, although reference is made to Gonerby Grange it cannot be concluded from the programmes that the route used was necessarily the Order route or that the route if used was public.
20. Having regard to all of the above, when the documentary evidence is taken as a whole it is insufficient to demonstrate the existence of public rights.

### ***Statutory dedication – Section 31 Highways Act 1980***

*When the right to use the way was brought into question*

21. For the purposes of a statutory dedication the relevant twenty year period applies retrospectively from the date when the right to use the way was brought into question. The Council submitted that the right to use the way was brought into question in 1982.
22. In 1982 the Belton Estate applied to extinguish Great Gonerby footpath number 1 and to divert footpath 3 onto part of the Order route and to create a footpath along the remainder of the route. The Orders were advertised on 20 October 1983 and attracted objections. The objection from a Mr I Barnes was on the basis that he had used the alternative diversion route and the route to be created since the 1950s. Mr Mitchell also objected on behalf of the Ramblers' Association but the objection did not raise any issues in relation to the status of the diversionary route or the route to be created. In November 1983 Mr Mitchell submitted an application under the 1981 Act for a footpath along the Order route. The Council indicate that the application made in 1983 came as a result of the application made by the Belton Estate in 1982 and that some user evidence forms (UEFs) were submitted in 1982.

23. In my opinion the application for the various public path orders would have raised issues as to the status of the Order route. This is demonstrated by the objection by Mr Barnes, the submission of UEFs forms and the application by Mr Mitchell. This sets a relevant twenty year period of 1962 to 1982. No evidence has been put before me of any other event which would have brought the right to use the way into question.

*Evidence of use 1962 to 1982*

24. A total of 19 UEFs have been submitted to the Council. Although the application was for the addition of a public footpath the UEFs identify the route as a 'Road used as path'. The issue to be considered is whether the evidence of use on foot is sufficient to raise a presumption of dedication of a public footpath. The objectors contend that the user evidence is wholly unsatisfactory and that little or no weight should be attached thereto. In particular the point is made that no map or plan has been attached and that the user evidence is littered with inconsistencies.
25. In its analysis of the UEFs (SoC 1/51) the Council have discounted the evidence from a number of individuals where the extent of their period of use is unclear. I have examined these UEFs and in my view they are unclear as to the years when these individuals have used the route. Consequently this evidence of use cannot be counted towards use during the relevant period.
26. The Council advise that none of the UEFs had maps attached although make the point that the UEFs were prepared in connection with the application of Mr Mitchell. However, it is of note that thirteen forms were submitted after the application had been made. There is no evidence before me to indicate than any UEFs were prepared by reference to the application plan. Only five UEFs, of those who have used a route during the twenty year period, make specific reference to a route through Gonerby Grange. I note the point in opposition that Gonerby Grange is not restricted to the buildings but would include the land. However, the application map identifies Gonerby Grange as the area of buildings and I do not accept that reference to Gonerby Grange in the context of the UEFs refers to the land as a whole.
27. The UEF of Edna Hall identifies a route on the track passing Gonerby Grange although this appears to have been added by an unknown hand, possibly Mr Mitchell. However, in response to question 8 reference is made to the footpath passing through a wooded section. The evidence from those in opposition to the Order is that there is no wooded section on the Order route and I have been provided with no evidence as to the same. The objectors suggest that Edna Hall is referring to footpath 3 which passes through Peascliff Plantation. Given the conflicting information in the form it is difficult to give the evidence of Edna Hall any weight, if any, in respect of the use of the Order route.
28. The UEF of Mr Harris also refers to a route 'via Gonerby Grange' although again this appears to have been added by an unknown hand, possibly Mr Mitchell. However, the form refers to the route being obstructed by barbed wire. In opposition it was suggested that this would have been on footpath 3 and it should be noted that none of the other UEFs refer to a barbed wire obstruction on the route. In the absence of other evidence of a barbed wire obstruction on the Order route this lessens the weight to be given to this form. In any event The Council have not included the evidence of Mr Hall as one who has used the

Order route in the relevant period. The UEF is unclear as to the dates when Mr Hall used the Order route (see paragraph 25 above).

29. The UEF of Mr Edley identifies the use of a route via Gonerby Grange and indicates use between 1975 and 1982. However, in response to the question as to frequency of use, it states '3 in 1982' although further particulars provided in response to question 8 identifies intermittent use over a period of seven years. As regards the route used the UEF indicates a route to and from 'Gonerby – Belton/Barkston and return'. It is suggested by the objectors that the Order route does not go to Barkston and that Mr Edley is confusing the route with footpath 3. I disagree, the form refers to a route via Gonerby Grange and it would clearly be possible to return to Gonerby from Barkston via Gonerby Grange albeit that part of the route will be along footpath 4 and not the eastern section of the Order route. However, there are inconsistencies in the responses to questions raised in the UEF and it is difficult to give any significant weight as to the use of the Order route during the relevant twenty year period. In any event any use, which is limited, will be towards the end of the twenty year period.
30. The objector refers to the UEF of J Snell which identifies a path leading from Great Gonerby to Belton but later refers to a path from Great Gonerby to Grantham. Although using the Order route to travel to Grantham would be circuitous the UEF does identify the path as one between Great Gonerby and Belton which could conceivably be the Order route. However, the form does not specify a route via Gonerby Grange and it would be possible to walk between Great Gonerby and Belton using footpath 3 and the eastern part of the Order route. In any event, the Council do not rely on the evidence provided in this form and I refer to paragraph 25 above which is relevant to this individual.
31. The UEFs of Mr and Mrs Hall refer to a handgate, L Harris identifies knowledge of stiles or handgates on the route but provides no further information and Mr Mitchell refers to an open or 'openable' field gate. However, no other UEFs make reference to handgates, stiles or other gates. I do not consider that the absence of any reference to gates on the route devalues the evidence of those who do not identify gates on the route, although the evidence of Mr Gadd is that there were a number of gates on the route. It may be the case that any gates had no consequence to users, Mr Mitchell refers to an open field gate which suggests that users could use the route without any hindrance of gates. As regards the reference to handgates, I have not been provided with any evidence as to their existence. As noted above Mrs Hall refers to a route through a wooded section which is unlikely to be the Order route and any handgate may have been on this route.
32. It is noted that the UEF of Mr Mitchell refers to the 'Occasional welcoming conversation with the occupants Mr and Mrs Gadd of Gonerby Grange'. However, no details are provided as to where these conversations took place and it is therefore difficult to give this any significant weight.
33. Having regard to all of the above, the UEFs do suggest the use of a route on foot as of right and without interruption. However, the UEFs are not accompanied by any maps and without specific reference to a route through Gonerby Grange it is difficult to give the UEFs any significant weight as to the use of the Order route. I am mindful of the UEF of Edna Hall which refers to a route through a wooded section which casts doubt as to whether she, and

possibly others who do not specifically identify a route through Gonerby Grange, used the Order route in its entirety. I also note that some of the UEFs have been partly completed in another hand, seemingly by Mr Mitchell. There is no indication as to when these alterations were made or whether the relevant person completing the UEF was party to the alteration. In this respect a number of UEFs make reference to the route passing or via Gonerby Grange. Given that this was written in another hand this lessens the weight that can be attributed to that UEF in respect of the use of the Order route. Only two, unaltered, UEFs whose period of use is clear identify the use of a route through Gonerby Grange. In addition to the above a number of forms provide insufficient detail to establish the period of use of any route.

34. In view of the inconsistencies it is difficult to give any significant weight to the UEFs. No additional statements have been gathered from those completing the UEFs and it is noted by the objector that witnesses will be aged between 72 and 120 years old. After the passage of time it is likely that many of the original witnesses are deceased. The opportunity to examine the evidence has therefore been lost along with the opportunity to verify or clarify the evidence contained in the UEFs.
35. Taking the evidence of use as a whole I do not consider that it is sufficient to raise a presumption of dedication of a public footpath. Although Mr Hargreaves said at the hearing that he had used a route through the farm for almost 40 years, once a year, possibly more, this evidence is not sufficient to tip the balance to reach a conclusion that a presumption of dedication has arisen.
36. In view of my conclusions it is not necessary to consider whether any landowner demonstrated a lack of intention to dedicate.

### ***Dedication at Common Law***

37. The Council stated that it was difficult to make a case for dedication at common law on the basis of some of the evidence. Given my conclusions in respect of the evidence of user I find it insufficient to raise any inference of dedication by the landowner.
38. I note that original objection of Messrs Gadd made on the 19 December 1985 states that they strongly object to the proposal to make the existing footpath running from Belton to Great Gonerby into a bridleway. Whilst this might offer some recognition of the Order route as being a public footpath, in the absence of further evidence I do not consider this sufficient to infer a dedication of a footpath.

### **Other Matters**

39. The objectors raise issues in respect of security, safety, unlawful activities and need for a footpath. Whilst I note these issues they are not matters which I can take into account in reaching my decision.
40. Mr J Thompson suggested that a compromise could be reached by agreeing upon an alternative route. Whilst I note the suggestion as to an alternative route which may be acceptable to others I am required to determine the Orders based on the evidence before me.

## **Conclusion**

41. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that Orders A and B should not be confirmed.

## **Formal Decisions**

### **Order A**

42. Order A is not confirmed

### **Order B**

43. Order B is not confirmed.

*Martin Elliott*

Inspector









