
Order Decision

Inquiry opened on 13 December 2016

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 23 January 2017

Order Ref: FPS/K2800/7/18

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Northamptonshire County Council (Public Footpath NG9 – Parish of Lilford-Cum-Wigthorpe) Definitive Map Modification Order 2014.
- The Order is dated 3 July 2014 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between Pilton Road and Footpath NG1 as shown on the Order Map and described in the Order Schedule.
- There were 6 objections outstanding at the commencement of the inquiry.

Summary of Decision: I propose to confirm the Order subject to modifications that require advertising.

Procedural Matters

1. I held a public inquiry into this Order on Tuesday 13 and Wednesday 14 December 2016 at The Sessions House, County Hall, Northampton. I made an unaccompanied site inspection on Monday 12 December when I was able to walk the whole of the Order route. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map to which I have added an additional point (Point A1).

The Main Issues

3. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
4. Some of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

5. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

Documentary Evidence

Turnpike Act 1753

6. In 1753 an Act of Parliament was obtained "*for repairing and widening the Road from the City of Peterborough, through Oundle and Thrapton, to Wellingborough in the County of Northampton*". The existing road was described in the Act as being "*in a very ruinous condition and in many places very narrow and incommodious*".
7. A map of that year deposited in the Northamptonshire County Archives was said to show two possible routes for the amended and repaired road between Oundle and Thorpe Waterville. This map is not drawn to scale and is effectively a sketch. However, it does mark distance along the routes in miles and furlongs and indicates the location of specific landmarks such as Lilford Hall and the former Lilford Church.
8. In January 1754 Thomas Powys, the owner of Lilford Park entered into an agreement with the Earl of Exeter, Lord of the Manor of Thorpe Achurch, regarding the routing of the Turnpike Road through the two villages. Thomas Powys agreed to pay a sum of money to the churchwardens and overseers of the poor for Thorpe Achurch if he was successful in an approach to the turnpike commissioners to have the road to be 'turned' taken out of his grounds. The agreement refers to the existing road as lying "*through the inclosed grounds of the said Thomas Powys in the parish of Lilford aforesaid and Barnwell*".
9. It was common ground between the parties that the eastern route annotated as Barnwell Green Lane on the 1753 map is the route that became the Turnpike Road and subsequently the current A605. It was argued on behalf of the OMA that the western route shown may have been the old road with an alignment along the current Order route, running as it does to the west of Barnwell Green Lane and east of Lilford Hall and church. However, on behalf of the principal objector, the Society of Merchant Venturers (SMV) a number of other possible alignments were suggested with the aid of a map showing various routes in Lilford Park thought to date from the 1700s and discovered on the Lilford Hall website. It was also argued that, as it was likely that the southern part of the route followed the alignment of the current road from Thorpe Achurch by way of Achurch to what is now the B662 road, then the route would have to have included two right angle bends and a section of the B662 in order to continue northward along the Order route. However, the B662 road is shown on the 1753 map with the route in question running straight across it.
10. Whatever the route of the old road was, it is likely that some or all existing rights over it would have been extinguished as part of the turnpike process. However, it is not known whether this occurred in this case.
11. In my view it seems clear that the route which became the Turnpike Road followed that of the current A605. However, the available evidence does not make clear what the route of the old road from Peterborough to

Wellingborough was in the area of Lilford and the 1753 sketch map cannot reasonably be interpreted as indicating that the western route shown was either that of the old road or coincided with the current Order route.

Quarter Sessions Records 1760s

12. In the 1760s Thomas Powys sought to divert a road running from Lilford Bridge to the Turnpike Road (now the A605) through part of Lilford Park. In 1769, a diversion was approved with the new road to be created running along London Way (now the B662) before turning northwards to link with an existing road to Wigsthorpe. The road created was to be 30ft wide (9.1m). It was common ground between parties at the inquiry that the new route that was created included the southernmost section of the Order route (Points A to A1) and was probably a public carriage road.
13. There is no evidence to suggest that public rights over this section of the route have subsequently been extinguished and any such rights therefore continue to exist. In addition Mr Micklewright, the owner of the affected land, withdrew his objection in so far as it related to this section of the Order route at the inquiry and the OMA requested that the Order be amended so as to describe the section A to A1 as a Restricted Byway rather than a footpath.
14. As a public carriage road the route would have been available for public use with all vehicles. However, the Natural Environment and Rural Communities Act 2006 extinguished unrecorded rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions, none of which apply in this case. It would therefore be appropriate for this section of the Order route now to be recorded as a Restricted Byway.

Thorpe Achurch Inclosure Award 1773

15. This award did not include any of the land crossed by the Order route but did cover land immediately to the south of Point A. Amongst other things the award included provision for the setting out of "*..one other footway or Road leading from the said Town of Thorpe towards Oundle...*". No copy of the actual award map has been discovered but, it was common ground between the parties that this referred to a new route running between the road at Achurch and what is now the B662 at Point A.
16. The award further stated that the awarded route was "*...nearly in the same Place where a foot Way or Road from Thorpe to Oundle has heretofore usually been*". There was some disagreement between parties at the inquiry as to whether this wording suggested that the route of the previous footway was uncertain.
17. The award did not specifically state that the new route was public but it was argued on behalf of the OMA that, in the light of the way in which other routes were described in the award and as it followed the description of another public foot road, it was likely that it was intended to be a public foot road. It was also pointed out that where private routes had been awarded the award had made clear who should have the benefit of their use and who should maintain them. This was not the case in respect of this route.
18. A Plan of the Lordship of Thorpe Achurch taken from a survey of 1772 shows what appears to be the awarded route leading to Point A and a short section continuing north-eastwards along the Order route which is annotated "*Foot*

road to Oundle". This plan is not the award map but may be similar as it was surveyed at around the same time as the award. However, even if this is the case, it was pointed out on behalf of SMV that the inclosure commissioners had no authority to set out any ways outside the area to be inclosed.

19. It was argued on behalf of the OMA that this annotation indicated that there was a foot road to Oundle continuing northwards from Point A and that this was probably the foot road referred to in the award and that, as Oundle was 4.5 miles distant, the route was likely to have been public rather than private. On behalf of SMV it was argued that the plan did not give any indication as to whether all or part of the route north of Point A was public or private or of the route it followed. It was also pointed out that many routes that may have been used by the public at that time did not necessarily carry public rights, public use simply being tolerated by landowners.
20. Also, it is known that the route immediately to the north-east of Point A as far as Point A1 was by 1773 probably already a public carriage road as a result of the 1769 diversion.
21. In my view, it seems likely that the route awarded in the inclosure award was intended to be public. The commissioners had authority to award both public and private routes and not routes of indeterminate status and would probably have specified who could use and who should maintain a private route. However, I do not think that the indication of the commencement of a route annotated "*Foot road to Oundle*" on the 1772 estate plan on a route which was probably already a public road (Points A to A1) can be taken as a reliable indication that the route continued north of A1 either as a public foot road or that it followed the current Order route.

Early Commercial Maps

22. Eyre's Map (1779) does not show any part of the Order route but appears to still show a road which had been stopped up as a result of the 1769 diversion. Bryant's Map (1827) shows part of the Order route (Points A to B) which appears to be an approach road to Lilford Hall. The remainder of the Order route is not shown.

Estate Maps

23. The early map of Lilford Park discovered on the Lilford Hall website, when considered with later estate plans, appears to show that significant changes were made in the mid to late 18th century which did not just affect roads in the area. In fact the whole village and church of Lilford was moved
24. A Plan of the Lordship of Thorpe Achurch (1772) which has already been referred to shows a very short section of the Order route to the north-east of Point A annotated "*Foot road to Oundle*".
25. A map entitled "*Lilford with Gardens and the land held in hand*" (1791) shows part of the Order route (Points A to B) as a road or track leading to Lilford Hall. The remainder of the Order route is not shown.
26. A map of the estate of Thomas Powys at Lilford (1794) again shows the section of the Order route from A to B but not the remainder of the Order route. This map does however show a northern approach road to Lilford Hall on an alignment further west than the northern part of the Order route.

27. A map of Lilford Liberty (1810) shows the whole of the Order route coloured brown as are several other roads and tracks including the northern approach road to Lilford Hall shown on the 1794 estate map. A route annotated 'Footway' is also shown running northwards from Point C on the alignment of the present Footpath NG1.
28. These maps do not indicate the existence of the Order route between Points B and C before 1810 although it was suggested on behalf of the OMA that this did not necessarily mean that the route did not exist until then. Depending on the purpose of the map, surveyors might be quite likely to omit details not regarded as being important. Also, the Order route follows field boundaries which were in place before 1810.

Ordnance Survey (OS) Maps

29. An OS 2" to the mile drawing of 1817 shows a route by means of parallel solid lines running roughly from Point A to Point B and then turning towards Lilford Hall. Another route shown by parallel pecked lines similar to the Order route branches from this route around Point B and continues north-eastwards to Point C where it appears to link with a northern approach road to Lilford Hall which is shown on a slightly different alignment than on the estate maps of 1794 and 1810. The OS 1" map of around 1835 (revised with the addition of railways c. 1860) also shows the whole of the Order route with a slightly different alignment around Point B and a differently aligned link to the northern approach road from Point C.
30. The OS 6" map of 1885 and 25" map of 1886 show the Order route north of Point B by means of parallel pecked lines and annotated 'F.P.' in the same manner as what is now Footpath NG1. Later OS maps show the route in a similar manner.
31. Since 1889 OS maps have carried a disclaimer to the effect that the showing of routes is not evidence of the existence of public rights of way. However, instructions to surveyors in 1893¹ stated that "*All footpaths over which there is a well-known and undisputed public right of way should be shown*". Subsequent instructions in 1905 stated that a clearly marked track on the ground was not sufficient to justify showing a path unless it was in obvious use by the public.
32. It is however not clear how surveyors would have been able to identify 'well-known and undisputed' rights of way and the OS had no wish to become involved in disputes about such matters. In evidence given to the Dorrington Committee in 1892 it was made clear that surveyors included all paths without inquiring into their status. It is therefore my view that although OS maps provide accurate evidence of features that existed on the ground at the time they were surveyed, they cannot be taken as indicative of the existence of public rights over routes shown.

1910 Finance Act Records

33. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be

¹ Instructions as to Trees, Footpaths and Small Detail, Circular No. 403 (known as the Southampton Circular)

made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.

34. In this case, the index maps show that the Order route was included within two hereditaments and no claim for the existence of public rights of way was made in respect of either of these holdings. Unofficial draft Field Books did include a reference to "*Alleged Foot Paths as indicated on Ordnance Survey*" but actual Field Books make no such reference, possibly suggesting that the existence of rights of way was considered but not accepted.
35. It was suggested on behalf of the OMA that it was not unusual for landowners not to claim deductions for public rights of way which they were unwilling to acknowledge and it was pointed out that no rights of way were claimed over the whole estate of Thomas Powys. This may be the case but, nevertheless, the Finance Act records provide no support for the current Order.

The Definitive Map and Statement

36. The Order route was not identified as a right of way in the survey carried out by the Rural District Council under the National Parks and Access to the Countryside Act 1949 and consequently was not included in the definitive map. However, the survey did include the footpath that is now Footpath NG1. This path is described as starting at the termination of the service road to Keepers Lodge and running northwards to the parish boundary. In the section of the survey form relating to the reason for believing the right of way to be public, the single word 'Nil' is written. The following section relating to the description of relevant documents is blank.
37. Presumably on the basis of the survey, Footpath NG1 was included in the definitive map as a cul de sac footpath terminating at Point C where there is no feature of public interest or resort.
38. The inclusion of Footpath NG1 in this manner raises some questions. It would be unusual to include such a path as a cul de sac although not completely out of the question. Another possibility is that the Order route was considered to be a public route of such a status that it was not appropriate for it also to be included, namely a public road. However, there is no evidence to support such a view. Alternatively, Footpath NG1 might have been included in error, particularly in view of the stated lack of any reason to believe it was a public right of way. In any event, the recording of this path in the 1950s cannot in my view be taken as an indication that the Order route had become established as a public footpath many years previously.

Conclusions regarding Documentary Evidence

39. The section of the Order route between Points A and A1 became a public vehicular route as a result of the diversion approved in 1769 and should now be recorded as a Restricted Byway. I therefore propose to modify the Order in this respect as requested by the OMA.
40. The 1753 sketch plan apparently prepared in connection with the establishment of the Turnpike Road is not sufficient evidence to indicate that the old road from Peterborough to Wellingborough included the Order route or, indeed, that the Order route existed at that time.

41. The Thorpe Achurch inclosure Award of 1773 indicates that there was a foot road running between Thorpe and Oundle at that time and that it probably passed through Point A. However, the award does not indicate the alignment of the route north of Point A nor whether it was a public route.
42. Although maps prepared after 1810 consistently show the whole Order route they do not indicate whether there were public rights over it.
43. The inclusion of Footpath NG1 on the definitive map is puzzling in the light of the lack of evidence which appears to have been available at the time. Accordingly, although this now gives the impression of the Order route constituting a 'missing link' in the network, this cannot be relied upon to support the existence of public rights over the Order route.
44. Overall, it is my view that on the balance of probability, the available documentary evidence does not indicate that the Order route between Points A1 and C is a public footpath.

User Evidence

45. Thirteen brief 'Preliminary Evidence Forms' (PEFs) were submitted in support of the application for the Order route to be added to the definitive map. After subsequent consultation by the OMA, 9 of those witnesses who completed PEFs prepared draft Proofs of Evidence and 7 of these then prepared final Proofs of Evidence. These documents claim use of the Order route from the 1970s until 2012.
46. Most of those providing this evidence appear to have used the route only once or on a very limited number of occasions, often with organised groups and in particular in connection with a rally organised by the Ramblers Association to support their claim for this alleged 'missing link' to be recorded.
47. Most witnesses claimed to have used the Order route in conjunction with Footpath NG1 and although some noted the presence of a gate at Point C none mentioned the existence of a substantial unbridged ditch immediately to the north of C despite there being a specific question regarding such obstructions on the draft Proof of Evidence forms used. When I visited there was also an electric fence obstructing Footpath NG1 near Point C but I have no information as to how long this had been present.
48. Overall, it is my view that the amount of evidence of public use of the Order route that is available is not sufficient to raise a presumption that the route has been dedicated as a public right of way in accordance with the provisions of the 1980 Act. I note also that the OMA does not rely on such a presumption to support the confirmation of the Order.

Common Law

49. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
50. In this case, although there is a limited amount of evidence of public use of the Order route in recent times, there is no substantive evidence of actions by landowners which indicates an intention to dedicate it as a public right of way.

Evidence also suggests that at some times landowners went to considerable lengths to remove public routes from the vicinity of Lilford Park.

Other Matters

51. The OMA has requested a modification to the Order so as to state that it shall come into force on the date it is confirmed rather than 7 days later. This seems appropriate to me and I therefore propose to modify the Order accordingly.
52. During the Second World War land immediately to the north-west of the Order route between Points B and C was occupied by a military hospital. It would appear that access to this hospital was gained by way of a route through Lilford Park rather than by the Order route. One objector has stated that the Order route would have been closed to the public during this period. However, the OMA has found no record of any closure and the Defence Estates organisation has stated that it has no record of any footpath orders relating to the wartime use of Lilford Hall.

Conclusions

53. Having regard to these and all other matters raised, I conclude that the Order should be confirmed subject to modifications to describe the section A to A1 as a Restricted Byway and to delete the section A1 to C. In view of the nature of these proposed modifications it would also be appropriate to change the title of the Order so as better to reflect its modified effect.

Formal Decision

54. I propose to confirm the Order subject to the following modifications:

Amend the title of the Order to read:

*THE NORTHAMPTONSHIRE COUNTY COUNCIL
(RESTRICTED BYWAY NG10 – PARISH OF LILFORD-CUM-WIGSTHORPE)
DEFINITIVE MAP MODIFICATION ORDER 2014*

Amend Section 3 of the Order to read:

"This Order shall take effect on the date it is confirmed"

Amend Section 5 of the Order to read:

"This Order may be cited as 'The Northamptonshire County Council (Restricted Byway NG10 – Parish of Lilford-Cum-Wigsthorpe) Definitive Map Modification Order 2014'"

Amend the Schedule to the Order, Part 1 to read:

"Description of Restricted Byway to be added

Restricted Byway NG10 in the Parish of Lilford-Cum-Wigsthorpe commencing at Point A on the Order Map, NGR TL 02976 83431 and proceeding in a north-easterly direction for 297 metres to NGR 03190 83462 (Order Map Point A1).

The route is shown on the Order map by a broken black line between Points A and A1. The Restricted Byway to have a width of 9.1 metres."

Amend the Schedule to the Order, Part 2 to read:

"Particulars of Restricted Byway to be added"

		Description of Route				
Path Ref No.	Type of Path	From	To	Width	Limitations or Conditions	Remarks
NG10	RB	Junction with Pilton Road at NGR TL 02976 83431	NGR TL 03190 83642	9.1m		See DMMO 2014

Amend the Order map accordingly.

55. The proposed modifications would have the effect of not showing as a highway part of a way which is shown in the Order and of showing as a highway of one description a way which is shown in the Order as a highway of another description. It is therefore required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act that notice of the proposal to modify the Order be given and an opportunity for objections and representations to be made regarding the proposed modifications.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Shahin Ismail	Counsel, representing Northants County Council (NCC)
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Who called:

Martyn Brawn	Definitive Map Officer, NCC
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Objectors

George Laurence QC	Counsel, representing the Society of Merchant Venturers (SMV), affected landowner
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Who called:

Robin Carr	Rights of Way Consultant
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Charles Micklewright	Affected landowner
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DOCUMENTS

1. Documents and Exhibits bundles, including Statement of Reasons, NCC.
2. Proof of Evidence and Summary of Martyn Brawn, NCC.
3. Statement of case on behalf of SMV.
4. Proof of Evidence of Robin Carr with appendices (2 Vols).
5. Supplementary Proof of Robin Carr with further appendices.
6. Additions to Proof and appendices, R Carr.
7. Letter dated 12/12/16 from C Micklewright.
8. Closing submission on behalf of SMV.
9. Closing submission OMA.

