

Order Decision

Site Visit on 19 July 2016

by Sue Arnott FIPROW

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

Decision date: 7 October 2016

Order Ref: FPS/X1355/7/4

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the County Council of Durham Public Rights of Way Modification Order No.3 (Public Footpath No. 128 Durham City) 2015.
- The Order is dated 13 August 2015. It proposes to modify the definitive map and statement for the area by recording a cul-de-sac public footpath from Framwellgate Peth into Wharton Park, Durham, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Durham County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: Confirmation of the Order is proposed subject to the modifications set out in the Formal Decision below.

Preliminary Matters

1. The Order was made by Durham County Council (DCC) in its capacity as surveying authority following an application to record three claimed footpaths within the grounds of Wharton Park in Durham. When the Order was advertised, two objections were submitted. One of these was from DCC's Neighbourhood Services, Culture and Sport Department (NSD) which is responsible for managing the park owned by DCC. Whilst DCC (as surveying authority) has stated that it does not actively support confirmation of the Order, where necessary in this Decision I shall distinguish between the role of DCC as the order-making authority and NSD as an objector to confirmation of the Order.
 2. The second objection was submitted by the applicant, Mr Hayes. His application to DCC also claimed two other connecting footpaths through Wharton Park; he submits these should be recorded as public rights of way in addition to the Order route. The three paths were identified on a map attached to a Report to DCC's Highway Committee dated 24 July 2015 as Footpaths A, B and C.
 3. The Order map identifies the Order route between points labelled A and B (where A lies on the A691 Framwellgate Peth and B is a point in the centre of Wharton Park) and for ease of reference here I shall refer to this as (part of) Footpath C. In fact the claimed route extended further south to a point I shall call X where branches then proceed to North Road to a point I shall call Y (Footpath A) and towards Durham Railway Station at a point I shall refer to as Z (Footpath B).
 4. In essence, NSD objects on the grounds that no public right of way should be recorded through Wharton Park whereas Mr Hayes supports the Order route being confirmed as a public path but objects on the grounds that this should be extended beyond its 'dead-end' to join North Road and Durham Station.
-

The Main Issues

5. The Order was made under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis that evidence of an event specified in sub-section 53(3)(c)(i) had been discovered by DCC, namely evidence showing that an unrecorded public right of way had been reasonably alleged to subsist, and that this claimed footpath should be recorded in the definitive map and statement.
6. Whilst the evidence need only be sufficient to *reasonably allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. At this stage, evidence is required which shows *on the balance of probability* that the claimed right of way subsists along the order route if the order is to be confirmed.
7. The main issues are therefore whether, on a balance of probability, the evidence shows that a public right of way has been established along the Order route and, if so, whether this extends beyond the Order route A-B.
8. DCC made the Order on the basis of the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to occur, sufficient evidence is required of use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route has been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
9. If, having addressed Mr Hayes' claim that public rights of way subsist over Footpath A, B and C, I find the evidence supports their addition to the definitive map, I shall need to propose to modify the Order so as to include also Footpaths A, B and the continuation of Footpath C (B-X). Whilst DCC has expressed concern over whether this might be appropriate, I am mindful of the view expressed by Lord Phillips in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266 that "*if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections*¹ ...".

Reasons

10. DCC received an application from Mr Hayes on 23 January 2015. The application sought to record on the definitive map three connected public footpaths forming a 'Y' shape network within Wharton Park, linking North Road to the south west, Framwellgate Peth to the north and Durham Railway Station to the south east.
11. Following investigation, on 24 July 2015 DCC's Highways Committee declined to make orders for two of the claimed routes (Footpaths A and B) but concluded that the evidence discovered was sufficient to reasonably allege the existence of a public footpath along the Order route (A-B of Footpath C), the issues being set out comprehensively in a detailed report.

¹ Schedule 15 to the 1981 Act requires that where any such modifications to be proposed, these would need to be advertised and a further period prescribed for the receipt of objections or representations.

12. Although DCC considered that the lesser test (a reasonable allegation that the footpath subsists) was met, it does not agree the higher test has been satisfied (that the footpath subsists on a balance of probability) and is therefore not supporting confirmation of the Order.
13. The Order was made on the basis of statutory dedication under Section 31 of the 1980 Act. As explained above, the first matter to be established is when the public's rights were brought into question.

Bringing into question

14. DCC considered this to have occurred in 23 January 2015 when it received the application. This had been prompted by a notice on 24 November 2014 which Mr Hayes described as "*in the small print of a map of Wharton Park 'improvements' posted on the internet*" which showed "*the path from the conveniences at North Road going towards the Battery was to be permanently closed*".
15. In fact in January 2014 a lottery grant had been awarded for a park restoration project and planning permission had been granted in September 2014 for the necessary works. This included blocking the existing pedestrian access to Footpath C from Framwellgate Peth and Footpath A from North Road. These proposed works were later implemented during the year-long closure of the park which began in May 2015.
16. DCC's conclusion that the status of the Order route was brought into question in January 2015 is not disputed by either objector, and sets the relevant twenty year period as January 1995 - January 2015.
17. Although it makes little difference to the outcome of my analysis of the evidence submitted, it seems to me that it was the advertisement of this proposal to close paths in Wharton Park which brought into question their status. However, nothing appears to turn on this.

Evidence of use by the public

18. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been actually enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.
19. In his application Mr Hayes relied on the evidence of use gathered by him which initially consisted of the written statements of 16 people and was later supplemented by two more.
20. Most of these people completed a user evidence form that had been created by Mr Hayes himself and tailored to the particular circumstances of his claim. There are three possible routes the claimants could have taken (Footpaths A & B, A & C and B & C) yet specific questions covered AB and AC but not BC. In addition, the difficulties of extracting precise details about more than one route, such as use where dates for each differ, does limit the extent of the relevant information that needs to be gathered to build a picture of use throughout the twenty year period. I note that no mention is made of interviews being carried out by DCC with the individual claimants to clarify the nature of usage in each case.

21. Nevertheless, the questions on the form do probe several pertinent issues and offer some reliable information. This was analysed by DCC in its July 2015 Report which included a table summarising the user evidence provided.
22. During the relevant period, 10 of the claimants say they had been using Footpath A, B and C in different combinations throughout all twenty years. Nine of these people did so to cross from one entry point to another as opposed to using one path to walk into the park for general recreational purposes off the path and leaving by the same exit point. (This distinction is considered later when addressing the basis on which these people used the claimed paths.)
23. In addition to those who had been using Footpaths A, B and C regularly for the relevant 20 years, 8 other claimants did so for lesser periods, some with their families. Of these, 5 refer to using one of the claimed footpaths to enter the park and leave by the same route.
24. I agree with DCC that in terms of numbers, the level of usage demonstrated by these claimants is not particularly extensive, especially given the location of the paths crossing a city centre park.
25. DCC's 2015 Report discounted the user evidence for Footpaths A, B and part of C on a quality issue (which I address below) and further suggested that the user evidence for A-B (of Footpath C) may not be sufficient to warrant confirmation of the Order although DCC accepted it was enough to reasonably allege the existence of a public right of way.
26. Before reaching a conclusion on whether it is sufficient to raise a presumption of dedication, I note firstly that I find the evidence of use for each of the three footpaths to be broadly similar in terms of numbers of people claiming to have used them as through-routes.
27. There is little to be gained in terms of support for the claimed usage from a physical examination of routes today. Route A has now been blocked by a wall and soil deposited on the old steps. The remainder of A, part of B² and most of C are all hard-surfaced paths giving no direct indication of the level of usage. Although Footpath C is similarly now blocked at its northern end, photographs provided by DCC³ taken in late 2014/early 2015 before the works began show a significant degree of wear and tear on the grassed section around the old gateway at Point A. Consequently this adds some weight to the case in support since there were clearly many more people passing through this gateway onto Framwellgate Peth using the Order route than claimed to be using it at the end of 2014 as demonstrated by the bare earth visible in the photographs.
28. It is not suggested that the claimed use had taken place in secret and none of the claimants stated they had ever sought or otherwise been given express permission to use the path. This is not disputed, either by DCC or NSD.
29. From the claimants' evidence it is apparent that at no time between 1995 and 2015 were any of them ever challenged whilst walking the route or otherwise prevented from doing so.
30. On this point, DCC highlights the evidence of its former employee, Mr T Punton, who resided at the park keeper's house from 1989 to 2007. As part of his duties

² This consists mostly of steps.

³ I understand these to be the same photographs submitted to DCC by Mr Hayes.

- and as a condition of his tenancy he was required to lock the park gates to secure it during the hours when the park was closed. These times were clearly displayed on notices at the park entrances. The gates were opened at 9 am and closed at 8 pm during the summer months and at dusk during the winter.
31. DCC's 2015 Report does not specifically consider the possibility that the claimed use may have been interrupted by park gates being locked across the claimed routes, perhaps because there is little to indicate they ever were.
32. I find Mr Punton's statement ambiguous. He does not confirm which gates were locked, or whether these were solely the gates which provided vehicular access into the park from North Road and Framwellgate Peth as suggested by the notices positioned beside these entrances. As far as I can ascertain, there was a pedestrian gateway from Framwellgate Peth (up an embankment beside the main vehicular access gates) but no gate during the relevant period. Neither have locked gates been mentioned along Footpath B from the railway station; indeed one photograph shows a sign near the railway station stating "FOOTPATH OPEN ALL YEAR ROUND". From North Road there were gates onto Footpath A but no record of notices here to indicate closing times. On a photograph dated January 2015 a padlock can be seen attached to the (open) gate but no other evidence to confirm this gate was locked between 1995 and 2015.
33. The photographs provided show that the notices welcoming visitors to the park at the two main access points differ, albeit subtly. Ones at both vehicular entrances state the "GATES WILL BE CLOSED TO PREVENT VEHICULAR ACCESS AT THE FOLLOWING TIMES ..." whereas one positioned beside the pedestrian gate near to the main entrance from North Road omits the word "vehicular". There is no record of a similar sign being placed at the start of Footpath A (or B or C) or of gates being locked here.
34. On a balance of probability I conclude that the continuous and regular use by the claimants during the relevant period was not interrupted by locked gates and nor was it directly challenged by notices. (Indeed the reverse might be implied by the sign visible along Footpath B but it is not certain who erected the sign or on whose land it was positioned.)
35. I return now to the key requirement of use necessary to establish a public right of passage here and that is that the users should not have any other lawful basis for using the ways claimed. It is this element of the applicant's evidence that is fundamentally challenged.

Was use of the Order route 'as of right'?

36. It is DCC's view that it is not legally possible for public rights of way to be established over land within Wharton Park which (it believes) is held under Section 164 of the Public Health Act 1875 (the 1875 Act). This Act enabled local authorities to acquire land for the purpose of providing 'public walks or pleasure grounds'⁴.
37. DCC submits that with paths physically set out within the grounds for the express purpose of being walked by the public, it must follow that those people who have done so (including the claimants) were using the routes 'by right' and therefore not 'as of right'. It is DCC's view that the use claimed during the relevant twenty year period (and earlier) cannot therefore qualify for the purposes of establishing

⁴ I note that both DCC and NSD refer to 'public walks and pleasure grounds'.

a public right of way through the process of deemed dedication as provided by Section 31 of the 1980 Act.

38. This argument applies only to Footpaths A, B and part of C (B-X) since these lie within the part of the park that first came into public ownership in 1932 (referred to as 'the old park'). The remainder (which is crossed by A-B of Footpath C) was acquired at a later date (in 1946) and is believed to be held under the Open Spaces Act of 1906. DCC accepted that the provisions of this Act did not preclude the establishment of a public right of way over 'the new park'. Thus it accepted the applicant's claim and made the Order for section A-B only.
39. NSD argues that there has never been any change to the purpose for which Wharton Park has been held since the local Council's first lease of the land in 1917. This document made specific reference to its use as "public walks or⁵ pleasure grounds" according to the provisions of the 1875 Act. When the land was later purchased in 1932 a covenant in the conveyance provided that if the Council were to sell or lease any part of the park land⁶ for any purpose other than as a public park, then half the profits were to be given to the vendors.
40. The applicant challenges NSD's claim that the land is held on the basis of the 1875 and 1906 Acts and submits that this is not substantiated by evidence. He further argues that even if the park were held under the 1875 Act, the ruling in the *Barkas* case⁷ in the Supreme Court in 2014 shows this does not necessarily prevent the establishment of a right of way across the land.
41. Initially the area within the old park was leased by the City of Durham Urban District Council from the owner by deed dated 17 December 1917. The terms of the lease provided "*the Corporation*" with "*full power to lay out plant improve and maintain the same land for the purpose of being used as public walks or pleasure grounds according to the provisions contained in the Public Health Act 1875*" (subject to the reservation of mineral rights).
42. Contemporary records prepared under the 1910 Finance Act describe the land as "*Park open to public with walks etc*" when inspected by the valuer on 15 January 1914, and including also a rink, a tea room and a cottage. Thus it would seem that the use as a park pre-dated the lease.
43. When, on 4 March 1932, an agreement for sale to Durham City UDC was signed, the accompanying plan identified an area that differed from the leased land⁸, with the conveyance to include allotment gardens and a property known as No 4 Parkside as well as the former area of Wharton Park. No mention is made of the purpose for which the land would be held by the authority in either this document or the subsequent conveyance dated 30 April 1932.
44. No other contemporary information has been submitted to shed light on this transaction so as to confirm the basis on which the land was acquired in 1932. There may be a strong inference that this was the same as had applied when the land was initially leased but other purposes cannot be ruled out, especially when additional land was purchased with no pre-existing use as pleasure grounds or for public walks. The covenant implies that some of the land purchased may not

⁵ The transcription provided suggests this word is "in" but the original lease appears to me to use the word "or".

⁶ This did not apply to the allotments or the cottage which were also conveyed.

⁷ *R (on the application of Barkas) v North Yorkshire County Council and another* [2014] UKSC 31

⁸ As shown on the lease plan dated April 1914

have been intended to form part of the park which casts a further degree of doubt on NSD's reliance on the 1875 Act as the basis of the acquisition.

45. I find the evidence for this quite weak. There is little more than an inference that the old park land was purchased and subsequently held under the same provisions of the 1875 Act as had applied to the lease some 15 years earlier. Yet, given both the prior and subsequent use of the land as a public park, on balance I regard this as the most probable explanation.
46. However, before reaching a firm conclusion on the status of the old park land, it is worth considering the basis on which the 'new park' area was acquired.
47. In 1942 Durham County Council purchased an extensive area of land including a parcel to the west of Framwellgate Peth which included the new park land. On 4 July 1946 this parcel was conveyed to "the Corporation" for no other purpose than "*as a burial ground or as a public open space or for road improvements*". The Ordnance Survey map of 1939 shows that around this time St Cuthbert's Church and Graveyard lay to the northwest, Wharton Park to the south west, Framwellgate Peth to the north east and railway land to the south east. Thus all three options were a clear possibility.
48. However the minutes of the Durham UDC's Park Committee meetings suggest that the original intention had been to acquire the land for a burial ground and that use as public open space was a later amendment to the terms of the transfer. Once the land had been purchased, the Committee approved a scheme to provide more tennis courts, a children's playground, a putting green and more paths and gardens. However in 1947 the Minister for Health was unwilling to provide a loan for the works so that a more limited scheme for a children's playing field was agreed instead. In 1955 an annual license to cultivate part of the land was issued but subject to "*public access to Wharton Park from Framwellgate Peth being preserved*"⁹.
49. In fact by 1959 the Council appears to have been undecided, resolving: "*That no action be taken at the present time with regard to the future use of the land at the rear of Wharton Park purchased from the County Council in 1946.*" In 1962 plans were agreed to install a new vehicular access into the park from Framwellgate Peth, but in the following year the Committee was still considering plans for the future of the park along with other playing fields and open spaces in the district. In 1967 a car parking area was agreed in the new park area off Framwellgate Peth. In 1969 arrangements for the appropriation of some of the land for road improvements were authorised, and it is clear from the minutes in 1971 that part of the land purchased in 1946 (a former quarry) was still being used for refuse disposal by the Council.
50. In the absence of any specific reference in the Park Committee minutes or elsewhere, NSD points to the covenant in the 1946 conveyance requiring use of the land as public open space in support of its contention that the land was acquired and held under the Open Spaces Act 1906.
51. The objector submits that it is more likely that both the new and the old parks are held under the 1906 Act. He argues that the language used in the 1946 conveyance implies that it is based on the 1906 Act which, in his submission, infers that the old park was already held on this basis.

⁹ Minute (4) 19/4/55

52. In the case of the new park, I find the evidence to support the purpose for which the present and previous Councils held the land to be even more tenuous than for the old park. Here there is no relevant pre-existing use and there seems to have been significant doubt over the intended purpose for a number of years after the purchase, despite the covenant in the conveyance.
53. Whilst Section 14 of the 1906 Act enabled county councils to purchase land for the purpose of public walks or pleasure grounds, the same power was not available to the City of Durham Urban District Council in 1946. It did however have the power (under Section 9) to acquire any open space, this being defined as *"any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied"*.
54. It seems to me dubious to assume that the new park land qualified as 'open space' in 1946 and I remain unconvinced that the land was acquired on that basis. Although the relevant question to ask is whether the land was held as public open space during the relevant twenty years, there is no further evidence to help provide an answer and no record of appropriation for that purpose.
55. Even if the new park land was (and is) held under the 1906 Act, it is not argued by NSD (or DCC) that this should preclude the establishment of a public right of way; indeed, DCC accepted this proposition when it decided to make the Order to record part of Footpath C on the definitive map.
56. I have also considered whether there is any evidence that might support a conclusion that the new park land was acquired under the 1875 Act, but nothing in the Committee minutes offers a strong enough indication that the land was initially intended to expand Wharton Park although that is what ultimately happened several years after the sale.
57. Turning back to the possibility that the old park was held under the 1875 Act, Section 164 provides as follows:
- "164. Urban authority may provide places of public recreation.
Any urban authority¹⁰ may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever. Any urban authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the urban authority or constable."*
58. It should be remembered that the thrust of this extensive legislation was aimed at improving many aspects of public health rather than being focussed on public access matters. It may also be pertinent to note that this section is concerned with providing "public walks or pleasure grounds", the significant word being "or" not "and". Whilst these two entities may not always be mutually exclusive, it seems to me that the parliamentary draftsman in 1875 anticipated that public walks and pleasure grounds would be separate and distinct features.

¹⁰ Amended by the Local Government Act 1972 to now read "Any local authority ..."

59. No submissions have been made as to whether Wharton Park might have been acquired for public walks or for pleasure grounds; the assumption seems to be that it was for both purposes. It may seem like semantics to attempt to distinguish here, yet the types of activity anticipated, and set onto a lawful footing by tenure under Section 164, are subtly different.
60. No byelaws were ever made for the regulation of Wharton Park. Nevertheless, it seems clear that from 1943 at least¹¹ Wharton Park has closed its gates at night. I have already concluded that this occurred during the relevant twenty year period but only at the vehicular entrances to the park, not at the three pedestrian-only approaches along Footpaths A, B and C.
61. Minutes of Parks Committee meetings also record a resolution in January 1944 that fencing should be erected along the boundary with the railway station and that this entrance be closed. However later that year the minutes make reference to the provision of a gate at the station entrance, noting that this should be kept closed¹². In 1947 repairs to the station path were to be carried out and the minutes referred to an agreement in 1920 which is later noted as being for a wayleave that was reviewed by the British Rail Property Board in 1979¹³. However in 1978 a request for a handrail alongside the steps was rejected although no reason was given.
62. Minute 6(b) of a meeting in May 1944 referred to a notice board being erected indicating the park and its facilities at "the lower entrance" (which I take to be at the steps on Footpath A). However nothing is recorded about the terms for access into the park.
63. The older notice that was positioned beside the more northerly entrance in North Road (shown in a submitted photograph) stated that "*the gates would be closed to prevent access*" between certain times of the day. It would therefore be reasonable to deduce that outside those times people walking through the park on the claimed footpaths could not have been doing so on any legitimate basis conferred by the 1875 Act but, arguably, were there as trespassers and thus unambiguously contributing to the establishment of a public right of way.
64. Since the sign on the station approach clearly stated "FOOTPATH OPEN ALL YEAR ROUND", the obvious implication to be drawn is that people were free to use it at all times. There was no notice or gate at point A on Framwellgate Peth to advise people of the terms on which they used the path. The wording of the notice at the North Road entrance to Footpath A cannot be confirmed but is assumed to have displayed information similar to that at the entrance further north, and whilst a photograph provided by DCC shows a padlock on a gate in this location, there is no evidence to confirm this was locked during the relevant twenty years.
65. Even if documentary evidence is lacking to identify the purpose for which the old park is held, NSD submits that it should be obvious that the land is a public park with gates which are locked outside opening hours, and that therefore the public could not acquire a right of way since they could rightfully use these paths. Indeed NSD accepts that pedestrian usage has always been welcomed within the

¹¹ A Park Committee Minute in December 1943 records arrangements being made to close the park each night.

¹² The details of this are noted in DCC's report of 24 July 2015. Copies of these minutes have not been submitted but the content reported is not challenged.

¹³ In 1979 British Rail Property Board sought to revise the annual payment made under the terms of an agreement in 1920 for a wayleave from 25p to £5.00. This was agreed by the Committee.

- park and submits that there is no means by which the Council, as landowner, could distinguish between people using the park for different purposes.
66. In particular it was not possible to identify those people simply walking through (and now claiming to have established a right of way) as opposed to people walking generally within the park for recreation; it had to be assumed that all pedestrians were there by right due to the park's purpose as a pleasure ground where paths are set out specifically for walking.
67. That is the nub of the issue: were the claimants and any other members of the public who walked on the paths claimed by the applicant entitled to do so by virtue of Wharton Park being held by the relevant Council for public walks or as a pleasure ground.
68. The applicant cites the important judgement of the Supreme Court in the 2014 *Barkas* case as authority for his submission that the dedication of a public right of way is not precluded over land held under Section 164 of the 1875 Act.
69. However, in that case (at paragraph 51) Lord Carnwath notes that: "*arguments have proceeded on the footing that in effect the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", the latter expression being treated as equivalent to "by licence" (or "precario") in the classic tripartite formulation (nec vi, nec clam, nec precario) as endorsed by Lord Hoffmann in the ... Sunningwell case¹⁴*" but concludes: "*On that basis, I have no doubt that the use by the local inhabitants in this case was "by right".*"
70. Turning to consider the issue in a wider context, Lord Carnwath quotes (at paragraph 59) from the judgement of Lord Scott in the Beresford¹⁵ case to the effect that "*There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.*" Consequently the *Barkas* decision (which concerned a claimed village green) needs careful analysis in order to extract relevant principles.
71. Having acknowledged that caveat, I note that (in paragraph 61) Carnwath LJ recognises that "*the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole. This includes consideration of what Lord Hope has called "the quality of the user", that is whether "the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right"* (*R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 67). *Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right.*"
72. He continues (at paragraph 62): "*This is not a live issue in most contexts in which the tripartite test has to be applied, whether under this legislation or*

¹⁴ R v Oxfordshire County Council ex parte Sunningwell Parish Council [1999] UKHL 28, [2000] 1 AC 335

¹⁵ Paragraph 34 in the case of R v City of Sunderland ex parte Beresford

otherwise, because there is no room for ambiguity." Where the land is in private ownership, there is no question of an alternative public use.

73. However where, as here in the present case, the land is in public ownership and where there is an arguable case that the public is entitled to walk the claimed routes 'by right', that ambiguity is such as to require the claimed use of Footpaths A, B and C by the public to be distinguishable by being of an amount and of a character as to be reasonably regarded as being the assertion a public right of way.
74. I agree with NSD that simply by observing a pedestrian entering the park it would not be possible to identify whether that person was intent on wandering the various ways around the park or walking straight through unless they were to be tracked by some means. In fact the task may have been somewhat easier in the evening or early morning when the park was officially closed, but observation aside, it seems to me that NSD would undoubtedly have been aware that members of the public walked directly between the three entrances along Footpaths A, B and C. All bar one of the claimants attest to walking one or more of these paths directly through the park. Each route clearly offers a short-cut as an alternative to a lengthy walk via public roads and together provide important distribution routes in the hierarchy of paths within Wharton Park.
75. The applicant also makes reference to the case of *Billson*¹⁶ in support of his contention that using a path for the purposes of recreation is quite different to walking from one place to another.
76. In *Billson* the route at issue crossed a common over which the public enjoyed the right to air and exercise under the provisions of Section 193 of the Law of Property Act 1925. In this instance it was decided that use of a track for the purposes set out under the 1925 Act could not give rise to use 'as of right'. However it was accepted that if the same track was used instead simply to walk between two points, A and B, then in principle such use would be capable of establishing a public right of way over the track despite the authority that was provided for other purposes.
77. NSD says the *Billson* case can be distinguished since it involved use 'for taking air and exercise' as opposed to being for 'public walks and pleasure grounds'. I recognise there is a distinction but the principle is similar.
78. NSD further considers it nonsense to expect a landowner to distinguish between people using paths for general recreation as opposed to highway purposes. It does not accept that a 'public walk' must be only referable to recreational use; it would be equally consistent with use for a highway purpose. Consequently it contends the public has a right to walk the claimed routes, whatever the nature of the journey.
79. I would agree that to try to differentiate between recreational walking (which I would describe loosely as walking for pleasure) and highway use (being use with the specific purpose of getting from one place to another) is meaningless since both can establish a public right of way if the use is over a defined route which is used to pass and re-pass. Here, what does need to be separated out and disregarded is general wandering over the area and any use that is not on foot.

¹⁶ R v Secretary of State for Environment ex parte Billson (QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374

80. Whilst the limited number of claimants may not have been easily distinguishable amongst the vast numbers of visitors to the park during the day, I consider them sufficient to represent the public in this context and to demonstrate use that could *reasonably be regarded as being the assertion of a public right*.
81. DCC accepted that the claimed use of Footpath C was sufficiently recognisable as being the assertion of a public right over the new park to raise a presumption of dedication to the public when it made the Order (although it has since expressed doubt over the quantity of the evidence). In practical terms, I see no reason why the same claimed usage should not be distinguishable over the old park, especially since the two areas are coexistent on the ground.
82. I therefore reach two conclusions: firstly that, on balance, it seems most probable that the old Wharton Park is held under the 1875 Act although there is a distinct lack of hard evidence to support this. Whilst I regard this conclusion as very finely balanced, it does potentially have the effect of altering the basis upon which members of the public walked through the old park along Footpaths A, B and C. Nevertheless, I secondly conclude that the use of all three routes by the claimants is sufficient in quality as well as quantity to raise a presumption that the owners, DCC, were content to dedicate them as public rights of way and that the nature of the use of these paths was such as to be distinguishable from other activities including those provided for (in the old park) by Section 164 of the 1875 Act.
83. Lastly, I note that DCC has suggested that such use by the public through a public park would be incompatible and unreasonably interfere with the statutory purpose for which the land is held, thus rendering the landowner incapable of dedicating a public right of way over it (or being presumed to have done so under Section 31 of the 1980 Act).
84. In response, the applicant argues that public footpaths pass through public parks elsewhere (although details of whether the paths existed before the parks were not stated).
85. It is the fact that the public could and did walk through the park along these paths unchallenged for over twenty years that brought about the application that prompted this Order. It is argued by DCC that the claimed use of these footpaths should be attributed to a right deriving from the provision of 'public paths or pleasure grounds' under the 1875 Act. Therefore both practically and legally I cannot see that there can be any possible conflict between the right to walk through a park where its purpose is expressly to provide 'public walks or pleasure grounds', especially where no byelaws exist.

Intentions of the landowner(s)

86. DCC assumed control of Wharton Park with the abolition of the City Council in 2008. The actions during the relevant twenty years of, and on behalf of, both Councils need to be taken into account.
87. In its 2015 Report, DCC accepted that the user evidence was sufficient in terms of quantity to reasonably allege the existence of a public right of way along the Order route but it did not move on to deal with the actions claimed by the objector NSD in rebuttal.
88. Firstly I note that there is no mention of any deposits or statutory declarations being made under Section 31(6) of the 1980 Act in relation to Wharton Park.

89. There is no evidence to suggest Mr Punton or any other representative of the relevant Council personally challenged anyone, whether outside park opening hours or otherwise.
90. Turning to notices, NSD argues that people using the park will have encountered the signs which give opening times and make clear the land is managed as a public park.
91. However I have already concluded that no notice was present at point A on path C; that the notice on path B near the railway station stated "FOOTPATH OPEN ALL YEAR ROUND", and that at the entrance to Footpath A there is no direct evidence of a notice although it is suggested one here may have indicated closing times¹⁷. Whilst it seems to me quite clear that the notices at the vehicular entrances to the park explained that access was only available during certain daylight hours, there is no evidence of any such statement along any of the claimed routes.
92. The applicant argues that it would have been possible for the landowner to protect itself against any possible right of way claim by putting up notices which advised that use for traversing the park was by its permission.
93. I agree. It would have been open to DCC as owner of the land, acting through NSD, to take measures to prevent a public right of way arising for example by putting up notices expressly granting permission for use, or by referring all pedestrian use to the provisions of the 1875 Act, or by lodging a deposit and statutory declaration as to what ways (if any) were admitted to have been dedicated. However there is no evidence any such actions were taken.
94. Consequently I am led to the conclusion that the landowner did not take sufficient steps to rebut the presumption of dedication arising from the claimed use by the public and that therefore Footpaths A, B and C should be recorded on the definitive map and statement as public rights of way.

Other matters

95. The initial objection from NSD was lodged on the grounds that public access through Wharton Park is already protected, and that the 'creation' of any public right of way would place a significant burden on management of the park whilst constraining the delivery of community events and activities. Further, during the recent improvements it had sought to address anti-social behaviour through 'designing out crime' with the support of the Police.
96. Whilst I fully understand the park managers' concerns, such issues are not relevant to the question here: as stated above, that is whether a public right of way or ways have already been established.
97. I noted the practical point made by the applicant that, as cul-de-sac to the middle of the park, the Order route makes little sense as a highway. Whilst I understand the basis on which this was proposed by DCC, it is usually a requirement that a cul-de-sac highway will only exist where it leads to a place of public resort, such as a view point. In this case it is conceivable that Footpath C might satisfy this criterion although that is not supported by the evidence from users. However, as I have concluded that all three footpaths should be recorded as public paths, I have not needed to address this point in any detail.

¹⁷ I note that the applicant recalls this notice asked visitors not to climb the walls.

Conclusion

98. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to modifications so that in addition to the Order route A-B, footpaths B-X, X-Y and X-Z are also recorded, as noted in paragraph 94 above.

Formal Decision

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

On the Order map

- Add points X (at grid reference 426812.542804), Y (at grid reference 426837.542732) and Z (at grid reference 426951.542845);
- Show as "Footpath to be added" the routes between points B and X, X and Y and X and Z;

In the Order schedule: Part I: Modification of the Definitive Map

- Delete "terminating approximately in the centre of Wharton Park" and substitute: "continuing southwards for a further 92 metres to grid reference 426812.542804 (point X on the map) where the path divides. The westerly branch proceeds generally south westwards for 228 metres via a zig-zag route to grid reference 426837.542732 (point Y on the map) where it meets North Road. The easterly branch proceeds generally north eastwards for 54 metres to grid reference 426951.542845 (point Z on the map) where it reaches a path leading to Durham Station.

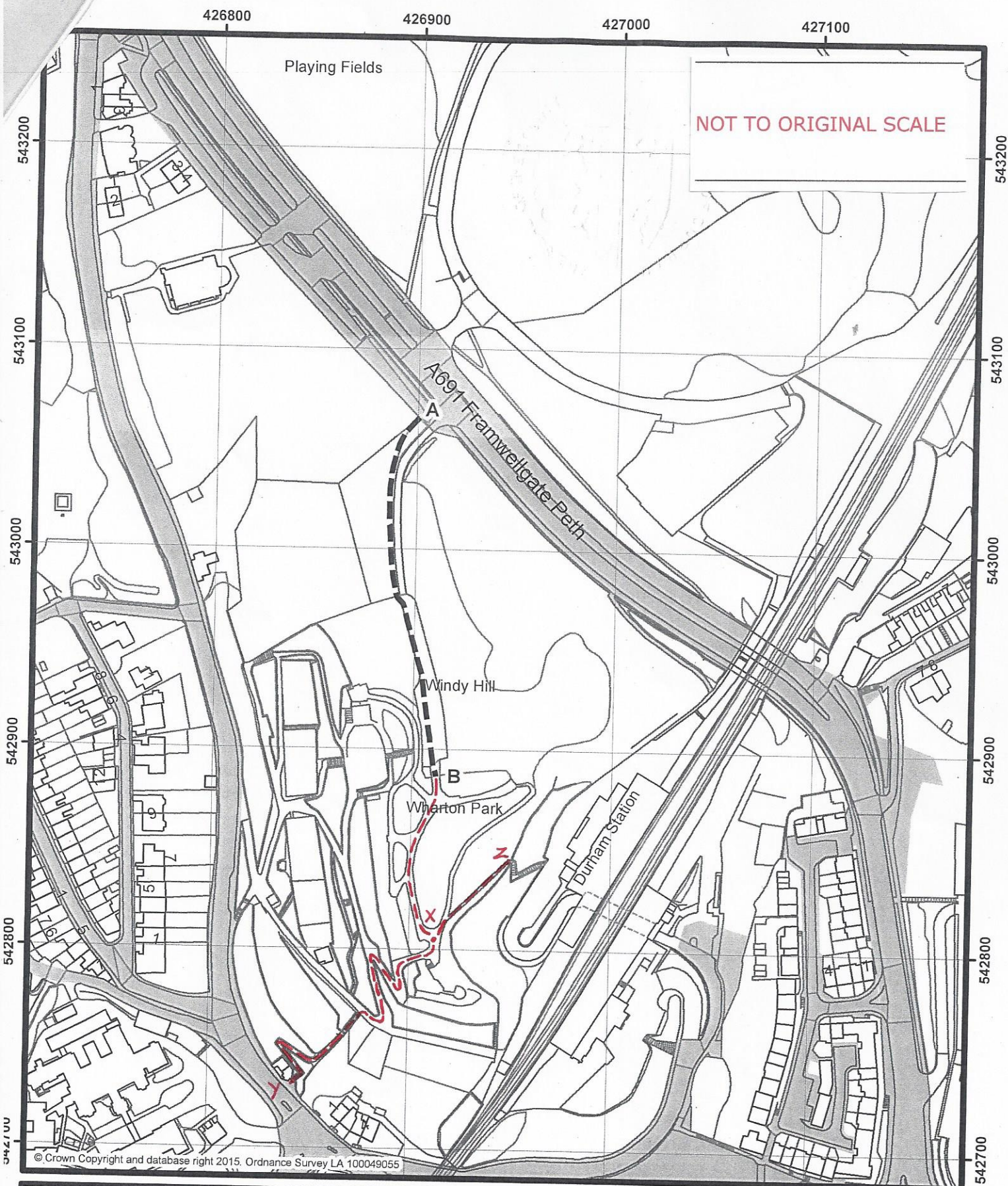
In the Order schedule: Part II: Modification of the Definitive Statement

- Amend 'Description of Route' by deleting "186 metres" and substitute "278 metres, then divides; one branch proceeding south westwards for 228 metres to North Road, and one branch proceeding north eastwards for 54 metres towards Durham Station";
- Amend 'Ultimate Destination' by deleting "A point approximately in the Centre of Wharton Park, grid reference 426912.542887" and substitute "North Road at grid reference 426837.542732 and also Durham Station at grid reference 426951.542845";
- Amend 'Length of Path' by deleting "186 metres" and substitute "560 metres".

100. Since the confirmed Order would affect land not affected by the Order, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Sue Arnott

Inspector



Durham
County Council



IAN THOMPSON
CORPORATE DIRECTOR
REGENERATION AND
ECONOMIC DEVELOPMENT
DURHAM COUNTY COUNCIL
COUNTY HALL
DURHAM DH1 5UQ

**The County Council of
Durham
Public Rights of Way
Modification Order
No. 3 (Public Footpath
No. 128 Durham City)
2015**

Footpath to be added



August 2015

Scale 1: 2,500

Adopted Highway

