



Order Decision

Hearing held on 13 June 2018

by Sue M Arnott FIPROW

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

Decision date: 21 June 2018

Order Ref: ROW/3184380

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Leicestershire County Council (Deletion of Footpath C50A, School Lane, Houghton on the Hill) Definitive Map Modification Order 2017.
- The Order is dated 1 February 2017. It proposes to modify the definitive map and statement for the area by deleting a footpath in Houghton on the Hill Parish, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Leicestershire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is confirmed with a modification as set out in the Formal Decision below.

Procedural Matters

1. I held a public hearing into the Order on 13 June 2018 at the offices of Leicestershire County Council (LCC) in County Hall, Glenfield, Leicester. During the afternoon of 12 June I visited the site of Footpath C50A, unaccompanied, to familiarise myself with the surroundings. At the close of the hearing, none of the parties present requested a further visit.
2. Although the matter had not been raised earlier, at the hearing it came to light that the Order contained an error. In article 3, the title of the Order mistakenly refers to "Footpath C5A" rather than "Footpath C50A" as appears elsewhere in the Order. I am satisfied that the Order is otherwise perfectly clear in its intention; that no-one will have been misled or in any way prejudiced by this minor mistake, and that it would not have resulted in incorrect information being recorded in the definitive map. Consequently I propose to modify the Order to correct it so as to avoid any confusion in the future.

The Main Issues

3. The Order was made by LCC relying on the occurrence of events specified in Section 53(3)(c)(iii) of the 1981 Act. The main issue is therefore whether the evidence discovered by the Council, when considered with all other relevant available evidence, is sufficient to show, on the balance of probability, that there is no public right of way along Footpath No C50A in the Parish of Houghton on the Hill as shown in the definitive map and statement and illustrated on the Order map between the points there marked as A and B.
 4. When considering cases where the removal of rights from the definitive map and statement is proposed by an order, paragraph 4.33 of Rights of Way
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Circular (1/09)¹ advises that *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements."*

5. The requirements are that (a) the evidence must be new. An order to remove a right of way cannot be founded simply on a re-examination of evidence known at the time the definitive map was surveyed and made; (b) the evidence must be of sufficient substance to displace the presumption that the definitive map is correct; and (c) the evidence must be cogent.
6. Once prepared, and unless and until subsequently revised, the definitive map and statement is regarded as the conclusive record of the existence, at the relevant date², of the public rights of way it shows. Therefore the deletion of a right of way from this record requires sufficient evidence to show that no right of way existed as at the relevant date of the definitive map on which the way was first shown.
7. The footpath at issue here was first recorded on the definitive map and statement for the County of Leicestershire with a relevant date of 1 December 1952. The central question is therefore whether or not it was included in error at that time.
8. The Circular also makes clear that it will be for those who contend that there is no right of way to prove that the map requires modification due to the discovery of evidence which, when considered with all other relevant evidence, shows that the right of way should be deleted. In short, it is not for the objector(s) to prove that the definitive map is right.
9. In this case both the Council and the applicant submitted that evidence which meets the criteria set out in the Circular has been brought forward to indicate a mistake was made when the way was first recorded.

Reasons

Background

10. This Order was made in response to an application by Mr Dennis to delete Footpath C50A from the definitive map and statement. This application had been prompted by his discovery that the route A-B was recorded as a public right of way following his purchase of the field adjacent to his home in 2014.
11. Following investigation by LCC and full consideration of the evidence discovered, a decision was taken under delegated powers to make the Order now at issue.
12. Footpath C50A appears on the current definitive map with a relevant date of 14 February 1997. Prior to this, it was shown on the definitive map of 1957. This was a review of the first such record which had a relevant date of 1 December 1952. There is no significant difference between the route of Footpath C50A as depicted on each of these three maps and there were no submissions to the contrary. The issue is therefore focussed entirely on the question of whether the identification of this route as a public right of way on 1 December 1952 was correct.

¹ Version 2 Issued October 2009

² Of the definitive map

The first definitive record

13. The National Parks and Access to the Countryside Act 1949 placed a duty on county councils to prepare maps and statements as a definitive record of public rights of way in their area. In Leicestershire, as in most other counties, the initial exercise of identifying and surveying public paths was undertaken by parish councils.
14. In Houghton on the Hill, the survey was carried out in September 1950 by a Mr Mickleburgh and Mr Davis, both being local men. Their involvement and their subsequent report is noted in the two extracts from the Parish Council Minute Book (from 1950 and 1951) submitted by Mr Keal.
15. Standard survey forms were completed for each path and the route drawn in red on the survey map. Route 1 is described as starting at Houghton Church and ending at Gaulby Brook via "the Warren" and "a Footbridge"; this was known as the "Norton Gorse F/P". Route 2 is described as leading from "St Catherine's Church to Gaulby Brook F/Bridge (at the) Parish Boundary", being known as the "F/Path to Gaulby".
16. On the extract from the survey map supplied, the Order route (now the cul-de-sac Footpath C50A) is marked as Route 1, and Route 2 leads south-eastwards from the churchyard along the present Footpath C50. However, at the hearing it was discovered that on the adjoining survey sheet where Route 2 continues to the parish boundary, a further section of Route 1 is shown in red. Whilst Route 2 diverges onto what is now Footpath C51, Route 1 is shown as continuing along the present C50 to the parish boundary.
17. The written description of Route 1 matches this southern section of Route 1 as shown on the survey map but bears little resemblance to the line of the Order route. Yet subsequently the southern section of Route 1 seems to have been amalgamated with Route 2 to form Footpaths C50 and C51. That the northern part of Route 1 was numbered with the suffix "A" might suggest a degree of uncertainty over the route. However, that aside, it seems clear that the description in the survey form for Route 1 was intended to apply to a different footpath, not the Order route C50A.
18. The wording included in the first definitive statement for the relevant paths does not incorporate the description from the parish survey form. Footpath C50 is identified as the through-route "From Kings Norton to Houghton-on-the-Hill" and Footpath C51 as "From Gaulby to C50 Houghton-on-the-Hill". Footpath C50A is said to lead "From Houghton-on-the-Hill Church, Easterly towards C50". Even as a description of the route shown on the definitive map, this is somewhat misleading insofar as it starts from the end of School Lane beside the Old Rectory, not from the Church. It clearly does not connect with Footpath C50 or any other path, again confirming its status as an apparent cul-de-sac.
19. There are two points I draw from this. The first is that from the earliest stage, the local parish surveyors showed the Order route as a cul-de-sac with no obvious destination of interest to the public being mentioned. Secondly, there is not a clear correlation between the survey map and parish description for Route 1 insofar as it relates (or possibly could relate) to the Order route A-B. Rather it is reasonably obvious that, read together with Route 2, the descriptions do not relate to A-B at all.

20. It seems fair to deduce that the description in the 1952 definitive statement was probably inserted by LCC staff tasked with compiling all the survey material from the parishes and systematically numbering the public rights of way identified by them. A mistaken reading of the map onto which the first definitive information was drawn could easily result in Footpath C50A being described as starting from the church if done by someone unfamiliar with the route on the ground. Consequently I consider the wording of the definitive statement to be unreliable, despite its theoretically conclusive status.
21. Yet, incorrect description notwithstanding, the fact remains that the Order route was drawn on the parish survey map in 1950, purporting to be a suitable candidate for recording as a public path.

New evidence submitted in support of deletion

22. There is no information on the parish survey form to indicate the reason for believing the route between A and B to be a public right of way in 1950. Since there is no record of exactly what evidence was taken into account at the time, it is impossible to be sure that the evidence now before me is entirely 'new' as required by the guidance in Circular 1/09.
23. However it seems likely that, at the very least, the county council of the day probably consulted Ordnance Survey (OS) maps and its own highway records.
24. In 1886 the OS First Edition map at 25" to one mile showed Footpath C50 as a double-pecked line annotated "FP"; however it showed no path continuing from the south eastern end of School Lane. By 1904, the Second Edition of the same map did show a double-pecked line along the line of Footpath C50A, ending at a field boundary as it does today. This path remained on subsequent editions until the revision in 1955 when it was omitted.
25. OS maps of this scale and era do not purport to record public rights of way but can provide evidence of the physical existence of a path or track. The map onto which the 1950 parish survey was drawn was an edition which depicted a track along the Order route as did the base map for the 1952 and 1957 definitive maps. Thus it is not in doubt that there was a track through two fields between A and B in existence throughout the early half of the twentieth century. However the OS maps themselves offer no support for the existence of a public right of way over it but rather confirm that it did not lead to a public place of interest at least as far back in time as the latter half of the nineteenth century.
26. The highway records held by LCC date back to 1929 when responsibility for highway maintenance was handed over from the district to the county councils. The enlarged extract from this record shows clearly that School Lane was not maintained at the public expense for its full length. Indeed the change in liability is today demarcated on the ground by different surfacing.
27. It is important to remember that these records were intended to identify maintenance responsibility for highways, not to record the extent of the public's rights. It is possible that the public had a right to continue to the end of School Lane and thereby join the start of Footpath C50A, but these records offer no proof of that.
28. Turning to other evidence which may not have been considered at the time Footpath C50A was included in the first definitive map, there are two other documents which require close examination. These include (a) the Sales

- Particulars prepared in 1920 relating to the sale of land associated with Glebe Farm in Houghton on the Hill, and (b) a field map of the village and surrounding land dated 1941, prepared for some unknown purpose.
29. The details from 1920 are revealing insofar as this clearly identifies the Order route as a "Right of Way" for the purchaser of "Lot 2" to reach the fields on sale which would otherwise be landlocked. The purchaser was to enjoy a "right of carriage and foot way ten feet wide".
 30. There is little doubt that this offers evidence of a private right of way along a track which OS maps confirm to have been in existence during this period. It is submitted by the applicant and LCC that, had there been a public right of way on foot in existence, there would have been no need to provide for a private foot way. I find some merit in that argument although I do not attach a great deal of weight to it. Nevertheless, this document does offer a cogent reason for the existence of a track which leads to a field but which otherwise appears to form a cul-de-sac.
 31. Mr Keal produced a copy of a 1941 plan of Houghton on the Hill which had been discovered in the county archives. The person responsible for its compilation is not known and its purpose is not stated. It identifies field names within the parish and their attachment to one of 7 named farms. Also shown are "Ancient Road(s)" and "Foot Road(s)". It is possible this plan was an attempt to make geographical sense of an inclosure award which covered the parish in the late eighteenth century (for which there is no accompanying map) but there is no proof of that.
 32. The 1941 plan shows Footpaths C50 and C50A in the notation for "Foot Road" but is significant insofar as it shows an "ancient road" known as "Old Salt Way" running north eastwards through fields from Stoughton Road, passing through point B and crossing Footpath C50. This would support the argument put forward by Mr Keal that Footpath C50A was not historically a cul-de-sac.
 33. He referred also to a guide book written by two well respected local historians (Carol and Ray Davis) in which it is stated that the footpath from the end of School Lane marks the line of an original track to Thurnby in one direction and to Gaulby in the other. Unfortunately no source data is referenced for this assertion.
 34. Mr Keal *did* accept that the definitive line may not accurately reflect the actual route of this historical way. He was inclined to accept the findings of LCC's archaeologist, that the original holloway ran south eastwards from point A, more closely following the field boundary, and that this original track was replaced, probably in the nineteenth century by the Order route.
 35. Whilst I am prepared to accept that there might be some substance to the claim that in previous centuries a continuation of School Lane did link with other ways in local use, the historical evidence available to show that this was a public route is notably lacking.

Conclusions

36. I am mindful that here it is not necessary to find evidence of sufficient weight to demonstrate that a public right of way subsists along the Order route. The burden rests with those who assert that an error was made in the 1950s when Footpath C50A was included in the definitive record.

37. At the hearing I drew attention to the guidance provided by the case of R (on the application of Norfolk County Council) v SSEFRA [2005]³ concerning a discrepancy between the definitive map and definitive statement. This confirmed that the definitive map is to be regarded as the primary and source document for the purposes of Section 56 of the 1981 Act. Pitchford J held that "*... If the accompanying statement cannot be read as supplying particulars of the position of the footpath on the map then the position as shown on the map prevails over the position described in the statement. It is conclusive evidence unless and until review under s53(2)...*".
38. The judgement continued: "*At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the Trevelyan⁴ presumption. Each should be accorded the weight analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate.*"
39. Applying this to the case of Footpath C50A, I have already concluded that the entry in the definitive statement does not reflect the route shown on the definitive map and I have examined the evidence which shows how the mistake probably arose during the preparation stages of the 1952 definitive record.
40. Following the *Norfolk* case, I should regard this conflict between map and statement as itself evidence of an error such that neither record takes precedence over the other. An examination of the extrinsic evidence leads me to conclude that there is support for the proposition that the Order route physically came into existence in the late nineteenth century (after the 1886 OS map and before the 1904 edition), and further that it arose as a private right of way to access land in different ownership to the south of point B.
41. The fact that it is recorded as a cul-de-sac lends weight to the argument that its purpose was only to provide access to land, not as is usual for a public right of way, to a place of public resort.
42. It is not inconceivable that when the parish survey was undertaken in 1950 a private foot way was mistaken for a public one, but that remains conjecture since there is no explanation for its inclusion on the first definitive map.
43. I recognise the arguments put forward by Mr Keal to suggest that long before the turnpike arrived in the late eighteenth century, or the inclosures of the same period, the roads and ways within the parish followed different routes which may or may not have survived the legislative processes that brought about considerable change. However I cannot accord any significant weight to the 1941 map or the local guidebook book in support of this submission without greater detail to reveal the evidence on which each is based.
44. I have noted that inclosure and tithe awards affecting land in Houghton on the Hill Parish were checked but failed to produce any useful information. Similarly records compiled under the 1910 Finance Act were not helpful.

³ R (oao) Norfolk County Council v SSEFRA (QBD) [2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994

⁴ J Trevelyan v SSETR [2000] NPC 6, (CA) [2001] EWCA Civ 266, [2001] 1 WLR 1264; evidence of some substance needs to be put in the balance if it is to outweigh the initial presumption that a right of way exist.

45. Overall, my conclusion is that the 1920 evidence is probably 'new' and sufficient to trigger a review of Footpath C50A although the conflict between the map and statement would also be sufficient to do so. Whilst the evidence available is not overwhelming, I find it to be cogent and of sufficient substance to displace the presumption that the definitive map is correct.
46. In summary I consider the evidence before me to be sufficient to support the deletion of Footpath C50A from the definitive map and statement.

Other matters

47. I have noted the additional evidence supplied, both by the applicant and by the objector, which relates to the use or non-use of the Order route in relatively recent times, and to the photographs provided which date mostly from the 1970s. I have also taken account of the responses to consultation on the proposed deletion of Footpath C50A from the definitive map, including from Houghton on the Hill Parish Council. However, as I stated at the hearing, this evidence can only be relevant if it assists in answering the essential question which is whether the route in question was a public right of way when first recorded on the definitive map.

Conclusion

48. Having regard to the above and all other matters raised at the hearing and in the written representations, I conclude that the Order should be confirmed with a modification to correct the minor mistake in the Order referred to in my paragraph 2 above.

Formal Decision

49. I confirm the Order with the following modification:
- In line 2 of Article 3 to the Order, amend "Footpath C5A" so as to read "Footpath C50A".

Sue Arnott

Inspector

APPEARANCES

In support of the Order

Ms N Varia	Solicitor; Leicestershire County Council
Mr P Lindley	Senior Access & Development Officer; Leicestershire CC
Ms P Pritchett	Legal Assistant; Leicestershire County Council
Mr J Dennis	Applicant
Mrs E Lewin	Agent for the Applicant

Opposing the Order

Mr R Keal	Objector
Mr S Thodey	

DOCUMENTS

1. Copy of the statutory objection and subsequent representations
2. Leicestershire County Council's statement of case with accompanying documents and comments on the objection
3. Statement of case of Mr J Dennis dated 21 March 2018 with attached documents
4. Statement of case of Dr R Keal dated 22 April 2018 with attached documents
5. Letters dated 24 April 2018 from Mr S Thodey and Professor P Allison

Submitted during the hearing

6. Copy of letter from Clerk to Houghton on the Hill PC to Mather Jamie dated 29 August 2014
7. Extract from HM Land Registry: Title No LT454508
8. Extract from 1929 Handover Map
9. Extracts from 1952 Definitive Map and Statement
10. Extracts from 1957 Definitive Map and Statement
11. Copy of the Leicestershire County Council (Addition (Part) and Deletion (Part), Footpaths C50 and D10, St Catherine's Church, Houghton on the Hill) Definitive Map Modification Order 2015
12. Extracts from the Minutes of Houghton on the Hill Parish Council from 1950 and 1951

Leicestershire County Council (Deletion of Footpath C50A, School Lane, Houghton on the Hill) Definitive Map Modification Order 2017

THE COMMON SEAL OF THE LEICESTERSHIRE COUNTY COUNCIL was hereunto affixed this 1st day of February 2017 in the presence of :-

Authorised Officer

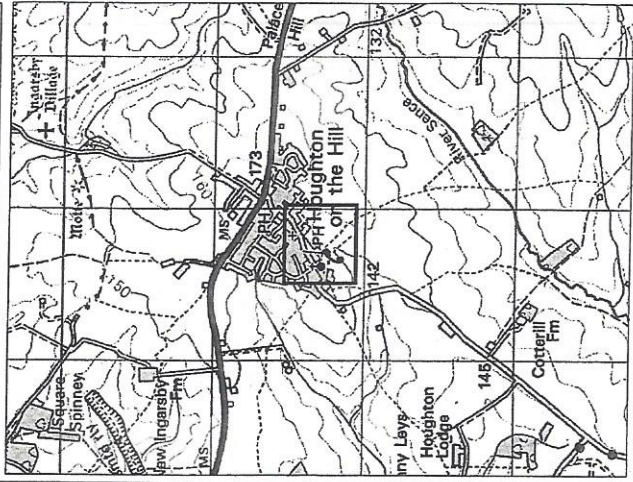
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Location Plan



Key

— Footpath to be deleted
A - B

- - - Footpaths unaffected

▬ County Highway Extent

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email footpaths@leics.gov.uk
Phil Crossland, Director



**Leicestershire
County Council**

Plan No. M1021.

Scale 1:2500