



Order Decision

Inquiry held on 28 November 2018

Site visit made on 27 November 2018

by Susan Doran BA Hons MIPROW

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

Decision date: 18 January 2019

Order Ref: ROW/3181363

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 and is known as the Rutland County Council District Council (Thorpe by Water) Footpath E361 Modification Order (No.2) 2017.
- The Order is dated 20 January 2017 and proposes to modify the Definitive Map and Statement for the area by amending the particulars contained in the map and statement as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision

Procedural Matters

1. This case concerns the addition of a public footpath alongside the River Welland at Thorpe by Water, from its junction with Footpath E317 at point A to its junction with Footpath E317 at B.
2. The case in support of the Order was made by Rutland County Council District Council ('the Council'). The Objectors, owners of the land over which the Order route passes, did not appear at the Inquiry and were not represented.
3. The Order had been made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 ('the 1981 Act') further to an event in Section 53(3)(c)(iii). At the Inquiry, the Council confirmed that both citations were incorrect. On the first point, the correct subsection under which it is made is determined by the date of the event giving rise to the Order. In this case, I consider that event falls under the duty of the surveying authority to keep the Definitive Map and Statement ('DMS') under continuous review which is Section 53(2)(b) of the 1981 Act. I do not consider that anyone has been prejudiced by the citing of Section 53(2)(a). However, I shall modify the Order, if I decide to confirm it.
4. On the second point, I am satisfied that the Order should have cited Section 53(3)(c)(i). Having examined the papers it is clear that it was this event by which the matter had been considered and promoted by the Council, and notified to relevant parties. On that basis I find no prejudice arises and the requirements of the 1981 Act have been applied correctly. Again, I shall modify the Order, as requested by the Council, should I decide to confirm it.

5. The Council confirmed it had consulted the Parish Meeting as required under the legislation¹, and I agree that how the Parish Meeting dealt with the issue was a matter for them and not for the Council.

The Main Issues

6. In the light of the above, the main issue is whether, on a balance of probabilities, the evidence discovered is sufficient to show that a public footpath subsists over the Order route.
7. The Council relies on a presumption of dedication arising under the tests laid down in Section 31 of the Highways Act 1980. This requires me to establish the date when the public's right to use the Order route was brought into question. I shall then examine the evidence to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, I shall consider whether there is sufficient evidence that during this 20 year period there was no intention on the part of the landowners to dedicate public footpath rights. Here it is argued that notices and challenges demonstrated a lack of intention.

Reasons

When use of the Order route was brought into question

8. There are two dates to consider - spring 2013 when notices were put up requesting users to "keep to the footpath", thereby giving rise to a 20 year period for the purposes of Section 31 of the 1980 Act of 1993 to 2013. Alternatively, the application itself (dated November 2013) is an act of bringing into question, effectively giving the same 20 year period, 1993 to 2013.
9. Although I heard that some witnesses considered the Order route to be the 'official' footpath, rather than the definitive alignment which passes directly between A and B in a southerly direction, one considered the notices brought its use by the public into question. This led to the application for the path to be added to the DMS.
10. I conclude that the 20 year period for me to consider is 1993 to 2013.

Whether the Order route was used by the public as of right and without interruption

11. Twelve User Evidence Forms ('UEFs') were submitted claiming use of the Order route from the late 1960s to 2013. I heard from 5 users. Whilst I note the applicant completed the UEFs and then the users had signed them, I was able to clarify the circumstances with these witnesses. It was apparent from some of those giving oral evidence that although they had answered a question concerning signs in the affirmative; in fact they had no clear recollection of having seen them. Nevertheless, and having heard their oral evidence, there was nothing to suggest that other recollections were mistaken. I attach less weight to the evidence that has not had the benefit of clarification.
12. All of those speaking at the Inquiry had followed the Order route alongside the River as there was a visible trodden line on the ground, whereas there was none on the alignment of Footpath E317. I accept that this worn line may in part have resulted from the movement of livestock. However, aerial

¹ Schedule 15 to the 1981 Act refers

photographs support the oral and written evidence of use of the Order route, and a clear lack of wear on the definitive line.

13. Between 5 and 12 of the claimants used the Order route annually. I heard of use varying in frequency from a few times a year to dog walking twice a day, or more at weekends and holidays, and of use about 100 times a year. Written evidence referred to weekly use and several times a week. Those speaking at the Inquiry began their use in 1990, 1998 and 2008.
14. For use to satisfy the test it must be without force, secrecy or permission. Furthermore, it must be without interruption, that is an interruption intended to prevent public use rather than for some other purpose. The Order route is unobstructed and there was no indication of use by force. I heard nothing to support the contention that challenges had taken place on, or related to, the Order route itself, but witnesses had recollections of challenges taking place elsewhere on the land. Some spoke of being told how to access Footpath E317 from the public road, but not of its route thereafter. Use was open and occurred at varying times of the day from early morning through to evenings, throughout the week. As such it occurred at times when it was likely to be observed. Indeed, several witnesses spoke of seeing and being seen by the landowners when they were tending their cattle, haymaking, or in a vehicle, of acknowledging them or being acknowledged by a nod or a wave, or passing the time of day. One witness had chatted with the landowner whilst using the Order route and others recounted similar events in written evidence, all without challenge.
15. I did not hear of any use of the Order route granted by permission. One or two people had been given permission to walk (with or without dogs) elsewhere on the land, for example Green Lane (a track from Main Street) to fields on the east of the village, north of the Order route. The Objectors had granted permission to a named person to walk their dog along the River or around the meadows, although it is not clear if this included the area of the Order route. This person had not provided evidence of use.
16. There is nothing to indicate that use was interrupted. The user evidence points to the route having been walked for many years prior to the 20 year period and of its continued use throughout that period. Notwithstanding this, I consider the number of users in this case to be relatively low. Nevertheless, it is commensurate with the rural location and small population of Thorpe by Water itself. In addition to the use made by local residents, I heard that users sometimes saw people they did not know from nearby villages walking the route, for example at weekends, as well as the "occasional rambler". Users also spoke of meeting people when they used the route, mostly people they knew.
17. On balance, I am satisfied there has been use by the public as of right and it is sufficient to raise a presumption of dedication.

The evidence and actions of the landowners

18. The Objectors, and family members, had challenged users over the years, and it is clear that several incidents had taken place. However, the incidents described concerned other parts of their land rather than the Order route; some to activities such as kite flying, playing or camping on the land, others to climbing fences or wandering generally over the land. Some took place outside the 20 year period; others lacked detail about where they occurred. Any

incidents that may be attributable to the Order route I find were not an effective demonstration of a lack of intention to dedicate it as a public right of way. The user evidence firmly points to the landowners having seen and been aware of use of the Order route over a long period and to have taken no effective action to prevent its use. Of the specific incidents concerning those providing evidence of use, the recollections of the witnesses differed to those of the landowners. Whilst, they had spoken with or been spoken to by them, the incidents described concerned other parts of the land. None of the witnesses recalled having been told the route of Footpath E317, but rather how to reach it; and none recalled being spoken to about use of the Order route. Further, these appear to have been private conversations between individuals, rather than the landowners communicating more widely to the general public.

19. Notices were said to have been taken down by persons unknown. It is not clear when or where notices were put up, in particular with regard to the Order route. However, the examples provided by the landowners were largely directed at dog walkers rather than challenging use by the public. It was only latterly in 2013 that notices which may have been interpreted as concerning the Order route (to keep to the footpath) were put up. Witnesses had seen signs elsewhere on the land, for example concerning dog fouling, but none were able to recall having seen signs concerning the Order route other than those referred to above.
20. I accept that the landowner had spoken to local people about use of his land and granted permission for some people to walk on the land other than on public rights of way. However, on balance, I conclude the evidence is that the landowners were aware that the Order route was in use by the public and that they took no, or insufficient, action to indicate they had no intention to dedicate it.

Conclusions

21. Having regard to these and all other matters raised at the Inquiry and in written representations, I conclude that the Order should be confirmed with modifications that do not require advertising.

Formal Decision

22. I confirm the Order subject to the following modifications:

- In the preamble to the Order, in the second line delete "53(2)(a)" and replace with "53(2)(b)", and
- in the fourth line onwards, delete "section 53(3)(c)(iii) namely that the discovery of evidence by the authority that particulars contained in the map and statement require modification" and replace with "section 53(3)(c)(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates"

S Doran

Inspector

APPEARANCES

For the Council:

Rosie Scott *of Counsel*

who called

Stuart Crook Public Rights of Way Officer, Rutland County Council
District Council

Anne Eley

Michael Eley

Maxine Fenton

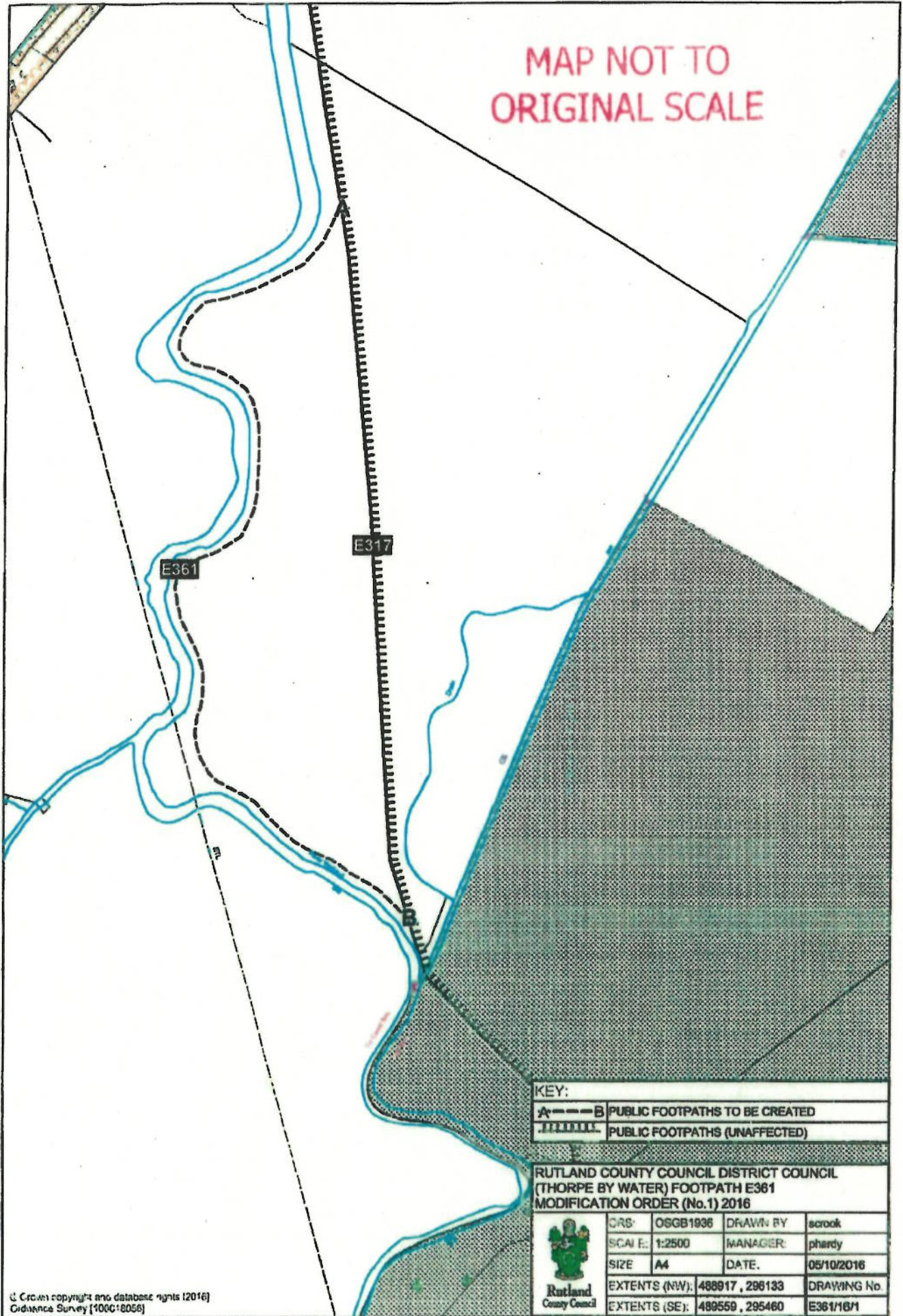
Ronald Fenton

John Herd

DOCUMENTS

1. Paginated bundle of Inquiry documents submitted by Rutland County Council District Council
2. Opening submissions on behalf of Rutland County Council District Council
3. Closing submissions on behalf of Rutland County Council District Council

MAP NOT TO ORIGINAL SCALE



KEY:

	PUBLIC FOOTPATHS TO BE CREATED
	PUBLIC FOOTPATHS (UNAFFECTED)

RUTLAND COUNTY COUNCIL DISTRICT COUNCIL
(THORPE BY WATER) FOOTPATH E361
MODIFICATION ORDER (No.1) 2016



Rutland
County Council

ORS:	OSGB1936	DRAWN BY:	scrook
SCALE:	1:2500	MANAGER:	phardy
SIZE:	A4	DATE:	05/10/2016
EXTENTS (NW):	488917 , 296133	DRAWING No.	
EXTENTS (SE):	489559 , 295460		E361/16/1