



Order Decision

Site visit made on 12 August 2020

by D M Young JP BSc (Hons) MA MRTPI MIHE

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

Decision date: 21 September 2020

Order Ref: ROW/3234969

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cambridgeshire County Council (Public Footpath No. 19 Doddington) Modification Order.
- The Order is dated 3 April 2019 and proposes to modify the Definitive Map and Statement for the area by recording the width of Footpath 19 as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding when Cambridgeshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Procedural Matters

1. None of the parties requested to be heard, I have therefore considered the case on the basis of the written representations received.
2. The proposed Order seeks to formally record the width of Footpath 19 and arises from an investigation by the Highway Authority which was undertaken in response to an application to register some of the land with the Land Registry. For ease of reference, I shall refer to the various points labelled on the Order plan a copy of which is attached to this decision.
3. I carried out an unaccompanied site inspection of Footpath 19 Doddington (the Order route) on the afternoon of the 12 August 2020.
4. The Order is supported by Cambridgeshire County Council (the "Order Making Authority" (OMA)). The objectors are Mr Ricky and Deborah Glowacki and Mr Ricky and Donna Glowacki. As I understand it, the former own land to the east of the Order route and are the father and father-in-law of the latter.

The Main Issues

5. The main issue is whether the evidence shows that in the past all of the Order route was accepted as being a public footpath. Whilst the status of the route as a public footpath is not in dispute, the objectors challenge the width of the way, claiming it is narrower than is proposed to be recorded.
6. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(iii) of the Act. This section requires me to consider whether the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show, on the

balance of probabilities, that the Definitive Map and Statement (DMS) require modification to add a width to Footpath 19.

7. At common law the width of a highway is a question of fact. If a route runs between fences, hedges or ditches the presumption is that the whole area between these has to be dedicated to the public provided one is satisfied that the enclosing features were laid out by reference to the highway. That is irrespective of the fact that the public's use will generally be limited to the surfaced portion of the way¹.

Reasons

8. The case in support of the Order relies mainly upon contemporaneous survey data supplemented by historical mapping evidence and aerial photographs to demonstrate the current and historical alignment and physical limits of the Order route. Having regard to the long established legal principle '*once a highway, always a highway*', if the evidence shows that a public right of way once existed across the full width of the route stated in the Order schedule, then it must still exist today unless there is evidence of formal closure. In this case, no record of any formal extinguishment has been produced.

The Route

9. The Order route commences on Turf Fen Lane situated on the southern edge of Doddington. It is approximately 280m in length running on a straight north-south alignment. Point A is located where there is a pronounced widening of the highway corridor with a private residential access located on the eastern side of the route. Point A is demarcated on the ground by a green footpath waymarker which is located at the northern end of a wide grass verge that continues south to point J. The section of the route between points A and J is slightly downhill.
10. The route proceeds in a straight line to Point O which is located at the northern edge of a large farm complex. After that, Footpath 19 continues in a south-eastern direction towards the Isle of Ely Way (A141) where upon it terminates. Just beyond the access to Cathedral View there is a metal gate across the route at Point J. The surrounding area forms part of a low-lying fenland landscape.
11. The Order route was first recorded as a Public Right of Way on the Draft Map for Cambridgeshire and the Isle of Ely in 1972. It was formally recorded on the DMS in May 1987 following a Definitive Map Modification Order made under section 55 of the 1981 Act. It is described in the Statement as: "*A Public Footpath from the end of the metalled section of Turf Fen Lane and extending in a southerly direction to the Chatteris parish boundary. Approx. 280 metres*". No width is recorded on the Statement.

Historical mapping evidence

12. The route was first mapped in 1770 as part of the Doddington Estate Map. It was subsequently shown on the 1840 Tithe Apportionment maps as lying between plots 612, 613 and 615. However, given the scale and rudimentary nature of these maps they do not assist with regards to the width of the route.

¹ Harvey v Truro Rural District Council (1903)

13. Ordnance Survey (OS) maps were first produced in the early 19th century. By the late 19th century most major roads had been surveyed with reasonable accuracy. However, the situation regarding minor roads is less certain. Even by the early 20th century the majority of minor roads were drawn without the benefit of a proper survey and consequently the maps were sometimes no more than the cartographer's impression of the road.
14. The 1885 1st Edition OS map shows the Order route between two solid lines and labelled "Turf Fen Lane". The western boundary of the route is drawn as a straight line. The northern section of the eastern boundary fluctuates such that there is some variation in the width of the route between points A and H. Ditches are depicted along both flanks of the southern section of the route. According to the OMA, the measurements taken from the 1885 OS map indicate the width of the Order route at Point A was 13.5m before widening out to 16.5m. The typical width between points A-H measured from ditch to ditch was between 12-14m.
15. Land duty valuation plans prepared in connection with the 1910 Finance Act were drawn up for the purposes of ascertaining the value of land for tax purposes. Deductions were regularly made in respect of public rights of way that crossed land and therefore the plans provide valuable information regarding the status and layout of public routes. The plans were produced using the 1910 2nd Edition OS Maps as base maps which were then annotated with further details provided in the accompanying valuation books.
16. The Order route is shown as uncoloured on the Finance Act plan of Doddington meaning that it was excluded from the taxable land value. The drainage ditches along both flanks of the southern section of the route are also uncoloured. Based on the foregoing, it would appear that the Order route was reputed to be a public footpath by 1910 at the latest.
17. There are no significant changes in respect of the Order route on the subsequent 1902 and 1926 OS maps. The Order route is shown in much greater detail on the 1954, 1971 and 1977 OS maps. These show the physical layout and alignment of the route in very similar terms to the earlier maps. The 1977 map shows a "drain" running southwards from approximately point B along the eastern flank of the route. In my view, these later OS maps add weight to support the accuracy of the 1910 2nd Edition map upon which the Finance Act plans were based.
18. The OMA submits that the mapping evidence demonstrates that the physical layout of the Order route has barely changed since it was first surveyed in 1770 and as such the width of the Order route should be measured from the Finance Act plan. Having carefully considered the range of OS maps before me I am satisfied that the physical layout of the route including its boundaries changed little from 1770 until the 1980s.
19. The objectors have challenged the measurements contained in the Order schedule based on alleged deficiencies with the base map used for the Finance Act plans. However, whilst I have been invited to modify the Order to record the width as it appears on the ground today, no actual measurements have been provided.
20. The objectors have submitted a plan which overlays the 1910 Finance Act plan with the 1929 Isle of Ely Handover Map. This shows amongst other things,

some inconsistencies most notably in relation to the main road through Doddington. Despite that, there are no alleged inconsistencies in relation to the Order route. Even if there were, I am sceptical whether an overlaid map which was surveyed at a different scale and time is a sufficiently strong reason to doubt the accuracy of the 2nd Edition OS map especially bearing in mind the subsequent mapping evidence. In short, some inconsistency is to be expected between the two maps but that is most likely to be a scaling issue and is not determinative as to there being an error in relation to the Order route.

Aerial photographs

21. The OMA has adduced various aerial photographs of the Order route dating back to 1969. These not only provide invaluable evidence as to the physical layout of the route but they also capture the introduction and evolution of built development particularly along the disputed eastern flank.
22. The photos corroborate what is known about the route from historical mapping evidence. In particular they confirm that since 1969 there has been a consistent and straight western boundary to the Order route. Moreover, on the eastern side there appears to have been little or no change to the boundary between points H to O. In contrast, it is apparent that there have been various changes to the width and boundaries of the Order route along the northern section of the eastern boundary between points A to H.
23. The photographs show that the gradual development of the land abutting the eastern flank of the route has been accompanied by various changes to the route itself. In particular the construction of a new private access and circular driveway at or near point E in the 2003 photograph has led to the route being enclosed by fences and gates rather than ditches and hedges. It also appears that some strip widening of the road has taken place between point A and H.
24. Whilst the location of the objector's former timber fence may well have been erected on the same line as the hedge which preceded it, the 1997 photograph shows a fairly wide grass verge to the east of the hedge. The 'green' verge and 'brown' ploughed field are clearly separated by a drainage ditch. This drain appears to be in the same location as that referred to above on the 1977 OS map. Notwithstanding that there appears to be a hedge within the verge, the drainage ditch is more likely to have represented the true boundary of the Order route. Moreover, despite the construction of a private access at point J, the verge and ditch between points B and H aligns with that to between points J to O further south.
25. Notwithstanding the above, the OS maps and aerial photographs do differ in relation to the location of the eastern route boundary between points A to C. Rather than the narrowing and widening between these points depicted on the OS maps, the aerial photographs, particularly 1969, 1987 and 1997, appear to show a straighter edge to the route. It is of course possible that the erection of structures including new vehicular access over the ditches from the mid 20th century onwards resulted in subtle changes to the location of the hedgerows. More likely is that the location of the eastern route boundary appears straighter than it is actually was because one can only really see the hedges as opposed to the ditches.
26. The photographs clearly demonstrate that since 1997 there has been a narrowing of the Order route between points B and G by the introduction of

walls, gates and fences. This has been accompanied by the loss of large sections of the eastern verge and the infilling of the drainage ditches.

Site survey

27. The OMA undertook a detailed survey of the route in 2019 taking width measurements between the enclosing boundary features on the ground. Fifteen measurements were taken along the route. Between points L-O the OMA took 'ditch-to-ditch' measurements on the basis that the alignment of these ditches are unlikely to have changed since the route was first surveyed.
28. At point A, the eastern boundary is delineated on the ground by a shallow ditch which continues northwards. This ditch also aligns with that which runs southwards from point I. Between points A and B the ditch has been filled in to facilitate the access to a new dwelling to the east of the Order route.
29. Between locations B-H on the eastern side of the route the ditch is no longer present and therefore the measurements were taken to the brick pillars, fence post or gate.
30. To ascertain whether there has been any encroachment, the OMA has produced a table which compares the survey data with the widths scaled from the Finance Act plan. Varying degrees of encroachment between 0.9m-4.3m were noted between points 1 to 10 which correspond to points A-I on the Order plan.

Conclusions on the Evidence

31. Having examined all the evidence and on a balance of probability, it is my view that the Order route was established as a highway before the Finance Act records were compiled in the early 20th century.
32. The objectors argue that the Finance Act plan is unreliable, and the width of the Order route should be taken from the boundaries as they appear on the ground today. This case essentially turns on whether the 1910 Finance Act plan can be regarded as a sufficiently accurate basis to support the widths in the Order schedule. In addressing that point, it is important to note that the accuracy of OS maps has been reaffirmed by the Courts in a number of legal judgements².
33. Whilst that does not mean OS maps are inviolable, I am satisfied that the totality of the mapping, photographic and survey evidence suggests the physical extent of the Order route has changed little from when it was first surveyed. I consider it more likely than not that the eastern site boundary between points B-I was demarked by a 1m wide ditch which has been slowly infilled by a succession of developments along the eastern flank of the route. In light of the above, I consider the OMA's approach to record the width from the highway facing batters of the ditches which were present between 1910 to 1977 to be a fairly logical methodology and a reasonably reliable approach. I do not therefore intend to modify the widths stated in the Order.
34. I have carefully considered the objectors' view that the agricultural use of the land abutting the Order route is likely to have resulted in the movement of the ditches over time. However, that argument has little going for it in terms of the documentary evidence. Moreover, given how time consuming it would have

² Norfolk CC v Mason [2004] NR20511 & Moser v Ambleside Urban District Council (1925)

been for farmers to reinstate the ditches, I consider it unlikely they would have been deliberately disturbed.

35. Overall, I conclude, on the balance of probabilities, that the boundaries shown on the Finance Act plan and reflected in Part II of the Order schedule should be recorded as the extent of the public's right of way at the time it became a public footpath.

Other Matters

36. I appreciate that confirmation of the Order may present the objectors with some practical and financial issues to resolve and to that end I can understand the desire to record the width of the route as it appears on the ground today. However, I am duty bound to consider the evidence that has been put to me in this case in accordance with the provisions of section 53 of the 1981 Act.
37. A Definitive Map Modification Order seeks to record a public right of way which already exists under the law; there is no consideration of the effect of the public right of way on individuals and no determination of any private, human or civil rights. The presence or otherwise of built structure on the route is not a matter to which I can ascribe any weight given the long-established legal principle "*once a highway, always a highway*". Whether it would be possible to extinguish the highway rights where encroachment is deemed to have taken place would be a matter for the objectors to discuss with the Highway Authority in due course.
38. The OMA have drawn my attention to a minor drafting error in the Order which refers to section 53(2)(c)(iii) of the Act instead of section 53(3)(c)(iii). Given the nature of the error, I am satisfied that no party has been prejudiced by it. To correct that mistake I proposed to modify the Order accordingly.

Conclusions

39. On the balance of probabilities, and considering the evidence as a whole, I am satisfied, that the widths specified in the Order should be recorded on the DMS. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

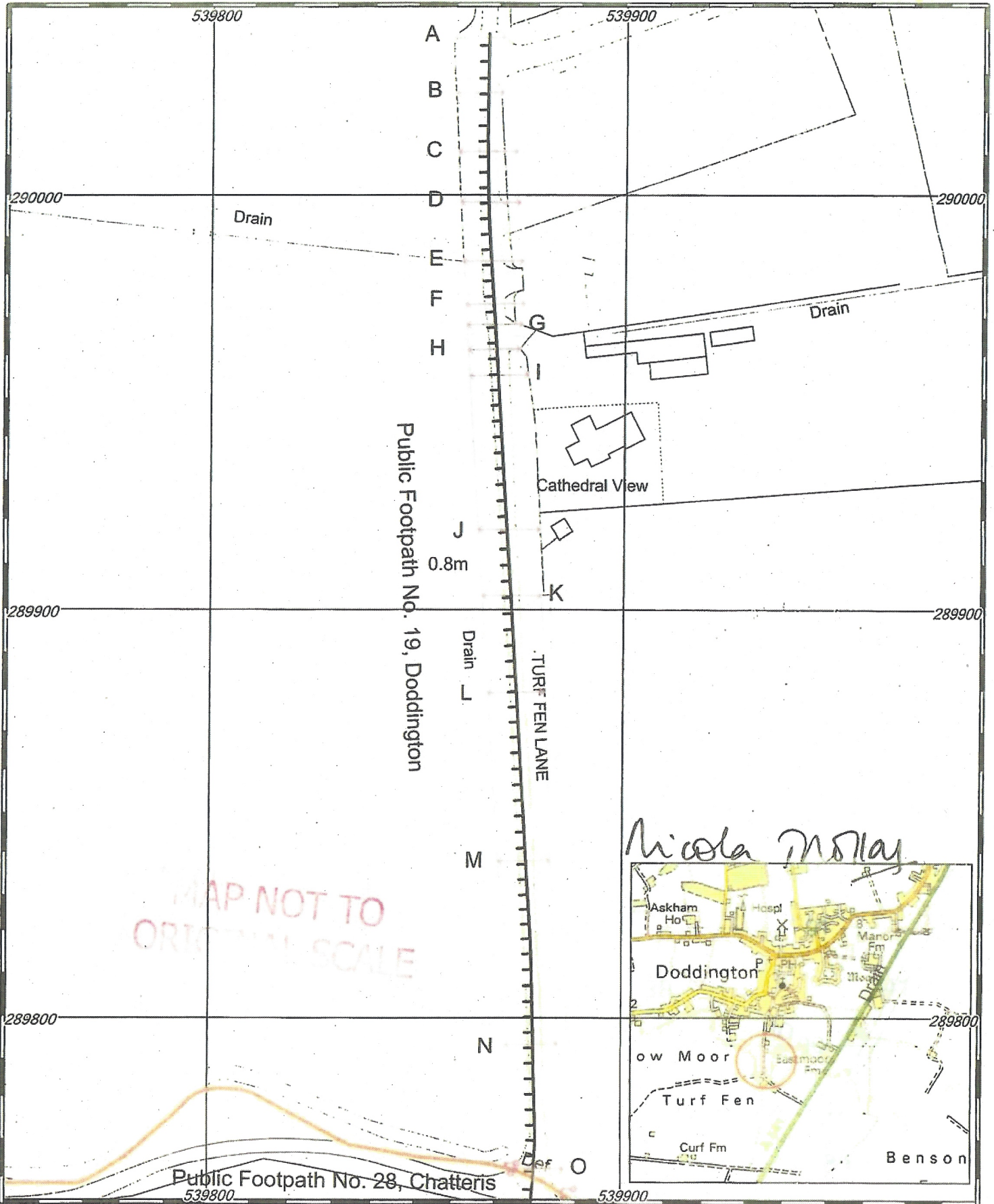
Formal Decision

40. The Order is confirmed subject to the following modification:

- On the fifth line of the Order description "section 53(2)(c)(iii) of the Act" shall be replaced with "section 53(3)(c)(iii) of the Act".

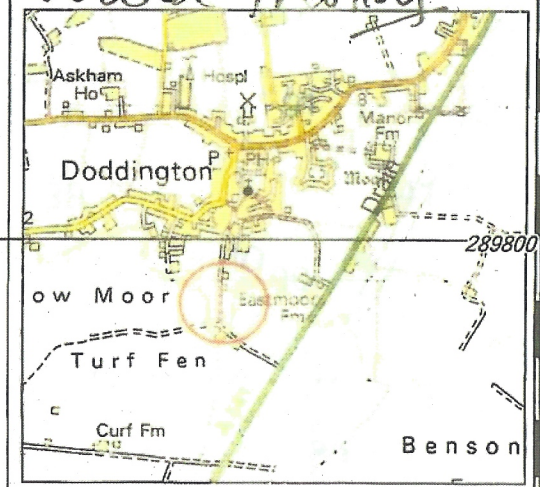
D. M. Young

Inspector



MAP NOT TO ORIGINAL SCALE

Nicola Molloy



Scale: 1:1250
Date: 18/03/2019
By: fn307



THIS PLAN FORMS PART OF THE CAMBRIDGESHIRE COUNTY COUNCIL (PUBLIC FOOTPATH NO. 19 DODDINGTON) MODIFICATION ORDER 2019

Public Footpath affected by Order (A - O) Unaffected Public Footpath

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